



Bribery and corruption risk

Introduction

On June 16–17, 2011, members of the Audit Committee Leadership Networks in North America (ACLN) and Europe (EACLN) met in Washington, DC, for their sixth annual summit meeting to discuss several topics,¹ including bribery and corruption risk. During a session on June 17, members were joined by Mr. Richard Alderman, director of the Serious Fraud Office, which covers England, Wales, and Northern Ireland, and Mr. Nathaniel Edmonds,² assistant chief of the Foreign Corrupt Practices Act unit of the US Department of Justice.

This topic was also addressed in an education session on June 16, hosted by two partners from Ernst & Young: Mr. David Stulb, global leader, Fraud Investigation & Dispute Services (FIDS), and Mr. Chris Costa, principal, FIDS.

ViewPoints contains a summary of the key points raised during these discussions, along with background information and selected perspectives that members and experts shared before and after the meeting.³ For further information on the networks, see “About this document,” on page 13. For a full list of participants, see Appendix 1, on page 14.

Executive summary

Audit chairs of public companies operating internationally say their companies are finding it increasingly challenging to fight bribery and corruption as they become more involved in growth markets, where risks are higher, and in the face of governmental efforts to prosecute bribery and corruption more aggressively. The following issues were discussed at the summit and are described in more detail on the following pages:

- **Governments have escalated anti-bribery efforts** (*Page 2*)

The UK Bribery Act (UKBA) and other new laws to fight bribery and corruption are creating a more complex legal landscape for companies operating globally. While the United States continues to vigorously enforce the Foreign Corrupt Practices Act (FCPA), with ever-increasing fines and aggressive investigations, the Serious Fraud Office (SFO) is showing signs that it will enforce the UKBA with an eye toward prosecuting corruption that undermines the success of UK companies that are operating ethically. Mr. Alderman and Mr. Edmonds emphasized that the SFO and Department of Justice (DOJ) cooperate closely, with the goal of reducing instances of bribery and corruption.

¹ Summit participants also discussed oversight of major transactions and environmental risk and reporting. *ViewPoints* for these discussions can be found at Audit Committee Leadership Summit, “*Sixth Audit Committee Leadership Network*,” July 2011.

² Like all US Department of Justice speakers at informal events, Mr. Edmonds was speaking only in his personal capacity. His statements do not reflect the official policy positions of the US Department of Justice.

³ *ViewPoints* reflects the networks’ use of a modified version of the Chatham House Rule whereby names of members and their company affiliations are a matter of public record, but comments made before, during, and after meetings are not attributed to individuals or corporations. However, the guests have given permission for their remarks to be attributed. Comments by the guests and network members are shown in italics.

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- **Companies are expected to continually improve compliance programs** (*Page 7*)

Mr. Alderman and Mr. Edmonds recommended that companies pay close attention to guidance issued by governments and adopt a risk-based approach to compliance that focuses attention on the greatest bribery and corruption risks. They also suggested companies continually improve compliance programs and identified several emerging best-practice compliance activities. In addition, Mr. Alderman and Mr. Edmonds suggested companies engage proactively with the SFO and DOJ should concerns about bribery or corruption arise.

- **Audit committees have a critical role to play** (*Page 10*)

Mr. Alderman, Mr. Edmonds, and ACLN and EACLN members agreed that audit committees can support their companies' efforts to eliminate bribery and corruption, most importantly by ensuring an ethical tone at the top. Audit chairs also agreed they can ensure their companies continually update codes of conduct to reflect the changing environment, and they can ensure those codes are well implemented, push the company to adopt a zero-tolerance culture, and seek opportunities to test the rigor of the compliance system.

Governments have escalated anti-bribery efforts

The past several years have seen a dramatic rise in governmental efforts to stamp out bribery and corruption. New laws have recently been passed in the UK and China, and the Working Group on Bribery (a project of the Organisation for Economic Co-operation and Development, or OECD) continues to enlist more countries to comply with the 1997 Anti-Bribery Convention. The scope of these laws appears to be expanding as well: whereas in the past, most jurisdictions limited anti-bribery laws to bribery that targeted public officials, the new UK Bribery Act bans private-to-private⁴ bribery as well. In addition, some countries have stepped up their enforcement of anti-corruption laws.⁵ Meanwhile, companies continue to struggle with ambiguities that transcend jurisdictions, such as who qualifies, for the purposes of anti-bribery laws, as a "public official" (a term commonly used to refer to an employee of a state or its agencies). See "Audit chairs worry about ambiguities that transcend jurisdictions," on page 4.

The proliferation of new laws

Observers say that the new anti-bribery laws reflect "countries trying to out-FCPA each other."⁶ Until passage of the UK Bribery Act, the FCPA was the most onerous anti-corruption law with the most far-reaching territoriality.⁷ Now, multinational companies not only have to be concerned about possible violations of the FCPA, but also of the UKBA and other emerging laws.

⁴ Private-to-private bribery is defined as bribery in and between companies or enterprises as opposed to bribery between a company and a government.

⁵ Ernst & Young, *Business Briefing: The Bribery Act* (Ernst & Young Global Limited, 2010), 1.

⁶ Richard Meyer, "China Passes Anti-bribery Law," *Compliance Week*, April 12, 2011.

⁷ The US FCPA generally prohibits US companies and citizens, foreign companies listed on a US stock exchange, or any person doing business in the United States from corruptly paying or offering to pay a foreign official to obtain or retain business.

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- **The UKBA.** The UKBA, a new legal framework for fighting commercial bribery and corruption that replaces disparate existing laws, some more than 100 years old, will come into effect on July 1, 2011. The Act goes beyond the FCPA by prohibiting business-to-business bribery and facilitation payments, and introducing a new corporate offence for failing to prevent bribery.⁸

The act does stipulate that the presence of “adequate procedures” to prevent bribery and corruption at a company may be a defense against charges. The government’s guidance offers limited practical information about the geographic scope of the law, saying that it applies to all companies who are considered to be “carrying on a business” in the UK. Speaking at the meeting, Mr. Alderman said, *“If you are listed in the UK, does the law apply to you? Not necessarily. A listing doesn’t mean the company is ‘carrying on a business.’ I’d want to know, how does the company work with bankers and lawyers in the UK, and how does it engage with the economy? [However] I recommend companies do not take advantage of complex legal arguments to say they’re out of scope. They’ll get a nasty shock in a few years’ time.”* It will be up to the courts to decide whether companies carry on a business in the UK, looking at the particular facts in individual cases.⁹ For more detail on the UKBA and its associated guidance, see Appendix 2 on page 15.

- **The OECD Anti-Bribery Convention.** Most large European member states have adopted the OECD Anti-Bribery Convention and are members of the OECD Working Group on Bribery, which means their governments have adopted legislation necessary to criminalize bribery of public officials in their countries.¹⁰ Article 8 of the Convention also requires member countries to introduce appropriate penalties for false accounting associated with bribery offenses.¹¹ While the Convention closely parallels the FCPA, country-level statutes differ, sometimes on important issues such as the definition of facilitation payments and what constitutes public or private bribery.

More countries outside of the OECD are adopting the Convention as well. Russia, for example, asked to join the Working Group on Bribery in 2009, and on May 4, President Medvedev signed into law legislation that criminalizes foreign bribery, a demonstration of commitment to the Convention’s principles that makes it possible for the OECD Council to accept Russia’s request to join the Convention.¹²

- **China’s new anti-bribery law.** On May 1, 2011, a series of amendments to China’s criminal law prohibiting bribery of foreign officials came into effect.¹³ The amendments forbid individuals and corporations from providing “money or property to any foreign party performing official duties or an

⁸ Ernst & Young, *Business Briefing: The Bribery Act* (Ernst & Young Global Limited, 2010), 2.

⁹ Ministry of Justice, *The Bribery Act 2010* (London: Ministry of Justice, 2011), 15.

¹⁰ Organisation for Economic Co-operation and Development, “[OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.](#)”

¹¹ Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Paris: Organisation for Economic Co-operation and Development, 2011), 9

¹² Organisation for Economic Co-operation and Development, “[OECD Welcomes Russia Introducing Law to Make Foreign Bribery a Crime.](#)” news release, May 5, 2011.

¹³ See White & Case, “[China’s New Anti-Corruption Law Goes into Effect May 1, 2011.](#)” *Client Alert*, April 19, 2011.

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official of international public organizations” for the purpose of “seeking illegitimate business benefits.”¹⁴ A subject matter expert said, *“The new PRC [People’s Republic of China] criminal law applies to all PRC citizens, wherever they are located. Therefore, in addition to applying to all PRC domestic companies, it applies to all business entities organized under PRC law, including joint ventures, wholly foreign-owned enterprises, and representative offices.”*

Audit chairs worry about ambiguities that transcend jurisdictions

In addition to ambiguity regarding the extraterritoriality of anti-bribery and anti-corruption laws such as the UKBA and FCPA, members expressed concerns over the following issues:

- **The definition of facilitation payments.** Facilitation payments – payments made to officials to facilitate the performance of their duty – are considered a form of bribery, but the FCPA makes an exception for payments made to expedite the performance of “routine governmental actions.” However, there is no comprehensive list of routine governmental actions. The UKBA bans facilitation payments, although such payments remain commonplace in many jurisdictions where companies subject to the UKBA conduct business. In addition, company codes of conduct often do not mention, define, or provide examples of facilitation payments.¹⁵ Mr. Alderman said, *“The OECD would like countries to eliminate facilitation payments. Different country-level laws add to the complexity. Sadly, this will be with us for a while.”*
- **The definition of a public official.** Jurisdictions also differ over what constitutes a government or public official. Mr. Alderman said, *“At the SFO, it’s a simple test based on the OECD’s definition. The government must have a controlling interest in the organization [that employs the individual], and control must be exercised.”* Mr. Edmonds said, *“We’re in litigation on this on several cases. Congress is examining the question and litigants are challenging the OECD definition. There will likely be multifactor tests to determine what is a foreign public official. For example, [does the organization serve] ... a governmental purpose? Is there governmental control? What are the origins of the business? Is it privatized? How is the board appointed? The definitions of public official and instrumentality will be challenged in the years to come.”*
- **What qualifies as reasonable hospitality.** There is uncertainty over when gifts, entertainment, and hospitality (as opposed to cash) can be considered bribery. For example, in the UK, the Ministry of Justice has said that the UKBA is not aimed at penalizing hospitality for legitimate commercial purposes, but “lavish” corporate hospitality may constitute a bribe.

More aggressive enforcement in the United States

In the United States, the DOJ and the Securities and Exchange Commission (SEC) are setting records for the number of FCPA cases they are opening and the severity of the fines they are levying. The DOJ is

¹⁴ *Ibid.*, 1.

¹⁵ Arielle Bikard, *“Companies Lacking in Facilitation Payments Policies,”* *Compliance Week*, April 26, 2011.

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responsible for all criminal enforcement of the FCPA and for civil enforcement of the anti-bribery provisions for domestic concerns, foreign companies, and nationals. The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers and can charge companies with violations of the books and records and internal control provisions of the Act. Speaking at the meeting, Mr. Edmonds said, *“Yes, there is an increased fervor to fight corruption. There is a massive increase by the DOJ, and that’s intentional ... We ... expect the same or increased levels of enforcement going forward.”*

Experts note several trends surrounding the increased enforcement in the United States:

- **The spiraling costs of settlements.** Eight of the largest amounts ever paid to US authorities to settle FCPA charges are from settlements in 2010 and early 2011, including BAE Systems (\$400 million), Technip (\$338 million), and Alcatel-Lucent (\$137 million).¹⁶ Mr. Stulb told members, *“The fines paid by companies are only part of the cost companies suffer: in total, it is actually a multiple of what the fines typically are, including investigations, subsequent remedial action, public relations, and brand damage.”*
- **More aggressive DOJ investigations.** In 2010, the DOJ conducted an unprecedented undercover investigation involving 150 FBI agents that resulted in an FCPA case against 22 executives and employees of companies in the military and law enforcement products industry.¹⁷ Investigative methods such as wiretaps of private conversations and perp walks¹⁸ are being used more frequently, and a member noted, *“US judges are caustic in their criticism of the DOJ’s investigative practices, which is resulting in throwing cases out. It’s a scandal.”* However, Mr. Stulb noted, *“Under President Obama, the Patriot Act¹⁹ was recently renewed. [This allows the DOJ to continue] to use aggressive investigative techniques.”*
- **Increased focus on prosecuting individuals.** Assistant Attorney General Lanny Breuer has characterized the DOJ’s undercover case mentioned above as “the largest action ever undertaken by the Justice Department against individuals for FCPA violations.”²⁰ The DOJ is seeking substantial jail time in such prosecutions,²¹ and the focus on individuals is also resulting in more cases going to trial.²²

The whistleblower provisions of the Dodd-Frank Act may also increase the number of FCPA investigations. The act required the SEC to establish a new program to encourage whistleblowing relating to all manner of securities law violations, including violations of the FCPA. It states that “where a whistleblower provides ‘original information’ that leads to a successful SEC enforcement action in which the government collects monetary sanctions exceeding \$1 million, the SEC will award the whistleblower between 10% and 30% of the total sum collected.”²³ Mr. Edmonds explained that this has increased the number of tips the DOJ is

¹⁶ Thomas Gorman, *“SEC Enforcement Trends 2011: The New Era of FCPA Enforcement.”* *SEC Actions* (blog), April 15, 2011.

¹⁷ Bruce Carton, *“DOJ Brings Massive FCPA Case against 22 Individuals.”* *Compliance Week*, January 20, 2010.

¹⁸ The practice of walking an arrested suspect through a public place, enabling the media to take and publish photos.

¹⁹ President George W. Bush signed the Patriot Act into law in 2001. The law extends law enforcement agencies’ ability to use telephone, email, and business records in investigations and provides other agencies with increased authority and discretion regarding investigations of suspected terrorism. President Barack Obama signed a four-year extension of the law in May 2011.

²⁰ Bruce Carton, *“DOJ Brings Massive FCPA Case against 22 Individuals.”*

²¹ Melissa Aguilar, *“2010 FCPA Enforcement Shatters Records.”* *Compliance Week*, January 4, 2011.

²² Thomas Gorman, *“SEC Enforcement Trends 2011: The New Era of FCPA Enforcement.”*

²³ Sarah Cox and David Esseks, *“New Whistleblower Program to Alter FCPA Landscape.”* July 20, 2010.

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receiving: “As a result of Dodd-Frank, a number of the whistleblower referrals [we receive] are from the SEC.” Audit chairs are very concerned that this provision may encourage whistleblowers to circumvent company compliance processes.

More focus on enforcement in the UK

As recently as last year, the UK’s track record for fighting bribery and corruption paled in comparison to that of the United States, Germany, and Italy.²⁴ The SFO was widely criticized, for example, for its initial decision not to prosecute BAE Systems for a number of corruption charges that it began to investigate in 2004. The appointment of Mr. Alderman as director of the SFO in April 2008 signaled the beginning of a shift toward more effective enforcement. Mr. Alderman’s approach – for example, to focus on whistleblowing and on proactively finding cases – is seen as similar to that of the DOJ.²⁵ Speaking at the meeting, Mr. Alderman said,

I’m pleased the UKBA will be enforced starting July 1. It does not mean we will be kicking down doors. There will be no retrospective [actions for previous issues]. We will be looking for cases where companies are using bribery to undermine the performance of ethical companies. If the effect of the bribery is negative for a UK company (for example, the company has to lay off employees) and there is a strong public interest, we will be very interested [in prosecuting that case].

However, recent budget cuts and several high-level prosecutorial departures at the SFO have raised concerns about the SFO’s ability to enforce the UKBA.²⁶ Mr. Alderman noted, “With our resources, we ask ourselves, what are the key cases we want to get in front of the courts? This issue will require some thought.” Speaking the evening before, Mr. Stulb said, “You don’t want to be the first company the SFO will go after – as they will be under significant pressure. They need a big case.”

More international cooperation

Mr. Alderman and Mr. Edmonds acknowledged a “very strong relationship” between the SFO and the DOJ and stressed the importance of information sharing. In a recent interview with *Compliance Week*, Mr. Alderman elaborated, “Every day, somebody in the SFO is talking, emailing or telephoning somebody in the DOJ or SEC. They are our closest colleagues in dealing with bribery and corruption. We talk to them about cases, about areas of risks and priorities, how we work together, and how to produce the results we both want to see, bearing in mind the differences in our respective legal systems.”²⁷

²⁴ OECD Working Group on Bribery, *2010 Data on Enforcement of the Anti-Bribery Convention* (Paris: OECD Working Group on Bribery, 2011), 4.

²⁵ *Ibid.*

²⁶ Cassell Bryan-Low, “U.K. Outlines Bribery Rules,” *Wall Street Journal*, March 31, 2011.

²⁷ Melissa Klein Aguilar, “A Conversation with Britain’s Top Fraud Investigator,” *Compliance Week*, January 19, 2011.

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At the meeting, members questioned Mr. Alderman and Mr. Edmonds about the likelihood of more global settlements in the future. Mr. Edmonds said, *“There will be a trend toward multinational settlements in the next decade. We are testing these in the courts.”* Mr. Alderman was more dubious: *“I understand companies want closure in all jurisdictions, but you’ll have to look to the international law firms to ask about global resolutions. It’s going to be a challenge.”*

When asked how the United States and UK were working with other countries to enforce their own anti-bribery legislation, Mr. Edmonds responded, *“The US is engaged at all levels. We want global enforcement ... The OECD is the major driver internationally. Both Russia and China passed laws recently, and now they’re reviewing their approaches to enforcement. This will be a decade-long project, but we are starting to see an impact.”*

Companies are expected to continually improve compliance programs

Audit chairs recognize that with the proliferation of new and complex anti-corruption laws, increased enforcement, and ongoing ambiguities, determining the optimum investment in and approach to compliance is difficult. An audit chair said, *“We don’t have the resources to investigate 100% of our revenues every year. So what is acceptable, and how much [compliance] is enough?”*

Mr. Alderman and Mr. Edmonds suggested companies draw upon valuable governmental guidance for compliance programs. Indeed, experts have noted governments are issuing increasingly prescriptive guidance for compliance programs and that settlements for wrongdoing often include specific compliance activities.²⁸ Mr. Alderman and Mr. Edmonds mentioned the following sources of guidance:

- **United States Federal Sentencing Guidelines.** Chapter 8 of the Federal Sentencing Guidelines outlines the features of an effective compliance program and serves as a benchmark for companies designing such programs. If a company is fined for a violation, a good compliance program can reduce fines by up to 30%.²⁹ The November 2010 revisions state that a compliance program may be deemed effective even if high-level employees were involved in an offense, as long as certain conditions are met, one of which is that the head of compliance has “direct reporting obligations” to the governing authority, such as the audit committee or board of directors.³⁰
- **Guidance from the UK Ministry of Justice.** A company that has adequate procedures in place will be able to use that fact to defend itself against charges of the new corporate offense of failing to prevent bribery. The guidance lists a number of actions that companies should take, including top-level commitment to an anti-corruption culture, assessments of the risk of exposure to bribery, communication and training, and monitoring of anti-bribery policies and procedures.³¹

²⁸ Ernst & Young, *“Regulatory Compliance: Adapting to a Pressurized Environment,” InSights*, June 2011, 5–6.

²⁹ Ryan McConnell and Charlotte Simon, *“Remedial Compliance Programs: A Key Ingredient in the Enforcement Recipe,” FCPA Blog*, January 18, 2011.

³⁰ Jay G. Martin and Ryan D. McConnell, *“How Revised Sentencing Guidelines Impact CCOs,” Compliance Week*, May 4, 2010.

³¹ Ernst & Young, *Business Briefing: The Bribery Act 2*.

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- **OECD best practices on internal controls, ethics, and compliance.** Issued in 2010, this guidance calls on companies to adopt a clear and visible anti-bribery policy that is strongly supported by senior management, to instill a sense of responsibility for compliance at all levels of the company, to ensure independent compliance structures, to undertake ongoing training on bribery for all employees and business partners, and to encourage disciplinary procedures to address violations.³²
- **Prosecution agreements with the SEC and DOJ.** A recent study found that “over 90% of the deferred prosecution (DPA) and non-prosecution (NPA) agreements entered into in 2010 contained compliance features, an almost 40% increase since 2005.”³³ These typically include “training on a code of conduct, a hotline or e-mail system to report abuses, procedures to monitor and detect wrongdoing, and a direct reporting line from a head of compliance to the CEO or board of directors.”³⁴

A risk-based approach to compliance

In dialogue with audit chairs, Mr. Alderman and Mr. Edmonds emphasized that companies should be highly attuned to areas that present the greatest risk of bribery and corruption. Risk factors include the following:

- **High-risk countries.** Transparency International (TI), a non-governmental organization committed to fighting corruption, publishes an annual index measuring the perceived levels of public-sector corruption in 178 countries of the world.³⁵ Mr. Alderman said, “*We will be looking at how operations in high-risk areas according to TI are being addressed.*” Speaking the evening before, Mr. Stulb said, “*The days of going to China every other year to have a look – those days are over.*” Please see overleaf for Transparency International’s 2010 index.
- **Industry sector.** Members and guests agreed the pharmaceutical, oil and gas, and consumer products sectors are most at risk for issues with bribery and corruption because the locations of these businesses expose them to additional risk. Mr. Alderman noted, “*Companies should get involved in sector-level efforts to deal with issues on a sector basis.*” He added, “*The OECD drew up codes of conduct by industry, and they are very helpful.*”
- **Certain populations of employees.** Mr. Stulb said, “*The biggest issues are sales forces and dealing with agents. They are representing your brand when they are trying to make deals.*”

Audit chairs were urged to ensure their companies take a “risk-based approach” to compliance programs by aiming the most rigorous compliance efforts at the highest-risk areas of the business. Mr. Edmonds said, “*We want to see identification of [key] risks and to see that companies have tailored compliance to those risks.*” Mr. Alderman added, “*We are interested in how things look on a risk-based approach. You have to prioritize where the biggest risks are.*”

³² Organisation for Economic Co-operation and Development, “[OECD Calls on Businesses to Step Up Their Fight against Bribery.](#)” news release, March 3, 2010.

³³ Ryan McConnell and Charlotte Simon, “[Remedial Compliance Programs: A Key Ingredient in the Enforcement Recipe.](#)”

³⁴ Sue Reisinger, “[Corporate Compliance and Criminal Cases: Plan Now or Pay Later.](#)” *Corporate Counsel*, January 13, 2011.

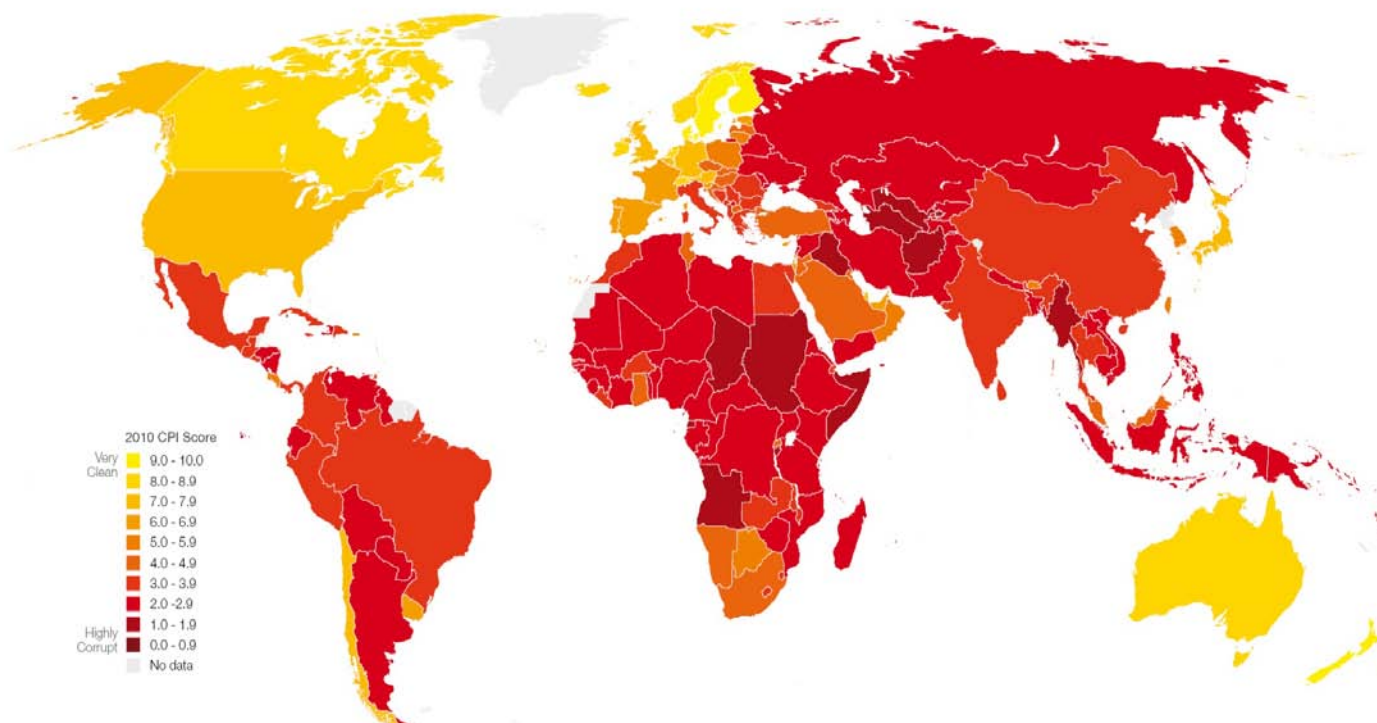
³⁵ See, for example, Transparency International, [Corruption Perceptions Index 2010](#) (Berlin: Transparency International, 2010).

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Transparency International 2010 Corruption Perceptions Index³⁶



On the road to zero tolerance

Mr. Alderman and Mr. Edmonds also made it clear that companies should ensure their compliance programs are continually improving. Mr. Alderman said, *“I expect companies to be on a road to zero tolerance [for facilitation payments and other forms of corruption]. If they are on this road, I will leave them alone.”* Mr. Edmonds said, *“[The DOJ] looks at what a company knows and what it intends to do ... We ask companies to continue to improve. What was best practice in compliance two to three years ago is no longer best practice.”* The discussion yielded several specific compliance practices for companies to consider:

- **Audit rights for third parties.** Mr. Edmonds said, *“Companies should focus on third parties and distributors. Are you trusting your business to those people with no visibility? ... Audit rights for third-party agents and distributors were not even considered three years ago. Now we will look to see whether they are enforced.”*
- **Spot checks by internal audit.** Mr. Edmonds said, *“Various audit checks and spot checks by internal audit [are important], and we’ll be looking for paper work [demonstrating that they have occurred].”* Mr. Alderman added, *“We will be looking at how adequate procedures are monitored for how well they are complied with.”*

³⁶ Transparency International, *Corruption Perceptions Index 2010* (Berlin: Transparency International, 2010).

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- **Special attention to major transactions.** Members and guests agreed that major transactions require special diligence due to successor liability for bribery and corruption. Mr. Edmonds said, *“At the DOJ, we consider what the companies are doing in terms of compliance. If we charge an entity, do we charge the acquiring entity? Or charge the entity that was acquired? ... We look at the level of commitment to compliance by the acquiring entity.”*
- **Trend analyses of operational and financial data.** Mr. Edmonds highlighted that new tools used by technical consultants can be useful in the fight against corruption. Data analytics and other forensic tools can uncover patterns or risk areas that internal audit might overlook. Mr. Edmonds said, *“If you’ve had a certain pattern of coding in the ledger for a long period and suddenly there is a spike, are you asking why?”*

A proactive relationship with enforcement authorities

Mr. Alderman and Mr. Edmonds encouraged companies to develop proactive relationships with the SFO and DOJ. Mr. Alderman said, *“Many companies are committed to building anti-bribery and anti-corruption cultures. We engage with these companies, and we give advice. Our role with these companies is supportive. We want to help.”* Mr. Edmonds agreed: *“Bribery and corruption constitute 3% of the world’s economy. We need to work with you to detect, prevent, and deter. Our role is not just enforcement, but to understand your views and concerns.”*

Members raised specific questions regarding when to report problems to the SFO and DOJ. Mr. Alderman has indicated that he will be supportive of companies seeking a more proactive approach to fighting bribery in partnership with the SFO. Speaking about acquisitions at the meeting, Mr. Alderman said, *“We recognize corruption issues in target companies are a special issue. If the acquiring company sees problems, come tell us, rather than having us hear allegations later. If this approach is taken, we’ll know the [acquiring company] is trying to do the right thing.”*

Experts have noted that the difference between self-reporting and not reporting to US authorities can be the difference between a NPA/DPA and a felony charge.³⁷ At the meeting, Mr. Edmonds said, *“There have been numerous times when the DOJ did not prosecute because the company was doing [what it could to prevent bribery]. We can’t disclose the specific companies, but it has happened.”*

Audit committees have a critical role to play

Members and guests acknowledged the importance of the audit committee in overseeing company efforts to eliminate bribery and corruption. In addition to ensuring their companies undertake the compliance activities mentioned above, members agreed audit committees should focus on the following priorities:

- **Establishing an ethical tone at the top.** Mr. Alderman said, *“What example is set by the executives and the top people [including the board]? If employees see executives not caring as long as employees get contracts, there will be problems. We look at the overall culture. What is the center doing to*

³⁷ Audit Committee Leadership Network, [“Changes at the SEC’s Division of Enforcement,”](#) *ViewPoints*, March 23, 2010, 7.

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promote an anti-corruption culture? Or is there a lot of empowerment for [individual] countries?”

Members agreed that the audit committee has an essential role to play in reinforcing an ethical tone at the top of the company, including in operations in growth markets – for example, by taking up specific questions about ethics and behavior with senior management and pushing management for consistency in messaging.

- **Ensuring the company has a clear and well-adopted code of conduct.** Audit chairs agreed that the company code of conduct must be sufficiently strong and well communicated, and they noted that many codes are insufficient in some way – perhaps missing critical definitions or examples – or are not effectively implemented. Mr. Edmonds suggested that authorities can tell whether or not a code of conduct has been well implemented: *“When we talk with companies, they may wave an impressive compliance program in front of us, but it’s only paper. We may then find out it has not been implemented effectively. So we trust, but verify.”* In addition, members and guests agreed codes should be updated frequently to adapt to the changing environment.
- **Pushing the company to have a zero-tolerance culture.** In network discussions, members have noted that zero tolerance is one of the most effective means of creating an anti-corruption culture.³⁸ Even the strongest anti-corruption culture may be no match for the cultural norms in certain markets, however – which may mean that the risks of doing business there outweigh the benefits. A member shared such an anecdote: *“I interviewed 20 law firms in [a growth market where we wanted to do business]. I wanted a guarantee there would be no violations of the FCPA if we were to do business there. I was told, ‘I’m sorry. You will not find a company that does not engage in [certain practices that might violate the FCPA].’ I proposed we did not do business in that country.”*
- **Focusing on key bribery and corruption risks in audit committee meetings.** Mr. Alderman and Mr. Edmonds emphasized a risk-based approach to compliance programs, and as such, audit committees should push management to report on the highest-risk geographies and business areas in their business in order to have a fulsome dialogue on these issues in audit committee meetings.
- **Testing the compliance system.** A member said, *“I will occasionally put a false transaction into the system to see what happens. I call it ‘mystery shopping.’”* Mr. Edmonds said, *“That’s a wonderful way to see where in the system the fraudulent behavior is overlooked and when it is caught.”*

³⁸ See European Audit Committee Leadership Network, [“Internal Controls over Financial Reporting.”](#) *ViewPoints*, April 2, 2011.

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Ernst & Young recommends audit committees pose five key questions to management

- Can management demonstrate the contemporaneous effectiveness of its anti-corruption compliance efforts to its stakeholders?
- Does the company know how many third parties and agents represent it, particularly in dealing with those that could be considered “government officials”?
- Assuming that contracts with third parties normally contain audit rights, how many times has the company conducted an audit principally to gain comfort regarding bribery and corruption risk?
- Does the company have clear criteria to guide it with respect to how extensive pre- or post-acquisition anti-corruption due diligence should be, or whether to conduct it at all?
- Is management making the best use of the latest forensic data analytics to monitor transactions in real time?

Conclusion

Faced with the proliferation of new anti-bribery laws and international authorities’ increasing enforcement zeal, audit chairs are focused on enhancing efforts to fight bribery and corruption. The adoption of a risk-based approach to compliance – whereby greater compliance efforts are focused where risks are higher – emerged as a key takeaway. In addition, Mr. Alderman and Mr. Edmonds made it clear that compliance programs and codes of conduct should be updated frequently in order to adapt to the changing environment. Indeed, they suggested their organizations will look for evidence of both when they assess the efficacy of compliance programs. In addition, both regulators urged audit committees to help set tone at the top and to help shepherd their companies down “*the road to zero tolerance.*”

ViewPoints

FOR THE AUDIT COMMITTEE
LEADERSHIP SUMMIT



About this document

The European Audit Committee Leadership Network (EACLN) and Audit Committee Leadership Network (ACLN) are groups of audit committee chairs drawn from leading European and North American companies committed to improving the performance of audit committees and enhancing trust in financial markets. The networks are convened by Ernst & Young and orchestrated by Tapestry Networks to access emerging best practices and share insights into issues that dominate the new audit committee environment.

ViewPoints is produced by Tapestry Networks to stimulate timely, substantive board discussions about the choices confronting audit committee members, management and their advisers as they endeavor to fulfill their respective responsibilities to the investing public. The ultimate value of *ViewPoints* lies in its power to help all constituencies develop their own informed points of view on these important issues. Anyone who receives *ViewPoints* may share it with those in their own network. The more board members, members of management, and advisers who become systematically engaged in this dialogue, the more value will be created for all.

The views expressed in this document represent those of the European or North American Audit Committee Leadership Networks. They do not reflect the views nor constitute the advice of network members, their companies, Ernst & Young, or Tapestry Networks. Please consult your counselors for specific advice. Ernst & Young refers to all members of the global Ernst & Young organization.

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ViewPoints

FOR THE AUDIT COMMITTEE
LEADERSHIP SUMMIT



Appendix 1: Participants at the Audit Committee Leadership Summit

European and North American Audit Committee Leadership Network members participating in the summit, who sit on the boards of over 40 large-, mid-, and small-cap public companies between them, included:

- Denny Beresford, Audit Committee Chair, Fannie Mae and Legg Mason
- Werner Brandt, Audit Committee Member, Lufthansa
- Les Brun, Audit Committee Chair, Merck
- Phil Hodgkinson, Audit Committee Chair, BT
- Judy Richards Hope, Audit Committee Chair, General Mills and Union Pacific
- DeAnne Julius, Audit Committee Chair, Roche Holding
- Ewald Kist, Audit Committee Chair, Royal Philips Electronics
- Marie Knowles, Audit Committee Chair, McKesson
- Mike Losh, Audit Committee Chair, Aon and TRW Automotive
- George Muñoz, Audit Committee Chair, Altria and Marriott International
- Chuck Noski, Audit Committee Chair, Microsoft
- Ian Prosser, Alumnus, Sara Lee
- Guylaine Saucier, Audit Committee Chair, Areva and Danone
- Tom de Swaan, Audit Committee Chair, GlaxoSmithKline and Royal Ahold
- Bernd Voss, Audit Committee Chair, Continental AG
- Chris Williams, Audit Committee Chair, Wal-Mart
- Mario Zibetti, Internal Control Chair, Fiat Group



Appendix 2: A briefing on the UK Bribery Act and the associated guidance

The UKBA identifies four offenses:

- “A general offense of offering, promising, or giving a bribe
- A general offense of requesting or agreeing to receive a bribe
- A separate offense of bribery of a foreign public official
- A new corporate offense of failing to prevent bribery (applies automatically if anyone associated with the organization has paid a bribe).”³⁹

During spring 2011, the Ministry of Justice released “adequate procedures” guidance, and the SFO and the UK’s director of public prosecutions released prosecutorial guidance, which went into effect on July 1, 2011, marking the official implementation of the UKBA.

Procedural guidance

This guidance sets out the procedures companies should undertake to prevent bribery. A company that has these procedures in place will be able to use that fact to defend itself against charges of the new corporate offense of failing to prevent bribery. The guidance lists a number of actions that companies should take, including top-level commitment to an anti-corruption culture, assessments of the risk of exposure to bribery, communication and training, and monitoring of anti-bribery policies and procedures.⁴⁰

Prosecutorial guidance

This guidance addresses the issues prosecutors need to take into account when contemplating prosecuting a case (such as whether there is sufficient evidence and whether the case is in the public interest) and gives parameters for “reasonable” hospitality and liability under the corporate offense provision of the UKBA:

- **Reasonable hospitality.** The guidance makes it clear that although hospitality or a promotional expenditure that is “reasonable, proportionate and made in good faith is an established and important part of doing business,”⁴¹ nevertheless such an expenditure could form the basis of an offense if it is perceived to be influencing an official. It goes on to say such expenditures should not be lavish.
- **Corporate offense liability.** The prosecutorial guidance makes it clear that “a single instance of bribery does not necessarily mean that an organisation’s procedures are inadequate.”⁴² It also reiterates, however, that there is no carve-out for facilitation payments.

³⁹ Ernst & Young, *The UK Bribery Act: Developing an Anti-corruption Compliance Framework*, 1.

⁴⁰ *Ibid.*

⁴¹ Keir Starmer and Richard Alderman, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (London: Serious Fraud Office, 2011), 10.

⁴² *Ibid.*, 11.