

CHAPTER 8

THE LAWYER'S ROLE IN ADVISING BUSINESS CLIENTS ON CORRUPTION AND ANTI-CORRUPTION ISSUES

[The first draft of this chapter was written by Erin Halma as a directed research and writing paper under Professor Ferguson's supervision. It was subsequently revised and substantially expanded by Professor Ferguson with Erin Halma's assistance. Revisions were also made by Dmytro Galagan in 2017.]

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1. INTRODUCTION

This chapter focuses on the role of lawyers in assisting their business clients to avoid corrupt acts by their officers, employees and agents, and to advise their clients on how to deal with allegations of corruption if they arise. In particular, it will address the following: identification of exactly who the client is in a corporation or other business organization; examination of a lawyer's relationship with a client; circumstances where a lawyer may encounter corruption; the duties lawyers owe to their clients in regard to corruption; and the prevention of corruption by the exercise of due diligence including compliance programs and risk assessments.

This chapter will often refer to corporate lawyers or corporate counsel. For the purposes of this chapter, the term corporate lawyer refers to both in-house and external counsel acting on behalf of their business clients. Also, this chapter focuses on the lawyer acting in a solicitor's role (e.g., advising clients on legal issues related to business transactions, negotiating and drafting agreements, settling disputes, etc.). The lawyer's role as a barrister or litigator is dealt with more prominently in Chapters 6 and 7 of this book.

2. ROLES OF LAWYERS IN BUSINESS

2.1 Multiple Roles

In the context of business law, lawyers have an increasingly large role to play in anti-corruption compliance. Lawyers provide legal, and sometimes business, advice to their

clients. The critical distinction between legal and business advice will be addressed later in this chapter. In providing legal advice, lawyers are “transaction facilitators” and are expected to construct transactions in a way that complies with the relevant laws, including laws prohibiting the offering or paying of bribes.¹ In addition to providing legal advice, lawyers educate their clients on the law and on how to comply with the law while achieving business objectives.² Lawyers may act as internal or external investigators if an allegation of corruption is made against a client.³ Frequently they will have to conduct or oversee due diligence investigations prior to closing certain transactions. Lawyers may act as compliance officers or ethics officers by creating, enforcing and reviewing their client’s compliance program.⁴ Lawyers may act as assurance practitioners and conduct an assurance engagement on the effectiveness of the organization’s control procedures, discussed more fully below in Section 6.2.3, item (7). Finally, some lawyers may be in the position of a gatekeeper in the sense that, by advising their client on the illegality or potential illegality of a proposed transaction and refusing to do the necessary legal work for the transaction, they may prevent their client from breaching the law. In each of these roles, the lawyer may come face to face with issues of corruption.

2.2 Who Is your Client?

Lawyers owe various duties to their clients. To fulfill those duties, the lawyer must of course know who their client is. In most cases, the client’s identity is self-evident. If either Mr. Smith or Ms. Brown hires a lawyer to buy a house for him or her, it is clear who the client is. However, in the business world, the client is usually an organization, not an actual person. Businesses are usually conducted under one of the many forms of business organizations, which include:

- Incorporated companies (both for-profit and not-for-profit and including special corporate structures such as universities, hospitals, municipalities and unions);
- Unincorporated associations or societies;
- Sole proprietorships;
- Partnerships; and
- Trusts (e.g., pension fund trusts, mutual trusts, and real estate investment fund trusts).

¹ Sarah Helene Duggin, “The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility” (2006-2007) 51 Saint Louis ULJ 1004 at 1006 (HeinOnline). Duggin’s article provides an examination of the different roles in-house counsel play in a corporation.

² *Ibid* at 1005.

³ *Ibid* at 1008. Dealt with more fully in Chapter 6, Section 4.2 of this book.

⁴ *Ibid* at 1011-12.

In this chapter, I will focus only on incorporated companies, both for simplicity and because incorporated companies are the most prevalent business form for most commercial entities of any significant size.

In common law countries (and some civil law countries) a corporation is a separate legal entity. While treating the corporation as a person is a legal fiction, it nonetheless means the corporation can act as a legal entity. For example, it can own property, enter into contracts for goods and services, hire and fire employees, and sue or be sued by others. Most importantly, it also means the corporation has limited liability; if the corporation fails financially, the individual owners and/or shareholders are not personally liable for the debts of the corporation. The legal authority for the actions of a corporation is vested in the board of directors. Thus, when a lawyer is hired by a corporation, the lawyer's client is the corporation whose authority and ultimate directions come from the board of directors. While a lawyer may operationally receive instructions from and interact with senior management, including CEOs and CFOs, the lawyer's client is still the corporation (i.e., the corporate entity that speaks through its board). The lawyer owes his or her professional duties to the corporation, not to senior management, the CEO, the chair of the board, or individual owners or shareholders.⁵

2.3 In-House Counsel and External Counsel

There are two primary relationships a lawyer may have with his or her business client: in-house counsel or external counsel. External counsel are not employees of the client; they operate independently and normally have multiple clients. The employment of lawyers as in-house counsel has largely developed over the past 75 to 100 years.⁶ More than forty years ago, Lord Denning described the position of in-house counsel in the legal profession as follows:

Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority

⁵ American Bar Association (ABA), *Model Rules of Professional Conduct*, 2016 ed. [Model Rules (2016)] Rule 1.13(a), online: <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>; Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct* [Model Code (2016)] (FLSC, 2016), Rule 3.2-3, online: <<http://flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf>>. In discussing the duties to clients and ethical obligations that a lawyer owes to clients in the Canadian context, reference will be made to the FLSC Model Code of Professional Conduct. This is a model code rather than the code that binds lawyers; however, it includes a comprehensive assessment of the general rules that lawyers in Canada are expected to abide by. Provincial Law Society websites can be accessed for detailed information on each province's Code of Professional Conduct.

⁶ "Legal Profession" (1985) 11 Commonwealth L Bull 962 at 974 (HeinOnline). See also John C. Coffee, *Gatekeepers: The Role of the Professions in Corporate Governance* (Oxford University Press, 2006) at 194.

... In every case these legal advisers do legal work for their employer and for no-one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer ... They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidence. They and their clients have the same privileges.⁷

The above description of in-house counsel remains generally accurate. The number of in-house counsel compared to external counsel continues to grow. In-house counsel constitute 10 to 20 percent of practicing lawyers and they have an active professional association in Canada called the Canadian Corporate Counsel Association.⁸ While many corporations have in-house counsel, a corporation will often turn to external counsel for highly specialized legal areas or for litigation. Some smaller corporations have no in-house counsel. They refer all their legal work to one or more external law firms. While the balance of work between in-house and external lawyers is often in flux, Woolley et al. describe some attractions of in-house counsel:

Companies have found it valuable to have dedicated legal expertise resident within their walls, with professionals who know both the law and the organization intimately. Hiring corporate counsel can also be far more cost-efficient than hiring outside law firms on a case-by-case basis. For many lawyers, in-house practice can offer the combined attractions of interesting work, a lifestyle often perceived as more accommodating than that offered by private practice, greater job security, and significant financial reward through both substantial salaries and the chance to participate in the success of the company through compensation plans that include stock options.⁹

While in-house lawyers have the same general duties as external lawyers, their status as an employee of the corporate client can raise professional issues requiring careful consideration. In particular, it is essential for in-house counsel to expressly indicate to the corporation whether they are giving business advice as opposed to legal advice. This distinction is very important, for example, in claims of legal privilege (discussed below).

Difficult issues around solicitor-client privilege and conflict of interest may arise more frequently for in-house counsel than external counsel. For example, a member of the upper management in a company may seek out the advice of in-house counsel on a matter of

⁷ *Crompton Amusement Machines Ltd v Commission of Customs and Excise (No. 2)*, [1972] 2 QB 102, 2 All ER 353 at 376 (CA).

⁸ Canadian Corporate Counsel Association, online: <<http://www.ccca-accje.org/>>.

⁹ Alice Woolley et al, *Lawyers' Ethics and Professional Regulation* (LexisNexis Canada, 2012) at 427.

corporate business.¹⁰ That person may mistakenly believe there is a degree of confidentiality covering the conversation. However, the in-house counsel may feel duty-bound to immediately disclose those seemingly confidential conversations to the board of directors. In addition, the role of in-house counsel may involve advising the board of directors or audit committee on acts or omissions of the officers and upper managers of the organization with whom the lawyer works and from whom the lawyer regularly receives directions.¹¹ Legally and ethically, in-house counsel's client is the corporation, but as a practical matter, in-house counsel are hired by and receive legal advice requests from officers or upper management. Reporting on some or all matters to the Board of Directors may greatly strain the relationship between the lawyer and company officers.¹²

Another concern for in-house counsel in respect to faithfully fulfilling their professional legal duties, and in particular their duty to act objectively and independently, has been referred to as the problem of "cognitive dissonance." Woolley et al. explain as follows:

Further, in-house lawyers have to be especially aware of the challenges to their independence, and the phenomenon described as "cognitive dissonance." As many legal ethics experts have noted, in cases of client misconduct, lawyers' professional norms of client loyalty often conflict with personal norms of honesty and integrity. To reduce the "cognitive dissonance," lawyers will often unconsciously dismiss or discount evidence of misconduct and its impact on third parties. This becomes even more of a problem when lawyers bond socially and professionally with other employees, including senior management. The more a lawyer blends into insider culture, the greater the pressures to conform to the organization's cultural norms. That can in turn lead lawyers to underestimate risk and to suppress compromising information in order to preserve internal solidarity. In the long run, this dynamic can create problems for everyone: clients lose access to disinterested advice; lawyers lose capacity for independent judgment and moral autonomy; and the public loses protection from organizational misconduct. While this is a problem for all lawyers, the challenge is especially strong for corporate counsel. Although the financial and other consequences of terminating a relationship with a major client can be significant for lawyers in law firms, they pale in comparison to the consequences faced by an in-house counsel who is in essence walking away

¹⁰ Out of 70 general counsel surveyed by Deloitte across Canada, 68% indicated that members of legal department in their organization are required to spend time with business units or in the front line of the business. See Deloitte, *Spotlight on General Counsel* (2015), at 4-5, online:

<<https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-EN-fa-2015-General-Counsel-Survey-AODA.pdf>>.

¹¹ Duggin (2006-2007) at 1004.

¹² William Alan Nelson II, "Attorney Liability under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions" (2008-2009) 39 U Mem L Rev 255 at 273 (HeinOnline).

from their job and their financial security. The pressures – personal and professional – are enormous.¹³

2.4 The Lawyer as a Corporate Gatekeeper

The term gatekeeper in the world of business generally refers to an outside or independent monitor or watchdog.¹⁴ A corporate gatekeeper is someone who “screen[s] out flaws or defects or who verifies compliance with standards or procedures.”¹⁵ A corporate gatekeeper will normally have at least one of two roles: (1) prevention of a corporate client’s wrongdoing by withholding their legal approval from actions that appear illegal and/or disclosing such actions if the client does not desist from those actions; and (2) acting as a “reputational intermediary” who assures investors of the quality of the message or signal sent out by the corporation.¹⁶ It has been suggested that there are four elements involved in gatekeepers’ responsibilities:

- (1) independence from the client;
- (2) professional skepticism of the client’s representations;
- (3) a duty to the public investor; and
- (4) a duty to resign when the [gatekeeper’s] integrity would otherwise be compromised.¹⁷

Gatekeeping is “premised on the ability of professionals to monitor and control their client’s conduct.”¹⁸ Failure to do so can result in gatekeeper liability. Some scholars consider auditors, attorneys and securities analysts to be the primary gatekeeping professions. However, the legal profession generally seeks to distance itself from the view that lawyers are gatekeepers, promoting instead the view that the lawyer’s role is to facilitate transactions.¹⁹ Since legal liability may extend to gatekeepers for their failure to advise a corporation appropriately or to disclose illegal dealings, the legal profession resists the label of gatekeeper. Being a gatekeeper, with the attached obligation of protecting the public from potential harm caused by clients, runs contrary to the traditional role of the lawyer as a committed and loyal advocate for the client’s interests and a guardian of the confidentiality

¹³ Woolley et al (2012) at 428. See also Deborah Rhode & Paul Paton, “Lawyers, Ethics, and Enron” (2002-2003) 8 *Stan JL Bus & Fin* 9 at 20 (HeinOnline). This article uses the Enron scandal as an example of how counsel reviewing its own work could have been viewed as contrary to professional ethics. However, no action was taken against the firm for breach of ethical duties.

¹⁴ Coffee (2006) at 2.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ John C. Coffee Jr, “The Attorney as Gatekeeper: An Agenda for the SEC” (2003) 103 *Colum L Rev* 1296

at 1299 (HeinOnline). These four elements also define the responsibilities of securities lawyers practicing in front of the SEC.

¹⁸ Andrew F. Turch, “Multiple Gatekeepers” (2010) 96 *Va L Rev* 1583 at 1584 (HeinOnline).

¹⁹ Coffee, (2006) at 3.

between lawyer and client. Regulators and the legal profession disagree over whether lawyers should play a gatekeeping role in certain large corporate affairs. On the one hand, the government has an obligation to regulate the corporate arena to prevent widespread public harm and, on the other hand, the legal profession has an interest in upholding the legal duties of confidentiality and loyalty to their clients.

Nonetheless, in some contexts lawyers are considered gatekeepers. The strongest argument for the lawyer's role as a gatekeeper has arisen in the context of the securities and banking sectors in the US, in which lawyers facilitated the questionable or illegal behaviour that lead to major stock market collapses and harm to the economy and public. The US Congress described lawyers as gatekeepers in the sense of "[p]rivate intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives."²⁰ If corporate lawyers are seen as transaction engineers rather than advocates for their clients, this strengthens the argument that (some) corporate lawyers may have a gatekeeping role.²¹ Litigators are not generally in the same position; they are approached on an *ex post* basis, i.e., after trouble has arisen, and are by definition advocates for their clients. However, corporate lawyers that provide services on an *ex ante* basis are described as "wise counselors who gently guide their clients toward law compliance."²² In that sense, they may be seen as having a role to play in ensuring that all transactions they assist and advise comply with the law.

The key debate centers on the question of whether corporate lawyers have or should have a duty to report their client or employer to market regulators when that client or employer refuses to comply with the law. As noted, the primary arguments against assigning lawyers the role of corporate gatekeeper (i.e., requiring disclosure of client wrongdoing) are that (1) the role of gatekeeper destroys the duty of confidentiality and loyalty owed by a lawyer to his or her client, and (2) it will tend to have a chilling effect on full and open solicitor-client communications.²³ These risks exist where gatekeepers must report wrongdoing externally rather than simply withhold their consent and withdraw from representation. Critics of the imposition of gatekeeper obligations on lawyers also oppose the idea that lawyers owe a duty to anyone aside from their clients and the courts, since additional duties may be at odds with the interests of clients.²⁴ Acting as a gatekeeper, the lawyer is put in a potentially adversarial position with their client. This diminishes the lawyer's ability to effectively fulfill his or her essential role of "promoting the corporation's compliance with law."²⁵ The American Bar Association Task Force on Corporate Responsibility found that lawyers are not gatekeepers in the same way that auditors are:

²⁰ Sung Hui Kim, "Naked Self-Interest – Why the Legal Profession Resists Gatekeeping" (2011) 63 Fla L Rev 131 at 131 (HeinOnline).

²¹ Coffee (2006) at 192.

²² *Ibid.*

²³ Coffee (2003) at 1296.

²⁴ Sung Hui Kim (2011).

²⁵ American Bar Association, "Report of the American Bar Association Task Force on Corporate Responsibility" (2003-2004) 59 Bus Law 156 at 156 (HeinOnline).

Accounting firms' responsibilities require them to express a formal public opinion, based upon an independent audit, that the corporation's financial statements fairly present the corporation's financial condition and results of operations in conformity with generally accepted accounting principles. The auditor is subject to standards designed to assure an arm's length perspective relative to the firms they audit. In contrast ... corporate lawyers are first and foremost counselors to their clients.²⁶

The American Bar Association also asserts that lawyers do not have an obligation or a right to disclose reasonable doubts concerning their clients' disclosures to the Securities and Exchange Commission.²⁷

If corporate lawyers are considered gatekeepers, or at least partial gatekeepers, it should be recognized that the extent of influence they can or will practically exert on a corporation can vary. The employment relationship between in-house counsel and their client dampens the lawyer's independence from their client. The practical ability of in-house counsel to give unwelcome but objective advice may be lessened by the existence of internal reviews of counsel and pressure from senior managers, as well as reprisals if lawyers refuse to provide legal approval for a transaction.²⁸ Since the legality of certain conduct may be grey, rather than black or white, in-house counsel may consciously or unconsciously tend to approve grey areas in circumstances where an external counsel may not.

However, external counsel may also feel pressure to approve grey-area transactions due to the desire to maintain the corporation as a client, especially if that corporation comprises a significant portion of their billing. Additionally, as the role of in-house counsel expands and less transactional business goes through external counsel, external counsel may have less opportunity to discover and put a stop to corrupt or unlawful practices. Although in-house counsel arguably have less professional independence than external counsel, they may be able to exert greater influence over corporate officers and directors because of their working relationship and the ability of corporations to shop for another law firm if unhappy with the advice or lack of cooperation of their current external law firm.²⁹

A different aspect of a gatekeeper's role is the use of their reputation to assure the marketplace that the corporation is abiding by various rules and regulations. External law firms are arguably better suited to this role than in-house counsel. In-house counsel will generally have less credibility in acting as a reputational intermediary, since they are seen as

²⁶ *Ibid.*

²⁷ American Bar Association, "Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission" (1975) 31 Bus Law 543 at 545.

²⁸ *Ibid.*

²⁹ Duggin (2006-2007) at 1004.

too closely associated with their company to provide an objective and impartial assurance to the marketplace.³⁰

At present, it seems that corporate lawyers in the US, UK and Canada are not gatekeepers in the same way auditors are, since lawyers generally do not have a duty to report a client's past wrongdoing or a duty to report a client's planned crimes unless death or serious bodily harm to others is reasonably imminent. (These disclosure exceptions are discussed in more detail in Section 3.4 below.) They do, however, have a duty not to assist in breaching the law. If asked to engage in illegal transactions, they are under a duty to withdraw as counsel.

Even if lawyers are not gatekeepers in the sense that auditors are, counsel often have the influence and ability to alter an organization's direction and propose a plan of action that achieves a client's objective without illegality.³¹ While both in-house and external counsel must say no to illegal methods of achieving the client's objectives, they are entitled and expected to attempt to accomplish the client's objectives through alternative legal means.

3. LEGAL AND ETHICAL DUTIES OF LAWYERS

All lawyers owe certain duties to their clients. In the case of a corporate client, fulfilling those duties may sometimes be challenging. Although an incorporated company has the legal status of a person, it cannot physically act on its own; instead, the corporation acts through its officers, employers, directors, agents and shareholders. This may create tension, as individual and corporate interests do not always align. A corporate lawyer works with any number of officers, employees, directors, agents and shareholders, but the lawyer's ultimate duty is to the corporation itself.³² As in-house counsel are employees of the corporation, they have duties to their corporate employer, but also duties to their corporate client as the client's lawyer. Like in-house counsel, external counsel's client is the corporation, not an individual director or officer. This part of the chapter will briefly discuss four of the legal and ethical duties that lawyers, whether in-house or external, owe to their clients and how they can come into play in the context of corporate corruption. In the most general sense, a lawyer's duties to a client involve integrity and competence. Integrity includes honesty, trustworthiness, candor, loyalty, civility, adherence to rules of confidentiality and avoidance of conflicts of interest while vigorously serving the client's stated interests within the limits of the law.

³⁰ Coffee (2006) at 195.

³¹ Duggin (2006-2007).

³² The duty to shareholders fluctuates with the shareholder makeup. For example, when one shareholder holds all the shares of a corporation the corporate lawyer owes a complete duty to that shareholder. However, if a shareholder only held one share of millions, the lawyer would not owe the individual shareholder a duty, but rather the shareholders as a whole.

3.1 Conflicts of Interest

A conflict of interest results from the existence of a factor(s) that materially and adversely affects the lawyer's ability to act in the best interests of his or her client.³³ Generally, there are two main categories of conflicts of interest: client conflict and own interest conflict. Client conflict occurs when two of the lawyer's clients have interests that are at odds with each other. Client conflict will normally only arise with external counsel, not in-house counsel. Of course, in-house counsel may raise the issue if he or she thinks that the external lawyer acting for the company has a client conflict. Own interest conflicts occur when a lawyer's interests are at odds with that of a client. This latter genre of conflicts of interest requires a lawyer to avoid placing his or her own interests before the interests of his or her clients. In order to avoid the appearance of a conflict of interest, lawyers must avoid taking or keeping clients whose interests are adverse, or potentially adverse, to their own.

The rationale for a lawyer's duty not to proceed with a case in the face of a conflict of interest is often explained by reference to a broader duty—the lawyer's duty of loyalty to a client. As Proulx and Layton state: "The leitmotif of conflict of interest is the broader duty of loyalty. Where the lawyer's duty of loyalty is compromised by a competing interest, a conflict of interest will exist."³⁴ And, as Graham notes:

Lawyers have an overriding duty to be loyal to their clients, and this duty of loyalty is undermined where lawyers act in cases that involve undisclosed conflicts of interests. As a result, lawyers are generally prohibited from acting in cases involving undisclosed conflicts of interest.

If the basis of the rules regarding conflicts of interest can truly be explained by reference to an overriding duty of loyalty, it should be noted that the word "loyalty," when used in the context of lawyer's conflicts of interest, bears an unusual meaning ... [A] lawyer need not agree with his or her client's position, nor even hope that the client succeeds in achieving his or her legal objectives The lawyer may represent a client whose position the lawyer abhors, or a client whose specific legal project the lawyer considers immoral.... As a result, the lawyer may be unlikely to characterize his or her feelings toward the client as feelings of "loyalty."

Such cases reveal that the lawyer's duty of loyalty does not truly imply loyalty to the client, or even loyalty to the client's legal objectives. Instead, the lawyer is loyal to his or her position as the client's legal adviser. If the lawyer fulfills the role of legal counsel, the lawyer will act as though he or she is loyal to the client. In reality, however, the lawyer's loyalty is to the job of lawyering. The lawyer's loyalty to his or her profession can be explained

³³ Model Rules (2016), Rule 1.7(a); Solicitors Regulatory Authority (SRA), *SRA Code of Conduct* (2011), c. 3, online: <<http://www.sra.org.uk/solicitors/handbook/welcome.page>>; Model Code (2016), Rule 1.1-1; *R v Neil*, 2002 SCC 70 at para 31, [2002] 3 SCR 631.

³⁴ Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Irwin Law, 2001) at 287.

by reference to the lawyer's interests in (1) promoting access to justice by fulfilling a social role that the lawyer believes to be important; (2) promoting his or her own professional reputation as a skilled and zealous advocate; and (3) receiving legal fees for services rendered.³⁵

Conflicts of interest may arise for corporate lawyers in many aspects of their practice unrelated to concerns of corporate corruption. But when an allegation or discovery of corruption in a client's business first arises, there is potential for a conflict of interest. For example, if a lawyer is working for two corporations, both of whom are alleged to have been involved in the same corrupt scheme, the two companies' best interests may be in conflict with one another (e.g., one company may agree to cooperate with the prosecution and testify against the other company). In such circumstances, the lawyer cannot continue to act for both client companies.³⁶

It should also be noted that the restriction against acting for two or more clients with opposing interests also restricts lawyers from acting for a corporation while acting personally for the CEO or other senior official connected to the corporation. A somewhat related ethical duty for corporate counsel arises when there is an allegation of corruption in respect to a corporate client. The corporate lawyer's client is the corporation. The corporation's best interests may be in conflict with the interests of senior officers of the company if those officers are allegedly involved in the corruption in some active or passive way. Any admissions made by senior officers to corporate counsel are not privileged nor confidential. It would be unethical in my opinion—showing an absence of integrity—for a corporate lawyer to allow a senior officer to make statements damaging to that officer without first warning the officer that the lawyer is not, and cannot be, the officer's lawyer and that any statements to the lawyer are not confidential or privileged and may subsequently be used against the officer.

The conflict between advising the corporation and acting for senior officers creates difficulties because a corporation can only act through its officers and employees. The corporation and its internal counsel are disadvantaged in determining the facts of a case if its corporate actors (the senior officers) do not cooperate in supplying information. It may be possible to mitigate this problem through various means. For example, the corporation could agree to indemnify the officer for his or her independent and separate legal fees in exchange for cooperation. In doing so, attention must be paid to problems of maintaining privilege, as referred to above, and outlined in detail below.

Other concerns can arise in regard to "own interest conflicts," especially for in-house counsel due to the very nature of their employment relationship with their corporate client. Since in-house counsel are employees of the organization, they may benefit financially from any lucrative deals the organization makes.³⁷ In addition, in-house counsel may fear being seen

³⁵ Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation*, 3rd ed (Edmond Montgomery Publications, 2014) at 321-322.

³⁶ Model Code (2016), Rule 3.4-5(c).

³⁷ Nelson (2008-2009) at 276.

as obstructionist if they vigorously oppose business activities on legal grounds (especially grey legal grounds). In-house counsel work daily with upper management officers and this can affect their ability to be fearlessly objective in delivering legal advice that may be unwelcome to their client's senior officers. As noted earlier, in-house counsel have to be especially aware of these types of challenges to their professional duty to act objectively and independently (i.e., the phenomenon of cognitive dissonance).

Finally, although not specifically related to corruption and conflicts of interest, it is worth noting that conflicts of interest can arise when a lawyer or his or her firm acts for a corporation and the lawyer serves as a director of the corporation.³⁸ Conflicts may occur in this situation because the dual roles may (1) affect the lawyer's independent judgment and fiduciary obligations, (2) make it difficult to distinguish between legal and business advice, (3) threaten solicitor-client privilege, and (4) potentially disqualify the lawyer or law firm from acting for the organization.³⁹

3.1.1 US Rules on Conflicts of Interest

In the following sections, in both Canada and the US, I refer to the model rules of professional conduct. These rules are "proposed" model rules. They are not binding in themselves. Rather, the rules of conduct laid down by the provincial or state law societies (i.e., the body which has the power to regulate lawyers) are binding for lawyers. It is these latter rules which lawyers must follow, but in general, the province/state rules of professional conduct reflect the content of the model rules.

The American Bar Association Model Rules of Professional Conduct contain rules regarding conflicts of interest. Rule 1.7 of the ABA's model rules states:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) The representation of one client will be directly adverse to another client; or
 - (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

³⁸ Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct* (FLSC, 2016), Commentary to Rule 3.4-1, para 11(e), online: <<http://flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf>>.

³⁹ *Ibid.*

- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) The representation is not prohibited by law;
- (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal; and
- (4) Each affected client gives informed consent, confirmed in writing.⁴⁰

3.1.2 UK Rules on Conflicts of Interest

The UK Solicitor Regulations Authority Code of Conduct (SRA Code) restricts lawyers from acting when there is “a conflict, or a significant risk of conflict, between you and your client.”⁴¹ Also, “if there is a conflict, or significant risk of conflict, between two or more current clients,” lawyers are restricted from acting for all of the clients, subject to a few exceptions.⁴² The SRA Code outlines various systems that lawyers should have in place to ensure they make themselves aware of any conflicts or potential conflicts and deal with them accordingly. The SRA Code, in Outcome 4.3, explains that if a lawyer is working for multiple clients who are in conflict with each other under one of the allowed exceptions, a lawyer’s duty of confidentiality to one client takes precedence over the lawyer’s duty to disclose to the opposing client.⁴³

3.1.3 Canadian Rules on Conflicts of Interest

In Canada, the general rule in regard to conflicts of interests is set out in the Federation of Law Society’s Model Code of Professional Conduct (FLS Model Code), rule 3.4-1:

A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.⁴⁴

Conflict of interest is defined by the FLS Model Code in rule 1.1-1 as:

The existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own

⁴⁰ Model Rules (2016), Rule 1.7.

⁴¹ *SRA Code of Conduct* (2011), c. 3, Outcome 3.4. In the UK, solicitors and barristers have different regulatory authorities and different codes of conduct. To access the Barrister’s Code of Conduct please see: Bar Standards Board, *The Bar Standards Board Handbook*, 2nd ed, Barrister’s Regulation Authority, 2015, online: <<https://www.barstandardsboard.org.uk>>.

⁴² *Ibid*, c. 3, Outcome 3.5.

⁴³ *Ibid*, c. 4, Outcome 4.3.

⁴⁴ Model Code (2016), Rule 3.4-1.

interest or the lawyer's duties to another client, a former client, or a third person.⁴⁵

The commentary to rule 3.4-1 expands this definition as follows:

The lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.⁴⁶

The Code permits acting where a conflict of interest exists if the lawyer has permission from their client(s). The Code provides examples of where conflicts of interest may arise. Lawyers are free to engage in other professions, businesses and occupations simultaneously with their practice of law. However, the Canadian Bar Association's Code of Professional Conduct states that lawyers who do so are not to allow this outside interest to jeopardize their "professional integrity, independence, or competence" as lawyers.⁴⁷ Since "outside interest" includes lawyers acting as directors for organizations or companies, law firms and lawyers should decline such directorships or take special care if a lawyer does serve on the board of a client corporation.⁴⁸

3.2 Duty to Not Advise or Assist in a Violation of the Law

Lawyers have a duty to not advise or assist in the violation of the law. Professional obligations generally require lawyers to resign as counsel if they are put in a situation where, after explaining to their client that the proposed course of conduct is illegal and that they cannot participate in that conduct, the client continues to instruct them to engage in or facilitate the illegal act. Most codes of conduct expressly forbid lawyers from implementing corporate instructions that would involve the commission of a crime, a fraud, or a breach of professional ethics.⁴⁹ Lawyers who do advise or assist in the violation of the criminal law are subject to prosecution under criminal law for conspiring, aiding, abetting, or counselling a breach of the law (see Chapter 3). The lawyer's duty not to facilitate a crime may arise where a lawyer is asked to act in a transaction that the lawyer believes is corrupt, such as when the lawyer is asked to draft a contract that likely includes a bribe or when a client approaches

⁴⁵ *Ibid*, Rule 1.1-1.

⁴⁶ *Ibid*, Commentary to Rule 3.4-1, para 2.

⁴⁷ The Canadian Bar Association, *CBA Code of Professional Conduct* (CBA, 2006) at c. VII.

⁴⁸ *Ibid* at commentary 1.

⁴⁹ The Law Society of Alberta, *Code of Conduct* (2016), Rule 3.2-13, online:

<https://learningcentre.lawsociety.ab.ca/pluginfile.php/68/mod_page/content/5/Code.pdf>.

the lawyer and requests advice on how to prevent a planned illegal transaction from being detected.

Lawyers can advise clients on how to achieve a business objective in compliance with the law. For example, a business development contract without certain limiting instructions might lead to a high probability of bribes being paid by company agents; ignoring that risk can constitute assisting in that bribery and therefore would be a violation of the lawyer's legal and ethical duties. However, properly documenting the nature of the work to be performed and the identity of those performing the work, along with prohibiting contact by the agent with government officials without specific company approval, can mitigate the potential misuse of the contract in an unlawful scenario.

Another factor that confuses the issue is the definition of "law." Advising on "hard law," like the *Corruption of Foreign Public Officials Act (CFPOA)*, *Criminal Code*, or *Foreign Corrupt Practices Act (FCPA)*, is often (though not always) relatively easy. What can be more difficult is advising on the stance to be taken toward "soft law," such as unratified treaty obligations or guidelines from multinational organizations like the UN. Strictly speaking, the "law" means hard law; however, it is advisable to at least alert clients to potential soft law concerns, as a client's level of adherence to these soft law obligations may affect public perceptions and prosecutorial positions.

3.2.1 US Rules

The American Bar Association model rules prohibit lawyers from counselling or assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. The rules allow the lawyer to discuss the legal consequences of proposed conduct and to "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."⁵⁰

3.2.2 UK Rules

The SRA Code of Conduct provides that a solicitor must not attempt to deceive or knowingly or recklessly mislead the court,⁵¹ or be complicit in another person deceiving or misleading the court,⁵² and has to refuse to continue acting for a client if a solicitor becomes aware they have committed perjury, misled the court or attempted to mislead the court in any material matter, unless the client agrees to disclose the truth to the court.⁵³

The lawyer's duty to a client does not trump the lawyer's duty to the court, as was noted by the House of Lords in *Myers v Elman*:

⁵⁰ Model Rules (2016), Rule 1.2(d).

⁵¹ *SRA Code of Conduct* (2011), c. 5, Outcome 5.1.

⁵² *Ibid*, Outcome 5.2.

⁵³ *Ibid*, Indicative Behaviour 5.5.

A lawyer is an officer of the Court and owes a duty to the Court; he is a helper in the administration of justice. He owes a duty to his client, but if he is asked or required by his client to do something which is inconsistent with this duty to the Court, it is for him to point out that he cannot do it and, if necessary, cease to act.⁵⁴

In this case the lawyer did not assist in breaking the law, but rather failed to ensure proper disclosure was made to the Court. The lawyer failed to uphold his duty to the Court and the Court made a costs order against him.

3.2.3 Canadian Rules

The FLS Model Code prohibits lawyers from knowingly assisting in or encouraging dishonesty, fraud, crime or illegal conduct:

3.2-7 When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.⁵⁵

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7:

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.⁵⁶

⁵⁴ *Myers v Elman*, [1940] AC 282 at 307, [1939] 4 All ER 484 (HL (Eng)).

⁵⁵ Model Code (2016), Rule 3.2-7.

⁵⁶ *Ibid*, Rule 3.2-8.

The commentary to the FLS Model Code further elaborates on the lawyer's duty not to assist in fraud or money laundering:

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.⁵⁷

In addition to the professional obligations listed above, the *Criminal Code* provisions on conspiracy, aiding, abetting, and counselling criminalize the conduct of anyone, including a lawyer, who knowingly assists their client in the commission of a crime.

3.3 The Duty of Confidentiality and Solicitor-Client Privilege

Both the duty of confidentiality and solicitor-client privilege restrict lawyers from disclosing information about their client without client permission. These concepts are important to a corporate lawyer working on corruption and anti-corruption issues. For example, providing assistance in developing, implementing, reviewing and assessing a client's anti-corruption compliance programs may reveal corporate information that is "secret" or "private" or may involve privileged advice about a company's past or future risk areas or wrongdoing. A fundamental purpose of the duty of confidentiality and privilege is to encourage full disclosure from clients to their lawyer, so the lawyer can best represent their client's interests. As the information disclosed may be harmful or embarrassing to the client's interests, providing protection from disclosure ensures that clients feel safe in making disclosures. A lawyer cannot assist in preventing or addressing corruption if the client is afraid that if they divulge information about a past potentially corrupt act, the lawyer will share this information with others. The privilege belongs to the client, and therefore the

⁵⁷ *Ibid*, Commentary to Rule 3.2-7, paras 2-3.

lawyer cannot unilaterally disclose otherwise privileged or confidential information without the client's permission unless a legally recognized exception applies, as discussed below.

The duty of confidentiality requires lawyers to hold "in strict confidence" all information concerning the affairs of their client acquired throughout the professional relationship. A breach of this duty, if not otherwise authorized, is a breach of the lawyer's professional and fiduciary obligations and may result in the lawyer being subject to fines, civil liability, or debarment from practicing law.⁵⁸ The rationale for the duty is described by Proulx and Layton as:

[T]he client who is assured of complete secrecy is more likely to reveal to his or her counsel all information pertaining to the case. The lawyer who is in possession of all relevant information is better able to advise the client and hence provide competent service. The client's legal rights are furthered, as is the truth-finding function of the adversarial system.⁵⁹

The duty of confidentiality prevents both the use of confidential information as well as disclosure of confidential information. This protects the client's confidential business information and prevents a lawyer from using this information to the lawyer's advantage or the client's detriment. This may arise in the corruption context, for example, through disclosure of due diligence procedures for preventing or finding violations of the company's policies, which are considered confidential and proprietary information by the company. A lawyer assisting or assessing a client's corruption compliance program may be restricted from using any information learned through that process when later assisting a second client on a similar project.

The duties of confidentiality and solicitor-client privilege are not identical. First, the duty of confidentiality is much broader and encompasses all communications between the solicitor and client, including the fact that the client has approached and hired the solicitor for a legal issue. As Proulx and Layton note:

[C]rucial distinctions exist between a lawyer's ethical duty of confidentiality and legal-professional privilege. First, the privilege applies only in proceedings where the lawyer may be a witness or otherwise compelled to produce evidence relating to the client. The ethical rule of confidentiality is not so restricted, operating even where there is no question of any attempt to compel disclosure by legal process. Second, legal-professional privilege encompasses only matters communicated in confidence by the client, or by a third party for the dominant purpose of litigation. Once again, the rule of confidentiality is broader, covering all information acquired by counsel whatever its source. Third, the privilege applies to the communication itself, does not bar the adduction of evidence pertaining to the facts communicated if gleaned from another source, and is often lost where other

⁵⁸ Graham (2014) at 192.

⁵⁹ Proulx & Layton (2001) at 170-71.

parties are present during the communication. In contrast, the rule of confidentiality usually persists despite the fact that third parties know the information in question or the communication was made in the presence of others.⁶⁰

Second, the duty of confidentiality affords less protection than solicitor-client privilege. The duty of confidentiality is an ethical duty, whereas solicitor-client privilege has evolved from a rule of evidence to a substantive rule of law and is “a principle of fundamental importance to the administration of justice.”⁶¹ As solicitor-client privilege affords greater protection due to its status as a rule of law, any exceptions that apply to the privilege necessarily apply to duties of confidentiality as well.⁶²

Legislative override of solicitor-client privilege and the duty of confidentiality has been attempted in cases where there appears to be a compelling public benefit in the disclosure of otherwise confidential information. These attempts have generally occurred where the lawyer holds information relevant to the question of whether or not the client has committed an offence. However, the courts tend to fiercely guard the duty of confidentiality and guard the solicitor-client privilege even more actively. In *R v Fink*, the Supreme Court of Canada struck down the *Criminal Code* provision (s. 588.1) that allowed police to obtain a warrant to search a lawyer’s office and seize documents that may be privileged.⁶³ The Supreme Court struck down that provision as an unreasonable search and seizure power. The Supreme

⁶⁰ *Ibid* at 173.

⁶¹ *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.

⁶² *Ibid*.

⁶³ *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.

Court held that solicitor-client privilege is “a civil right of extreme importance” and it “must remain as close to absolute as possible.”⁶⁴

3.3.1 The Duty of Confidentiality under US Rules

The American rule regarding the duty of confidentiality is set out in the ABA's Model Rules of Professional Conduct at rule 1.6:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) To prevent reasonably certain death or substantial bodily harm;
 - (2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result

⁶⁴ According to D. Watt & M. Fuerst in *The 2017 Annotated Tremear's Criminal Code* (Thomson Reuters Canada, 2016) at 894: “The principal constitutional flaws in the regime created by s. 488.1 have to do with the *potential breach* of the privilege *without* the client's knowledge, let alone consent, and the *absence of judicial discretion* in the determination of an asserted claim of privilege. *Reasonableness* requires that the courts retain a *discretion* to decide whether materials seized in a lawyer's office should remain inaccessible to the state as privileged if and when it is in the interests of justice to do so. No search warrant can be issued for documents *known* to be protected by solicitor-client privilege. Before issuing a warrant to search a law office, the justice must be satisfied that there is no other reasonable alternative to the search. In issuing a warrant, the justice must afford maximum protection of solicitor-client privilege. All documents must be sealed before being examined or removed from a lawyer's office, except where the warrant specifically authorizes the immediate examination, copying and seizure of an identified document. Every effort must be made to contact the lawyer and the client at the time of execution of the warrant. If the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents. All potential privilege holders should be contacted by the police and should have a reasonable opportunity to assert a claim of privilege and to have it judicially decided. If such notification is not possible, the lawyer who had possession of the documents, or another lawyer appointed by the Law Society or the court, should examine the documents to determine whether a claim of privilege should be asserted. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents unless it is determined by a judge that the documents are not privileged. Documents found to be privileged are to be returned immediately to the holder of the privilege, or to a person designated by the court. Documents found *not* to be privileged may be used in the investigation.”

- or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) To secure legal advice about the lawyer's compliance with these Rules;
 - (5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) To comply with other law or court order; [or]
 - (7) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.⁶⁵

Note that the Model Rules allow, but do not require, disclosure under any of the circumstances in Rule 1.6(b).

3.3.2 The Duty of Confidentiality under UK Rules

The UK Solicitor's Regulation Authority's Code of Conduct requires that a lawyer "keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents."⁶⁶ Solicitors also have to have effective systems and controls in place to enable them to identify risks to client confidentiality and to mitigate those risks.⁶⁷

3.3.3 The Duty of Confidentiality under Canadian Rules

The Canadian rule set out in Rule 3.3 of the FLS Model Code is as follows:

A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;

⁶⁵ Model Rules (2016), Rule 1.6.

⁶⁶ *SRA Code of Conduct* (2011), c. 4, Outcome 4.1.

⁶⁷ *Ibid*, Outcome 4.5.

- (b) required by law or a court to do so;
- (c) required to deliver the information to the Law Society; or
- (d) otherwise permitted by this rule.⁶⁸

A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.⁶⁹

A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.⁷⁰

If it is alleged that a lawyer or the lawyer's associates or employees:

- (a) have committed a criminal offence involving a client's affairs;
- (b) are civilly liable with respect to a matter involving a client's affairs;
- (c) have committed acts of professional negligence; or
- (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.⁷¹

A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.⁷²

A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.⁷³

A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.⁷⁴

⁶⁸ Model Code (2016), Rule 3.3-1.

⁶⁹ *Ibid*, Rule 3.3-2.

⁷⁰ *Ibid*, Rule 3.3-3.

⁷¹ *Ibid*, Rule 3.3-4.

⁷² *Ibid*, Rule 3.3-5.

⁷³ *Ibid*, Rule 3.3-6.

⁷⁴ *Ibid*, Rule 3.3-7.

3.3.4 Solicitor-Client Privilege: Legal Advice and Litigation Privilege

As discussed above, the scope of the application of solicitor-client privilege is narrower than what is encompassed under the duty of confidentiality. Solicitor-client privilege is also referred to as legal professional privilege. It is composed of two aspects: legal advice privilege and litigation privilege. Legal advice privilege does not apply to all communications or advice between lawyer and client; it only extends to information that is regarded as legal advice.⁷⁵ It does not extend to business advice provided by the lawyer. Many corporate lawyers serve as officers or directors for a company and in that “dual capacity” they may provide business advice alongside legal advice.⁷⁶ This may bring about issues in assessing whether privilege exists; it is sometimes difficult for lawyers or courts to separate legal and business advice. Each jurisdiction takes a slightly different view in interpreting the difference between legal and business advice and the application of and exceptions to legal advice privilege, as discussed more fully below. Generally, lawyers are able to divulge their clients’ otherwise confidential information if required by law. However, few laws require such divulgence as new laws that seek to infringe upon legal professional privilege are generally not upheld by the courts.⁷⁷ As there are differing exceptions to legal advice privilege in the jurisdictions discussed, only those pertaining to corruption will be discussed.

When providing legal as opposed to business advice to a client, a lawyer should clearly indicate that the advice is legal advice and therefore covered by legal professional privilege. As outlined in the CBA Code, Chapter III, “Advising Clients,” Commentary 10:

10. In addition to opinions on legal questions, the lawyer may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question, or the course the client should choose. In many instances the lawyer’s experience will be such that the lawyer’s views on non-legal matters will be of real benefit to the client. The lawyer who advises on such matters should, where and to the extent necessary, point out the lawyer’s lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other such advice.⁷⁸

For example, lawyers may want to give their written legal opinions to the client-employer on their own letterhead stationery, with non-legal advice or opinions being forwarded on the letterhead of the client employer and being clearly marked as being non-legal in nature.⁷⁹

⁷⁵ Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed (Thomson Carswell, 2006) at 20-11. However, a lawyer’s duty of confidentiality to their client is broader than solicitor-client privilege and applies to all communications between lawyer and client.

⁷⁶ Nelson (2008-2009) at 274.

⁷⁷ In Canada, see e.g. *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.

⁷⁸ *CBA Code of Professional Conduct* (2006) at c. III, commentary 10.

⁷⁹ Beverley Smith, *Professional Conduct for Lawyers and Judges*, 4th ed, (Maritime Law Book, 2011) at 13.

Litigation privilege applies to communications or documents created primarily for the purpose of current or anticipated litigation. It extends to communications beyond just the lawyer and client, and encompasses any experts the lawyer may retain to learn about the issues as well as other third parties who may assist in preparing for litigation. Unlike legal advice privilege, the extent of litigation privilege is not infinite but rather ends with the litigation. Litigation privilege may arise for a corporate lawyer where the company has been charged or where litigation is pending in regards to their own alleged corrupt acts or the corruption of another company (for example, a civil suit for loss of a contract). A corporate lawyer may have to assist the litigation team by sending documents or informing them of the company's anti-corruption compliance program. Although the corporate lawyer would not be the litigator in charge of the litigation, their communications to the litigation team would be protected under the litigation privilege. Equally important, the litigation team may need various expert reports. Those reports will also be protected by the litigation privilege.

3.3.5 Solicitor-Client Privilege: Distinguishing Business and Legal Advice

Although the duty of confidentiality extends to all communications between a lawyer and his or her client, solicitor-client privilege only exists where the advice is "legal advice." American courts take two differing approaches to determining whether advice is business or legal. The first approach is to determine whether the person is acting as a lawyer or a business person and treat all advice provided by that person accordingly.⁸⁰ A businessperson will be found to only give business advice and a lawyer will be found to only give legal advice. Under the second method, the court will determine whether the advice is business or legal on an ad hoc basis and provide privilege only for legal advice.⁸¹ This involves looking at individual communications to determine the purpose and nature of the communication.

UK legal advice privilege requires that the advice given is legal in nature, in the sense that there is a relevant legal context. As Lord Denning stated:

It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps an executive capacity. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction.⁸²

The rationale for the distinction was described as:

⁸⁰ Robert J. Wilczek, "Corporate Confidentiality: Problems and Dilemmas of Corporate Counsel" (1982) 7 Del J Corp L 221 at 240.

⁸¹ *Ibid.*

⁸² *Crompton Amusement Machines Ltd v Commission of Customs and Excise (No. 2)*, [1972] 2 QB 102, 2 All ER 353 at 376 (CA). As discussed by John S Logan & Michael Dew, *Overview of Privilege and Confidentiality* (Paper) (Continuing Legal Education Society of British Columbia, 2011) at 1.1.7.

To extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide.⁸³

As such, the court must make the determination of whether the advice was business or legal.

In Canada, the Supreme Court has stated:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.⁸⁴

However, the courts have generally interpreted “legal advice” broadly. The following excerpts show that the line between business and legal advice is fuzzy:

[Legal advice privilege] is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

Whether communications are made to the lawyer himself or employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.

I am satisfied that a communication which does not make specific reference to legal advice is nevertheless privileged if it falls within the continuum of communication within which the legal advice is sought or offered: see *Manes and Silver, supra*, p. 26. If the rule were otherwise, a disclosure of such documents would tend in many cases to permit the opposing side to infer the nature and extent of the legal advice from the tenor of the documents falling within this continuum. Thus, the intent of the rule would be frustrated.⁸⁵

Although specifically referencing in-house counsel, this would apply to all lawyers who provide business advice in addition to legal advice.

⁸³ *Balabel v Air India*, [1988] 2 All ER 246, 1 Ch 317 CA (Eng).

⁸⁴ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20, [2004] 1 SCR 809.

⁸⁵ In order from top: *Samson Indian Nation and Band v. Canada*, [1995] 2 FCR 762 at para 8, 125 DLR (4th) 294 (CA); *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860 at 876, 141 DLR (3d) 590; *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of B.*, 18 BCLR (3d) 150, 1996 CanLII 2311 at para 5 (SC). As discussed by Logan & Dew, (2011) at 1.1.7.

3.4 Solicitor-Client Privilege, Confidentiality and Reporting Wrongdoing

Lawyers are under a duty to protect the interests of their client, the corporation. A lawyer that notices wrongdoing on the part of one of the officers, agents, etc. has an obligation to report that wrongdoing within the corporation.⁸⁶ This reporting usually requires the lawyer to bring the matter to a more senior individual in the corporation, particularly if the wrongdoing is committed by an individual the lawyer normally reports to.⁸⁷ As lawyers have a duty of confidentiality, reporting of wrongdoing must be internal, except in rare circumstances.⁸⁸ This is not a violation of solicitor-client privilege because the communication is still with the client.

Some jurisdictions allow for external reporting when a lawyer believes that a serious crime is about to be committed.⁸⁹ Where the client has not waived privilege, this is a violation of solicitor-client privilege, and as such, any confidential information that is reported should be the minimum necessary to prevent the crime.⁹⁰ Where lawyers are *allowed* to report wrongdoing externally, the idea that the lawyer is a gatekeeper is more accurate. Where lawyers are *required* to report wrongdoing externally, the lawyer has an even more significant role as a gatekeeper. As discussed previously, the gatekeeping role of lawyers has not yet been fully accepted in the same way that the auditor's role as gatekeeper has been. This is primarily due to legal professional privilege and the lawyer's duty of loyalty to their client.

3.4.1 US Rules on Internal and External Disclosure of Wrongdoing

Following the Enron scandal, the US implemented the *Sarbanes-Oxley Act of 2002 (SOX)*. A primary objective of *SOX* was to address major corporate and accounting scandals and promote lagging investor confidence in the stock market. Section 307 of the *SOX* requires lawyers to internally report up the ladder (to the CEO or even the board of directors or audit committee) evidence of material violations of federal and state securities laws and other fraudulent acts.⁹¹ This rule applies to the record keeping provisions of the *FCPA* and anti-bribery provisions of the *Securities Exchange Act of 1934*,⁹² as per 15 USC § 78dd-1.

The ABA Model Rules of Professional Conduct state that lawyers have a duty to protect the corporation's interests:

⁸⁶ MacKenzie (2006) at 20-12.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* at 20-11.

⁸⁹ The US and Canada both allow lawyers to divulge otherwise privileged information in order to prevent a serious crime. The UK does not have a similar exception to allow for a breach of solicitor-client privilege.

⁹⁰ MacKenzie (2006) at 20-13.

⁹¹ Nelson (2008-2009) at 280.

⁹² *Ibid* at 281.

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) Except as provided in paragraph (d), if
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
 then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.⁹³

⁹³ Model Rules (2016), Rule 1.13.

There is *no professional duty to report* wrongdoing outside of the corporation; rather, they *may* report wrongdoing externally:

[T]o prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.⁹⁴

The SEC attempted to require lawyers who practice before it to report knowledge of their client's wrongdoing to the SEC. The American Bar Association and many others vehemently opposed this stance, claiming solicitor-client privilege must prevail.⁹⁵ As a result of the resounding opposition to the SEC's proposed requirements for external reporting, the SEC implemented provisions that allow, but do not require, lawyers to report material violations of the SEC rules to them.⁹⁶ The SEC also included a provision that requires subordinate lawyers to report evidence of a material violation of the SEC rules to their supervising attorney.⁹⁷

3.4.2 UK Rules on Internal and External Disclosure of Wrongdoing

Lawyers are under a duty to their client to report wrongdoing up the ladder to a higher ranking official or to the board of directors.⁹⁸ If the board of directors are the wrongdoers, the lawyer may be obligated to report to the general meeting of the shareholders.⁹⁹ However, although there have been cases about how directors are liable for failing to prevent co-directors from breach of fiduciary duty or other wrongdoing, the courts have not specifically addressed the lawyer's obligation to disclose wrongdoing of executives and directors.¹⁰⁰

The UK House of Lords, in *Three Rivers Council and others v Governor and Company of the Bank of England (Three Rivers)*, explains that if legal professional privilege exists, it is absolute and cannot be overridden for public policy concerns; the only way around it is if the client (or

⁹⁴ *Ibid*, Rule 1.6.

⁹⁵ US, Securities Exchange Commission, *Final Rule: Implementation of Standards of Professional Conduct for Attorneys* (RIN 3235-AI72) (Securities Exchange Commission, 2003), online: <https://www.sec.gov/rules/final/33-8185.htm>.

⁹⁶ *Ibid*, 17 CFR § 205.5.

⁹⁷ *Ibid*.

⁹⁸ Joan Loughrey, *Corporate Lawyers and Corporate Governance*, (Cambridge University Press, 2011) at 119.

⁹⁹ *Ibid*. This stems from the principle established in *Barron v Potter*, [1914] 1 Ch 895, and *Foster v Foster*, [1916] 1 Ch 532, that the general meeting of shareholders has the ability to act when the board of directors is unable or incapable of acting. In *Foster v Foster*, the board of directors was unable to act due to conflict of interest.

¹⁰⁰ *Ibid* at 120.

individual entitled to it) waives the privilege or it is overridden by statute.¹⁰¹ The court has found that a balancing act between legal professional privilege and the public interest is not required because legal professional privilege is the “dominant public interest” and “the balance must always come down in favour of upholding the privilege.”¹⁰² The court’s strict interpretation of the scope of legal professional privilege does not allow for the disclosure of otherwise privileged communications in order to prevent a crime from being committed. Under the rule in *Bullivant v Att-Gen of Victoria*, legal professional privilege extends to information given to a client on how to avoid committing a crime.¹⁰³ Legal professional privilege also extends to communications informing a client that their actions may result in prosecution, as per *Butler v Board of Trade*.¹⁰⁴ However, legal professional privilege may not extend to documents which form part of the crime itself or to communication that occurs in order to obtain advice with the intent of committing an offence.¹⁰⁵ In order to disclose otherwise privileged communications, lawyers must show they have prima facie evidence their client is involving them in a fraud without their consent.¹⁰⁶

3.4.3 Canadian Rules on Internal and External Disclosure of Wrongdoing

The Canadian rules vary from province to province. However, the Model Code places the following requirement on lawyers, and applies to all lawyers in jurisdictions that have adopted the Model Code:

A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7: (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped; (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief

¹⁰¹ *Three Rivers District Council and others v Governor and Company of the Bank of England*, [2004] UKHL 48 at paras 10 and 25, [2005] 4 All ER 948. Note that in-house counsel in the UK maintain legal professional privilege with their client. This is, however, contrary to the EU Rule. As per the European Court of Justice decision in *Akzo Nobel Chemicals Limited & anor v European Commission* (Case C-550/07 P), solicitor-client privilege does not extend to in-house counsel and their client.

¹⁰² *R v Derby Magistrates’ Court*, [1995] 4 All ER 526, [1995] 3 WLR 681. The SCC came to the same conclusion in *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.

¹⁰³ *Bullivant v Att-Gen of Victoria*, [1901] AC 196. This is different than giving advice on how to avoid getting caught after committing a crime. For more information on legal professional privilege when a crime or fraud is being committed, see UK, Law Society, *Anti-money laundering* (Practice Note) (The Law Society, 2013) at c. 6, online:

<<http://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/>>.

¹⁰⁴ *Butler v Board of Trade*, [1971] Ch 680, [1970] 3 WLR 822.

¹⁰⁵ *R v Cox & Railton* (1884), 14 QBD 153.

¹⁰⁶ *O’Rourke v Darbishire*, [1920] UKHL 730, [1920] AC 581.

executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.¹⁰⁷

Some Canadian jurisdictions also specifically require that if a lawyer receives relevant information regarding the corporation for whom they act, the lawyer must disclose this information to a proper authority within the organization.¹⁰⁸

The Supreme Court of Canada differs from the UK's traditional judicial approach to applying legal professional privilege. The SCC has allowed for limited exceptions to its application. Where an exception exists, the scope of the privileged communication to be disclosed is to be interpreted as narrowly as reasonably possible.¹⁰⁹ Where a former client alleges misconduct by their former lawyer, the privilege may be set aside to protect the lawyer's self-interest.¹¹⁰ If a client seeks legal advice for an unlawful purpose, privilege will not exist.¹¹¹ Where privilege may be set aside, no requirement has been placed on the lawyer to disclose the confidential information. Rather, a permissive "may disclose" allows the lawyer to exercise his or her discretion in the matter.

In *Smith v Jones*, the Supreme Court of Canada provided guidance on where solicitor-client privilege may be overridden for public policy concerns.¹¹² The Court advised that an exception to the privilege be allowed where "public safety is involved and death or serious bodily harm is imminent."¹¹³ The test from *Smith v Jones* was that (1) the harm had to be targeted at an identifiable group, (2) the risk was of serious bodily harm or death, and (3) the harm was imminent.¹¹⁴ In *Smith v Jones*, solicitor-client privilege was claimed for a doctor's report that was completed for the purpose of assisting in the preparation of the defence or with sentencing submissions. The psychiatrist felt that the accused was likely to commit further crimes based on the assessment, and sought to have the report considered

¹⁰⁷ Model Code (2016), Rule 3.2-8.

¹⁰⁸ The Law Society of Alberta, *Code of Professional Conduct* (Law Society of Alberta, 2004) at c. 12, rule 3.

¹⁰⁹ *Ibid* at para 86.

¹¹⁰ *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).

¹¹¹ *R v McClure*, 2001 SCC 14 at para 36, [2001] 1 SCR 445. See also *Descoteaux v Mierzwinski*, [1982] SCJ No 43, [1982] 1 SCR 860, 141 DLR (3d) 590.

¹¹² *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.

¹¹³ *Ibid* at para 35.

¹¹⁴ Although serious economic harm is not included in this test, law societies will allow lawyers to disclose aspects of otherwise confidential or privileged information if the lawyer is at risk (i.e. when the lawyer faces allegations of misconduct or is not getting paid, etc.). See:

<www.cba.org/CBA/activities/pdf/Dodek-English.pdf>.

by the Court in sentencing. As the report was cloaked by solicitor-client privilege, the Court set out a test for where solicitor-client privilege may be overridden for public policy concerns.

The Supreme Court of Canada has also allowed solicitor-client privilege to be overridden where an accused's innocence is at stake.¹¹⁵ Additionally, lawyers are not as tightly bound to solicitor-client privilege where the interests of the lawyer are at stake; this may occur where the lawyer is collecting fees or is defending against a client's claim of professional misconduct.¹¹⁶

3.5 Duty to Know Your Customer

Some jurisdictions have enacted legislation requiring lawyers to confirm the identity of their clients prior to engaging in high risk transactions, particularly in cases of suspected money laundering or terrorist activities (for further information, see Chapter 4). This duty has the potential to infringe upon solicitor-client privilege because the client's personal information must be confirmed and recorded by the lawyer, and this information can later be seized by the government if the client is under investigation.

4. WHERE LAWYERS MIGHT ENCOUNTER CORRUPTION

Corporate lawyers may come across corruption in a multitude of circumstances. Corruption can be a part of any transaction, and lawyers should be careful they are not assisting their client in the violation of the law or acquiring the liabilities associated with a violation of the law by third parties. Certain financing agreements or procurement contracts may require special attention. Likewise, clients' lobbying and political contributions need careful screening for legality. Lawyers may uncover a corrupt act when providing routine assistance on corporate contracts for the sale of goods and services. In acquisitions and mergers, it is critical to determine whether the target of an acquisition has engaged in corrupt practices in the past, as the acquiring corporation may be liable for past corruption after a merger. A lawyer has a duty to undertake risk assessments to determine the potential for corrupt behaviours. This does not always need to be a full systemic risk assessment, as outlined below. Normally an internal counsel will know enough about the business that a conclusion is intuitively obvious. On the other hand, the use of third party agents, consultants or joint venture partners from foreign countries requires careful attention. In that regard, Robert Tarun lists 25 red flags to assist in determining the appropriate nature and level of due diligence required in each circumstance.¹¹⁷ Transparency International UK has also

¹¹⁵ *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445.

¹¹⁶ *Graham* (2014) at 272-274; *MacKenzie* (2006) at 3-15 – 3-19. See e.g. *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).

¹¹⁷ Robert W. Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013) at 119-120.

published a very helpful guide to anti-bribery due diligence in acquisitions, mergers and investments.¹¹⁸

5. RELATIONSHIP BETWEEN DUE DILIGENCE, ANTI-CORRUPTION COMPLIANCE PROGRAMS AND RISK ASSESSMENTS

Due diligence, anti-corruption compliance programs and risk assessments are distinct but interrelated concepts. “Due diligence” can be viewed as a generic legal concept. In that sense, it means using reasonable care and taking into account all the surrounding circumstances to avoid breaking the law or causing harm to others in carrying out one’s business. It is relevant in criminal law, regulatory law and civil liability. Due diligence by an accused is not a substantive defence to the commission of a subjective *mens rea* offence such as bribery, but it is a relevant mitigating factor that can affect the nature of the charge and the sentence or sanction.¹¹⁹ For strict liability regulatory offences in Canada¹²⁰ and the UK¹²¹ (including s.7 of the UK *Bribery Act, 2010*), due diligence provides a defence. However, due diligence is not a defence to regulatory offences in the US and liability can be found even where companies have implemented compliance programs to prevent regulatory offences from occurring.¹²² Due diligence is also a defence to civil actions based on negligence or malpractice.

In the context of assisting a client to avoid the commission of corruption offences, careful creation and implementation of an anti-corruption compliance program that is geared to the size and nature of the business has quickly become the expected norm of due diligence. Due diligence or reasonable care must be used in designing an anti-corruption program and due diligence must be used in ensuring that the program is implemented, monitored and evaluated from time to time. In this context, due diligence requires compliance with a number of steps and safeguards specific to the particular business activity in question.

An anti-corruption compliance program will set out the steps that are reasonably required to avoid corruption in the course of one’s business. Those reasonable steps will be based on

¹¹⁸ Transparency International UK, *Anti-Bribery Due Diligence for Transactions* (Transparency International UK, May 2012), online: <<http://www.transparency.org.uk/publications/anti-bribery-due-diligence-for-transactions/>>. See also Tarun, *ibid*, at 140-141 for a list of 15 risk factors which warrant consideration of heightened due diligence for mergers, acquisitions and investments. These factors are listed in Section 7.2 of this chapter.

¹¹⁹ Due diligence acts as a substantive defence in the UK under section 7 of the *Bribery Act*. In Canada and the US, due diligence is not a substantive defence to charges of bribery or corruption.

¹²⁰ *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161.

¹²¹ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127. Note that in the UK the defence of due diligence must be included in the statutory scheme to be available to the defendant charged with a regulatory offence.

¹²² See Mark Pieth & Radha Ivory, “Emergence and Convergence: Corporate Criminal Liability Principles in Overview” in Mark Pieth & Radha Ivory, eds, *Corporate Criminal Liability: Emergence, Convergence, and Risk*, (Springer, 2011) at 22-23.

the actual risk of corruption arising in the client's business transactions. Thus, the first step in developing an effective anti-corruption compliance program is to conduct a thorough risk assessment. To achieve the standard of due diligence, the risk assessment must be designed and carried out with reasonable care based on all the circumstances including the risk of corruption occurring, the nature and extent of harm if it does occur and the cost and effectiveness of procedures to minimize or eliminate that risk.

As enforcement becomes more frequent and the penalties sought increase in amount, the cost of any corrupt act has greatly increased. As such, companies seek guidance on complying with the law in order to avoid prosecutions and fines. Two theories indicate differing approaches on the type of guidance or regulations governments should provide: rules-based theory and principles-based theory.¹²³ The rules-based theory suggests that governments and enforcement agencies should set out the rules that companies need to play by.¹²⁴ This would effectively set a minimum standard for organizations to comply with and would provide certainty for companies. A significant issue with this approach is that such rules tend to be inflexible and unable to address changing situations as they arise. In addition, this approach can result in creative interpretations of the rules that ignore the spirit of the rules and allow individuals to bend them in their favour. The principles-based theory focuses on principles that governments would like to see corporations uphold.¹²⁵ This provides more flexibility in a court's interpretation of whether or not the company was in compliance, but provides less certainty to the corporation as to whether their compliance program is adequate to avoid criminal or regulatory liability.¹²⁶

The next three sections examine anti-corruption compliance policies, risk assessments and due diligence in various contexts including mergers and acquisitions and the use of foreign agents.

6. ANTI-CORRUPTION COMPLIANCE PROGRAMS

6.1 Introduction

An increasing global expectation exists for companies to create and enforce an anti-corruption compliance program within their company. Although such programs are often not a legislative requirement, they are becoming a standard factor that enforcement bodies

¹²³ Todd Archibald, Kenneth Jull & Kent Roach, *Regulatory and corporate liability: From due diligence to risk management*, 2nd ed (Canada Law Book, 2004) at 14-3.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ For more information on rules-based versus principles-based regulation, see Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55 McGill LJ 257, and Cristie Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45 Am Bus LJ 1. These papers do not address corruption directly, but some of the points addressed provide insight into the debate between rules-based and principles-based regulation.

and courts consider when deciding whether to charge a company, or if charges are laid, in setting the penalty for a convicted organization. Under s. 7(2) of the UK *Bribery Act 2010*, the implementation of “adequate procedures” provides a substantive defence for the corporation to a charge under section 7(1) (see Chapter 2, Section 2.4.3(i)). The courts and enforcement agencies consider whether there is a program in place and evaluate its effectiveness in preventing corrupt acts. These programs are seen as critical to ensuring that corporations are complying with anti-corruption and anti-bribery laws. The primary purpose of these programs is to reduce the risk of corrupt acts taking place in an organization.

In light of the legal ramifications of creating and enforcing a sound anti-corruption program, lawyers advising business clients have an important role to play in informing clients of the practical utility of having such programs and ensuring that the client's program is up to date and meets minimum international standards. Enforcement agencies and courts have repeatedly advised that anti-corruption efforts should be custom-designed for the organization and should consider the particular risks that the organization is subject to. The United Nations Office on Drugs and Crime (UNODC) has produced a guide on compliance programs that states “an ounce of prevention is worth a pound of cure, and for business organizations, this is achieved through an effective internal programme for preventing and detecting violations.”¹²⁷ A strong, effective program protects the company and the shareholders from directors, managers, or employees who are in a position to put the organization at risk. Although an effective compliance program cannot protect against all corrupt acts, largely due to *respondeat superior* (the vicarious liability of companies for the acts of their employees in the course of business) and the risk of hiring rogue employees, it can help to effectively manage and minimize risk.¹²⁸ For more information on the relevance of compliance programs in sentencing, refer to Chapter 7, Sections 4 to 6.

There are two approaches to corporate responsibility for self-regulation under anti-corruption law. The first is for the State to place a legal requirement on organizations to develop a compliance program and then enforce any breaches. An alternative is for the State to publicize best practices with notice to organizations that they may have to justify any departures from those practices.¹²⁹ As of yet, the US, UK and Canada have not specifically made the absence of a compliance program a crime or regulatory offence; however, compliance programs are effectively necessary due to the enforcement of anti-corruption legislation, the consideration of compliance programs in sentencing and, in the case of the UK, the substantive defence of adequate due diligence.

¹²⁷ UNODC, *A Resource Guide on State Measures for Strengthening Corporate Integrity* (United Nations, 2013) at 1.

¹²⁸ Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar Publishing, 2014) at 304.

¹²⁹ Archibald, Jull & Roach (2004) at 14-3.

6.2 International Framework for Anti-Corruption Compliance Programs

6.2.1 UNCAC

As previously noted, UNCAC came into force on December 14, 2005 and is the broadest and most widely agreed to anti-corruption measure.¹³⁰ As of October 3, 2017, UNCAC has been ratified by 183 member states.¹³¹ UNCAC does not specifically require its ratifying parties to provide guidelines on anti-corruption compliance programs. Instead, Article 12 states that “each party shall take measures ... to prevent corruption involving the private sector” and lists possible measures, including:

Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State.¹³²

While not specifically requiring state parties to provide guidance to businesses on what constitutes an effective anti-corruption compliance program, it does encourage parties to promote the use of good commercial practices. UNODC has published a *Resource Guide on State Measures for Strengthening Corporate Integrity (Integrity Guide)*, which indicates that governments should consider providing guidance to the private sector on legal compliance responsibilities.¹³³ It suggests that the core elements of an effective anti-corruption compliance program include: executive leadership, anti-corruption policies and procedures, training and education, advice and reporting channels, effective responses to problems, a risk-based approach, and continuous improvement via periodic testing and review.¹³⁴

6.2.2 OECD Anti-Bribery Convention

The OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)*, which came into force on February 15, 1999, has been ratified by 35 OECD countries and 8 non-member countries (Argentina, Brazil, Bulgaria,

¹³⁰ UNODC, *Background of the United Nations Convention against Corruption*, online: <<http://www.unodc.org/unodc/en/treaties/CAC/>>.

¹³¹ UNODC, *United Nations Convention against Corruption Signature and Ratification Status as of 21 September 2016*, online: <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

¹³² *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005) at article 12 s 2(b), online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

¹³³ UNODC, *A Resource Guide on State Measures for Strengthening Corporate Integrity* (New York: UN, 2013) at 1, online: <https://www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strengthening_Corporate_Integrity.pdf>.

¹³⁴ *Ibid* at 13-14.

Colombia, Costa Rica, Lithuania, Russia, and South Africa).¹³⁵ It does not place any requirements on state parties to provide guidance on key aspects of effective compliance programs for the private sector. Furthermore, it does not require states to implement laws that require organizations to implement effective compliance programs. However, in 2009, the OECD *Recommendations for Further Combating Bribery of Foreign Public Officials (OECD Recommendations)* were adopted by all 41 states that had ratified the OECD Convention. Recommendation III requests that its members encourage companies to develop and implement adequate internal controls and compliance programs and also provides companies with *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.¹³⁶

6.2.3 Key Elements of Compliance Guidelines Published by Various International Organizations

The international community has created various tools to guide companies in the prevention of corruption within their organization. These tools recognize the complexity of identifying and combating corruption and address the need for a multi-faceted approach with the involvement of the entire organization. To aid companies in their anti-corruption policies, the following organizations have published guidelines to assist companies in the implementation of effective compliance programs:¹³⁷

- The Asia-Pacific Economic Cooperation (APEC) has released the Anti-Corruption Code of Conduct for Business.¹³⁸
- Transparency International (TI) has released Business Principles for Countering Bribery.¹³⁹
- Transparency International-Canada (TI Canada) has released the Anti-Corruption Compliance Checklist.¹⁴⁰

¹³⁵ OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, online: <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

¹³⁶ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online: <<https://www.oecd.org/daf/anti-bribery/44176910.pdf>>.

¹³⁷ See *Anti-Corruption Ethics and Compliance Handbook for Business* (OECD, UNODC & World Bank, 2013) for an overview of the principles in the various compliance programs and guidelines for implementing a successful anti-corruption compliance program.

¹³⁸ Asia-Pacific Economic Cooperation, *APEC Code of Conduct for Business*, APEC#207-SO-05.1 (September 2007), online: <http://publications.apec.org/publication-detail.php?pub_id=269>.

¹³⁹ Transparency International, *Business Principles for Countering Bribery*, 3d ed (October 2013), online: <http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery>.

¹⁴⁰ Transparency International-Canada, *Anti-Corruption Compliance Checklist*, 3rd ed (2014), online: <http://www.transparencycanada.ca/wp-content/uploads/2014/09/2014-TI-Canada_Anti-Corruption_Compliance_Checklist-Third_Edition-20140506.pdf>.

- The Organisation for Economic Co-operation and Development (OECD) has produced the Good Practice Guidance on Internal Controls, Ethics, and Compliance.¹⁴¹
- The World Bank created the Integrity Compliance Guidelines.¹⁴²
- The World Economic Forum Partnering Against Corruption Initiative (PACI) created the Principles for Countering Bribery.¹⁴³
- The International Chamber of Commerce (ICC) has produced the Rules on Combating Corruption.¹⁴⁴
- The International Organization for Standardization (ISO) has developed and published ISO 37001 anti-bribery management system (ABMS) standard for organizations.¹⁴⁵

These guidelines and principles provide organizations with suggestions on how to create and maintain anti-corruption programs that fall within expectations under the OECD Convention and UNCAC. Lawyers who are assisting a client in drafting or amending its compliance program should familiarize themselves with these guidelines. For in-house lawyers, the Association of Corporate Counsel (ACC) has prepared a *How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program*.¹⁴⁶

Organizations in the public, private and voluntary sectors may obtain independent certification of compliance of their ABMS with ISO 37001 standard and require their major contractors, suppliers and consultants to provide evidence of compliance.¹⁴⁷ In relation to the organization's activities, this standard addresses:

- bribery in the public, private and not-for-profit sectors;
- bribery by the organization;
- bribery by the organization's personnel acting on the organization's behalf or for its benefit;

¹⁴¹ OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (18 February 2010), online: <<http://www.oecd.org/daf/anti-bribery/44884389.pdf>>.

¹⁴² World Bank, *Integrity Compliance Guidelines* (2010), online: <<http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf>>.

¹⁴³ World Economic Forum Partnering Against Corruption Initiative, *Principles for Countering Bribery* (2004), online: <http://www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf>.

¹⁴⁴ International Chamber of Commerce Commission on Corporate Responsibility and Anti-Corruption, *Rules on Combating Corruption* (17 October 2011) online: <<http://www.iccwbo.org/Data/Policies/2011/ICC-Rules-on-Combating-Corruption-2011/>>.

¹⁴⁵ International Organization for Standardization, "ISO 37001 – Anti-bribery management systems", online: <<http://www.iso.org/iso/iso37001>>.

¹⁴⁶ Kristen Collier Wright, Wally Dietz & Lindsey Fetzer, "How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program" (2015) 33:5 ACC Docket 38, online: <<http://www.acc.com/docket/articles/resource.cfm?show=1401723>>.

¹⁴⁷ Global Infrastructure Anti-Corruption Centre, "International Standard ISO 37001 Anti-bribery Management Systems Standard", online: <<http://www.giacentre.org/ISO37001.php>>.

- bribery by the organization's business associates acting on the organization's behalf or for its benefit;
- bribery of the organization;
- bribery of the organization's personnel in relation to the organization's activities;
- bribery of the organization's business associates in relation to the organization's activities;
- direct and indirect bribery (for instance, a bribe offered or accepted through or by a third party).¹⁴⁸

To help prevent, detect and deal with bribery, ISO 37001 requires the organization to:

1. Implement the anti-bribery policy and supporting anti-bribery procedures (ABMS);
2. Ensure that the organization's top management has overall responsibility for the implementation and effectiveness of the anti-bribery policy and ABMS, and provides the appropriate commitment and leadership in this regard;
3. Ensure that responsibilities for ensuring compliance with the anti-bribery policy and ABMS are effectively allocated and communicated throughout the organization;
4. Appoint a person(s) with responsibility for overseeing anti-bribery compliance by the organization (compliance function);
5. Ensure that controls are in place over the making of decisions in relation to more than low bribery risk transactions. The decision process and the level of authority of the decision-maker(s) must be appropriate to the level of bribery risk and be free of actual or potential conflicts of interest;
6. Ensure that resources (personnel, equipment and financial) are made available as necessary for the effective implementation of the ABMS;
7. Implement appropriate vetting and controls over the organization's personnel designed to ensure that they are competent, and will comply with the anti-bribery policy and ABMS, and can be disciplined if they do not comply;
8. Provide appropriate anti-bribery training and/or guidance to personnel on the anti-bribery policy and ABMS;
9. Produce and retain appropriate documentation in relation to the design and implementation of the anti-bribery policy and ABMS;

¹⁴⁸ International Organization for Standardization, "ISO 37001:2016(en) Anti-bribery management systems — Requirements with guidance for use", s 1 (Scope), online: <<https://www.iso.org/obp/ui/-iso:std:iso:37001:ed-1:v1:en>>.

10. Undertake periodic bribery risk assessments and appropriate due diligence on transactions and business associates;
11. Implement appropriate financial controls to reduce bribery risk (e.g. two signatures on payments, restricting use of cash, etc.);
12. Implement appropriate procurement, commercial and other non-financial controls to reduce bribery risk (e.g. separation of functions, two signatures on work approvals, etc.);
13. Ensure that all other organizations over which it has control implement anti-bribery measures which are reasonable and proportionate to the nature and extent of bribery risks which the controlled organization faces;
14. Require, where it is practicable to do so, and would help mitigate the bribery risk, any business associate which poses more than a low bribery risk to the organization to implement anti-bribery controls which manage the relevant bribery risk;
15. Ensure, where practicable, that appropriate anti-bribery commitments are obtained from business associates which pose more than a low bribery risk to the organization;
16. Implement controls over gifts, hospitality, donations and similar benefits to prevent them from being used for bribery purposes;
17. Ensure that the organization does not participate in, or withdraws from, any transaction where it cannot appropriately manage the bribery risk;
18. Implement reporting (whistle-blowing) procedures which encourage and enable persons to report suspected bribery, or any violation of or weakness in the ABMS, to the compliance function or to appropriate personnel;
19. Implement procedures to investigate and deal appropriately with any suspected or actual bribery or violation of the ABMS;
20. Monitor, measure and evaluate the effectiveness of the ABMS procedures;
21. Undertake internal audits at planned intervals which assess whether the ABMS conforms to the requirements of ISO 37001 and is being effectively implemented;
22. Undertake periodic reviews of the effectiveness of the ABMS by the compliance function and top management;
23. Rectify any identified problem with the ABMS, and improve the ABMS as necessary.¹⁴⁹

¹⁴⁹ Global Infrastructure Anti-Corruption Centre, "International Standard ISO 37001 Anti-bribery Management Systems Standard", online: <<http://www.giacentre.org/ISO37001.php>>.

In general, the keys to success promoted by various anti-corruption compliance guidelines tend to fall within the following six categories: (1) clear policy from the top; (2) communication and training; (3) developing and implementing an anti-corruption program; (4) incentivizing and promoting compliance; (5) detecting and reporting violations; and (6) continual testing and improvement.¹⁵⁰ I will briefly comment on each of these categories.

(1) Clear policy from the top

An effective compliance program requires commitment from the top level of the organization. A strong program may be prone to failure if senior management is not committed to its implementation. Senior management establish the culture of ethics for the organization, and without a zero tolerance policy on corruption, it is unlikely that the program will be effective in combating corrupt transactions. The policy should be clear and spoken from one voice, so there is no confusion about company expectations and the company's definition of corruption. Senior management's support and commitment to the program should be an "ongoing demonstration of the company's norms and values."¹⁵¹ They must make it clear that the company's zeal for more business and profit does not mean getting more business by the use of bribery.

(2) Communication and training

Companies are required to communicate and train their employees on their compliance programs and on anti-corruption laws. Communication and training must be in the local language of the employee in order to be effective. Orthofix International was targeted by the DOJ for failing to adequately communicate compliance programs with its employees. In its enforcement action against the company, the DOJ stated: "Orthofix International, ... failed to engage in any serious form of corruption-related diligence before it purchased [the subsidiary]. Although Orthofix International promulgated its own anti-corruption policy, that policy was neither translated into Spanish nor implemented at [the subsidiary]."¹⁵² Companies should tailor training to the position of the employee: different aspects of corruption law will apply to employees in accounting versus employees in sales, which means different controls to prevent and report corruption will be required for each group. Training should also consider the level of the employee, as higher level managers, who often

¹⁵⁰ TI Canada suggests that a corporate anti-corruption compliance program may be developed and implemented in the following six steps: (1) commit to the anti-corruption program from the top, (2) assess the current status and risk environment, (3) plan the anti-corruption program, (4) act on the plan, (5) monitor controls and progress, and (6) report internally and externally on the program. See Transparency International-Canada, *Anti-Corruption Compliance Checklist*, (2014), at 5-6.

¹⁵¹ UNDOC, *Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*, (United Nations, 2013) [ebook]. For more information on the importance of corporate culture in combating corruption, see David Hess & Cristie Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem" (2008) 41 *Cornell Int'l LJ* 301.

¹⁵² Koehler (2014). See also: *United States v Orthofix International*, NV, 4:12-CR-00150-RAS-DDB-1, online: <<https://www.justice.gov/criminal-fraud/case/united-states-v-orthofix-international-nv-court-docket-number-412-cr-00150-ras>>.

set the tone for the office or department, may require more extensive training and knowledge of anti-corruption initiatives than lower level employees.

(3) Developing and implementing an anti-corruption program

An effective anti-corruption program should be specifically tailored to the risks the company faces. Controls should be in place to reduce to a reasonable level the chance that corrupt transactions occur and to ensure that employees are not given unreasonable opportunities to participate in corrupt acts.¹⁵³ Characteristics of a well-designed compliance program include consistency with applicable laws, adaptation to specific requirements, participation of stakeholders, shared responsibility, accessibility, readability, promotion of a trust-based internal culture, applicability, continuity and efficiency.¹⁵⁴

TI's *Business Principles for Countering Bribery* state that the Board of Directors, or equivalent body, is responsible for implementing and overseeing the compliance program.¹⁵⁵ The CEO is responsible for ensuring the program is implemented and adhered to.¹⁵⁶ The Board of Directors and/or CEO should enlist various experts, such as lawyers, accountants and compliance officers, to design and implement the program. Additionally, managers and staff, particularly those faced with bribery demands or forms of corruption, may provide assistance in the development of the program. In medium-sized or large companies, the Board of Directors, or similar governing body, should create a special internal unit to develop and implement the compliance program.¹⁵⁷

A primary aspect of a company's compliance program is that it implements adequate financial controls and follows generally accepted accounting standards. The complexity of these features will depend on the risk level and size of the company. Payments of a certain type, or over a certain amount, could require multiple authorizations to ensure that they are in line with company policies. Procedures must prohibit and prevent actions such as the creation of off-the-book accounts, the making of inadequately identified transactions, the recording of non-existent expenditures, the use of false documents, the recording of liabilities with incorrect identification and the intentional and unlawful destruction of book-keeping records.¹⁵⁸ Accounting controls should not only prevent wrongful transactions and

¹⁵³ This section will address several areas that compliance programs should cover. Depending on the company, the compliance program will be expanded or reduced to suit the risks the company faces and the types of transactions it enters into.

¹⁵⁴ UNDOC (2013) at 28-29. The Guide describes each of these characteristics in more detail.

¹⁵⁵ *Ibid* at 29; Transparency International, (October 2013) at 6.1.

¹⁵⁶ *Ibid*.

¹⁵⁷ Stefania Giavazzi, Francesca Cottone & Michele De Rosa, "The ABC Program: An Anti-Bribery Compliance Program Recommended to Corporations Operating in a Multinational Environment" in Stefano Manacorda, Francesco Centonze & Gabrio Forti, eds, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer International Publishing, 2014) at 140 [ebook].

¹⁵⁸ *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005) at article 12.3.

other forms of wrongdoing, but should also assist in bringing wrongdoing to light through regular audits.¹⁵⁹

Compliance programs should also address gifts and entertainment expenses, particularly for government officials. Company policy should outline appropriate levels for gift or entertainment expenses, as well as any exceptions to allowable expenses. These expenses may require multiple levels of approval and increased disclosure as the size and nature of the gift reasonably dictates. Suggested best practice requires prior written approval by the direct supervisor for receipt or offer of gifts, with consideration of the aggregate amount of gifts or promotional expenses provided to or received from the public official in the recent past.¹⁶⁰ Any gifts or other benefits provided or received should be recorded in an accurate and transparent manner and the company should record gifts offered but not accepted.¹⁶¹

Charitable and political donations should also be addressed in the compliance program. The company may wish to set out various approval levels; for example, greater donations might require approval from a more senior individual within the company. Public disclosure is suggested for both charitable and political donations.¹⁶² Any political donations must be carried out in accordance with applicable laws, which vary greatly from jurisdiction to jurisdiction. Preliminary checks are suggested for charitable donations to ensure the charity is legitimate and not affiliated with public officials with whom the company deals.¹⁶³ Suggested minimum standards for charitable donations include:

- All contributions must be approved by senior management, with evidence provided of the nature and scope of the individual contribution.
- The beneficiary must show that it has all relevant certifications and has satisfied all requirements for operating in compliance with applicable laws.
- An adequate due diligence review on the beneficiary entity must be carried out.
- Contributions shall be made only in favor of well-known, reliable entities with outstanding reputations for honesty and correct business practices and which have not been recently incorporated.
- Contributions must be properly and transparently recorded in the company's books and records.
- The beneficiary entity shall guarantee that contributions received are recorded properly and transparently in its own books and records.¹⁶⁴

The compliance program must also address contracts for services and procurement policies. Contracts should include "express contractual obligations, remedies, and/or penalties in

¹⁵⁹ World Bank, *Integrity Compliance Guidelines* (2010) at 6.1, online: <<http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf>>.

¹⁶⁰ Giavazzi, Cottone & De Rosa (2014) at 151.

¹⁶¹ *Ibid.*

¹⁶² Transparency International (October 2013) at 5.3.2 & 5.4.2.

¹⁶³ Giavazzi, Cottone & De Rosa (2014) at 159.

¹⁶⁴ *Ibid* at 159-160.

relation to misconduct.”¹⁶⁵ Additionally, various approval levels may be needed for contracts with third parties depending on the size or nature of the contract. Higher risk areas or contracts for large amounts should normally require more approvals than standard low-value contracts. Project financing should normally require additional safeguards to ensure that all applicable laws are being complied with.

Conflicts of interest should be addressed by the compliance program:

The enterprise should establish policies and procedures to identify, monitor and manage conflicts of interest which may give rise to a risk of bribery – actual, potential or perceived. These policies and procedures should apply to directors, officers, employees and contracted parties such as agents, lobbyists and other intermediaries.¹⁶⁶

Human resource policies and practices, particularly in regard to hiring, remunerating and incentivizing employees need to be considered as an aspect of the compliance program. It is particularly important to include a policy that “no employee will suffer demotion, penalty, or other adverse consequences for refusing to pay bribes even if such refusal may result in the enterprise losing business.”¹⁶⁷

(4) Incentivizing and promoting compliance

Compliance with anti-corruption programs should be adequately incentivized and promoted in order to ensure that employees are more likely than not to avoid corrupt transactions. This area requires careful implementation because incentivizing employees often results in adverse effects for anti-corruption (e.g., rewards for high sales or punishment for low sales may incentivize employees to reach sales targets, regardless of the means employed). Companies should ensure that they are complying with local law in structuring their incentive schemes. They also should test their program to ensure that it does not promote corrupt behaviour.

(5) Detecting and reporting violations

A compliance program is more effective if it also works to detect and report violations. Although adequate safeguards may be in place, if the organization is not actively seeking to detect violations, employees will not be properly incentivized to stop their corrupt behaviour. As corrupt individuals will be able to find a way around any scheme, the program must ensure that there is active detection and reporting of violations to ensure that there is a risk to engaging in corrupt practices.

¹⁶⁵ World Bank, *Integrity Compliance Guidelines* (2010) at 6.2, online: <<http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf>>.

¹⁶⁶ Transparency International (October 2013) at 5.1.

¹⁶⁷ *Ibid* at 6.3.3.

(6) Continual testing and improvement

Compliance programs should evolve with companies and their work environments. Without continually testing the program for effectiveness and improving any weaknesses, a company's compliance program can quickly become outdated. For example, the use of technology and the Internet has completely changed what an effective compliance program should look like. Additionally, the company's area of business may change and require new mechanisms for preventing, detecting and reporting corrupt acts.

An anti-corruption compliance program may be evaluated in two ways: (1) the suitability of the program design; and (2) the operational effectiveness of the controls in place.¹⁶⁸ External counsel may have to undertake more due diligence than in-house counsel when performing tests of a compliance system, since external counsel may be less aware of the actual operating practices of the company. External counsel may also be accused of trying to gold plate compliance systems by making them more complex than necessary. On the other hand, internal counsel must be aware of the problem of cognitive dissonance and its tendency to promote assumptions that the status quo is effective.

(7) TI's Assurance Framework

In 2012, TI published an *Assurance Framework* aimed at assisting enterprises in receiving "independent assurance of their anti-bribery programmes."¹⁶⁹ In its guidelines on the *Bribery Act 2010*, the UK Ministry of Justice recommends the use of external verification or independent assurance to achieve the measures necessary to prevent bribery.¹⁷⁰ Independent assurance, defined by the AA1000 Assurance Standard 2008, is:

the methods and processes employed by an assurance practitioner to evaluate an organization's public disclosures about its performance as well as underlying systems, data and processes against suitable criteria and standards in order to increase the results of the assurance process in an assurance statement credibility of public disclosure.¹⁷¹

Benefits of conducting independent assurance of anti-corruption compliance programs include the following:

Strengthening its programme by identifying areas for improvement;
Providing confidence to the board and management of the adequacy of its anti-bribery programme;

¹⁶⁸ Jermyn Brooks, Susan Côté-Freeman & Peter Wilkinson, *Assurance Framework for Corporate Anti-Bribery Programmes* (Transparency International, 2012) at 9.

¹⁶⁹ *Ibid* at 5.

¹⁷⁰ UK, Ministry of Justice, *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*[UK Min J Guidance (2012)] (Her Majesty's Stationary Office, 2012) at 31.

¹⁷¹ Brooks, Côté-Freeman & Wilkinson (2012) at 6.

- Increasing the credibility of its public reporting on its anti-bribery programme;
- Maintaining and/or enhancing its reputation as an enterprise committed to high standards of integrity and transparency;
- Contributing to a case for mitigation of sentencing in the event of a bribery incident in jurisdictions where this applies;
- Helping restore market confidence following the discovery of a bribery incident; and
- Meeting any future pre-qualification requirements.¹⁷²

Lawyers may serve as assurance practitioners to oversee the assurance process. In this capacity they are able to test and review the effectiveness of the anti-corruption compliance program and assist the company in identifying any risks that still need addressing.

6.3 US Framework

6.3.1 *Foreign Corrupt Practices Act*

The *FCPA* does not explicitly require companies to have an anti-corruption compliance program. Even though there is no affirmative defense for having an active and effective anti-corruption compliance program under the *FCPA*, enforcement agencies consider compliance programs to be a necessary mechanism and, as explained more fully in Chapter 6, Section 6.1.6.2 and Chapter 7, Section 6, will treat companies that follow a reasonable compliance program far more leniently.

6.3.2 *Guidelines and Interpretation*

The DOJ often sets specific requirements for compliance programs in companies that have agreed to a resolution under the *FCPA*. These resolutions provide further illustration as to what the DOJ considers to be reasonable standards for company compliance. In regard to DPAs and NPAs,¹⁷³ the DOJ has stated:

DPAs and NPAs benefit the public and industries by providing guidance on what constitutes improper conduct.... Because the agreements typically provide a recitation of the improper conduct at issue, the agreements can serve as an educational tool for other companies in a particular industry.¹⁷⁴

¹⁷² *Ibid* at 7.

¹⁷³ DPA refers to deferred prosecution agreement. NPA refers to non-prosecution agreement.

¹⁷⁴ Koehler (2014) at 313. For more information on the use of DPAs and NPAs, see: US Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* (GA-10-110) (US Government Accountability Office, 2009).

These settlement agreements are in relation to potential *FCPA* charges against specific companies, but they can be useful in tailoring a compliance program to the specific needs of other organizations and to keep other companies abreast of new requirements that the DOJ may look for.

Another resource is provided by SEC enforcement orders against companies charged under the *FCPA*. These orders indicate areas of a business or industry where the SEC has pursued charges in the past and may continue to do so in the future. In 2014, Avon Products Inc. (Avon) was charged with violating the *FCPA* because it failed to implement controls to prevent and detect bribe payments in the form of gifts at its Chinese subsidiary.¹⁷⁵ In addition to a US\$135 million fine for SEC violations and criminal charges, Avon was required to have its compliance program reviewed by an independent compliance monitor for 18 months and self-report on its compliance efforts for an additional 18 months.¹⁷⁶ In September 2016, Och-Ziff Capital Management Group agreed to a nearly \$200 million settlement with the SEC for paying bribes to secure mining rights and corruptly influence public officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo.¹⁷⁷ The SEC order found that Och-Ziff failed, in particular, to devise and maintain an adequate system of internal controls to prevent corrupt payments to foreign government officials.¹⁷⁸ As part of the settlement, Och-Ziff agreed to implement enhanced internal accounting controls and policies, designate a Chief Compliance Officer who, for a period of five years, would not simultaneously hold any other officer position at Och-Ziff, and to retain an independent monitor for a period of no less than 36 month.¹⁷⁹ The SEC's enforcement actions against Avon and Och-Ziff speak to the importance of implementing an effective compliance program.

6.3.2.1 The DOJ and SEC: A Resource Guide

The DOJ and SEC view a corporate compliance program as essential to ensuring compliance with the *FCPA*, as the program will assist in detection and prevention of violations. The DOJ and SEC have released *A Resource Guide to the US Foreign Corrupt Practices Act (Resource Guide)* to assist organizations in their compliance with the *FCPA*. The *Resource Guide* provides information for all sizes and types of businesses on implementing effective anti-corruption programs within their organization.

¹⁷⁵ US Securities Exchange Commission, Press Release, 2014-285, "SEC Charges Avon with *FCPA* Violations" (17 December 2014), online: <<http://www.sec.gov/news/pressrelease/2014-285.html>>.

¹⁷⁶ *Ibid.*

¹⁷⁷ US Securities and Exchange Commission, Press Release, 2016-203, "Och-Ziff Hedge Fund Settles *FCPA* Charges" (29 September 2016), online: <<https://www.sec.gov/news/pressrelease/2016-203.html>>.

¹⁷⁸ US Securities and Exchange Commission, "Order Instituting Administrative and Cease-and-Desist Proceedings pursuant to Section 21C of the Securities Exchange Act of 1934, and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order, and Notice of Hearing", Administrative Proceeding File No. 3-17595, at 5, online: <<https://www.sec.gov/litigation/admin/2016/34-78989.pdf>>.

¹⁷⁹ *Ibid* at 32-33, 36-44.

The *Resource Guide* also indicates that companies with adequate compliance programs will fare better if they, despite their compliance program, somehow violate the *FCPA*. The implementation and enforcement of an adequate compliance program is a major factor in encouraging the DOJ and SEC to resolve charges through a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).¹⁸⁰ As noted, having an effective compliance program will also influence whether a DPA or NPA is made, the terms of the corporate probation and the amount of the fine. The DOJ and SEC look for three basic requirements when evaluating a compliance program: (1) effective design of the program, (2) good faith application of the program, and (3) actual effectiveness.¹⁸¹ At the time of sentencing, a culpability score is assigned to the company.¹⁸² This score is multiplied against the original fine determination and can reduce the fine to 5% of the original fine or increase it by four times the original fine. One aspect of determining the culpability score is the organization's compliance program (see Chapter 7, Sections 4.5 and 4.6).

According to the *Resource Guide*, "effective compliance programs are tailored to the company's specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change."¹⁸³ When implemented throughout the entire organization, a program that is carefully calculated to address the specific risks faced by the business will help "prevent, detect, remediate, and report misconduct, including *FCPA* violations."¹⁸⁴ The *Resource Guide* stresses the importance of tailoring the compliance program to fit the needs of the organization:

One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective.¹⁸⁵

Implementing an effective compliance program requires an assessment of the types of risks a company faces and an analysis of the best use of compliance dollars to prevent corruption in the organization. The *Resource Guide* stresses the importance of the following aspects in an effective compliance program:

¹⁸⁰ US, Department of Justice & Securities Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act* [DJSEC Resource Guide (2012)] (US Government Printing Office, 2012) at 56, online: <<https://www.justice.gov/criminal-fraud/fcpa-guidance>>.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* at 58.

- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advice
- Incentives and Disciplinary Measures
- Third Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration.¹⁸⁶

Additionally, the Resource Guide alerts companies to the international organizations' guidelines previously discussed.

6.3.2.2 US DOJ Sentencing Guidelines

The *US Sentencing Guidelines* set out seven minimum standards for complying with due diligence requirements and promoting an ethical organizational culture. As these are the DOJ's own guidelines and not legislation or regulations, they are not binding; however, the DOJ frowns upon deviation from these guidelines absent a very good reason to do so. The guidelines specify that the organizations must:

- establish standards and procedures to prevent and detect criminal conduct;
- ensure that the compliance program is coming from the top down throughout the organization;
- make reasonable efforts to ensure that personnel with substantial authority are not known to have engaged in illegal activities;
- make reasonable efforts to communicate standards and procedures to personnel with substantial authority and the governing body;
- take reasonable steps to monitor compliance with the program and audit the program for effectiveness;
- promote and enforce the program throughout the organization and appropriately incentivize compliance; and
- respond appropriately when criminal conduct is detected, including making any necessary modifications to the compliance program.¹⁸⁷

¹⁸⁶ *Ibid* at 57-62.

¹⁸⁷ United States Sentencing Commission, *Guidance Manual* (2016), c. 8, §8B2.1, online: <http://www.ussc.gov/guidelines/2016-guidelines-manual>.

The *Sentencing Guidelines* are a starting point for organizations to determine what is required for an adequate compliance program. The *Guidelines* advise that in determining how to meet each requirement, factors to consider are (i) industry practice and government regulation; (ii) an organization's size; and (iii) similar misconduct.¹⁸⁸ The *Sentencing Guidelines*, created to guide prosecutors in seeking the appropriate punishment for corporations, "have become the benchmark for US corporations seeking to both satisfy corporate governance standards and to minimize sentencing exposure in the event of a prosecution and conviction."¹⁸⁹ These guidelines are stated to be a minimum requirement and thus do not necessarily reflect best practices. More information about these guidelines can be found in Chapter 7, Section 4.

6.4 UK Framework

6.4.1 *Bribery Act 2010*

Section 7(1) of the *Bribery Act* creates a strict liability offence if an organization fails to prevent bribery by a person associated with it, while section 7(2) provides a complete defence to this offence if the organization has "adequate procedures" in place. Section 7 provides:

- (1) A relevant commercial organization (C) is guilty of an offence under this section if a person associated (A) with C bribes another person intending -
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.¹⁹⁰

Under section 7, "businesses who fail to have adequate procedures in place and whose 'associated persons' commit bribery are at risk of being prosecuted."¹⁹¹ The effect of this provision is that anti-bribery compliance programs are mandatory for all "relevant commercial organizations" if they want to avoid liability for bribery offences committed by persons associated with the organization. Section 9 of the *Bribery Act* requires the Secretary of State to "publish guidance about procedures that relevant commercial organizations can put in place to prevent persons associated with them from committing bribery."¹⁹² The guidelines were published in April 2011.

¹⁸⁸ *Ibid*, c. 8, Commentary to §8B2.1, para 4(B).

¹⁸⁹ Tarun (2013) at 94.

¹⁹⁰ *Bribery Act 2010* (UK), c 23, s 7.

¹⁹¹ Colin Nicholls QC et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 90.

¹⁹² *Bribery Act 2010* (UK), s 9.

In December 2016, Sweett Group PLC pleaded guilty to failing to prevent an act of bribery committed by its subsidiary, Cyril Sweett International Limited, in order to secure a contract with Al Ain Ahlia Insurance Company (AAAI) for the building of the Rotana Hotel in Abu Dhabi.¹⁹³ In February 2016, Sweett Group PLC was sentenced and ordered to pay £2.25 million, thus becoming the first company to be fined under s. 7 of the *Bribery Act*.¹⁹⁴ The SFO's successful prosecution of Sweett Group speaks to the importance of implementing an adequate anti-corruption compliance program.

6.4.2 Guidelines and Interpretation

UK case law provides insight on the interpretation of the phrase “carries on business” in section 7. The courts have found that a singular transaction, if essential to the carrying on of business or carried out in the course of business, can constitute carrying on business under section 7.¹⁹⁵ The courts have also found a business to be carried on in the case of a company engaged only in collecting debts owed and paying off creditors.¹⁹⁶

On March 30, 2011, the Ministry of Justice (MOJ) published statutory *Guidance*, which came into force on July 1, 2011.¹⁹⁷ On the same day, the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) published the *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP (the Joint Guidance)* to ensure consistency in prosecutions.¹⁹⁸

6.4.2.1 Bribery Act 2010: Guidance

The MOJ *Guidance* provides insight into the objectives of the *Anti-Bribery Act 2010*, particularly in regard to section 7:

The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage

¹⁹³ UK Serious Fraud Office, “Sweett Group PLC pleads guilty to bribery offence” (18 December 2015), online: <<https://www.sfo.gov.uk/2015/12/18/sweett-group-plc-pleads-guilty-to-bribery-offence/>>.

¹⁹⁴ UK Serious Fraud Office, “Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction” (19 February 2016), online: <<https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>>.

¹⁹⁵ *Morphitis v Bernasconi*, [2003] EWCA Civ 289 at paras 42-49, [2003] 2 WLR 1521.

¹⁹⁶ *Re Sarflax Ltd* [1979] Ch 592 (Ch D) 993, 1 All ER 529.

¹⁹⁷ UK Min J Guidance (2012).

¹⁹⁸ Nicholls QC et al (2011) at 131.

commercial organisations to put procedures in place to prevent bribery by persons associated with them.¹⁹⁹

The MOJ *Guidance* sets out six principles to inform evaluation of a company's compliance program:²⁰⁰ (1) proportionate procedures; (2) top level commitment; (3) risk assessment; (4) due diligence; (5) communication; and (6) monitoring and review. The principles are intended to focus on the outcome of preventing bribery and corruption and should be applied flexibly, as commercial organizations encounter a wide variety of circumstances that place them at risk.²⁰¹

(1) Proportionate Procedures

This principle requires that the organization's anti-bribery procedures be proportionate to the bribery risks the organization faces and proportionate to the "nature, scale and complexity of the commercial organisation's activities."²⁰² The use of the term "procedure" encompasses both the organization's policies and the implementing procedures for those policies. The level of risk the organization faces may be affected by factors such as the size of the organization and the type and nature of the persons associated with it.²⁰³ In the commentary to the guidance, the MOJ suggests topics that will normally be included in anti-bribery policies as well procedures that could be implemented to prevent bribery.

(2) Top Level Commitment

This principle requires the board of directors, or equal top level management of the organization, to be committed to the prevention of bribery by persons within or working with their organization.²⁰⁴ It also states that top level management should "foster a culture within the organization in which bribery is never acceptable."²⁰⁵

(3) Risk Assessment

This principle requires the organization to conduct periodic assessments of the internal and external risks that the organization faces.²⁰⁶ These assessments should be informed and documented.²⁰⁷ Risk assessments will be discussed more fully later in this chapter.

¹⁹⁹ UK Min J Guidance (2012) at 8.

²⁰⁰ *Ibid* at 20.

²⁰¹ *Ibid*.

²⁰² *Ibid* at 21.

²⁰³ *Ibid*.

²⁰⁴ *Ibid* at 23.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid* at 25.

²⁰⁷ *Ibid*.

(4) Due Diligence

This principle requires the organization to apply appropriate due diligence procedures when its employees and agents are performing services for or on behalf of the organization.²⁰⁸ Due diligence will be discussed more fully later in this chapter.

(5) Communication (including training)

This principle requires the organization to ensure that its anti-corruption policies and procedures are known and understood throughout the organization.²⁰⁹ This requires internal and external communications and training.²¹⁰ External communications are suggested in order to assure people outside of the organization of the organization's commitment to compliance with anti-bribery laws, as well as to discourage people intending to engage in bribery from approaching the organization.²¹¹ Training is necessary to inform employees of what bribery is and should be tailored to the risks involved in the employee's position.²¹²

(6) Monitoring and Review

This principle requires the organization to monitor and review its procedures so the organization can make any necessary changes.²¹³ The MOJ *Guidance* suggests that organizations may want to involve external verification or assurance of the effectiveness of their compliance procedures.²¹⁴

6.4.2.2 Bribery Act 2010: Joint Prosecution Guidance

The SFO and the CPS developed the *Joint Prosecution Guidance* to ensure consistent enforcement of the *Act* across jurisdictions. The *Joint Prosecution Guidance* sets out factors that weigh against or in favour of prosecution. For example, prosecution will be favoured if a company has "a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed."²¹⁵ Non-prosecution will be favoured if these same procedures and policies have been followed.²¹⁶

The *Guidance* addresses defences to section 7 offences. The defendant organization must show the existence of adequate procedures on a balance of probabilities. The courts will consider the adequacy of a company's procedures on a case-by-case basis because adequate

²⁰⁸ *Ibid* at 27.

²⁰⁹ *Ibid* at 29.

²¹⁰ *Ibid*.

²¹¹ *Ibid* at 29-30.

²¹² *Ibid* at 30.

²¹³ *Ibid* at 31.

²¹⁴ *Ibid*.

²¹⁵ UK, *Bribery Act 2010: Joint prosecution guidance of the Director of the Serious Fraud Office and Director of Public Prosecutions* (Her Majesty's Stationary Office, 2011) at 9.

²¹⁶ *Ibid*.

procedures are entirely dependent on the risks faced by and the nature and size of each company. Prosecutors are required to take into account the MOJ *Guidance* when assessing whether the organization's anti-corruption procedures are adequate.

6.5 Canadian Framework

6.5.1 Corruption of Foreign Public Officials Act

The *CFPOA* does not create a legal requirement for organizations to implement an anti-corruption compliance program. Nevertheless, many organizations are looking for guidance from the government on how to comply with the *CFPOA*.²¹⁷ The Canadian government's guidance on the *CFPOA* is, however, brief and general and does not address the creation of adequate compliance programs.²¹⁸ Unlike the US and UK, there is no meaningful prosecutorial guidance on either the content or prosecutorial impact of reasonable anti-corruption compliance programs (see Chapter 6, Section 6.3). At this point, Canadian companies have to rely on the courts' interpretation of the legislation in order to determine Canadian standards for implementing effective anti-corruption programs. However, to date, there is only one case (*Niko Resources*) where a Canadian court has indicated what a reasonable compliance program would look like for a mining company carrying on business in Bangladesh.

6.5.2 Judicial Guidance

In 2011, *Niko Resources Ltd* was charged with bribery under the *CFPOA* after a six-year investigation. The company pled guilty, was fined CAD\$9.5 million and was placed on probation for three years, requiring independent audits and court supervision. In its probation order, the Alberta Court of Queen's Bench worked with the US DOJ in drafting the terms of the probation order, particularly the compliance program requirements. It provides some guidance on how Canadian courts may view an effective anti-corruption compliance program. Although it is a trial level decision and therefore has limited binding effect, courts will examine the decision in the future when deciding what constitutes an adequate anti-corruption compliance program. Clearly, the Court in *Niko Resources* relied to some degree on US standards for compliance programs, as it adopted terminology found in US DPAs in relation to compliance programs. The Alberta Court of Queen's Bench required the following from *Niko Resources* as part of its probation order:

- internal accounting controls for maintaining fair and accurate books and records;

²¹⁷ Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis, 2013) at 146.

²¹⁸ Department of Justice, *The Corruption of Foreign Public Officials Act: A Guide* (Canada, Department of Justice, 1999), online: <<http://publications.gc.ca/collections/Collection/J2-161-1999E.pdf>>.

- a rigorous anti-corruption compliance code designed to detect and deter violations of *CFPOA* and other anti-corruption laws, which includes:
 - a clearly articulated written policy against violations of the *CFPOA* and other anti-bribery laws;
 - strong, explicit and visible support from senior management;
 - compliance standards and procedures that apply to all directors, officers, employees, and outside parties acting on behalf of the company; and
 - policies governing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments and solicitation and extortion.
- conducting risk assessment in order to develop these standards and procedures based on specific bribery risks facing the company and taking into account a number of specified factors, including the company's geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, and involvement in joint venture agreements;
- reviewing and updating anti-corruption compliance measures at least annually;
- assigning anti-corruption compliance responsibility to senior corporate executive(s) with direct reporting to independent monitoring bodies, such as internal audit or the Board of Directors;
- a system of financial and accounting procedures designed to ensure fair and accurate books and records and that they cannot be used to effect or conceal bribery;
- periodic training and annual certification of directors, officers employees, agents and business partners;
- systems for providing anti-corruption guidance and advice within the company and to business partners, confidential reporting of possible contraventions, protection against retaliation, and responding to reports and taking appropriate action;
- disciplinary procedures for violations of anti-corruption laws and policies;
- due diligence and compliance requirements for the retention and oversight of agents and business partners, including the documentation of such due diligence, ensuring they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments;
- standard provisions in agreements with agents and business partners to prevent anti-corruption violations – representations and

undertakings, the right to audit books and records of agents and business partners, and termination rights in the event of any breach of anti-corruption law or policy; and

- periodic review and testing of anti-corruption compliance systems.²¹⁹

In other cases involving offences under the *CFPOA*, Canadian courts have not imposed corporate compliance programs as part of their sentences. Although the RCMP is reportedly investigating around 10 to 15 possible corruption cases, until more sentencing judgments are rendered, the best guidelines for Canadian companies in relation to adequate compliance programs are found in *Niko Resources Ltd*. However, it is unclear how compliance programs will impact prosecutorial decisions and sentence mitigation. For more information about Canadian cases involving the *CFPOA*, see Chapter 7, Section 6.

6.6 Critiques of Compliance Programs

As guidelines and frameworks to prevent corruption are becoming more prevalent, there is criticism that increased enforcement is resulting in wasteful over-compliance. Instead of investing in efficient compliance programs, companies are implementing programs intended only to impress prosecutors.²²⁰ US Senators Amy Klobuchar and Christopher Coons argue that over-compliance can negatively impact the economy through decreasing product development, export production and expansion of the workforce.²²¹

Another criticism is that the US's over enforcement of the *FCPA* has caused compliance fatigue:

Rules and controls and training programs are essential in any organization but at some point, the burdens imposed by intricate matrices of rules, complete reporting and approval processes, and seemingly never-ending training requirements become a net drag on the business.... A system that is overly-controlled, that has passed its optimal point of compliance activities, will engender backlash and bewilderment from those who are being controlled. Managers and other employees will balk at the sclerotic network of rules and processes, and they won't – and in many instances may not be able to – comply. Rules and signoffs will be overlooked and training courses never taken.²²²

As governments seek compliance with their laws, attention must be directed to the question of whether laws and enforcement actions are having their intended effect: are they actually

²¹⁹ John Boscariol, "A Deeper Dive Into Canada's First Significant Foreign Bribery Case: *Niko Resources Ltd*", Case Comment (2011), online: McCarthy Tetrault <http://mccarthy.ca/article_detail.aspx?id=5640>.

²²⁰ Miriam Baer, "Insuring Corporate Crime" (2008) 83 *Indiana LJ* 1035 at 1036.

²²¹ Koehler (2014) at 331.

²²² LRN Corporation, *Culture and the Optimal Degree of Compliance* (2011), online: <<http://lrn.com/ethics-compliance/>>.

reducing the prevalence of global corruption? Continual analysis of the most effective ways to prevent corruption is required to ensure that governments are not using excessive enforcement orders to serve a political agenda.

A further problem with anti-corruption compliance programs is the issue of program design: the program designers tend to be “external to the context of deployment and use.”²²³ “Disciplinary externality” occurs when the designer is not the person who will be implementing the program and has a different work background than those who will be implementing the program.²²⁴ Work background includes factors like the educational background, departmental culture and “language” spoken by the designer and implementer.²²⁵ “Country externality” occurs when a program designer is from a different country than those implementing and using the program, and may result in incompatibility with the political, social and economic conditions of the country of implementation.²²⁶

7. RISK ASSESSMENT

7.1 What is a Risk Assessment?

Risk assessments are premised on the concept that “[p]reventing and fighting corruption effectively, and proportionately, requires an understanding of the risks an enterprise may face.”²²⁷ Risk assessment is a necessary starting point for all anti-corruption compliance programs, as well as a way to review the success of an existing program and assess where changes are needed. Risk assessments examine an organization’s exposure to internal and external risks of corruption and bribery.²²⁸ An overview of risk areas allows the company to determine necessary compliance measures and target high-risk business sectors or countries. Tarun describes how organizations can use risk assessments as a tool:

A risk assessment is inter alia designed to evaluate the compliance roles and activities of the board of directors, the chief executive officer, chief financial officer, general counsel, and the internal audit staff and the company as a whole; to review international operations and contracts, anti-corruption training, and due diligence in hiring and mergers and acquisitions; and to

²²³ Richard Heeks & Harald Mathisen, “Understanding success and failure of anti-corruption initiatives” (2012) 58 *Crime, L and Soc Change* 533 at 543.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ United Nations Global Compact, “A Guide for Anti-Corruption Risk Assessment” (UN Global Compact, 2013) at 10.

²²⁸ UK Min J Guidance (2012) at 25.

then weigh the multinational company's country risks, regional and/or in-country management weaknesses, and prior enforcement history issues.²²⁹

A risk assessment seeks to promote informed decision making.²³⁰ Effective risk assessments are seen to fulfill four goals:

- (1) Identify areas of business and activities that are at risk of corruption;
- (2) Evaluate and analyze the risks identified and prioritize all relevant risks of corruption;
- (3) Carry out a gap analysis of the current internal standard of procedures, systems, and controls; and
- (4) Undertake a root cause analysis of internal and external causes.²³¹

Risk assessments not only provide the company with an overview of risks in order to prevent those risks from materializing, but also demonstrate to law enforcement personnel that the company is proactively seeking to comply with the law.²³² As with an anti-corruption compliance program, the nature and scope of the risk assessment should be proportionate to the size, activities, customers and markets of the organization. A risk assessment will help determine the scope and nature of the company's anti-corruption compliance program, ensuring that resources are allocated to major risk areas and spent where they produce the greatest benefit. As enforcement agencies do not look fondly on "cookie cutter" compliance programs or compliance programs that are only found on paper, it is important that any investments made in a compliance program produce effective results while consuming resources that match the benefit gained. Effective anti-corruption compliance programs require an up-to-date and accurate understanding of the risks the company encounters. Risk assessments should not be a one-time event; regular reviews should be made to ensure that resources are properly deployed to deal with evolving risks.²³³ Not only does a corporation's business evolve, but the external environment evolves as governments and laws change. The OECD *Recommendations* provide guidance on the use of risk assessments for companies:

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as

²²⁹ Tarun (2013) at 99.

²³⁰ *Anti-Corruption Ethics and Compliance Handbook for Business* (2013) at 10.

²³¹ Giavazzi, Cottone & De Rosa (2014) at 129.

²³² Jeffrey Harfenist & Saul Pilchen, "Anti-Corruption Risk Assessments: A Primer for General Counsels, Internal Auditors, and Other Compliance Personnel" (2010) 2 *Financial Fraud LR* 771 at 773.

²³³ United Nations Global Compact, "A Guide for Anti-Corruption Risk Assessment" (UN Global Compact, 2013).

necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.²³⁴

7.2 What Risk Areas Are Being Assessed?

According to the UK MOJ *Guidance*, there are ten types of risk that fall into two broad categories: external risk and internal risk. The external risks that should be assessed during the risk assessment are: country risk, sectoral risk, transaction risk, business opportunity risk, and business partnership risk.²³⁵ Country risk is affected by such factors as government structure, the role of the media and whether the country has implemented and enforced effective anti-corruption legislation.²³⁶ Sectoral risk recognizes that different sectors or industries are at a higher risk of corruption than others. For example, corruption is more prevalent in extractive industries. Certain types of transactions also entail higher risks of corruption. Campaign donations and charitable donations are transactions that have traditionally been prone to corruption. Business opportunity risk is heightened when working with a multitude of contractors or intermediaries on projects that do not have clear objectives. Business partnership risk refers to the increased risk that comes with working with intermediaries or partners, especially when utilizing the connections they have. This risk is especially high when their connections are with prominent public officials. These external risks require risk assessments when companies engage in business in a new country or acquire another company. Risks assessments may also be appropriate prior to starting a large scale project.

The UK MOJ has also identified a number of internal risk factors: (1) deficiencies in employee training, skills and knowledge; (2) a bonus culture that rewards excessive risk taking; (3) lack of clarity in policies on hospitality and promotional expenditures and political or charitable contributions; (4) lack of clear financial controls; and (5) lack of a clear anti-bribery message from top-level management.²³⁷ When conducting a risk assessment, these risks may be rated by their probability of occurrence and the potential impact if the risk were to come to fruition (this is called inherent risk). Companies should then assess the controls required to reduce these risks.

Tarun's *Foreign Corrupt Practices Act Handbook* outlines 15 key risk factors that should be considered in a risk assessment prior to the acquisition and merger of another company. These are:

- (1) A presence in a BRIC country and other countries where corruption risk is high;

²³⁴ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009 at Annex II.

²³⁵ UK Min J Guidance (2012).

²³⁶ For more information on countries' risks of corruption, see Transparency International's rating system.

²³⁷ UK Min J Guidance (2012) at 26.

- (2) An industry that has been the subject of recent anti-bribery or FCPA investigations;
- (3) Significant use of third party agents;
- (4) Significant contracts with a foreign government or instrumentality;
- (5) Significant revenue from a foreign government or instrumentality;
- (6) Substantial projected revenue growth in a foreign country;
- (7) High amount or frequency of claimed discounts, rebates, or refunds in a foreign country;
- (8) Substantial system of regulatory approvals in a foreign country;
- (9) History of prior government anti-bribery or FCPA investigations or prosecutions;
- (10) Poor or no anti-bribery or FCPA training;
- (11) Weak corporate compliance program and culture, in particular from legal, sales, and finance perspectives at the parent level or in foreign country operations;
- (12) Significant issues in past FCPA audits;
- (13) The degree of competition in the foreign country;
- (14) Weak internal controls at the parent or in foreign country operations; and
- (15) In-country managers who appear indifferent or uncommitted to US laws, the FCPA, and/or anti-bribery laws.²³⁸

In its guide on anti-corruption third party due diligence for small and medium-size enterprises, the International Chamber of Commerce considers that a risk assessment must include the following five factors: (1) whether the third party is an entity owned or controlled by the government or a public official, or whether the third party will be interacting with public officials in order to perform the contract; (2) the country the third party is based in and the country where the services are being performed; (3) the industry the third party operates in; (4) the value of the contract; and (5) the nature of the work or services to be performed.²³⁹

7.3 Conducting an Effective Risk Assessment

At its most basic, a risk assessment involves determining the risks a company is willing to live with, as elimination of all risks is impossible. It then involves valuing the risks faced by the company based on probability of occurrence and the consequences of the risk being realized. This process reveals a company's inherent risk. A risk assessment should then

²³⁸ Tarun (2013) at 140-41.

²³⁹ International Chamber of Commerce, *ICC Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises* (2015), Document 195-64 Rev2, at 8-9, online: <https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/>.

evaluate what actions can be taken to mitigate those risks, and the costs associated with doing so. The company will then consider the residual risk (inherent risk less the mitigated risk), which will likely never reach zero. If the company's residual risk is higher than the risk the company is willing to tolerate, the company will need to add additional protections or reconsider the protections it has in place.²⁴⁰

When assessing risks, companies should consult a variety of sources to ensure that risk areas are not overlooked. UNODC has suggested five ways to determine the risks a company faces.²⁴¹ The first is to determine the legal requirements applicable to the company's operations, remembering that highly bureaucratic processes entail greater risks of corruption, particularly with regard to bribery and/or facilitation payments.²⁴² Second, the company should consult with its internal and external stakeholders, such as employees and business partners.²⁴³ These stakeholders are likely able to identify risks of corruption that may have been initially overlooked, and also may provide valuable insight on ways to mitigate the risk. Third, the company should consider previous corruption cases to see where other companies failed or had weaknesses.²⁴⁴ Fourthly, a company may wish to hire external consultants; these consultants can provide a fresh set of eyes and point out risks that have been overlooked by internal controls and reviews.²⁴⁵ Lastly, companies should review risk assessment guidelines to incorporate best practices into their assessments.²⁴⁶

Companies may consider engaging external experts and consultants to conduct an effective risk assessment. For instance, TRACE International, a non-profit business association founded in 2001 by in-house anti-bribery compliance experts, provides its members with anti-bribery compliance support, and TRACE Incorporated offers risk-based due diligence, anti-bribery training and advisory services to both members and non-members.²⁴⁷ In collaboration with the RAND Corporation, TRACE International developed the TRACE Matrix, a global business bribery risk index for compliance professionals, which scores 199 countries in four domains—business interactions with the government, anti-bribery laws and enforcement, government and civil service transparency, and capacity for civil society oversight, and may be used by businesses to understand the risks of business bribery in a particular country.²⁴⁸

²⁴⁰ For more information on conducting a risk assessment, see the *Anti-Corruption Ethics and Compliance Handbook for Business* (2013), published by the OECD, UNODC and The World Bank.

²⁴¹ UNODC (2013) at 10.

²⁴² *Ibid* at 10.

²⁴³ *Ibid* at 11.

²⁴⁴ *Ibid*.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid*.

²⁴⁷ TRACE, "About TRACE", online: <<https://www.traceinternational.org/about-trace>>.

²⁴⁸ TRACE, "TRACE Matrix", online: <<https://www.traceinternational.org/trace-matrix>>.

7.4 US Law

The DOJ and SEC see risk assessments as an essential component of an effective anti-corruption compliance program.²⁴⁹ Both organizations stress the importance of implementing a risk-based compliance program and risk-based due diligence.

7.5 UK Law

Principle 3 of the UK MOJ's *Guidance* provides insight into what constitutes an "adequate process" for a risk assessment in order to form a full defence to strict liability under section 7 of the *Bribery Act*:

The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.²⁵⁰

The *Guidance* suggests that a common sense approach should be taken to this principle to ensure that efforts are proportionate.²⁵¹ In order to comply with the principle, assessments for multinational firms should be performed annually at a minimum. To be informed, assessments require top-level management oversight and the input of various legal, compliance, financial, audit, sales and country managers. Documentation is required to prove that the risk assessment took place, particularly if the adequacy of the risk assessment comes into question.²⁵² The *Guidance* goes on to say that risk assessment procedures will generally include the following characteristics:

- oversight of the risk assessment by top-level management;
- appropriate resourcing – this should reflect the scale of the organization's business and the need to identify and prioritize all relevant risks;
- identification of the internal and external information sources that will enable risk to be assessed and reviewed;
- due diligence inquiries; and
- accurate and appropriate documentation of the risk assessment and its conclusions.²⁵³

7.6 Canadian Law

The Court in *Niko Resources* required the company to complete a risk assessment:

²⁴⁹ DJSEC Resource Guide (2012) at 58.

²⁵⁰ UK Min J Guidance (2012) at 25.

²⁵¹ Nicholls QC et al (2011) at 135.

²⁵² Tarun (2013) at 439-40.

²⁵³ UK Min J Guidance (2012) at 25.

The company will develop these compliance standards and procedures, including internal controls, ethics and compliance programs, on the basis of a risk assessment addressing the individual circumstances of the company, in particular foreign bribery risks facing the company, including, but not limited to, its geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture agreements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.²⁵⁴

Canadian legislation and Canadian courts have not provided any guidelines on implementing risk assessments as part of a compliance program; however, *Niko Resources* shows the Court's inclination to assess the compliance procedures in place on the basis of the risk assessment the company is expected to complete. *Niko Resources* demonstrates that Canadian prosecutors may work with the US DOJ and use standard aspects of American orders to make recommendations to the courts regarding ways companies can be directed to comply with *CFPOA*.²⁵⁵

8. DUE DILIGENCE REQUIREMENTS

As already noted, a risk assessment is one of the first steps to take in fulfilling due diligence requirements for various transactions.²⁵⁶ The risk assessment will help focus the due diligence procedures efficiently and effectively. Risk-based due diligence, the process of assessing the level of risk posed to determine the level of due diligence requirements,²⁵⁷ should be conducted at a minimum during mergers and acquisitions and when working with third-party intermediaries.²⁵⁸

²⁵⁴ John Boscariol, "Canada: Anti-Corruption Compliance Message Received? Risk Assessment is Your Next Step", McCarthy Tetrault (16 August 2012), online: <www.mccarthy.ca/article_detail.aspx?id=5985>.

²⁵⁵ John Boscariol, "A Deeper Dive Into Canada's First Significant Foreign Bribery Case: *Niko Resources Ltd*", McCarthy Tetrault (21 November 2011), online: <http://www.mccarthy.ca/article_detail.aspx?id=5640>.

²⁵⁶ Ernst & Young, *Third-party due diligence: Key components of an effective, risk-based compliance program* (2011) at 5, online: <[http://www.ey.com/Publication/vwLUAssets/Third-party_due_diligence/\\$FILE/Third-Party-Due-Diligence.pdf](http://www.ey.com/Publication/vwLUAssets/Third-party_due_diligence/$FILE/Third-Party-Due-Diligence.pdf)>.

²⁵⁷ *Ibid.*

²⁵⁸ This is not to suggest that due diligence should only be conducted in these scenarios. Investments, contracts with governments and large sales or service contracts also may require due diligence procedures.

8.1 Third Party Intermediaries

Companies often use third parties to conceal corrupt acts, particularly bribes to foreign officials.²⁵⁹ Because many countries make companies liable for the acts of their agents, it is important to conduct adequate due diligence on third party intermediaries, particularly when working in high risk environments or on high-risk transactions. The essential purpose of due diligence in relation to third party intermediaries is to increase knowledge of the third party.²⁶⁰ The DOJ and SEC guidelines indicate three criteria in undergoing due diligence on third party intermediaries. First, companies need to understand “the qualifications and associations of its third party partners” and particularly any relationship with foreign officials. Second, companies should understand the business rationale for including a third party intermediary in the transaction and define the role that the third party will serve. Third, a company should conduct ongoing monitoring of its third party relationships. The World Economic Forum suggests four steps in conducting risk-based due diligence on third parties. The first is to understand third parties and determine which ones should be subject to due diligence procedures; the second is to assess the level of risk associated with the third party; the third is to conduct the due diligence; and lastly, the process should be managed to identify and mitigate risks.²⁶¹

The International Chamber of Commerce suggests that, for small and medium sized entities, anti-corruption third party due diligence may be conducted without the use of external consultants.²⁶² It lists the following six “pillars” upon which background information should be sought: (1) beneficial ownership; (2) financial background and payment of contract; (3) competency of third party; (4) history of corruption and adverse news (from public records resources); (5) reputation (consulting third party’s commercial references); and (6) approach to ethics and compliance.²⁶³ In particular, to establish competency of the third party, a company should ask whether the third party (1) has experience in the industry and the country where the services are to be provided; (2) has necessary qualifications and experience to provide the services; (3) has provided a competitive estimate for the services to be provided; (4) has a business presence in the country where the services are to be provided; (5) has been recommended by a public official; (6) has requested urgent payments or unusually high commissions; (7) has requested payments to be made in cash, to a third party, or to a different country; (8) suggested they know the “right people” to secure the contract; and (9) has been selected in a transparent way.²⁶⁴

²⁵⁹ DJSEC Resource Guide (2012) at 60.

²⁶⁰ World Economic Forum/Partnering Against Corruption Initiative, *Good Practice Guidelines on Conducting Third-Party Due Diligence*, (2013) at 7, online: www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf.

²⁶¹ *Ibid.*

²⁶² International Chamber of Commerce (2015), at 8-9.

²⁶³ *Ibid* at 14.

²⁶⁴ *Ibid* at 17.

8.2 Transparency Reporting Requirements in Extractive Industries

8.2.1 Extractive Industries Transparency Initiative (EITI)

The Extractive Industries Transparency Initiative (EITI)²⁶⁵ is “a global standard to promote the open and accountable management of oil, gas and mineral resources.”²⁶⁶ The standard requires implementing countries to disclose certain information regarding the governance of oil, gas, and mining revenues because poor natural resource governance has frequently led to corruption and conflict.²⁶⁷ The EITI is an international multi-stakeholder initiative involving representatives from governments, companies, local civil society groups, and international NGOs.²⁶⁸ The aim of the EITI is to “strengthen government and company systems, inform the public debate and promote understanding.”²⁶⁹

In order to be an EITI member, a country must fulfill the seven requirements of EITI, which can be briefly summarized as follows:²⁷⁰

1. Oversight by a multi-stakeholder group.

The multi-stakeholder group must involve the country's government and companies as well as “the full, independent, active and effective participation of civil society.” The multi-stakeholder group must agree to and maintain a work plan that includes clear objectives for EITI implementation and a timetable that meets the deadlines established by the EITI Board.²⁷¹

2. Legal and institutional framework, including allocation of contracts and licenses.

An implementing country must disclose information about the legal framework and fiscal regime relating to its extractive industries. It must also disclose information relating to licences, contracts, beneficial ownership of companies, and state participation in the extractive industries. Implementing countries must maintain a publicly accessible register for licenses awarded to companies involved in the extractive industries.²⁷²

An important new element in the February 2016 version of the EITI Standard is disclosure of beneficial ownership. In December of 2015, the EITI Board decided that

²⁶⁵ The full EITI standard can be found online at <<https://eiti.org/document/standard>>.

²⁶⁶ EITI, “Who We Are,” online: <<https://eiti.org/about/who-we-are>>.

²⁶⁷ Kjerstin Andreasen and Victor Ponsford, eds, *2016 Progress Report: From Reports to Results* (EITI, 2016) at 7, online: <<https://eiti.org/sites/default/files/documents/progressreport.pdf>>.

²⁶⁸ EITI International Secretariat, *EITI Board Manual* (EITI International Secretariat, 2016) at 3, online: <https://eiti.org/sites/default/files/documents/eiti_board_manual_updated_11_july_2016_website.pdf>.

²⁶⁹ EITI, “Who We Are,” online: <<https://eiti.org/about/who-we-are>>.

²⁷⁰ Dyveke Rogan, ed, *The EITI Standard 2016* (EITI International Secretariat, 2016), online: <https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf>.

²⁷¹ *Ibid* at 13-16.

²⁷² *Ibid* at 17-21.

disclosure of the beneficial ownership of companies that are involved in the extractive industries must be mandatory.²⁷³ The second requirement of the EITI Standard sets out the timeline and requirements for how the disclosure for beneficial ownership will be gradually implemented beginning in 2017.²⁷⁴ Disclosure of beneficial ownership for all companies, regardless of what sectors of the economy they operate in, is discussed in more detail in Chapter 5, Section 5.2.2.

3. Exploration and production

The third EITI requirement stipulates that implementing countries must report on the exploration for and production of oil, gas, and mineral resources.

4. Revenue collection

This requirement necessitates the disclosure of government revenue from the extractive industries as well as material payments to the government by companies involved in the extractive industries. A credible Independent Administrator must then reconcile these revenues and payments. Implementing countries must produce their first EITI report within 18 months of becoming a Candidate and must produce subsequent reports annually.²⁷⁵

5. Revenue allocations

Requirement 5 provides for disclosure of the allocation of revenue generated by the extractive industries.²⁷⁶

6. Social and economic spending

Implementing countries are required to disclose certain relevant information when companies involved in the extractive industries must make material social expenditures because of legal or contractual obligations. Implementing countries must also disclose information relating to quasi-fiscal expenditures and the impact of the extractive industries on the economy.²⁷⁷

7. Outcomes and impact

Requirement 7 seeks to promote public awareness and understanding of the extractive industry data. It also encourages public debate about the effective use of resource revenues. This section sets out requirements for the form, accessibility, and promotion of the information set out in the EITI reports of implementing countries. It also mandates review of the outcome and impact of EITI implementation.²⁷⁸

²⁷³ Andreasen and Ponsford, eds, (2016) at 5.

²⁷⁴ Rogan, ed, (2016) at 17-21.

²⁷⁵ *Ibid* at 22-26.

²⁷⁶ *Ibid* at 26-27.

²⁷⁷ *Ibid* at 28-29.

²⁷⁸ *Ibid* at 29-31.

8. Compliance and deadlines for implementing countries

This final requirement sets out in detail the timeframes set out by the EITI Board for the completion of the various actions required by the EITI, such as the publication of EITI Reports.²⁷⁹

When a country pledges to adhere to the EITI standard, it will be deemed a "Candidate" and have 2.5 years in order to meet all seven EITI requirements. The country will then be evaluated independently. If the country has met all requirements, it will be deemed "Compliant," and from then on it will be reevaluated every three years.²⁸⁰

As of June 2016, fifty-one countries, including the US and UK, had implemented the EITI Standard. However, only 31 countries had been deemed EITI compliant at that time.²⁸¹ Canada has not signed on to become an EITI Candidate, but it is an EITI "supporting country."²⁸² Canada's legislation mandating reporting by the extractive industries, described below in Section 8.2.4, somewhat provides an equivalent level of reporting to the EITI standards.

8.2.2 US

In the United States, Section 1504 of the 2010 *Dodd-Frank Act* added Section 13(q) to the 1934 *Securities Exchange Act*, which now requires "resource extraction issuers" (all US and foreign companies that are required to file an annual report with the SEC and are engaged in the commercial development of oil, natural gas or minerals) to include in their annual reports information relating to any payment made by the resource extraction issuer, its subsidiary or an entity under its control, to the United States federal government or any foreign government for the purpose of the commercial development of oil, natural gas, or minerals.²⁸³ The reports must specify the type and total amount of such payments made (i) for each project and (ii) to each government.

The SEC first adopted the rules implementing Section 13(q) in August 2012, but they were vacated by the US District Court for the District of Columbia in July 2013. The revised version of the rules was adopted by the SEC on June 27, 2016.²⁸⁴ Under the rules, resource extraction issuers are required to disclose payments that are:

²⁷⁹ *Ibid* at 32-38.

²⁸⁰ EITI, *Fact Sheet* (2016), online: <https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf>.

²⁸¹ *Ibid*.

²⁸² *Ibid*.

²⁸³ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, HR 4173, s. 1504, online: <<https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>>.

²⁸⁴ Securities and Exchange Commission, *Disclosure of Payments by Resource Extraction Issuers*, 17 CFR Parts 240 and 249b, Release No 34-78167, File No S7-25-15, online: <<https://www.sec.gov/rules/final/2016/34-78167.pdf>>. See also US Securities and Exchange Commission, "SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act" (27 June 2016), online: <<https://www.sec.gov/news/pressrelease/2016-132.html>>.

- (i) made to further the commercial development (exploration, extraction, processing, export or acquisition of a license for any such activity) of oil, natural gas or minerals;
- (ii) not *de minimis* (i.e. any payment, whether made as a single payment or a series of related payments, which equals or exceeds \$100,000 during the same fiscal year); and
- (iii) within the types of payments specified in the rules, namely:
 - (a) taxes;
 - (b) royalties;
 - (c) fees (including license fees);
 - (d) production entitlements;
 - (e) bonuses;
 - (f) dividends;
 - (g) payments for infrastructure improvements; and
 - (h) community and social responsibility payments, if required by law or contract.²⁸⁵

Resource extraction issuers are required to comply with the new SEC rules starting with their fiscal year ending no earlier than September 30, 2018.²⁸⁶

8.2.3 UK

The United Kingdom Extractive Industries Transparency Initiative Multi Stakeholder Group (MSG) is charged with implementing the EITI in the UK. The UK has no legislation requiring companies to disclose payments, making the UK EITI a voluntary process. Her Majesty's Revenue and Customs department can only disclose information from extractive companies who give their consent. A total of 71 extractive companies participated in compiling the UK EITI's first report, published in 2016, while six oil and gas companies made material payments, but did not participate.²⁸⁷ The report included detailed information about £3,233 million of revenues received by UK Government Agencies from extractive companies in 2014. An independent administrator has been able to reconcile £2,431 million of those payments to disclosures made by companies.²⁸⁸

²⁸⁵ *Ibid* at 25-28.

²⁸⁶ *Ibid* at 28.

²⁸⁷ United Kingdom Extractive Industries Transparency Initiative, *UK EITI Report for 2014*, (2016), at 5, 11, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537177/bis-16-194-uk-eiti-report-2014.pdf>.

²⁸⁸ United Kingdom Extractive Industries Transparency Initiative (UK EITI), *UK EITI Report for 2014* (April 2016), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537177/bis-16-194-uk-eiti-report-2014.pdf>.

8.2.4 Canada

In Canada, the *Extractive Sector Transparency Measures Act (ESTMA)*, which came into force on June 1, 2015, requires specified companies involved in the extractive sector to report payments made to domestic and foreign governments.²⁸⁹ The stated purpose of the *ESTMA* is:

to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the *Criminal Code* and sections 3 and 4 of the *Corruption of Foreign Public Officials Act*.²⁹⁰

The *ESTMA* applies to a corporation, trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals, either directly or through a controlled organization, and (1) is listed on a stock exchange in Canada or (2) has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (a) it has at least \$20 million in assets, (b) it has generated at least \$40 million in revenue, and (c) it employs an average of at least 250 employees.²⁹¹ Thus, an entity that has its shares listed on any stock exchange in Canada will be subject to the *ESTMA* reporting requirements even if it does not do business, does not have assets in Canada or does not meet the size-related criteria.

An entity must report every payment, whether monetary or in kind, that is made to a single payee in relation to the commercial development of oil, gas or minerals and that totals, as a single or multiple payments, CAD\$100,000 or more within one of the following categories:

- (1) Taxes (other than consumption taxes and personal income taxes);
- (2) Royalties;
- (3) Fees (including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions);
- (4) Production entitlements;
- (5) Bonuses (including signature, discovery and production bonuses);

²⁸⁹ *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376, online: <<http://laws-lois.justice.gc.ca/eng/acts/E-22.7/FullText.html>>.

²⁹⁰ *Ibid*, s 6.

²⁹¹ *Ibid*, ss 2 (entity), 8(1).

- (6) Dividends (other than dividends paid to payees as ordinary shareholders); and
- (7) Infrastructure improvement payments.²⁹²

The term “payee” in the *ESTMA* includes:

- (a) any government in Canada or in a foreign state;
- (b) a body that is established by two or more governments; or
- (c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (a) or a body referred to in paragraph (b).²⁹³

Reports are due within 150 days after the end of the financial year and must include an attestation made by a director or officer of the entity, or an independent auditor or accountant, that the information in the report is true, accurate and complete.²⁹⁴ An entity must keep records of its payments for a seven-year period from the day on which it provides the report.²⁹⁵

Non-compliance with the *ESTMA* and its reporting and record-keeping obligations is punishable on summary conviction by a fine of up to CAD\$250,000.²⁹⁶ As each day of non-compliance forms a new offence, an unreported payment could result in a multimillion-dollar liability. However, s. 26(b) of the *ESTMA* creates a defence to liability if the person or entity “establish that they exercised due diligence” to prevent the commission of the offence.

In 2016, the Ministry of Natural Resources released a *Guidance*²⁹⁷ and *Technical Reporting Specifications*²⁹⁸ to the *ESTMA*. Since the *ESTMA* came into force in 2015 it has not required companies to provide reports with respect to the financial year in progress on that day or any previous financial year, and the companies are expected to submit their first *ESTMA* reports no later than 2017.²⁹⁹ The provisions of the *ESTMA* also do not apply to the payments made to Aboriginal governments in Canada before June 1, 2017.³⁰⁰

²⁹² *Ibid*, ss 2 (payment), 9(2).

²⁹³ *Ibid*, s 2 (payee).

²⁹⁴ *Ibid*, ss 9(1), (4).

²⁹⁵ *Ibid*, s 13.

²⁹⁶ *Ibid*, s 24.

²⁹⁷ Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Guidance* (2016), online: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Guidance_e.pdf>.

²⁹⁸ Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Technical Reporting Specifications* (2016), online <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Technical_e.pdf>.

²⁹⁹ *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 30.

³⁰⁰ *Ibid*, s 29.

While the *ESTMA* has a similar purpose to that of the EITI, it is unlikely that some of the reporting requirements in the *ESTMA* meet the more stringent requirements of the EITI. As mentioned earlier, however, Canada has never pledged to adhere to EITI.

8.3 Mergers and Acquisitions

Due diligence is widely recognized as an important factor in any merger or acquisition (M&A) transaction.³⁰¹ When conducting anti-corruption due diligence in the context of M&A transactions, a core aim is to determine the extent to which operations and revenues of the target business have been distorted by bribery and to flag any corruption risks the successor may be liable for.³⁰² A further aim is to mitigate potential risks and to begin a monitoring program for the target to ensure the acquisition's compliance with anti-corruption laws.³⁰³ Transparency International outlines the following ten good practice principles for anti-bribery due diligence in mergers, acquisitions and investments:

1. The purchaser (or investor) has a public anti-bribery policy;
2. The purchaser ensures it has an adequate anti-bribery program that is compatible with the *Business Principles for Countering Bribery* or an equivalent international code or standard;
3. Anti-bribery due diligence is considered on a proportionate basis for all investments;
4. The level of anti-bribery due diligence for the transaction is commensurate with the bribery risks;
5. Anti-bribery due diligence starts sufficiently early in the due diligence process to allow adequate due diligence to be carried out and for the findings to influence the outcome of the negotiations or stimulate further review if necessary;
6. The partners or board provide commitment and oversight to the due diligence reviews;
7. Information gained during the anti-bribery due diligence is passed on efficiently and effectively to the company's management once the investment has been made;
8. The purchaser starts to conduct due diligence on a proportionate basis immediately after purchase to determine if there is any current bribery and if so, takes immediate remedial action;

³⁰¹ Peter Wilkinson, *Anti-Bribery Due Diligence for Transactions: Guidance for Anti-Bribery Due Diligence in Mergers, Acquisitions and Investments*, ed by Robert Barrington (Transparency International UK, 2012) at 14, online: <<http://www.transparency.org.uk/publications/anti-bribery-due-diligence-for-transactions/>>. This guide by Transparency International provides details on each stage in the due diligence process. The checklist provides non-comprehensive guidance to companies in conducting adequate anti-bribery due diligence in the context of mergers and acquisitions.

³⁰² *Ibid* at 6.

³⁰³ *Ibid*.

9. The purchaser ensures that the target has or adopts an adequate anti-bribery program equivalent to its own; and
10. Bribery detected through due diligence is reported to the authorities.³⁰⁴

The six stages to the due diligence process are: (1) initiating the process; (2) initial screening; (3) detailed analysis; (4) decision; (5) post-acquisition due diligence; and (6) post-acquisition integration and monitoring.³⁰⁵ Transparency International also developed the following checklist of 59 indicators to be used as an aid in anti-bribery due diligence:

BEGINNING OF EXCERPT

Bribery Due Diligence Process

1. Is the bribery due diligence integrated into the due diligence process from the start?
2. Have milestones been set for the bribery due diligence?
3. Is the timetable adequate for effective anti-bribery due diligence?
4. Have the deal and due diligence teams been trained in their company's anti-bribery program including the significance of relevant legislation?
5. Have the deal and due diligence teams been trained in anti-bribery due diligence?
6. Is there a process implemented for co-ordination across functions?
7. Has legal privilege been established with use of general counsel and external legal advisers?
8. Is there a process for dealing with any bribery discovered during the due diligence?
9. Is the person responsible for anti-bribery due diligence at a sufficiently senior level to influence the transaction's decision-makers?

Geographical and Sectoral Risks

10. Is the target dependent on operations in countries where corruption is prevalent?
11. Does the target operate in sectors known to be prone to high risk of bribery?

³⁰⁴ *Ibid* at iv.

³⁰⁵ *Ibid* at 8.

12. Are competitors suspected to be actively using bribery in the target's markets?

Business Model Risks

13. Does the organizational structure of the target foster an effective anti-bribery program or present risks?
14. Is the target dependent on large contracts or critical licenses?
15. Does the target implement an adequate anti-bribery program in its subsidiaries?
16. Is the target reliant on agents or other intermediaries?
17. Has the target been assessed for its exposure to use of intermediaries that operate in countries and sectors prone to corruption risks?
18. Does it have policies and effective systems to counter risks related to intermediaries?
19. Does the target require contractual anti-bribery standards of its suppliers?
20. Does the target's organizational structure present bribery risks – e.g. diversified structure?
21. Is the target reliant on outsourcing and if so do the contracted outsourcers show evidence of commitment and effective implementation of the target's anti-bribery program?

Legislative Footprint

22. Is the target subject to the UK Bribery Act and/or the US FCPA?
23. Are there equivalent laws from other jurisdictions that are relevant?

Organizational

24. Does the target's board and leadership show commitment to embedding anti-bribery in their company?
25. Does the target exhibit a culture of commitment to ethical business conduct? (Use evidence such as results of employee surveys)
26. Has the senior management of the target carried out an assessment of bribery risk in the business?
27. Have there been any corruption allegations or convictions related to members of the target's board or management?

28. Have the main shareholders or investors in the target had a history of activism related to the integrity of the target?
29. Have there been any corruption allegations or convictions related to the main shareholders or investors in the target?
30. Does the target have an active audit committee that oversees anti-corruption effectively?

Anti-Bribery Program

31. Does the target have an anti-bribery program that matches that recommended by Transparency International UK?
32. Is the anti-bribery program based on an adequate risk-based approach?
33. Is the anti-bribery program implemented and effective?

Key Bribery Risks

34. Has the target been assessed for its exposure to risk of paying large bribes in public contracts or to kickbacks?
35. Has the target been assessed for risks attached to hospitality and gifts?
36. Has the target been assessed for risks attached to travel expenses?
37. Has the target been assessed for risks attached to political contributions?
38. Has the target been assessed for risks attached to charitable donations and sponsorships?
39. Has the target been assessed for risks attached to facilitation payments?

(Foreign) Public Officials (FPOs)

40. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
41. Have any FPOs been identified that are associated with intermediaries, customers and prospects?
42. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
43. Have any FPOs been identified that present particular risk?

44. Is there evidence or suspicion that subsidiaries or intermediaries are being used to disguise or channel corrupt payments to FPOs or others?

Financial and Ledger Analysis

45. Have the financial tests listed on page 11 of this Transparency International's "Anti-Bribery Due Diligence for Transactions" Guidance been carried out?
46. Are the beneficiaries of banking payments clearly identifiable?
47. Is there evidence of payments being made to intermediaries in countries different to where the intermediary is located and if so are the payments valid?
48. Is there evidence of regular orders being placed in batches just below the approval level?
49. Are payments rounded, especially in currencies with large denominations?
50. Are suppliers appointed for valid reasons?
51. Is there evidence of suppliers created for bribery e.g. just appointed for the transaction, no VAT registration?
52. Is there evidence of special purpose vehicles created to act as channels for bribery?

Incidents

53. Has a schedule and description been provided of pending or threatened government, regulatory or administrative proceedings, inquiries or investigations or litigation related to bribery and other corruption?
54. Has the target provided a schedule of any internal investigations over the past five years into bribery allegations?
55. Has the target been involved in any bribery incidents or investigations not reported by the target?
56. Has the target sanctioned any employees or directors in the past five years for violations related to bribery?
57. Has the target sanctioned any business partners in the past five years for violations related to bribery?
58. Is there an implemented policy and process for reporting bribery when discovered during due diligence?

Audit Reports

59. Has the target provided any reviews, reports or audits, internal and external, carried out on the implementation of its anti-bribery program?³⁰⁶

END OF EXCERPT

Failure to conduct adequate due diligence when purchasing a company may result in charges under anti-corruption legislation. In February 2015, the SEC announced charges against Goodyear Tire & Rubber Company for violations of the *FCPA* by subsidiaries in Kenya and Angola. The SEC Order indicates that Goodyear did not conduct adequate due diligence when it purchased its Kenyan subsidiary and did not implement adequate anti-corruption controls after the acquisition:

Goodyear did not detect or prevent these improper payments because it failed to conduct adequate due diligence when it acquired Treadsetters, and failed to implement adequate *FCPA* compliance training and controls after the acquisition.³⁰⁷

Pre-acquisition due diligence is not always possible, particularly in hostile takeovers. The DOJ has indicated that companies who are unable to perform adequate pre-acquisition due diligence may still be rewarded for due diligence efforts conducted post-acquisition.³⁰⁸ Investigating for corruption prior to acquisition is not sufficient to be in compliance with the *FCPA*. The DOJ and SEC have indicated they will also evaluate the extent the acquiring company integrated internal controls into the acquired company.³⁰⁹

The UK MOJ *Guidance*, in Principle 4 on Due Diligence, states:

The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.³¹⁰

³⁰⁶ *Ibid* at 14-18.

³⁰⁷ SEC Order, *USA before the SEC in the Matter of Goodyear Tire & Rubber Company*, no 74356, Feb 24, 2015, at 3, online: <<https://www.sec.gov/litigation/admin/2015/34-74356.pdf>>.

³⁰⁸ DJSEC Resource Guide (2012) at 62.

³⁰⁹ *Ibid*.

³¹⁰ UK Min J Guidance (2012) at 27.

The MOJ encourages companies to carefully consider the bribery risks that transactions pose to the company and assess the requisite due diligence procedures for ensuring that the company is aware of the risks and has a plan to deal with any risks that materialize.

9. INTERNAL INVESTIGATION OF CORRUPTION

When senior officials or the board of a company suspect that the company may have been involved in corruption in one or more of its transactions, they may choose to conduct an internal investigation. As noted in Chapter 6 (on investigation and prosecution of corruption), there are various reasons to conduct an internal investigation:

- To convince enforcement bodies to use prosecutorial discretion not to bring charges;
- To gather evidence and prepare a defence or negotiation strategy for prosecutions, enforcement actions and/or litigation with shareholders;
- To fulfill management's fiduciary duty to the company's shareholders and satisfy shareholder concerns;
- To assess the effectiveness of internal accounting procedures.

To the extent that the internal investigation results will be handed over to the relevant enforcement body as part of a company's attempts to negotiate a favourable resolution with the prosecutor, it is strongly advisable to hire an experienced and respected external lawyer to conduct or manage the internal investigation. An external counsel's investigation will be given far greater credibility by the relevant law enforcement agencies than a similar investigation conducted by in-house counsel or the company's regular external counsel.

Chapter 6, Section 4.2 sets out five basic steps to follow when counsel is advising the board on undertaking an internal investigation in cases of alleged corruption.

10. CORPORATE LAWYERS' POTENTIAL LIABILITY FOR A CLIENT'S CORRUPTION

10.1 Introduction

Lawyers may be liable civilly, criminally, or administratively for their acts or omissions in regard to a client's business activities. Criminal provisions on conspiracy, aiding, abetting and counselling apply to lawyers assisting their clients in illegal transactions. Accessory liability is also applicable in private law actions in tort and contract.³¹¹ Furthermore, legal malpractice is a tort available to individuals injured by the acts or omissions of their lawyers.

³¹¹ Paul Davies, *Accessory Liability* (Oxford University Press, 2015).

Civil liability may arise for economic loss due to a lawyer's intentional or negligent involvement in corrupt transactions. Lastly, regulatory agencies, such as securities commissions, may discipline, expel, or fine lawyers for regulatory violations related to corrupt transactions.

10.2 Criminal Liability

As discussed in Chapter 3, the US, UK and Canada have criminal provisions that could result in a lawyer being criminally liable for membership or participation in a conspiracy to commit an offence of corruption, or for aiding, abetting, or counselling a crime committed by a client. For instance, when the former Nigerian State governor James Ibori pleaded guilty in the United Kingdom to conspiracy to defraud and money-laundering offences, his London solicitor Bhadrash Gohil was also convicted of money laundering. To divert funds from the sale of shares in a state-owned telecommunications company, Ibori's lawyer established Africa Development Finance consulting company. Since both the consultancy and the solicitor charged fees for fictitious services, \$37 million in proceeds were diverted to them. The judge, who sentenced Mr. Gohil to 10 years of imprisonment, described him as the architect of this scheme.³¹²

10.3 Accessory Liability in Civil Actions

Accessory or assistance liability in tort law may result in civil liability for lawyers who assist clients in committing a tort in relation to a corrupt transaction.³¹³ The client and lawyer are referred to as joint tortfeasors. This concept originated alongside accessory liability in criminal proceedings, but the criminal and civil actions have since diverged.³¹⁴ Accessory liability is a subset of joint tortfeasor law and is divided into its own subsets.³¹⁵ This section provides only a brief overview of the topic.

10.3.1 US Law

In the US, a leading case on accessory liability is *Halberstam v Welch*,³¹⁶ which was described by the US Supreme Court as being a "comprehensive opinion on the subject."³¹⁷ Other leading cases applying this doctrine tend to be statutory securities cases.³¹⁸ Generally,

³¹² United Nations Office on Drugs and Crime (UNODC), "Digest of Asset Recovery Cases" (United Nations, 2015), at 11, 22, online: <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf>.

³¹³ *Ibid.* For more details about civil actions for compensation of damages in tort in the context of asset recovery see Section 2.4.5.2(a) of Chapter 5.

³¹⁴ Paul Davies, "Accessory Liability for Assisting Torts" (2011) 70 Cambridge LJ 353 at 353.

³¹⁵ For a general overview on various subsets of Accessory Civil Liability, see Martin Kenney, "British Virgin Islands: Accessory Civil Liability," *Mondaq Business Briefing* (2008, August 27) (LexisNexis).

³¹⁶ *Halberstam v Welch*, 705 F.2d 472, 489 (DC Cir 1983).

³¹⁷ *Central Bank of Denver, NA v First Interstate Bank of Denver, NA*, 511 US 164 (1994) at 181.

³¹⁸ *Ibid.*

accessory liability in the US requires that the accessory “knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.”³¹⁹

10.3.2 UK Law

A leading UK case, *Sea Shephard UK v Fish & Fish Ltd*, sets out the test for finding a defendant liable as a joint tortfeasor where the defendant:

- (1) Has assisted in the commission of the tort by another person;
- (2) The tort is pursuant to a common design; and
- (3) An act is done that is tortious.³²⁰

Lord Sumpton noted:

In both England and the United States, the principles [of joint tortfeasorship] have been worked out mainly in the context of allegations of accessory liability for the tortious infringement of intellectual property rights.³²¹

The civil law has tended to require procurement as an element to establish accessory liability.³²² In *CBS Songs v Amstrad Consumer Electronics plc*, a UK Court found that procurement was more than merely “inducement, incitement, or persuasion.” Advice alone would not result in a finding of accessory liability; more active participation would be required.³²³

10.3.3 Canadian Law

Canadian courts have adopted and applied the English definition of joint tortfeasors. Canadian courts have not defined the minimum “degree of participation” required for the secondary tortfeasor to be liable for the primary tort.³²⁴ However, Canadian courts have said that a “concerted action to a common end” is required.³²⁵ Although this has not been defined

³¹⁹ Restatement (Second) of Torts § 876(b) (1977). For additional material on this topic, see W. Keeton et al, eds, *Law of Torts*, 5th ed (West Group, 1984).

³²⁰ Sarah Johnson & Alastair Shaw, “UK Supreme Court confirms test for joint liability in tort”, *Hogan Lovells* (3 April 2015), online: LimeGreen IP News <<http://www.limegreenipnews.com/2015/04/uk-supreme-court-confirms-test-for-joint-liability-in-tort/>>.

³²¹ *Sea Shepherd UK v Fish & Fish Ltd*, [2015] UKSC 10, [2015] WLR 694 at para 40.

³²² Davies (2011).

³²³ *CBS Songs v Amstrad Consumer Electronics plc*, [1988] AC 1013, [1988] UKHL 15. For additional materials on this topic, see Hazel Carty, “Joint Tortfeasance and Assistance Liability” (1999) 19 *Leg Studies* 494.

³²⁴ John Fleming, *Law of Torts*, 5th ed (Thomson Reuters (Professional); Lawbook Co., 1977) at 237-38.

³²⁵ *Ibid.*

by the courts either, this statement suggests that some act must be committed to put the tort in motion or to substantially assist in its commission, as in England.

10.4 Tort of Legal Malpractice

Legal malpractice actions are an option for dissatisfied clients or third parties seeking private redress for harm attributable to a lawyer's violation of his or her duties to a client or the legal profession.³²⁶ The tort may occur when a lawyer is professionally negligent, breaches a contract and/or breaches his or her fiduciary duty to a client. Legal malpractice requires a harmed party with standing to show that malpractice occurred, and that as a result of that malpractice, the harmed party suffered damages.³²⁷ In doing so, the harmed party must show that but for the lawyer's malpractice, the harm would not have occurred or would have been less. As stated in *Hummer v Pulley, Watson, King & Lischer, PA*, "[i]n a legal malpractice case, a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney."³²⁸

Professional negligence is a common action in the category of legal malpractice. The UK case *Ross v Caunters* states that solicitors owe a duty of care to their clients and to third parties who could reasonably be expected to suffer loss or damage.³²⁹ This has generally been accepted in the US and Canada. This duty could apply to a lawyer who negligently advises that the client's conduct does not constitute an offence of corruption when in fact it does, or that a client's anti-corruption compliance program and its implementation are adequate, when they clearly are not. Malpractice actions may also be possible if a lawyer fails to disclose the actual or planned corrupt conduct of an employee, agent, or officer to more senior officers or the board of directors. In-house counsel in particular may have clauses in their employment contracts requiring certain actions if they encounter corruption in the organization. Failure to act in the way outlined in their employment contract on uncovering corruption may result in a breach of contract claim against the lawyer. The Supreme Court of Canada in *Central Trust Co v Rafuse*³³⁰ held that the standard of care for solicitors is that of "the reasonably competent solicitor, ordinarily competent solicitor and the ordinarily prudent solicitor."³³¹ This follows the English authorities, which state that the standard of care is one of "reasonable competence and diligence."³³²

³²⁶ R. Bruce Anderson, *Encyclopedia of White-Collar and Corporate Crime*, 2nd ed by Lawrence Salinger (Sage Publications, 2013) *sub verbo* "legal malpractice".

³²⁷ *Ibid.*

³²⁸ *Hummer v Pulley, Watson, King & Lischer, PA*, 157 NC App 60, 577 SE 2d 918 (2003).

³²⁹ *Ross v Caunters*, [1979] 3 All ER 580, [1979] 3 WLR 605.

³³⁰ *Central Trust Co v Rafuse*, [1986] SCJ No 52, [1986] 2 SCR 147 at 208.

³³¹ Woolley et al (2012) at 174.

³³² For more information, see: Halsbury's Laws of Canada (online), *Legal Profession*, (IV(5)(2)(a)) (2013 reissue). English authorities include *Fletcher & Son v Jubb, Booth & Helliwell*, [1920] 1 KB 275 (CA); *Groom v Crocker*, [1939] 1 KB 194, [1938] 2 All ER 394 (CA).

10.5 Shareholders' or Beneficial Owners' Actions Against the Corporation's Lawyer

10.5.1 US Law

In *Stichting Ter Behartigin Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, the Court of Appeal for the Second Circuit allowed the shareholders of the defendant company to maintain an action for legal malpractice against the company's legal counsel.³³³ The company had been found criminally liable under the *FCPA* for paying a bribe after counsel advised that the bribe could be paid through the company's subsidiary to avoid liability under the *FCPA*. The defendant argued that no such cause of action existed in law, but the Court rejected that argument in a pre-trial motion and allowed the shareholders to continue their action against the lawyer defendant.

10.5.2 UK Law

In the UK, Zambia's Attorney General launched a private law claim against two UK lawyers and their firms for their participation in "allegedly giving dishonest assistance in the misappropriation" of public funds.³³⁴ This claim was for "dishonest assistance" and conspiring in corrupt acts; it was not a claim for professional negligence. The Attorney General alleged that the lawyers had assisted the former president of Zambia, Frederick Chiluba, in corrupt acts and the misappropriation of public funds. The Attorney General of Zambia was successful at the lower court level, but on appeal the action failed because the court found that the lawyers had not crossed the line from incompetence to dishonesty.³³⁵ The test applied is known as the "fool or knave test" and is a difficult test to meet when trying to prove legal malpractice. Despite the Court of Appeals decision, Chiluba's lawyer, Mohammed Iqbal Meer, was suspended from the practice of law for three years for failure to uphold professional standards.³³⁶

In contrast, in the Kuwaiti Investment Organization (KIO) case, Spanish attorney Juan Jose Folchi Bonafonte, was held civilly liable for assisting to divert funds from the KIO's subsidiary, Grupo Torras (GT). Sheikh Fahad, a member of the Kuwaiti royal family of Al-Sabah and the chairman of the KIO between 1984 and 1992, made a number of questionable investments causing a loss of \$4 billion to the KIO, of which \$1.2 billion were attributable to

³³³ *Stichting Ter Behartigin Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, 327 F (3d) 173 (2d Cir 2003). For more details about civil actions based on the *FCPA* violations in the context of asset recovery see section 2.4.5.4(a) of Chapter 5.

³³⁴ Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (World Bank Publications, 2014) at 122-3. See also *Zambia v Meer Care & Desai (a firm) & Ors*, [2007] EWHC 952 (Ch) and *Zambia v Meer Care & Desai (a firm) & Ors*, [2008] EWCA Civ 1007.

³³⁵ *Ibid* at 124.

³³⁶ UNODC, "Digest of Asset Recovery Cases" (United Nations, 2015) at 21.

fraud, embezzlement and misappropriation.³³⁷ The England and Wales Court of Appeal commented on Mr. Folchi's involvement in this matter as a lawyer in the following manner:

The [trial] judge was not prepared to hold that Mr Folchi was a conspirator. But his findings of fact about what Mr. Folchi did know, or shut his eyes to, take his conclusion out of the sphere of hypothesis. The assistance that Mr. Folchi gave in all the transactions was crucial and without it they could not have taken place as they did. He was just as much a linchpin in giving dishonest assistance as he would have been if he was a conspirator. It was the obvious duty of an honest lawyer to make more enquiries as to why very large sums of money were being dealt with in highly questionable ways, and to stop the transactions if he did not receive satisfactory explanations. Mr. Folchi repeatedly failed in his duty and in consequence GT suffered losses.³³⁸

10.5.3 Canadian Law

The common law in Canada provides some limited avenues of redress against lawyers for aggrieved investors. Lawyers may be liable to their corporate clients for misrepresentations or negligence. As stated by Gillen:

If the client is found liable for a misrepresentation in the prospectus, the client could sue the lawyer for negligent advice or assistance in the preparation of the prospectus. The lawyer may also have a duty to the public requiring the lawyer to discourage the client from distributing securities under a misleading prospectus and possibly requiring the lawyer to disclose, or "blow the whistle", where a client persists with the use of a misleading prospectus.³³⁹

However, often a corporation is unable or unwilling to pursue its lawyers for unlawful or negligent acts or omissions, particularly if the board of directors is involved in them. Shareholders who wish to pursue corporate lawyers for the torts committed against the company have an additional hurdle in seeking to hold the corporate lawyer liable; they must first establish that a duty of care is owed by the corporate lawyer to the shareholder, rather than just to the corporate client. After establishing the duty of care, they must show that the lawyer breached that duty.

This duty of care is difficult to establish because lawyers owe an overriding duty to their client, and any duty to a third party may come into conflict with their duty to their client. Policy reasons, such as the fear of liability to an indeterminate class for an indeterminate amount, may prevent the court from finding a duty to shareholders. Even if the duty is

³³⁷ *Ibid* at 9, 21-22.

³³⁸ *Khaled Naser Hamoud Al-Sabah and Juan Jose Folchi Bonafonte v Grupo Torras SA*, [2000] EWCA Civ J1102-9.

³³⁹ Mark Gillen, *Securities Regulation in Canada*, 2nd ed (Carswell, 1998).

established, Canadian courts rarely find a breach of the duty of care on the part of lawyers. Generally, the court finds that the lawyer took reasonable care to fulfill the duty or that the circumstances did not give rise to reasonable suspicion, which would require increased due diligence on the part of the lawyer.

In *CC&L Dedicated Enterprise Fund v Fisherman*, an Ontario court found that “a *prima facie* duty of care exists when a lawyer makes representations to the investing public for the purpose of furthering the investments in their client.”³⁴⁰ In *Filipovic v Upshall*, the Court found that the lawyer “stood in a sufficient relationship of proximity with the plaintiffs to engender a duty of care on their part.”³⁴¹ In *Filipovic*, the shareholders confirmed the corporate solicitors’ appointments to the corporation, knew the solicitors from previous dealings and wrote their cheques directly to the solicitors on the instructions of the promoters of the investment. The court found that the duty of care “flowed through the company to the shareholders, but did not arise independent of the company itself.”³⁴² However, in *Filipovic*, the court found that the solicitors discharged their duty in a “reasonably competent and professional manner.”³⁴³ In coming to this decision, the court considered the fact that the solicitors had worked with the principals before with no history of dishonesty and that the solicitors took instructions from the principals of the company, who would reasonably have the authority claimed. The court also found a lack of circumstances that would reasonably raise the solicitors’ suspicions.

10.6 Lawyers’ Civil Liability under Securities Acts

Lawyers’ liability under securities legislation is important in the corruption context because corporate lawyers often work with publically traded corporations. In addition, the SEC is a major enforcer of the *FCPA*. Violations of anti-corruption and anti-bribery laws may result in additional violations of securities regulations, as the corporation may fail to accurately disclose their financial position and potential liabilities to the financial market. An investor who purchases a share shortly before a company is investigated for or charged with corruption offences could see the value of their investment fall drastically in a short period, either due to negative public perception of the company or because of the massive fines imposed on the company upon conviction or settlement. As disclosure and investigation of

³⁴⁰ *CC&L Dedicated Enterprise Fund v Fisherman* (2001), 18 BLR (3d) 240, 2001 CanLII 28387 (Ont Sup Ct).

³⁴¹ *Filipovic v Upshall* (1998), 19 RPR (3d) 88 (Ont Ct J (Gen Div)), affirmed by the CA at [2000] OJ No 2291.

³⁴² *Ibid* at para 64.

³⁴³ *Ibid* at para 67.

corruption and bribery may have a significant impact on the value of a company's shares, securities law is applicable in the anti-corruption context.³⁴⁴

³⁴⁴ For US law on this topic see: 17 CFR § 240.10b-5 (1951), 15 USC § 78t(e), *Sarbanes-Oxley Act of 2002*, 15 USC 7201, 116 Stat 745 § 307 (2002), 17 CFR § 205, and Securities Exchange Commission, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans*, 2006, § 102(e) online: <<https://www.sec.gov>>. For more information on UK Securities Regulation, see Joan Loughery, *Corporate Lawyers and Corporate Governance*, (Cambridge University Press, 2011). For more information on Canadian securities regulation, see David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (LexisNexis, 2014) and Mark Gillen, *Securities Regulation in Canada*, 3rd ed (Thomson Carswell, 2007). Note that Canada's securities law varies provincially.