CHARTERED PROFESSIONAL ACCOUNTANTS CANADA

# Governance of Anti-Corruption and Responsible Business: A Framework for Board of Directors

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CPA CANADA DIRECTOR BRIEFING

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# Preface

The Corporate Oversight and Governance Board (COGB) of the Chartered Professional Accountants of Canada (CPA Canada) has commissioned this important and timely publication: Governance of Anti-Corruption and Responsible Business: A Framework for Board of Directors.

The document presents a globally accepted framework for an effective ethics and anti-corruption compliance program. While the framework has its origins in the anti-bribery and anti-corruption context, it also applies to organizations striving to meet the broader emerging responsible business challenges of Environmental, Social and Corporate Governance (ESG) mandates.

The COGB would like to thank the authors and other stakeholders who provided valuable input during the drafting process.

**Tom Peddie, FCPA, FCA**
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## Executive Summary

The landmark $280-million settlement that SNC-Lavalin reached with Canadian federal authorities in 2019 served to awaken Canadian companies to the serious consequences of corruption and other types of white-collar crime. While greater attention is being paid to the issue today, significantly more work remains to be done. Canada has a long way to go to achieve the progress the U.S. and other jurisdictions have made in tackling bribery and corruption over the past decade.

Part of the problem has been Canadian organizations' tendency to view anti-bribery and anti-corruption (ABC) efforts as niche legal and regulatory concerns, rather than as what they are: central to doing business responsibly and meeting the environmental, social and governance (ESG) expectations of stakeholders. It is time that organizations recognized that the goals of running a sound business, realizing sustainable profits and making a positive ESG impact go hand-in-hand with managing both domestic and global corruption risks in a timely and effective manner.

Corporate directors – who bear the responsibilities of safeguarding the assets and reputation of a corporation and overseeing its leaders – must understand how their organization's business model, culture, geography, industry sector and incentives all shape its risk profile and the actions that must be taken to mitigate such risks. In particular, they must be closely attuned to the ethical tone of management, to the risks of outsourcing misconduct to third parties and to the externalities of their organization's activities. They must also ensure that companies who do business abroad take care to abide by the relevant laws and regulations across the jurisdictions in which they operate or sell products and services.

This director briefing follows the prevent-detect-respond framework that was developed in Europe and has been adopted by companies around the world. SNC-Lavalin adopted the framework as a foundational element to address its internal risks and help restore its reputation with key stakeholders and the public. Having a working knowledge of this framework will help directors critically interpret and assess the compliance information they receive from management, and will guide their questioning on how their organizations address corruption risks.

### The Prevent-Detect-Respond Framework

The prevent-detect-respond framework brings together hallmarks of an effective compliance program and groups them according to their objective. These include:

- having the right culture, policies and systems to **prevent** misconduct from occurring
- structures and controls to **detect** deviations from accepted practices
- tools and methods to **respond** to such deviations

### Prevent

To uphold their responsibilities for mitigating corruption risk, directors should have a strong understanding of how their organization is preventing corruption in the first place. Preventing corruption effectively within a global organization is a multi-pronged effort. It entails:

- having the right people and organizational culture to conduct business ethically
- establishing clear lines of acceptable conduct
- evaluating compliance risks as they evolve
- maintaining robust policies and procedures that support compliance
- extending oversight to the conduct of third parties
- providing frequent communication and training on corruption issues
- helping employees navigate ethical decision-making by providing steadfast guidance and support
- promoting better business practices among corporate peers

### Detect

Detecting transactions or arrangements that present heightened compliance risk requires a number of measures, which directors should be able to scrutinize. These include:

- suitable internal controls
- periodic testing and reviews of the compliance program
- effective channels for receiving allegations of misconduct
- robust and independent investigations to gather facts

### Respond

It is essential that the leaders of an organization take suitable corrective action in response to confirmed evidence of misconduct. Not responding effectively increases the risk that underlying issues fester, spread and recur. Directors, who bear special responsibility for overseeing the CEO and management team, should scrutinize how ethical conduct is incentivized and how leaders are held accountable for lapses in ethical judgment. Important questions to ask include:

- Are compliance targets embedded into HR processes for performance evaluation, bonuses and promotions?
- Are consequences for misconduct adequate and consistently applied?

## Conclusion

Understanding the prevent-detect-respond framework can help directors to ensure that management implements a sustainable compliance program that is strategically matched to their organization and that supports doing business responsibly and with appropriate regard for ESG concerns.

## Introduction and Background

In 2019, the Montreal-based engineering and construction company SNC-Lavalin entered into a landmark settlement with Canadian federal authorities to resolve criminal charges related to allegations of bribery and fraud. Under the settlement, the company agreed to pay $280 million in fines and accept a three-year probationary period during which it was required to retain an independent compliance monitor and to institute changes to its controls, policies and procedures. Prior to the federal settlement, SNC-Lavalin had settled costly shareholder class actions and entered into an agreement with the World Bank Group, which led to the debarment of a number of its subsidiaries for an unprecedented ten-year period.

Underlying these settlements, sanctions and scandals were allegations that company personnel made improper payments to win or retain business in various countries, in some cases using third-party intermediaries to hide bribes.

The SNC-Lavalin corruption case has resulted in a much needed, if perhaps incomplete, awakening in Canadian companies to the serious consequences of corruption and other types of white-collar crime. However, more work remains to be done. Although often treated as a niche legal and regulatory concern, anti-bribery and anti-corruption (ABC) efforts within organizations should instead be viewed as just one key thread in a larger tapestry: doing business responsibly and meeting the environmental, social and governance (ESG) expectations of stakeholders.

Fortunately, the goals of running a sound business, realizing sustainable profits and making a positive ESG impact go hand-in-hand with managing corruption risks in a timely and effective manner. There is considerable overlap in the general principles that apply to mitigating corruption risks and the risks of other adverse effects on society and the planet. Corporate directors – who bear the responsibilities of safeguarding the assets and reputation of a corporation and overseeing its leaders – must understand how their organization's business model, culture, geography, industry sector and incentives all shape its risk profile and the actions that must be taken to mitigate such risks. In particular, they must be closely attuned to the ethical tone of management, to the risks of outsourcing misconduct to third parties and to the externalities of their organization's activities.

This director briefing presents a globally accepted framework for an effective ethics and anti-corruption compliance program that helps to scandal-proof an organization (and to prevent recidivism in those that have been involved in a scandal). The framework outlined here has its origins in the specific context of ABC but is also applicable to organizations and their directors striving to meet the broader emerging challenges of ESG.

## Anti-corruption enforcement then and now

Prior to the SNC-Lavalin case, anti-corruption enforcement actions against Canadian companies were few, and of minor importance. The first conviction under Canada's Corruption of Foreign Public Officials Act (CFPOA), that of Hydro Kleen Group[1] in 2005, resulted in a $25,000 fine – less than the total amount paid in bribes. The second one followed in 2011, about the same time that the SNC-Lavalin investigation first hit the headlines. In that matter, Calgary's Niko Resources,[2] a TSX-listed oil and gas firm, pled guilty to bribing the Minister of Energy of Bangladesh and received a fine of just under $10 million.

Although it was a milestone at the time for anti-corruption enforcement in Canada, the Niko Resources resolution still paled in comparison to contemporary U.S. enforcement actions – then approaching the billion-dollar mark – which had mostly left Canadian companies unscathed. With its broad jurisdictional reach and aggressive joint enforcement by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC), the U.S. Foreign Corrupt Practices Act (FCPA) had already ensnared numerous large multinationals headquartered in various countries for violations of its anti-bribery and accounting provisions.[3] As of 2011, these included German industrial giants Siemens (2008) and Daimler (2010), French telecom equipment maker Alcatel-Lucent (2010) and the Norwegian oil company Statoil (2006), among many others, resulting in large penalties, lengthy monitorships and tarnished reputations.

Today, a decade later, anti-corruption enforcement continues to become more vigorous around the world and this trend is expected to continue. In the United States, regulatory agencies continue to place a strong emphasis on anti-corruption, viewing it as an issue with national security implications. In 2020, the aerospace leader Airbus paid nearly US$4 billion in fines and penalties alone to the United States, France and the United Kingdom for violations of those countries' anti-corruption statutes, a record global settlement. However, despite this and the lessons learned from both SNC-Lavalin and Niko Resources, the paucity of CFPOA cases and foreign prosecutions of Canadian companies to date may allow a false sense of security to persist in Canada's boardrooms. Ensuring that Canadian companies are equipped to mitigate global corruption risks is urgent as the pressures to compete on an uneven global playing field are also increasing, especially in the uncertain aftermath of the COVID-19 pandemic. Having the right tools in place to prevent, detect and respond to indications of misconduct, including corruption, has become more essential than ever before.

1 *R. v. Watts [Hydro Kleen]* (2005) A.J. No. 568 (Alta. Q.B.).

2 *R. v. Niko Resources Ltd.* (2011), 101 W.C.B. (2d) 118 (Alta. Q.B.).

3 Broadly, the FCPA's anti-bribery provisions prohibit any offer or provision of money or anything of value, directly or indirectly, to a government official for the purpose of securing an improper advantage in obtaining or retaining business. The accounting provisions of the FCPA require U.S.-listed companies to (a) make and keep books and records that accurately and fairly reflect the transactions of the company, and (b) devise and maintain an adequate system of internal accounting controls.

Canadian companies must abide by the relevant Canadian laws and regulations as well as those applicable across the jurisdictions in which they operate or sell products and services. Directors need to ensure that management understands these laws, especially those that have extraterritorial reach such the FCPA and the U.K. Bribery Act. Directors should also be familiar with the overall expectations of law enforcement agencies and regulators for proactive disclosure of misconduct, cooperation with governmental investigations and implementation of compliance safeguards upon discovery of misconduct. In circumstances where misconduct is suspected to have occurred, a swift response that meets the expectations of such authorities may go a long way towards achieving a more favourable resolution for the organization with reduced penalties, sanctions and other collateral consequences. Although an organization's specific measures to ensure compliance with anti-corruption laws are the responsibility of the head of the legal department and other members of the management team, directors are charged with overseeing how management is executing these responsibilities.

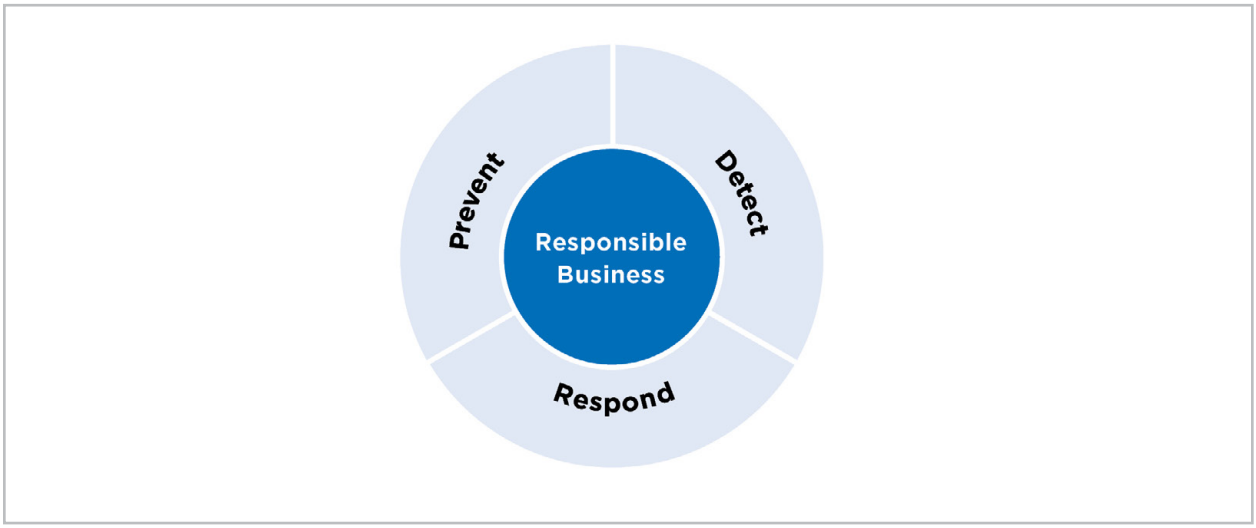
This director briefing is based on:

- guidance issued by law enforcement and regulatory authorities around the world
- the expectations of public international organizations such as the World Bank and of director and officer insurers
- the experiences of global corporations that have responded effectively to past anti-corruption enforcement actions

The prevent-detect-respond framework that forms the basis for this briefing was originally developed in Europe by organizations such as Siemens in an anti-corruption context and has since been adopted by many companies around the world. In Canada, the framework was adopted by SNC-Lavalin, and – buttressed by engaged management and robust board oversight – helped that organization restore trust among its own stakeholders (and, notably, earn credit towards an early release from its World Bank debarment). As such, the framework is a useful model for Canadian directors of mid-size and large companies – especially those with global operations – as they exercise their oversight role and navigate the evolving landscape of corporate misconduct and its attendant legal, financial and reputational risks.[4]

4 Although the measures described in this director briefing are based on globally accepted good practices in mitigating corruption risks, directors should also familiarize themselves with applicable local laws and regulations, as well as any specific requirements of their directors and officers insurance policy as regards required diligence and risk management, as these may vary by provider and jurisdiction.

**FIGURE 1: PREVENT-DETECT-RESPOND FRAMEWORK FOR ANTI-CORRUPTION AND RESPONSIBLE BUSINESS**




## The Framework

What framework can companies adopt that helps them meet Canadian and international standards for doing ethical business, including meeting the applicable legal requirements? SNC-Lavalin asked itself this question in the wake of its corruption investigations and adopted a compliance management system that had been developed by Germany's Siemens following its own corruption crisis in 2007. It remains a useful and relevant standard.

The system brings together hallmarks of an effective compliance program and groups them into three logical and easy-to-understand bundles, according to their objective. These include:

- having the right culture, policies and systems to **prevent** misconduct from occurring
- structures and controls to **detect** deviations from accepted practices
- tools and methods to **respond** to such deviations[5]

Directors need not be experts on each of the specific anti-corruption compliance program elements summarized in this briefing. However, having a working knowledge of this framework will help directors critically interpret and assess the compliance information they receive from management, and will guide their questioning on how their organizations address corruption risks.

5 Under these three broad pillars, the specific elements that an anti-corruption compliance program should include have been formulated in various ways, and there is no single "correct" model that a company must adopt. This briefing generally follows the elements set forth in the integrity compliance guidelines issued by the World Bank Group's integrity vice-presidency, as they provide a clear and effective approach to mitigating corruption risks as well as those presented by certain other forms of sanctionable misconduct, such as fraud, money laundering and anti-competitive conduct.

**FIGURE 2: ELEMENTS OF THE PREVENT-DETECT-RESPOND FRAMEWORK FOR ANTI-CORRUPTION AND RESPONSIBLE BUSINESS**

| A. Prevent | B. Detect | C. Respond |
|---|---|---|
| 1. Leadership and responsibility<br>2. Prohibition of misconduct<br>3. Risk assessment<br>4. Policies and procedures<br>5. Policies regarding business partners<br>6. Training and communication<br>7. Advice and support<br>8. Collective action | 1. Internal control measures<br>2. Testing and compliance reviews<br>3. Reporting compliance concerns<br>4. Internal investigations | 1. Incentives<br>2. Disciplinary measures |

## A. Prevent

An ounce of prevention, as the cliché goes, is worth a pound of cure. To uphold their responsibilities for mitigating corruption risk, directors should have a strong understanding of how their organization is preventing corruption in the first place.

Preventing corruption effectively within a global organization is a multi-pronged effort. It entails:

- having the right people and organizational culture to conduct business ethically
- establishing clear lines of acceptable conduct
- evaluating compliance risks as they evolve
- maintaining robust policies and procedures that support compliance
- extending oversight to the conduct of third parties
- providing frequent communication and training on corruption issues
- helping employees navigate ethical decision-making by providing steadfast guidance and support
- promoting better business practices among corporate peers

These key efforts are discussed in more detail below.

### 1. Leadership and responsibility

Everyone in a company plays an integral role in ensuring the organization complies with anti-corruption laws. It is essential that those who fail to uphold their ethical responsibilities – whether through improper actions, wilful blindness towards misconduct or simple negligence – are held accountable. Allowing double standards on accountability can seriously undermine and erode the compliance culture of the organization.

Special responsibility falls on the CEO and senior management team to set a strong "tone from the top," foster an ethical culture and serve as role models for their workforce. In their oversight capacity, directors should pay close attention to how management demonstrates its commitment to ethical conduct and compliance through actions and words. Important questions to ask include:

- Are compliance topics regularly included in management meeting agendas?
- Does the CEO appear to have any ethical "blind spots," for example, around charismatic, high-performing managers whose business methods raise red flags in the form of whistleblower complaints?
- Does the CEO insist on getting all the relevant facts when such allegations do arise?
- Does the management team engage in open, transparent dialogue about ethical issues with employees through written communiqués, multimedia and in-person events?
- Do they take a firm zero-tolerance stance towards all forms of retaliation against those willing to speak up about ethical concerns?

Larger global organizations should also maintain a dedicated compliance function with the appropriate resources, autonomy, stature and competence to implement the company's compliance program throughout its operations.[6] Usually, the audit committee of the board of directors will have oversight of this program and will formally review its adequacy at least once per year. Although an organization's designated head of compliance (or chief compliance officer) typically reports to the CEO, chief legal officer, or other management leader, it is important that he/she also maintain an independent reporting line to the audit committee to help ensure that all issues are brought to the board's attention. Directors should confer regularly with their compliance leaders to gain confidence that the function has all the resources, capabilities and protection from interference that it requires to operate effectively.

6 For companies operating in higher-risk geographies, it is important for the compliance function to maintain a local presence in these regions, for example, through a network of dedicated compliance officers who understand the local cultural context, provide compliance guidance to the business and report back to headquarters on the challenges they encounter.

### 2. Prohibition of misconduct

Communicating a clear and universal policy of zero-tolerance towards ethical misconduct is a cornerstone of a corporate compliance program. Although this may appear to be self-evident, directors should not take its effective execution for granted. Whether the company's prohibition of misconduct is contained in a code of ethics or in a standalone policy document, there are several important questions to ask:

- Is the prohibition worded unambiguously, so that no reasonable person could interpret (or rationalize) the existence of loopholes in its application?
- Are the consequences of violations clearly articulated and adequate to deter misconduct, even in business lines and geographies where the pressure to skirt rules may be constant and intense?
- Is the prohibition communicated frequently and effectively to all stakeholders, including customers and third-party business partners?
- Is the zero-tolerance stance personally championed by the CEO and members of the executive management team?

### 3. Risk assessment

An organization must be able to identify and measure risk before it can effectively manage it. As part of a compliance program, periodic risk assessments allow organizations to identify and evaluate their exposure to corruption risks, and to allocate their limited compliance resources where they are most needed. As with compliance programs more generally, there is no single "correct" methodology for conducting an effective risk assessment. A comprehensive risk assessment should involve a combination of methods, such as: cross-functional teams interviewing management at local entities about the compliance challenges they face; examining arrangements with third parties, interactions with government officials, and adherence to policies around gifts and entertainment; and reviewing local investigations that may indicate organizational culture problems or patterns of misconduct.

Directors should take a keen interest in their company's risk assessment plan and results, and should be prepared to ask questions about how all identified risks are being identified, measured and addressed.

### 4. Internal policies and procedures for compliance

Every company should maintain – and periodically revisit – a body of detailed written directives, policies and procedures that address all identified areas of corruption risk. The foundational document of any compliance program is a comprehensive code of ethics that describes the organization's overall ethical values and expectations for compliance. To be effective, it should use clear and simple language to address all forms of corporate misconduct, such as fraud, bribery/corruption, harassment, money laundering, misuse

of company assets, insider trading and anti-competitive activities. It should also clearly indicate how employees can confidentially raise concerns about improper conduct they have witnessed. Directors should verify that all employees are periodically trained on the code and agree to adhere to it as a condition of their employment. (It is also important that a similar document be applicable to the company's third-party business partners.)

It is equally critical to supplement the high-level ethical expectations set forth in the code with more granular policies and procedures that articulate specific requirements for navigating areas of corruption risk. Examples of key anti-corruption policies include:

- those governing interactions with government officials (and their relatives)
- use of third-party sales consultants and intermediaries
- use of company bank accounts
- provision and receipt of gifts, entertainment, and travel
- donations and sponsorships
- political contributions
- recordkeeping
- facilitation payments

### 5. Policies regarding business partners

The most significant corruption risks facing global companies today arise from third-party business partners operating outside of the direct scrutiny and oversight of the company's governance and control framework. In emerging markets, third parties such as agents and sales consultants are frequently involved, either under company direction or as rogue operators, in "outsourced" bribe payments as well as in the improper provision of gifts and entertainment to government officials and their relatives, and to customers. This is accomplished through a variety of schemes, which can involve sham contracts and invoices for fictitious or inflated services, off-the-books slush funds and serpentine networks of intermediaries and offshore companies. Such schemes may also lend themselves to trade-based money laundering and other illegal activities, which are also increasingly the focus of prosecutors. Consequently, published anti-corruption guidance from regulators places a strong emphasis on effective third-party management, including due diligence, approvals, contract management, training, audits and ongoing monitoring over the duration of the relationship.

Directors should understand the risks presented by third parties and ask the right questions about the role they play in a company's business dealings. Important questions include the following:

- Does the company use higher-risk intermediaries, such as agents and sales consultants? Are these truly necessary? Can the company mitigate corruption risks by "in-sourcing" the business development functions that these third parties provide?
- What due diligence procedures are performed prior to approving a third party?
- Does a third party possess the necessary expertise and capabilities to undertake the services agreed? How is this verified?
- Are the fees paid to the third party commensurate with the services rendered?
- Has the third party requested any unusual payment structures?
- Is the third party domiciled in a tax haven or low-transparency jurisdiction?
- Who are the ultimate beneficiaries of the third party?
- Are there anti-corruption terms in place in the contract, such as a clear prohibition of corruption and a right-to-audit clause? Has the company exercised its audit rights?
- Does the third party employ government officials, their relatives, or former company employees sanctioned or terminated for misconduct?
- Has the third party been checked against information arising from internal investigations?
- Does the third party receive training and guidance on the company's anti-corruption requirements?

### 6. Training and communication

Cultivating real awareness of, and sensitivity towards, corruption risks within an organization requires a sustained effort. It is important to provide employees, management, directors and third-party business partners with the knowledge needed to identify and respond to red flags encountered in the course of their duties.

Directors should ask for statistics on compliance training to ensure that all stakeholders are being reached, along with examples of training to verify that it is sufficiently detailed, risk-based, and up to date. Directors themselves should periodically receive robust, tailored training on anti-corruption.

Compliance training should not follow a "one-size-fits-all" approach. A standardized, mandatory training module for all employees on complying with the organization's code of ethics is a good starting point, but it should be supplemented with training tailored to the target audience's location, role and risk profile. Key functions such as compliance, legal, finance, HR, internal audit, sourcing, and security should each have detailed training on how

to carry out their specific responsibilities with respect to the anti-corruption compliance program. Online training modules are useful, but in-person training is more interactive and allows participants to raise questions and work through dilemma situations for which there may be no single "correct" answer. Financial and logistical barriers to training a global workforce in this manner have lessened considerably with the widespread adoption of remote meeting tools (such as Webex, Zoom, and Teams) during the COVID-19 pandemic.

Regular communication on compliance topics is also essential. Emails, letters posted on the intranet and company website, physical signs and posters, podcasts, videos and live events all provide opportunities to reinforce anti-corruption messages, strengthen the organization's ethical culture and empower employees to speak up when they notice red flags.

### 7. Advice and support

From time to time, even employees who have been adequately sensitized to corruption risks need expert guidance in making the right decision – which, in the field of anti-corruption, is not always intuitive. Cultural norms around gift-giving, hospitality and use of local business partners vary significantly from region to region. Making matters more complicated, anti-corruption laws also vary from jurisdiction to jurisdiction and evolve over time. Meanwhile, the pressure to win deals and meet targets can be overwhelming. Thus, it is important for the corporate compliance function to support the business by providing advice on risk-mitigation measures that strike the right balance between compliance and business considerations. Directors should oversee how this is being accomplished and documented.[7]

### 8. Collective action

Most of the standard elements of an anti-corruption compliance program, as articulated in published guidance, are focused on helping companies address corruption issues internally, within the four walls of their organizations. But corruption is a global problem, and no one organization can combat the blight of corruption by itself. The same applies to meeting ESG goals. Some companies balk at implementing robust anti-corruption programs based on the (reasonable) assumption that doing so may put them at a disadvantage in competing with their less-scrupulous peers.

Collective action comprises those efforts that companies take to collaborate with their corporate peers in promoting better anti-corruption standards, more ethical business practices and generally, a more level playing field. In practice, it may mean championing

7 In some companies, a "compliance consultation desk" staffed by internal compliance professionals serves to channel and respond to such inquiries.

anti-corruption efforts within industry associations or local business forums, or involvement in international initiatives such as the UN Global Compact, the Partnering Against Corruption Initiative and other initiatives.[8]

## B. Detect

Detecting transactions or arrangements that present heightened compliance risk requires a number of measures, which directors should be able to scrutinize. These include:

- suitable internal controls
- periodic testing and reviews of the compliance program
- effective channels for receiving allegations of misconduct
- robust and independent investigations to gather facts

### 1. Internal control measures

Corporate codes of ethics, policies and directives cannot enforce themselves no matter how well articulated they might be. Internal controls serve as essential checks that can help identify red flags in a company's voluminous business transactions. Sound financial controls are an important starting point. A company needs to establish and maintain a thorough and effective system of controls over all financial, accounting and record-keeping practices, and it should ensure the maintenance of accurate books and records that are available for inspection at any time by auditors or other parties. All transactions must be documented and there should be no off-the-books transactions or accounts. Furthermore, the limits of authority in an organization should not just incorporate dollar-amount thresholds but also consider the potential corruption risk that could be entailed by particular types of arrangements or transactions.

Commonly, organizations will use the power of technology to scrutinize unusual arrangements such as payments in tax havens, payments to intermediaries and invoice mark-ups that may be used as vehicles to channel money for improper purposes. In particular, analytic software such as Tableau and emerging artificial intelligence tools show promise in helping to identify potential red flags for additional scrutiny.

Internal controls should extend to arrangements involving third parties. As an example, contracts with a third-party business partner need to include formal obligations, remedies and/or penalties in relation to misconduct. These should include clearly stated intentions to exit the relationship if the partner engages in misconduct or has behaved in a way that is inconsistent with the contracting company's ethics and compliance program. Further, it is important that such contracts include a right-to-audit clause, and that such audit rights be exercised when legitimate concerns arise.

8 The not-for-profit Basel Institute on Governance, an affiliated institute of the University of Basel (Switzerland), maintains an open database of anti-corruption collective action initiatives around the world.

Internal controls do not reside in a single function such as finance, accounting or internal audit. Instead, controls to mitigate corruption risks should extend across an organization and be executed by other key gatekeeper functions as well such as human resources, legal and procurement/sourcing.

### 2. Testing and compliance reviews

Building on risk assessments, companies should undertake program and transaction testing as well as compliance reviews and gap analyses to ensure that their compliance programs are being implemented throughout their operations (including within acquired entities) and are working as intended.

An organization should also institute regular internal and external audits of the internal controls system, especially in the areas of accounting and compliance. Auditors who find evidence of suspected misconduct must be empowered to report to management and/or the board.

### 3. Reporting compliance concerns

Fostering a "speak-up" culture in which employees feel empowered to raise concerns about improper conduct they have witnessed should be a priority for management and directors alike. It is important for corporate leaders to communicate a clear duty to report all misconduct and to protect those who do report from any retaliation or discrimination. In addition, it is essential that all reports from whistleblowers be treated confidentially and that whistleblowers be provided the option to report concerns anonymously (where permissible by law). Many companies utilize an independent service provider to administer their allegation intake channels (often referred to as "hotlines"). To be effective, compliance hotlines should be secure, globally accessible 24/7 via phone and the web and provide reporting instructions in multiple languages.

Directors who receive whistleblower reports directly should take all precautions to protect the identity of whistleblowers and ensure that all such reports are adequately investigated. Where the allegation concerns senior management and/or a member of a gatekeeper function, that person should be recused from the investigation to avoid a conflict of interest, and directors should consider retaining an independent external investigator for fact-finding. Protocols related to whistleblowing and investigations should be codified within a clear and comprehensive policy that directors can refer to.

From the insulated position of the boardroom, directors must rely on whistleblowers, among other information sources, to be their "eyes and ears" and to raise the alarm when they notice red flags in the course of their duties. Directors should be regularly informed regarding the number and nature of whistleblower reports received by the company, along

with statistics indicating how all allegations were addressed and resolved. A small number of reports may not be a sign of an organization with few compliance violations but instead may indicate a culture of conformity and fear (and/or ineffective reporting systems).

### 4. Internal investigations

The value of a "speak-up culture" lies largely in its ability to bring potential compliance issues to the attention of management, who must then ensure that each issue is effectively addressed. Every large organization should have an effective allegation management system, through which all compliance-related allegations (whether they originate in a whistleblower's complaint, a media report or an inquiry by law enforcement) are centrally logged, assessed, investigated, remediated, and ultimately, reported to the board.

The complexity of modern corruption schemes – often using international networks of third parties, offshore bank accounts and shell companies – means that compliance investigations themselves can be complex, time-consuming and costly. Too often in global companies, internal investigative capabilities are seriously deficient, leading to long case backlogs, unduly narrow investigations and incomplete or inaccurate reporting to the board. Accordingly, this is an area that requires special attention from directors; they should make a point of examining whether management allocates adequate resources and attention to the company's internal investigations.

For any given compliance investigation, directors should consider:

- Were the investigative techniques adequate? What were the parameters of email reviews, interviews or financial forensics?
- Is the scope of the investigation adequately comprehensive? Do the findings regarding any employee, customer or third party necessitate further inquiries into other deals or transactions? Have investigations that were focused on fraud or embezzlement by employees overlooked potential corruption issues?
- Is the investigation sufficiently independent and credible? Is there any indication of interference by management? For particularly serious matters, should an independent external investigator be retained to undertake fact-finding under the supervision of the board?
- Is the scope of remediation adequate? Have all involved personnel and third parties been addressed? Are plans in place to address all identified process weaknesses?
- Does the investigation give rise to any disclosure obligations for the organization?

Regarding the organization's investigative function more generally, questions to ask include:

- Do internal investigators possess the necessary skills, tools and knowledge to undertake an effective investigation? Is the investigative function understaffed?
- How efficiently are investigations conducted and closed? Is there a case backlog? What is the plan to reduce case backlog and improve the efficiency of investigations?

### C. Respond

Having effective mechanisms to detect misconduct is useless if the leaders of an organization do not take suitable corrective action in response to confirmed evidence of misconduct. Not responding effectively increases the risk that underlying issues fester, spread and recur. As has happened in many prominent corruption scandals, the failure of corporate leaders to take action against high-performing managers found to have engaged in misconduct may lower the perceived ethical standards of an organization. Disciplinary measures need to be fair but consequential. Beyond personnel measures, an adequate response needs to address remediation of identified deficiencies in internal controls, policies and procedures, so as to decrease the probability of recurrence.

Even with the most sophisticated procedures, systems and controls in place, anti-corruption compliance programs ultimately cannot be effective if they fail to address the human dimension: personal ownership of ethical conduct and accountability. In a global marketplace, employees are subjected to intense pressure to achieve financial targets, while the rewards for doing the right thing may appear ephemeral at best. For some, this leads to cutting corners, wilful blindness and outright misconduct.

Adopting a carrot-and-stick approach to address this may seem intuitive, but, again, the real challenge is in the execution. Directors, who bear special responsibility for overseeing the CEO and management team, should scrutinize how ethical conduct is incentivized and how leaders are held accountable for lapses in ethical judgment. Important questions to ask include:

- Are compliance targets embedded into HR processes for performance evaluation, bonuses and promotions?
- Are consequences for misconduct adequate and consistently applied?

## Conclusion

A decade ago, the legal, financial and reputational risks to Canadian business posed by corruption and bribery were little appreciated, receiving scant attention in the media or, for that matter, on board agendas. Meanwhile, enforcement of the FCPA was growing steadily in the United States, where fines, penalties and disgorgements came to exceed the billion-dollar mark. Internal investigation and remediation costs, as well as lost business, also exceeded the billion-dollar threshold, and they continue to rise steadily today.

Although Canada's own, roughly comparable, CFPOA took effect in 1998, prosecutions in this country were mostly theoretical, in turn giving rise to a false sense of security as Canadians looked to consistent Top-10 rankings on Transparency International's Corruption Perception Index (CPI) as proof that corruption simply was not a major concern for Canadian businesses. For directors already grappling with overcrowded board agendas,

combating corruption was not widely viewed as meriting the investment of precious time or resources. The headline-making saga at SNC-Lavalin has changed this perception, but still greater awareness is needed.

The prevent-detect-respond framework presented here brings together the standards that have been embraced by law enforcement, regulators, NGOs and corporate monitors, as well as global companies that have made significant strides in reducing the risk of recidivism after a corruption scandal. Looking beyond corruption, it is a valuable framework for doing business responsibly in a world that is increasingly focused on ESG concerns. For directors, understanding this framework can help guide them as they work to ensure that management implements a sustainable compliance program that is strategically matched to their organization and its risks.

# Appendix A

## Top Ten FCPA Enforcements as of 2021[9]

This table summarizes the top ten U.S. Foreign Corrupt Practices Act (FCPA) enforcement actions executed by the U.S Department of Justice (DOJ) and/or the U.S. Securities and Exchange Commission (SEC) in response to violations of the FCPA's anti-bribery and accounting provisions.

| Rank | Company | Country | Sector | Amount (US) | Year |
|---|---|---|---|---|---|
| 1 | Goldman Sachs | United States | Financial services | $3.3 billion | 2020 |
| 2 | Airbus | France/ Netherlands | Aerospace | $2.09 billion | 2020 |
| 3 | Petrobras | Brazil | Oil and gas | $1.78 billion | 2018 |
| 4 | Ericsson | Sweden | Telecom | $1.06 billion | 2019 |
| 5 | Telia Company | Sweden | Telecom | $1.01 billion | 2017 |
| 6 | MTS | Russia | Telecom | $850 million | 2019 |
| 7 | Siemens | Germany | Industrial | $800 million | 2008 |
| 8 | VimpelCom | Netherlands | Telecom | $795 million | 2016 |
| 9 | Alstom | France | Industrial | $772 million | 2014 |
| 10 | Société Générale | France | Financial services | $585 million | 2018 |

9 Source: *The FCPA Blog*. Amounts shown include only the direct FCPA portions of fines and penalties levied for violations of the FCPA's anti-bribery and accounting provisions. Total fines and penalties paid to other national authorities, as well as remediation and monitoring costs, may be significantly higher. This table excludes the global settlement at Odebrecht.

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