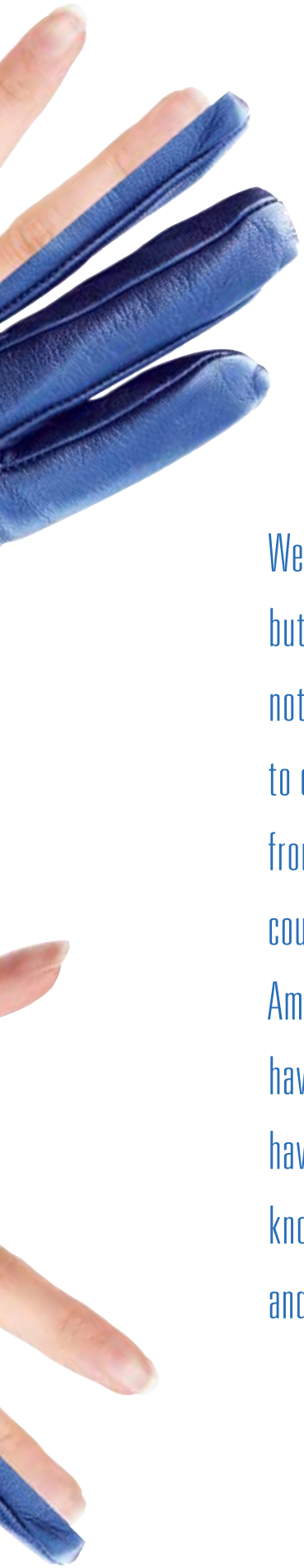
Does the Hand Fit in the Glove?

Assessing Your Company's Anti-corruption Compliance Program



By Jonathan Drimmer, Lauren Camilli, Mauricio Almar and Mara V.J. Senn

We've all heard of the "*Wall Street Journal* test," but here's a news flash: Anti-corruption efforts are not limited to the United States. Are you prepared to ensure that your company does not end up in the front page news in the United States or any other country where you operate? Whether it's Asia, Latin America, Africa or Eastern Europe, many countries have been identified by Transparency International as having a high perception of corruption. Do you really know your company's corruption and bribery risks, and how to guard against them?

30-SECOND SUMMARY

There is no one-size-fits-all risk assessment, but most begin with gathering information and analyzing the results. How you gather information and the questions you ask determine the usefulness of your risk assessment. Include a broad range of employees and conduct in-person interviews of key personnel. Once risks are identified, develop mitigation action plans. Will you prohibit risky activities, or institute strong oversight and control mechanisms? New issues and risks arise frequently; keep your risk assessment updated and adaptable.

Increased international anti-corruption enforcement means increased risks

Across the globe, enforcement of anti-corruption laws continues to rise. While we hear most often about enforcement of the United States Foreign Corrupt Practices Act (FCPA)[1] and questions on whether enforcement under the United Kingdom Bribery Act[2] will pick up, the truth is that governments, with the support and pressure of multiple international organizations, increasingly are paying closer attention to corruption and bribery, and are becoming more skilled, resourceful and aggressive with enforcement of their anti-corruption and anti-bribery laws. Even organizations such as the World Bank and other development institutions have devoted a considerable amount of time and effort to smoking out corrupt behavior from their investment projects and processes. Simply put, a multinational corporation in today's world, no matter how big or small, can no longer ignore its exposure to applicable anti-corruption and anti-bribery laws, but rather must take appropriate steps to monitor its company's activities, and prevent, detect and respond to improper conduct. Failing to do so can prove costly, both financially for the company and personally for its directors and employees.

So what should you do? Now is the time to assess, or perhaps re-assess, your company's risks by conducting a thorough and effective risk assessment. The risk assessment will give you key information about current and potential future exposure to corruption-related risks and will inform the basis for developing or enhancing your anti-corruption compliance program. Below, we discuss why a risk assessment is so important and tips to consider when conducting one.

The importance of risk assessment

Government enforcement authorities expect that multinational corporations will develop or enhance anti-corruption compliance programs on the basis of a risk assessment. In the recently published *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (FCPA Guidance), the US Department of Justice (DOJ) and US Securities and Exchange Commission (SEC) said that "[a]ssessment of risk is fundamental to developing a strong compliance program" and that "[o]ne-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."[3] The expectation that companies assess their risks, and tailor their anti-corruption compliance programs, responses and controls to those risks, is a common and fundamental theme in guidance documents from government authorities and respected international organizations. This has become a global standard and a global expectation.[4]

As for enforcement in the United States, the DOJ and SEC have affirmed that they "take into account whether and to what degree a company analyzes and address the particular risks it faces" and "will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low-risk area because greater attention and resources had been devoted to a higher-risk area."[5] Thus, it is in a company's best interest to ensure that its compliance program is tailored to its specific risks.

Risk assessment steps

There is no mandatory template that must be followed to accomplish a successful risk assessment; it must be appropriately tailored for your organization. Just as there is no one-size-fits-all compliance program, there is no one-size-fits-all risk assessment. Most risk assessments usually follow similar stages: planning, execution, analysis and prioritization, reporting and responding to identified risks. Below, we subdivide and discuss steps you can consider taking within two broad categories: planning and conducting your risk assessment; and analyzing and responding to risks identified.

Planning and conducting your risk assessment

The importance of appropriately planning your risk assessment before getting started cannot be overemphasized. Early in the process, you should lay out the scope of the risk assessment, determine the methodology for collecting information and analyzing it, and ensure you have a coordination and communication strategy.

Scope of the risk assessment

How you design your risk assessment will be guided by its scope and purpose. It could be that this is the first time your organization is conducting a corruption-focused risk assessment. Perhaps you are updating an earlier risk assessment, reviewing your understanding of company risks and evaluating how your existing compliance program is performing. Or your

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company may be considering a major acquisition or entering into a new product line or market, and you want to know the corruption-related risks associated with those plans before moving forward. Knowing why you are conducting the assessment and what your goals are up front will make for a more efficient process and allow you to decide how in-depth your review should be, how many information sources you will plan to speak with and what methods you will choose for the assessment.

Depending on the scope and purpose of the review, you will also want to consider who should perform the risk assessment. Some organizations prefer to handle the process internally, while others choose to hire outside experts — sometimes, a combination of the two works best. Whichever approach you choose, make sure that your risk assessment maintains sufficient independence from internal pressures so as to be a thoughtful and credible analysis of the company's risks.

Gathering information and developing a methodology for analyzing the results

How you choose to gather information and what questions to ask will determine how useful your risk assessment will be for understanding your company's risks and appropriately responding to them. It is important to cover a broad but specific selection of employees who have relevant information, using appropriate communication methods, to ensure that the risks are adequately identified. A risk assessment should include in-person interviews of key personnel and can also involve some form of questionnaire. If it is difficult to identify who the important people are to interview, the questionnaire approach can be useful in gathering preliminary information from a wider audience, and can help you streamline and tailor the in-person interviews.

When choosing whom to interview, it is best to focus on their position and role in the company. Given that the interviewees will form a small portion of the overall employee population, they should be selected because of their ability to touch on and discuss the key areas that are relevant to corruption and bribery risks. The focus should be on people who interact with the government, either as customers or as regulators; those responsible for internal financial controls, such as the accounting and finance functions; and senior management with the authority to make significant and impacting decisions on the company, such as the primary executive in a local market. Interviewees should also include those who oversee the selection and day-to-day activity of intermediaries, such as agents, distributors and consultants. Interviewees should include not just senior management, but also those who are directly responsible for day-to-day activities of the business. In our experience, both groups of individuals have valuable, relevant and not always identical information to share during the course of a risk assessment.

If the assessment is being conducted by external consultants, the interviews should give them a sense of the business's structure and goals. However, even internal interviewers should focus on familiar areas to enable deeper learning. In either case, as the interviews progress, interviewees should be adjusted to cover areas not previously addressed and to speak to people about potential risks identified during the course of the interviews.

In addition to focusing on a person's position and role in your organization, when deciding who should complete a questionnaire and whom you should interview, you will also want to take into consideration the purpose and scope of your risk assessment, as well as particular factors unique to your organization and its business model. According to the FCPA Guidance, some factors that should be considered include risks presented by "the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation, and oversight and exposure to customs and immigration in conducting business affairs."[6]

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In addition to the guidance provided by the DOJ and SEC, we have found that most corruption-focused risk assessments will address all or some of the following factors. In part, what your risk assessment will tackle and with what depth will depend on its scope as well as your resources for the project. For ease of reference, and to assist with prioritizing your risk assessment, we have divided the following factors into three categories: general corruption risks, specific commercial activities and existing anti-corruption controls. While a thorough risk assessment will review each of these factors, your scope may call for a different approach. Please keep in mind that your organization may face particular risks that would make one factor a higher priority than others.

The following should simply serve as a starting point for discussion and tailoring your risk assessment.

General corruption risks

Corruption risk perception in the markets where your company operates, directly or indirectly, through independent affiliates, consultants, distributors, joint ventures or other third parties

One of the key predictors of where your company may have corruption problems is the amount of corruption that is perceived to exist in a given market. Transparency International's *Corruption Perception Index* is an excellent resource for assessing up front which markets may present greater corruption risks.[7] A risk assessment must focus additional resources on identifying risks in these high-risk markets, should determine whether the culture expects gift-giving as a part of normal interactions, and should closely scrutinize other cultural norms that interface with the business and may make corruption more likely.

Typical government interactions or touch points, either as a regulator or customer, and the frequency of the interactions

Probably the most important part of a risk assessment is to determine a business's touch points with government, including commercial businesses that are partially owned or controlled by government. These touch points create the biggest opportunities for corruption. Bribes are usually paid to get things from government officials. When evaluating touch points, keep in mind that the definition of "foreign official" or "government official" is broadly interpreted to include not just elected officials and employees of government bodies or agencies, but also employees of state-owned enterprises.

The kinds of touch points that are important to identify include:

- sales efforts where the customer is a government or state-owned entity;
- bidding or RFP procedures where your company is directly competing with other companies to get business;
- interactions with customs to get product into a given country for sales or contract execution;
- interactions with the judiciary and governmental administrative agencies as part of legal proceedings;
- negotiations with government officials about how to classify products (e.g., whether it is a healthcare product or not; whether it is a vitamin or a dietary supplement, etc.);
- discussions with governments about the amount of taxes owed;
- procurement of work permits and visas for employees;
- procurement of permits to proceed with construction, production or any other business-related permits;
- approvals granted by government agencies;
- inspections conducted by government agencies; and
- receiving any money or approvals from any medical personnel, including doctors, in state-run healthcare systems that would make your product more likely to sell in the medical field.

In each of these situations, it is important to ascertain whether it is an employee of the company or a third party interacting with the government, as well as to evaluate what sorts of safeguards are in place to prevent improper payments.

Corruption and bribery-related concerns of your business personnel

One of the best ways to determine risks of corruption is to identify close calls or actual problems that have occurred in the past. A realized risk is obviously a predictor of potential future problems. Each person interviewed should be directly asked whether they have heard of or experienced any corruption in their work experience. If any incidents are identified, the full details of those incidents should be documented. This will allow an analysis of what caused the breakdown and what can be done to fix it. Previously reported incidents should also be reviewed to ensure that steps have been taken that will prevent a repetition of the problem.[8] A failure to address prior known or suspected issues is a significant factor in determining the adequacy of any compliance program.

Your organization's (or its senior management's) affiliations or connections to government officials

Another aspect of a risk assessment is to determine whether there are any corporate connections to government officials. For example, is the general manager in Indonesia the brother of the governor of the province in which he is working? Or perhaps the wife of the financial chief in China is the sister of the head of the Communist party in the region. Strong personal connections to government officials make it more likely that an employee will be given an opportunity to engage in improper behavior and that those personal ties may outweigh loyalty to the company.

Specific commercial activities

How third parties are vetted, reviewed and monitored, and what they do on behalf of your organization

More than half of all international corruption cases involve bribes passed through third parties. This includes:

- agents who solely act as a conduit to pay bribes;
- agents who perform legitimate sales functions but win business by paying bribes;
- distributors who inflate the price of goods and use the increased price to pay kickbacks to government officials; and
- bribes paid through joint ventures of which your company is a partner.[9]

As discussed below, implementing an effective due-diligence process for third parties is one of the most important ways to prevent bribery. However, many companies use thousands of third parties and do not have the resources to vet all of them thoroughly. An effective risk assessment will help identify which sorts of third parties are high-risk and require a higher level of scrutiny. Tier third-party risks to ensure that compliance resources are being effectively deployed, ensuring the optimal use of compliance dollars.

Hospitality, entertainment and gift practices

Many corruption cases have involved payments to government officials, not in the form of cash, but lavish entertainment. This would include:

- gifts to foreign officials that are more than nominal;
- trips for government officials paid for by the company that are purely or primarily recreational (e.g., trips to Las Vegas, Disneyland or New York); and
- lavish dinners for government officials.

A risk assessment must determine what hospitality, entertainment and gift practices exist, and what mechanisms are in place to track and control those sorts of payments. If the culture of your company is to spend money on potential customers or government regulators in this way, safeguards need to be put in place to make sure that these practices do not run afoul of anti-corruption and anti-bribery laws.

Charitable, community benefit and political contribution practices

Many companies are surprised to learn that charitable and political contributions are potential bribery risks. Because the FCPA considers a bribe to be "anything of value" to a foreign official, and most other anti-corruption and anti-bribery laws have similarly broad definitions, if a government official asks your company to give money to a charity (or you give money to a charity to curry favor with a government official), that would be considered a bribe if it is done to obtain or retain business. Similarly, if a government official tells your company that it is more likely that it will get a contract if you build a school in the local community, that community benefit would be considered a bribe if it is done to obtain or retain business.

As a result, a risk assessment must include questions about how such expenditures are made, what they are made for, and how they are overseen and approved.

Merger and acquisition activities

Risk associated with mergers and acquisitions should not be overlooked. Acquiring companies can be, and have been, held liable for the activities of acquired companies through the theory of successor liability. Even if a company to be acquired has not engaged in past improper conduct, the acquiring entity will take on any risks associated with the new company's business.[10] As a result, the risk assessment should determine what anti-corruption safeguards are in place in the context of acquiring another company, such as pre-acquisition due diligence and post-acquisition incorporation into company anti-corruption controls. On the flip side, if the company is planning to put itself on the market, resolving any anti-corruption issues before such a sale will increase the company's value to a buyer.

Existing anti-corruption policies, procedures or internal controls

In order to determine whether policies, procedures and internal controls need to be revised, it is necessary to determine what is currently in place.

Level of oversight and involvement of senior management in anti-corruption and anti-bribery efforts

One important element of an effective compliance program is to ensure "tone at the top," which means that senior management buys into corruption prevention, and signals to the rest of the company that preventing corruption is a core part of the corporate mission and is valued by the company. A risk assessment should determine to what extent senior management is involved in anti-corruption and can be used as a launch pad to encourage greater involvement, if necessary.

Another, sometimes overlooked, element is the "tone in the middle." Because middle managers often come into contact with a broader range and number of employees, ensuring that managers are adequately embedded in the anti-corruption efforts is also crucial.

Training

A risk assessment should determine what sort of infrastructure is in place to push out training to the employees and what training the company offers on a regular basis. Tailored and frequent training are considered key to an effective anti-corruption compliance program.

Confidential reporting, anti-retaliation and investigations apparatus

Encouraging employees to speak up is another key element of a compliance program. This can be done in a number of ways, including:

- ensuring anonymity through an online or telephone hotline;
- reassuring employees that they will not be retaliated against if they do speak up; and
- an effective investigations function that signals to employees that their complaints will be taken seriously and will be dealt with fairly.

Ensuring that safeguards are in place in the accounting system will make tracking payments easier and should help to prevent rogue finance personnel from cooking the books.

A risk assessment should determine how willing employees have been to come forward with problems, and how reporting and follow-up is handled.

Incentives and disciplinary measures in place at your organization

A risk assessment should also determine how employees are rewarded for coming forward and for complying with company policies, as well as how they are disciplined if they run afoul of company and legal norms. The FCPA Guidance, for example, recommends incorporating adherence to compliance as "a significant metric for management's bonuses," "recognizing compliance professionals and internal audit staff," and making "working in the company's compliance organization a way to advance an employee's career."[11] Further, a company's compliance program cannot be taken seriously if it does not have "appropriate and clear disciplinary procedures" or "procedures [that] are applied reliably and promptly" and that "are commensurate with the violation."[12]

Monitoring, auditing and other financial internal controls related to the prevention or detection of corruption or bribery

Accounting procedures is another area that some may not realize is important from the perspective of risk. Ensuring that safeguards are in place in the accounting system will make tracking payments easier and should help to prevent rogue finance personnel from cooking the books. This includes ensuring that accounting personnel are sensitized to red flags, such as making commission payments to Swiss bank accounts; making sure strong policies are in place for petty cash and employee expense accounts so improper payments cannot be hidden in those accounts; and ensuring that expenses are properly recorded in the proper accounts and supported with sufficient documentation.

Because compliance is a living and breathing part of any multinational corporation, monitoring and auditing must be integral parts of compliance programs and used as a look-back or evaluation of how compliance systems are working within the company.

Reporting obligations throughout the organization, with a focus towards understanding the centralized or decentralized nature of decision-making authority and oversight controls

Each company has different reporting structures for different areas. During the course of the risk assessment, it is important to evaluate what structures exist in the company and be sure to take those into account when structuring any revisions to ensure that any changes to the system are more likely to be easily accepted.

Coordination and communication.

A department in your organization — perhaps legal, compliance or internal audit — will likely handle the risk assessment. Nonetheless, you should plan to coordinate your efforts with other departments or stakeholders in the process. For one, they will have key insights into business operations or issues you may want to explore. However, you will need "buy-in" from them when it comes time to make recommendations on controls, procedures and perhaps even changes in business practices.

When determining how to actually implement the responses to the risk assessment, it is important to take into consideration the way the company is structured, as well as the resources in the compliance department. The compliance function is perennially underfunded in many companies. In order to maximize effectiveness, it is often necessary to use existing resources. One thing to look at is where to embed some of the new efforts — it may make sense for your company to do so along functional lines; in other companies, it may make sense to organize it along regional lines. It is also important to look at the function of

ACC EXTRAS ON... Anti-bribery and anti-corruption compliance

ACC Docket

Business Ethics—What Hope Is There for Business Ethics in a World Full of Scoundrels? (Jan. 2013). *www.acc.com/docket/bus-ethics_jan13*

Tips & Insights — Building a Bridge to Global Anti-bribery Compliance (Jan. 2013). *www.acc.com/docket/global-compl_jan13*

InfoPAK℠

The Foreign Corrupt Practices Act and Global Anti-Corruption Law (Dec. 2010). *www.acc.com/infopak/fcpa_dec10*

Forms & Policies

Sample Anti-Corruption Incident Response Preparation Steps (Feb. 2013). *www.acc.com/form/anti-corrup_feb13*

Anti-Corruption Program Rolling Action Item List (Feb. 2013). *www.acc.com/form/anti-corrup-list_feb13*

Article

Gatekeeper Liability Global Practice Guide (Dec. 2012). *www.acc.com/liability-global_dec12*

Quick Reference

Successfully Managing Legal Risk Multi-Nationally (May 2012). *www.acc.com/quickref/manage-risk_may12*

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the person implementing them. Local regional counsel, for example, may be a good choice for implementation. But if there is a weak counsel in place, or no counsel at all, it may be better to look elsewhere.

You should also develop an effective communication strategy that communicates to the organization the purpose for the risk assessment, its importance and senior management's expectations. Direct messaging from senior management sets a good tone at the top, lends legitimacy to the process, and puts business units and middle managers on notice that the company is taking the process seriously, as should they.

Analyzing and responding to risks identified

Your risk assessment is only as good as what you do with it. Once you have conducted your interviews and received responses to your questionnaires, you will have the information needed to identify your organization's greatest risks and to prioritize trouble areas. One way to organize data that has been collected is to develop an assessment tool or scoring matrix. While assigning numbers to particular risk categories (e.g., frequency of interactions with government officials, departments of the organization most involved with such interactions, high-risk markets, etc.) may be somewhat subjective, a sophisticated and well-designed scoring matrix will provide objectivity to the review and analysis process. It will also provide you with helpful metrics for ranking risk and thus responding in a risk-based and effective manner. Keep in mind that even the most complex scoring matrix may, at times, produce results that seem incorrect to the person reviewing them. In those instances, you should not be afraid to use your subjective judgment when appropriate.

Once risks are identified, you should develop control mechanisms and mitigation action plans to address them. For example:

- If you discover a process or system that is in place but not working, responding to the risk assessment is the appropriate time to redesign it to make it more effective.
- You may want to make organizational changes if a gap is identified in certain business units or functional areas.
- You may want to prohibit certain risky activities or institute strong pre-approval, oversight and control mechanisms.

Always keep in mind that while you cannot do everything at once, government enforcement authorities will expect to see legitimate attempts to

develop and execute remediation plans to address the issues and concerns you have identified in your risk assessment. Creating a plan of action that focuses on urgent issues first, while creating clear timelines for deliverables, will help to track progress on a quarterly or monthly basis. Clear buy-in from senior management will guarantee that you have the appropriate budget and resources to ensure your efforts are successful, and that they don't stall for lack of interest or support later in the process. Depending on your starting point and results, responding to every risk identified can take years, so having appropriate resources and taking care of the most urgent issues first will help to document that you have taken this seriously and responded appropriately. Just recently, DOJ and SEC declined to prosecute Morgan Stanley for FCPA violations committed by one of its executives in China. In that instance, DOJ and SEC determined that Morgan Stanley had a "robust compliance program and good faith enforcement of it," including extensive training for the company employees involved in the improper conduct and extensive due diligence of the third-party entities involved in the transaction. Given this, Morgan Stanley would not be held responsible for missing certain information related to the transaction because it had been lied to by all parties involved, including Chinese government officials, the lawyer of the third party involved and its own executive. The executive was charged and pled guilty to conspiracy to violate the FCPA's internal controls provisions. Companies that have not taken compliance as seriously, or responded appropriately to risks identified in their operations, have not been as lucky.

Finally, remember that a risk assessment is not a one-and-done kind of exercise. Rather, multinational companies are expected to regularly review their operations, to assess their risk, to test the effectiveness of their compliance program, and to adjust and enhance their controls as necessary. As stated in the FCPA Guidance, "As a company's risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits."[13] The ability for a compliance program to work closely with the business, identify changing risks quickly and adapt to the new information is key to a successful risk assessment. New issues and risks may arise frequently; your risk assessment must have be updated, adapted to new circumstances and communicated to senior management.

One size does not fit all

Multinational companies are increasingly cognizant of the risks associated with corruption, bribery and the aggressive enforcement environment in which they operate. The most effective tool for combating the risk is an effective, risk-based anti-corruption compliance program that is equipped to prevent, detect and respond to your organization's particular risks. As the DOJ and SEC recently stated, there is no one-size-fits-all compliance program. For that reason, multinational companies are well advised to conduct a thorough and comprehensive risk assessment that identifies its particularized risks such that it can then respond accordingly. **ACC**

NOTES

1 US Foreign Corrupt Practices Act, 15 USC. §§ 78dd-1, et seq. (1977), available at *www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html*.

2 2010 UK Bribery Act, Chapter 23, available at *www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf*.

3 *A Resource Guide to the US Foreign Corrupt Practices Act*, Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission (FCPA Guidance), available at *www.justice.gov/criminal/fraud/fcpa/guidance*. For more information about the FCPA Guidance, see *The FCPA Guidance Road Map*, Mara V.J. Senn, Drew A. Harker, Arthur Luk, and Philippe A. Oudinot, Financial Fraud Law Report (February 2013), available at *www.arnoldporter.com/resources/documents/Senn.pdf*.

4 For further information and an in-depth review of the emerging global standard for anti-corruption compliance programs, see *Emerging Global Standard for Effective Anti-Corruption Compliance: Meeting the Expectations of Governments Worldwide*, Keith M. Korenchuk, Samuel M. Witten, and Mauricio J. Almar, Bloomberg BNA's Corporate Accountability Report (23 Jan. 2013), available at *www.arnoldporter.com/resources/documents/Arnold&PorterLLP.BloombergBNA'sCorporateAccountabilityReport_011813.pdf*.

5 FCPA Guidance at 59.

6 FCPA Guidance at 59.

7 Transparency International Corruption Perceptions Index 2012, available at *www.transparency.org/cpi2012/results*.

8 Keep in mind that parent corporations can be held liable under the FCPA for the actions of their subsidiaries where it was aware of the conduct and failed to stop it from continuing to occur. See *United States. v. Biomet, Inc.*, 12-cr-00080-RBW (D.D.C. Mar. 26, 2012), *available at www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet- information.pdf* (parent violated FCPA where it was aware of bribes being paid by subsidiary and failed to stop the unlawful conduct).

9 See FCPA Guidance at 21–22 for a discussion of how payments made through third parties are viewed by enforcement authorities, as well as examples of enforcement actions involving the use of third parties to make improper payments.

10 See FCPA Guidance at 62–63 for a discussion regarding the risk associated with mergers and acquisitions, as well as the importance of pre-acquisition due diligence and post-acquisition integration.

11 FCPA Guidance at 59–60.

12 FCPA Guidance at 59.

13 FCPA Guidance at 59.