THE ALL-IMPORTANT "G" IN ESG AND ITS RELATIONSHIP TO GOOD GOVERNANCE AND CORPORATE COMPLIANCE IN ANTI-CORRUPTION: TOWARDS A MORE HOLISTIC APPROACH

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INTRODUCTION

In recent years, ESG (Environmental, Social, and Governance) has become a regulatory and business focus, in response to increased societal pressures for businesses to become more accountable for their impact on the environment and take a more socially responsible stance vis-à-vis not only their workers but more broadly in relation to their supply chains, surrounding communities, and even more broadly in relation to human rights, data security, privacy, and public welfare.

On the regulatory side, with respect to environmental issues, Europe has led the way with the Green Deal, supply chain due diligence measures, and other initiatives.[1] The United Kingdom has played a leadership role on a number of social and human rights issues, as exemplified by its adoption of the Modern Slavery Act.[2] The United States has been slower to develop regulatory initiatives in this area, but the Securities and Exchange Commission (SEC) has proposed regulations and has recently questioned the adequacy of disclosures made by SEC-reporting companies ("greenwashing").[3] On June 21, 2022, the Uyghur Forced Labor

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1. E.g., *A European Green Deal*, EUR. COMM'N., https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en (last visited Aug. 24, 2022); *see EU taxonomy for sustainable activities*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en (last visited Aug. 24, 2022). On February 23, 2022, the EU Commission issued a proposal for a Supply Chain Directive on corporate sustainability due diligence, *see Corporate sustainability due diligence*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en (last visited Aug. 24, 2022). Several European countries have already enacted legislation in this area; this directive, once effective, would "level the playing field" for companies in (and doing business in) the European Union.

2. Modern Slavery Act 2015, c. 30 (Eng.), https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

3. On March 21, the Securities and Exchange Commission (SEC) released its long-awaited proposed rule requiring public companies to disclose certain climate-related information in their registration statements and annual reports. For a discussion of the proposed rule, *see* Elizabeth A. Cassady et al., *SEC Releases Proposed Rule on Climate Disclosure Requirements for Public Companies*, STEPTOE (Mar. 23, 2022), https://www.steptoe.com/en/news-publications/sec-releases-proposed-rule-on-climate-disclosure-requirements-for-public-companies.html. On May 25, the Securities and Exchange Commission (SEC) released a proposed rule requiring specific disclosures from certain investment funds and advisors on their environmental, social, and governance (ESG) strategies. *See* Elizabeth A. Cassady & Ashelen Vicuña, *SEC Releases Proposed ESG Disclosure Rule for Investment Advisors and Funds*, STEPTOE (June 2, 2022), https://www.steptoe.com/en/news-publications/sec-releases-proposed-esg-disclosure-rule-for-investment-advisors-and-funds.html. On June 10, 2022, the press reported that the SEC was investigating Goldman Sachs over its ESG funds. *See* Praveen Paramasivam, *U.S. SEC*

Prevention Act came into effect in the United States.[4] The U.S. Department of Homeland Security has emphasized the importance of effective supply chain tracing by companies.[5]

While the "E" and "S" elements of ESG tend to dominate attention, this article focuses on the "G" as the key element not only of successful ESG efforts but for good corporate practices more generally. In particular, it will examine how the "G" in the context of "ESG" may intersect with good governance and compliance standards in other regulatory compliance contexts, and particularly in the anti-corruption/transparency context.

This article will argue that for multinational businesses, the "G"—i.e., good governance, including strong internal controls and corporate compliance measures—is the key to effective ESG, just as it is the key to effective anti-corruption compliance. It will also argue that the "G" in "ESG" should not be defined or implemented in such a way that it undercuts or conflicts with the "G" in anti-corruption efforts. Indeed, the two overlap in multiple respects, and can be mutually complementary and reinforcing. As this article will show, many leading standards dealing with corporate social responsibility include bribery and corruption on the same footing as human rights, labor, and the environment. Both companies and regulators should recognize these qualities of complementarity and approach the two areas in a way that is mutually beneficial, rather than treating them as separate and distinct silos. This is especially true when supply chains and, more generally, third-party relationships, are considered.

Some may even argue that anti-corruption is part of ESG. This position may stem from the assumption that ESG is just a new name for corporate social responsibility. And there is no question that corruption has not just legal but social implications. For example, the so-called "social license" of a foreign investor to operate in another country—a particularly important issue for long-term investors in industries such as the extractives sector—can be threatened by corrupt practices.[6] Corruption also has reputational consequences for any firm that has been found to have engaged in it,

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investigating Goldman Sachs over ESG funds—WSJ, REUTERS (June 10, 2022, 3:16 PM), https://www.reuters.com/business/us-sec-investigating-goldman-sachs-over-esg-funds-wsj-2022-06-10/.

4. *See* Stephanie Sheridan et al., *Understanding the Uyghur Forced Labor Prevention Act and What Comes Next*, STEPTOE: GLOB. TRADE POL'Y BLOG (Feb.14, 2022), https://www.steptoeglobaltradeblog.com/2022/02/understanding-the-uyghur-forced-labor-prevention-act-and-what-comes-next/.

5. U.S. Dep't of Homeland Sec., Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China (June 17, 2022).

6. Gabriel Res. Ltd. v. Romania, ICSID Case No. ARB/15/31, Notice of Arbitration (July 21, 2015).

particularly in consumer-focused businesses, public procurement, and certain other sectors. It is therefore concerned with more than simple legal compliance. With ESG's leading focus on the "E" and "S" rather than the "G" (which some even assume only operates in relation to those two areas, rather than a broader "G"), and the lack of any mention of "C," this approach seems to give short shrift to the issue of corruption, despite the fact that it, like ESG, is a values-driven arena. Thus, this article will take the approach outlined earlier, of its status as a separate but complementary area.

This article will begin with the topic of good corporate governance both generally and more specifically as it has evolved in international standards for corporate responsibility and anti-corruption compliance. It will then discuss how governance in this area relates to governance in the ESG arena, with a particular focus on businesses that are engaged in cross-border trade, investment, financing, or other forms of transnational business activity.

I. GOOD CORPORATE GOVERNANCE—GENERAL NORMS

Standards of corporate governance have been articulated at both the international and national levels.

A. International Guidance—the OECD Corporate Governance Principles

At the international level, one leading instrument is the Recommendation on Principles of Corporate Governance ("Principles") of the Organization for Economic Cooperation and Development (OECD).[7] First adopted in 2015 and elaborated in a Recommendation of the Council in 2022 (the "2022 Recommendation"),[8] the Principles are designed for use in multiple jurisdictions with different corporate structures. They have been endorsed by the Financial Stability Board as a key standard for sound financial systems, and used by other bodies as well, including the G20 group of countries, international organizations such as the World Bank, and others. They are particularly applicable to publicly traded companies,[9] but

7. *See* Org. for Econ. Coop. and Dev. [OECD], *G20/OECD Principles of Corporate Governance* (2015), http://www.oecd.org/corporate/principles-corporate-governance/. The OECD has also articulated complementary principles for state-owned enterprises, *see* OECD, *Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises* (June 2015), https://one.oecd.org/document/C(2015)85/en/pdf.

8. OECD, *Recommendation of the Council on Principles of Corporate Governance* (2022), https://legalinstruments.oecd.org/public/doc/322/322.en.pdf.

9. *Id.* at 6.

many parts of the Principles also have relevance to privately held enterprises as well.

The 2022 Recommendation succinctly frames the topic as follows:

> "Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined."[10]

In terms of the Principles' relationship to other areas, the 2022 Recommendation states that:

> "The Principles recognise the interests of employees and other stakeholders and their important role in contributing to the long-term success and performance of the company. Other factors relevant to a company's decision-making processes, such as environmental, anti-corruption or ethical concerns, are considered in the Principles but are treated more explicitly in a number of other instruments including the OECD Guidelines for Multinational Enterprises, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Guiding Principles on Business and Human Rights, and the ILO Declaration on Fundamental Principles and Rights at Work, which are referenced in the Principles."[11]

The Principles consist of six major principles, each elaborated with a series of sub-principles and commentary. The six major principles are as follows:

1. Ensuring the Basis for an Effective Corporate Governance Framework: The corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources. It should be consistent with the rule of law and support effective supervision and enforcement.

2. The Rights and Equitable Treatment of Shareholders and Key Ownership Functions: The corporate governance framework should protect and facilitate the exercise of shareholders' rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

3. Institutional Investors, Stock Markets, and Other Intermediaries: The corporate governance framework should provide sound incentives

10. *Id.*
11. *Id.*

> throughout the investment chain and provide for stock markets to function in a way that contributes to good corporate governance.
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> 4. The Role of Stakeholders in Corporate Governance: The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.
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> 5. Disclosure and Transparency: The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.
>
> 6. The Responsibilities of the Board: The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.[12]

These OECD Principles are content-neutral, in the sense that they do not focus on any particular types of corporate activities that may give risk to specific risks or obligations, beyond the area of the core functioning of the company.

B. Domestic U.S. Guidance and Norms

Within the U.S., there are binding governance norms for certain enterprises, as well as non-binding guidance.

1. Guidance

At the domestic level, multiple groups, including the Business Roundtable, have been active in articulating principles of corporate governance. In 2016, the Roundtable identified eight guiding principles of corporate governance, as follows:

> 1. The board approves corporate strategies that are intended to build sustainable long-term value; selects a chief executive officer (CEO); oversees the CEO and senior management in operating the company's

12. *See* OECD, *supra* note 7.

business, including allocating capital for long-term growth and assessing and managing risks; and sets the "tone at the top" for ethical conduct.

2. Management develops and implements corporate strategy and operates the company's business under the board's oversight, with the goal of producing sustainable long-term value creation.

3. Management, under the oversight of the board and its audit committee, produces financial statements that fairly present the company's financial condition and results of operations and makes the timely disclosures investors need to assess the financial and business soundness and risks of the company.

4. The audit committee of the board retains and manages the relationship with the outside auditor, oversees the company's annual financial statement audit and internal controls over financial reporting, and oversees the company's risk management and compliance programs.

5. The nominating/corporate governance committee of the board plays a leadership role in shaping the corporate governance of the company, strives to build an engaged and diverse board whose composition is appropriate in light of the company's needs and strategy, and actively conducts succession planning for the board.

6. The compensation committee of the board develops an executive compensation philosophy, adopts and oversees the implementation of compensation policies that fit within its philosophy, designs compensation packages for the CEO and senior management to incentivize the creation of long-term value, and develops meaningful goals for performance-based compensation that support the company's long-term value creation strategy.

7. The board and management should engage with long-term shareholders on issues and concerns that are of widespread interest to them and that affect the company's long-term value creation. Shareholders that engage with the board and management in a manner that may affect corporate decision-making or strategies are encouraged to disclose appropriate identifying information and to assume some accountability for the long-term interests of the company and its shareholders as a whole. As part of this responsibility, shareholders should recognize that the board must continually weigh both short-term and long-term uses of capital when determining how to allocate it in a way that is most beneficial to

> shareholders and to building long-term value.
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> 8. In making decisions, the board may consider the interests of all of the company's constituencies, including stakeholders such as employees, customers, suppliers and the community in which the company does business, when doing so contributes in a direct and meaningful way to building long-term value creation.[13]

As can be seen, these guiding principles focus on the allocation of responsibilities between the Board of Directors and company management, the relationship with shareholders, and on the elaboration of Board responsibilities across key committees. Like the OECD Principles, they are aimed at publicly traded companies. They have less to say about transparency or other stakeholders than the OECD Principles, but like the OECD Principles, they do mention sustainability as a long-term goal.

2. Binding Decisions and Norms

Apart from guidance and principles, which are "soft" law, there are legally binding norms and decisions that have driven corporate governance standards in recent years. One of the leading court decisions regarding the responsibilities of corporate boards of directors is the *Caremark* case decided by the Delaware Chancery Court in 1996.[14] *Caremark* held, in the context of the settlement of a stockholder derivative action, that the defendants, directors of the corporation, had failed to oversee, supervise, and monitor management, leading to significant losses to the company as a result of its criminal prosecution for violation of certain health care statutes.

The Chancellor determined that the obligation of corporate directors included:

> "A duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may… render a director liable for losses caused by non-compliance with applicable legal standards."[15]

The test that the Chancellor ultimately identified in *Caremark* was a "lack of good faith as evidenced by a sustained or systematic failure of a director to exercise reasonable oversight."[16]

13. *See* Bus. Roundtable, *Principles of Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 8, 2016), https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/.

14. *In re* Caremark Int'l, Inc. Derivative Litig., 698 A. 2d 959 (Del. Ch. 1996).

15. *Id.* at 970.

16. *Id.* at 971.

Although considered to be a high standard for liability to be established, in the years that followed, *Caremark* had a profound effect on boards of directors in the United States in terms of their focus on compliance programs in a variety of areas.[17] Although not all companies are organized in Delaware, many are, and Delaware is considered a leading jurisdiction for corporate law decisions. The impact of such a decision is therefore not limited to Delaware companies.

Moreover, for public companies, the incentives created by the *Caremark* decision were expanded and reinforced first, by the Sarbanes-Oxley legislation, passed in the wake of the Enron scandal, in 2002, and later, in 2010, the Dodd-Frank legislation. These statutes established, among other things, a periodic disclosure regime within public companies to ensure that material information is reported up to management and ultimately, the Board, and to encourage and protect whistleblowing activity.[18]

In the enforcement context, the United States Sentencing Guidelines for Business Organizations[19] have also operated as an incentive for companies to adopt and maintain compliance programs designed to prevent, detect, and remediate conduct that would implicate criminal laws. The United States, unlike many countries, has corporate criminal liability. However, prosecutors have discretion as to whether to prosecute individuals or companies for misconduct, and even if a company is prosecuted, penalties may be mitigated by such programs. The U.S. Attorney's Manual, now called the Justice Manual, also instructs prosecutors to take such programs into account.[20]

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17. For a good discussion of the *Caremark* decision and subsequent cases, *see* E. Norman Veasey & Randy J. Holland, *Caremark at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors' Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen's 1996 Caremark Landmark*, 76 BUS. L. 1, 2 (2020).

18. Sarbanes-Oxley, § 302, 15 U.S.C § 7241 (2002) (responsibility of corporate officers for the accuracy and validity of corporate financial reports); Sarbanes-Oxley, § 404(a), 15 U.S.C. § 7262(a) (2002) (reporting on the state of a company's internal controls over financial reporting); Sarbanes-Oxley, § 806, 18 U.S.C. § 1514A(c) (2002); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (codified at 15 U.S.C. § 78u-6).

19. *See* U.S. SENT'G GUIDELINES MANUAL §8B2.1 cmt. background (U.S. SENT'G COMM'N 2021) (requiring that "The organization's governing authority [generally the Board of Directors] shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.")

20. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S § 9-28.800 (2018) ("In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate

II. STANDARDS FOR SOCIALLY RESPONSIBLE BUSINESS CONDUCT

A. *International Norms and Guidance*

While the international governance standards reviewed in Section I.A. are generic in nature and do not focus on particular types of corporate activities, other international standards or guidance documents do have such a focus. Two leading examples are the UN Global Compact, and the OECD Guidelines for Multinational Enterprises. There are also many standards that are sector- or activity-specific. The more general of these instruments place bribery and corruption on the same plane as environmental, human rights, and labor issues.

1. UN Global Compact

The UN Global Compact[21] contains ten principles related to corporate sustainability to which companies are encouraged to adhere. They fall into four categories: human rights (Principles 1 and 2);[22] labor (Principles 3-6);[23] environment (Principles 7-9);[24] and corruption (Principle 10).[25] They are derived from various international, and particularly UN, instruments, that have achieved wide acceptance.[26] Currently 9,500 companies have declared their adherence to the Compact. The UN has elaborated tools to help companies implement the compact. [27] The Compact has no associated enforcement mechanism.

2. OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises, first developed in 1976 and updated in 2010, are "non-binding principles and standards for

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actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.") *See*, *Caremark*, 698 A. 2d at 968-70.

21. Global Compact, *The Ten Principles*, available at https://www.unglobalcompact.org/.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Deloitte, *UN Global Compact Management Model: Framework for Implementation*, U.N. GLOBAL COMPACT (2010).

responsible business conduct in a global context consistent with applicable laws and internationally recognised standards."[28]

The Guidelines' Recommendations for responsible business conduct, set forth in part I of the Guidelines, are divided into eleven parts: Part I, Concepts and Principles; Part II, General Policies; Part III, Disclosure; Part IV, Human Rights; Part V, Industrial Relations; Part VI, Environment; Part VII, Combating Bribery, Bribe Solicitation and Extortion; Part VIII, Consumer Interests; Part IX, Science and Technology; Part X, Competition; and Part XI, Taxation. As such, they cover the same areas of subject matter as the UN Global Compact and also several additional areas not covered by the Compact.[29] The OECD Council established National Contact Points (NCPs) to which complaints about business non-compliance with the Guidelines can be made by affected persons.[30]

The OECD developed guidance to assist companies in the implementation of the Guidelines: OECD Due Diligence Guidance for Responsible Business Conduct.[31]

3. Sector, Issue, or Activity-Specific Standards

Beyond the ten general principles of the UN Global Compact and the OECD Guidelines, these organizations and others have elaborated multiple guidance documents for either sector-, issue- or activity-specific conduct. Virtually all of these, like the Compact and Guidelines, are "soft" laws, but in some cases are reflected in binding national legislation.

From the OECD, they include: institutional investors; the extractive industries; the garment and footwear sector; agriculture; mineral supply chains, including conflict-affected and high-risk areas and child labor.[32]

In January 2012, the United Nations published the Guiding Principles on Business and Human Rights,[33] a set of thirty-one principles directed at both business and governments elaborating the core concepts of "protect, respect and remedy" in relation to human rights.

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28. OECD, *OECD Guidelines on Multinational Enterprises 2011 Edition* (2011).
29. *Id.*
30. *Id.* at 72.
31. OECD, *OECD Guidance Due Diligence Guidance for Responsible Business Conduct* (2018).
32. OECD, *supra* note 31.
33. Guiding Principles on Business and Human Rights: *Implementing the United Nations "Protect, Respect and Remedy "Framework*, U.N. Doc. A/HRC/17/31, 3 (Mar. 21, 2011)
[hereinafter U.N. Guiding Principles].

From this brief cataloging of international norms dealing with corporate social responsibility, it can be seen that they deal with all of the same areas that are covered by the concepts of ESG, plus others. All include corruption as part of the key areas to be addressed, but none of them really deal with governance as such, or fully explore the link between good governance and compliance. However, good governance standards have been amply developed in the anti-corruption area. This article will therefore now turn to an examination of these standards.

III. Good Corporate Governance in the Anti-Corruption Arena

A. The Conduct at Issue and the Advent of Risk Prevention Practices

Corruption, especially of public sector officials, is a criminal offense in virtually all countries. It is also prohibited by a host of international treaties, both regional and global.[34] In addition to prohibitions on domestic bribery, many countries today have laws prohibiting the bribery of foreign public officials in the course of international business (transnational bribery, also referred to as TNB).[35] An international treaty, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention" or "OECD Convention") has been instrumental in the adoption of such laws.[36]

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34. The first international treaty to focus on the issue of corruption was the Inter-American Convention Against Corruption, adopted in 1996. *See* Organization of American States, *Inter-American Convention Against Corruption*, OAS (Mar. 29, 1996), http://www.oas.org/juridico/english/sigs/Convenco.html (text of Convention and signatories and ratifications). Other regional treaties include: (1) the Council of Europe Criminal and Criminal Law Conventions on Corruption, ETS Nos. 173 and 174, both adopted in 1999. *See* Criminal Law Convention on Corruption, Jan. 7, 2022, 173 ETS, https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=173 and Criminal Law Convention on Corruption, Jan. 11, 2003, 174 ETS https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=174; (2) the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, adopted in 1997, OJ C 195, *available at* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41997A0625%2801%29; and (3) the African Union Convention on Preventing and Combating Corruption, adopted in 2003, *available at* https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption. Also in 2003, a global instrument, the United Nations Convention Against Corruption, was adopted. It entered into force in December 2005 and currently has 189 States Parties. *See* U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 9, 2003).

35. Examples include the United Kingdom's Bribery Act 2010, Brazil's Clean Company Act, and France's Sapin II legislation. *See also infra* note 37.

36. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 4 (1998), *available at* https://www.oecd.org/corruption/oecdantibriberyconvention.htm. Currently forty-four countries

TNB laws began with the enactment in 1977 of the U.S. Foreign Corrupt Practices Act (FCPA),[37] which stood alone for about twenty-five years. From the outset, as a statute with both civil and criminal dimensions, the FCPA gave rise to the risk of corporate liability. Such liability could arise through various routes: through vicarious liability for the acts of officers, directors, shareholders, employees, or agents (referred to in this article as "direct payments liability"), or through payments made to "any person" while "knowing" that a pass-through to a foreign official or other covered recipient would occur (referred to in this article as "third-party, or indirect payments liability").[38]

Under the FCPA's "any person" third party liability standard, knowledge is not limited to actual knowledge, but also includes the awareness of facts that indicate a high probability that an improper payment will occur.[39] This standard has brought in the concept of "red flags"—basically risk indicators specific to the corruption area—that companies ignore at their peril.[40] This third-party liability risk has spawned extensive compliance efforts. Even before *Caremark* and the developments above incentivizing corporate compliance programs, companies were advised by enforcement authorities that to of misconduct, they were putting their head in the sand regarding the conduct of intermediaries, they should take certain precautions when engaging and working with third parties. These precautions included performing anti-corruption-focused due diligence on potential third parties and the adoption other safeguards to prevent and detect potential improper practices. Accordingly, companies began anti-corruption corporate compliance programs.

Since then, the scope of such programs has grown enormously, as have the expectations for what companies need to do to make such programs effective. While such programs are not a defense to liability under the FCPA, they do mitigate penalties and can even—given the extent of

(thirty-eight OECD Member States and six non-Member States) are party to the Convention. *See* OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Ratification Status as of May 2018*, (May 2018), https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf. All forty-four States Parties have adopted legislation prohibiting TNB, as required by the Convention.

37. 15 U.S.C. §§ 78dd-1 to -3.

38. *See id.* §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

39. *Id.* §§ 78dd-1(f)(2), dd-2(h)(3), dd-3(f)(3).

40. *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 23, THE DEP'T OF JUST. & THE SEC. AND EXCH. COMM'N (2d ed. 2020).

prosecutorial discretion—result in a decision not to prosecute entirely or prosecute for a more limited set of conduct.[41]

In addition, the FCPA's accounting provisions, designed to complement the anti-bribery provisions—although applicable only to SEC reporting companies—the "issuers" subject to the 15 U.S.C. §78dd-1 anti-bribery prohibition provide an important complement to those programs through those accounting standards, in particular the internal controls requirement. Under this provision,[42] issuers are required to devise and maintain systems of internal accounting controls that will provide reasonable assurances that expenditures of corporate funds are being made consistent with management authorization, that transactions are being recorded sufficiently for the purposes of auditability and the preparation of financial statements, as well as for management oversight. As the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have acknowledged, although the statute speaks in terms of internal *accounting* controls, the control requirements these provisions establish for issuers overlap significantly with the control expectations for anti-corruption compliance programs.[43]

Other national TNB statutes and enforcement regimes fall into roughly three categories: (1) countries that take an approach similar to the U.S. approach and treat compliance efforts as mitigating—e.g., Brazil, under the Clean Company Act[44]; (2) countries that mandate a compliance program (e.g., Spain and Chile); and (3) countries that have a compliance defense. In this last category is the United Kingdom, whose 2010 Bribery Act contains a defense to its Section 7 strict liability offense for so-called "adequate procedures."[45]

B. Anti-Corruption Compliance Programs

Anti-corruption compliance programs are expected to establish systems of control around those activities that give rise to anti-corruption compliance risks. Although each company's risk profile is different,

41. FCPA Corporate Enforcement Policy, Justice Manual, U.S. Department of Justice, §9-47.120 (2020), *available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977, subsection 3.c, Timely and Appropriate Remediation in FCPA Matters.

42. 15 U.S.C. § 78m(b)(2)(B).

43. THE DEP'T OF JUST. & THE SEC. AND EXCH. COMM'N, *supra* note 40.

44. Adria Perez, *Parallel Lives: How Brazil and the United States Consider Leniency Agreements and Compliance Programs*, NYSBA (New York Bar Association, New York, N.Y.), Fall 2015, at 20.

45. Bribery Act 2010, c. 23, § 7 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

depending on where it does business and how it does business, there are widely recognized risk areas in the anti-corruption space.

Very specific compliance expectations have been articulated at both the national and international levels for companies to effectively prevent, detect, and remediate corrupt practices in the course of their business activities. As will be discussed below, the foundation of these expectations is good corporate governance. There is significant convergence between the compliance standards that have been developed at the international level with those that have been put forward at the domestic (national) level, particularly in countries that adhere to the OECD Anti-Bribery Convention.

For instance, the OECD Good Practice Guidance, updated in 2021 as part of a Recommendation of the Council on Further Combating Bribery of Foreign Public Officials in International Business Transactions,[46] sets forth the following sixteen elements as comprising good practices for ensuring effective internal controls, ethics and compliance programs or measures for the purpose of preventing and detecting foreign bribery:

> 1. Strong, explicit, and visible support and commitment from the board of directors or equivalent governing body and senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery with a view to implementing a culture of ethics and compliance;
>
> 2. A clearly articulated and visible corporate policy prohibiting foreign bribery, easily accessible to all employees and relevant third parties, including foreign subsidiaries, where applicable and translated as necessary;
>
> 3. Compliance with this prohibition and the related internal controls, ethics, and compliance
>
> programmes or measures is the duty of individuals at all levels of the company;
>
> 4. Oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies, senior management, the board of directors or equivalent governing body, the supervisory board or their relevant committees, are the duty of one or more senior corporate officers, such as a senior compliance officer, with an adequate level of autonomy from

46. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009).

management and other operational functions, resources, access to relevant sources of data, experience, qualification, and authority;

5. Ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas:

i. gifts;

ii. hospitality, entertainment and expenses;

iii. travel, including customer travel;

iv. political contributions;

v. charitable donations and sponsorships;

vi. facilitation payments;

vii. solicitation and extortion;

viii. conflicts of interest;

ix. hiring processes;

x. risks associated with the use of intermediaries, especially those interacting with foreign public officials; and

xi. processes to respond to public calls for tender, where relevant.

6. Ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter “business partners”), including, inter alia, the following essential elements:

i. properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular continued oversight of business partners throughout the business relationship;

ii. informing business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s ethics and compliance programme or measures for preventing and detecting such bribery;

iii. seeking a reciprocal commitment from business partners;

iv. implementing mechanisms to ensure that the contract terms, where appropriate, specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered;

v. where appropriate, ensuring the company's audit rights to analyse the books and records of business partners and exercising those rights as appropriate;

vi. providing for adequate mechanisms to address incidents of foreign bribery by business partners, including for example contractual termination rights.

7. A system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. The use of internal control systems to identify patterns indicative of foreign bribery, including as appropriate by applying innovative technologies;

9. Measures designed to ensure effective periodic communication and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for business partners;

10. Appropriate measures to encourage and provide positive support and incentives for the observance of ethics and compliance programmes or measures against foreign bribery at all levels of the company including by integrating ethics and compliance in human resources processes, with a view to implementing a culture of compliance;

11. Measures to address cases of suspected foreign bribery, which may include:

i. processes for identifying, investigating, and reporting the misconduct and genuinely and proactively engaging with law enforcement authorities;

ii. remediation, including, inter alia, analysing the root causes of the misconduct and addressing identified weaknesses in the company's compliance programme or measures;

iii. appropriate and consistent disciplinary measures and procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery; and

iv. appropriate communication to ensure awareness of these measures and consistent application of disciplinary procedures across the company.

12. Effective measures for providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions, as well as measures to ensure there is no retaliation against any person within the company who is instructed or pressured, including from hierarchical superiors, to engage in foreign bribery and chooses not to do so;

13. A strong and effective protected reporting framework, including: i. internal, confidential, and where appropriate, anonymous, reporting by, and protection against any form of retaliation for, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for reporting persons willing to report breaches of the law or professional standards or ethics occurring within the company on reasonable grounds; ii. clearly defined procedures and visible, accessible, and diversified channels for all reporting persons to report breaches of the law or professional standards or ethics occurring within the company.

14. Periodic reviews and testing of the internal controls, ethics and compliance programmes or measures, including training, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, both on a regular basis and upon specific developments, taking into account the company's evolving risk profile, such as:

i. changes in the company's activity, structure and operating model,

ii. results of monitoring and auditing,

iii. relevant developments in the field,

iv. evolving international and industry standards, and

v. lessons learned from a company's possible misconduct and that of other companies facing similar risks based on relevant documentation and data.

15. In cases of mergers and acquisitions, comprehensive risk-based due diligence of acquisition targets; prompt incorporation of the acquired business into its internal controls and ethics and compliance programme; and training of new employees and post-acquisition audits;

> 16. External communication of the company's commitment to effective internal controls and ethics and compliance programmes.

The DOJ and SEC provide a very similar list in their *Resource Guide to the Foreign Corrupt Practices Act.*[47]

Other international standards—notably, all soft law instruments—include Transparency International's Business Principles on Countering Bribery,[48] the World Economic Forum's Partnership Against Corruption Initiative,[49] and others, contain similar formulations.

At the national level, both soft and hard law standards exist. In the United States, the DOJ and SEC have included a section on compliance in the *Resource Guide to the Foreign Corrupt Practices Act* that details their expectations.[50] In addition, deferred prosecution agreements (a form of non-trial resolution of criminal charges that typically defer prosecution of a company on those charges pending compliance with various conditions, including compliance conditions) typically set out in an annex detailed compliance expectations for the companies subject to such resolutions.[51]

In the United Kingdom, whereas noted earlier "adequate procedures" provide a defense to strict corporate liability under Section 7 of the Bribery Act 2010, the authorities have provided guidance on the content of such procedures.[52] Individual settlements also reflect those compliance expectations.[53]

Thus, in the anti-corruption field, a substantial convergence has taken place around the types of standards and controls that companies engaged in international business activities should adopt. This convergence has emerged over the last twenty-five years at the international level with the emergence of international standards.

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47. *See* THE DEP'T OF JUST. & THE SEC. AND EXCH. COMM'N, *supra* note 40, at 56-67.

48. *Business Principles for Countering Bribery*, TRANSPARENCY INT'L (Dec. 30, 2013), https://files.transparencycdn.org/images/2013_BusinessPrinciples_PT.pdf.

49. *Partnering Against Corruption Initiative*, WORLD ECON. FORUM, https://www.weforum.org/communities/partnering-against-corruption-initiative (last visited Nov. 12, 2022).

50. THE DEP'T OF JUST. & THE SEC. AND EXCH. COMM'N, *supra* note 40, at 65.

51. *See, e.g., United States v. Glencore Int'l.*, No. 3:22-cr-71, ECF No. 18 (D. Conn May 24, 2022).

52. Ministry of Just., *The Bribery Act 2010: Guidance* (2011).

53. *See, e.g.*, *SFO enters into €991m Deferred Prosecution Agreement with Airbus as part of a €3.6bn global resolution*, SFO (Jan. 31, 2020), https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/.

IV. TOWARDS A MORE HOLISTIC APPROACH TO GOVERNANCE AND COMPLIANCE FOR INTERNATIONAL BUSINESSES

The foregoing review has shown that regardless of the specific area of focus, good corporate governance and compliance builds on a common foundation: a board of directors that is focused on providing the guidance and oversight expected by international and domestic standards; management that sets the "tone at the top," implements the board's guidance, and ensures that specific controls systems are developed and implemented to manage the risks, legal and otherwise, faced by the company, and responds to stakeholder demands for proper stewardship, and the specific controls themselves.

The ESG movement could learn much from thinking that has taken place in the anti-corruption arena about effective compliance. Like "E" and "S," successful compliance efforts in the anti-corruption space are values-driven. Transparency and integrity are core values articulated in many companies' compliance programs. While compliance with laws such as the FCPA and its counterparts are an important part of the goal of anti-corruption compliance programs, many companies, in the author's experience, are as concerned with establishing an ethical culture and protecting against reputational risk as they are with legal risk in this arena.

The "G" as it relates to ESG will necessarily evolve as the standards for "E" and "S" continue to develop and crystallize into legal obligations. Companies will need to elaborate internal strategies for compliance and risk management, as they have done in the anti-corruption area. They will need to conduct risk assessments and prioritize key risks. While the measures they adopt with "E" and "S" solely in mind may not intersect with financial and accounting controls to the same extent as in the anti-corruption area, much can be learned from the experience with developing effective compliance programs in the anti-corruption area. As the OECD Good Practice Guidance clearly demonstrates, anti-corruption compliance cuts across a wide range of business activities, much wider than trade controls or competition laws, and is values-based. It implicates not only third parties as a core risk area, but a company's own work force in multiple areas. The same can be said for the environmental and social areas.

As such, a more holistic and less siloed approach to achieving responsible business conduct would seem to offer efficiencies and benefits to companies. Boards should consider carefully how to approach their role: Is it through creation of a new ESG committee that will seek to execute a charter independent of other Board Committees, such as the Compliance or Audit Committee? While the need for an Audit Committee undoubtedly remains strong, should the role of any Compliance Committee be particularly reconsidered? Especially for companies engaged in international business, given that standards for responsible business conduct are not limited to "E" and "S," but include at least "C," should the charter be broadened consistent with the scope of those expectations?

Anti-corruption controls have direct relevance to environmental activities such as permitting and regulatory compliance and may also have direct interaction with human rights-focused and labor activities in both public and private-sector dimensions. Supply chain concerns are also common to both arenas. Community development programs, which may have an environmental or health and welfare focus, will also benefit from incorporating measures to ensure transparency and integrity. Thus, as companies elaborate their control strategy, they will want to consider an approach that prioritizes complementariness, avoiding siloing, and efficiencies.

Companies and their advisors may wish to consider these issues as they grapple with the expanding set of expectations and responsibilities that the ESG movement creates.