Anti- corruption risk mitigation for organizations working with third parties

Is out of sight out of mind?

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1. Introduction

1.1. Background

Many businesses and organizations are under increased pressure to meet the targets of their investors and owners, and improve their financial performance. Organizations are faced with critical strategic choices that they need to make. At the C-suite, executives face tremendous pressure to meet revenue targets and live up to shareholder expectations. Under this pressure, they may select strategies and choose to make decisions that they regret after the fact.

> *"It was greed, pure and simple," the 67-year-old former executive told a New York State parole panel at a December 3 video conference hearing. "I feel horrible ... I can't say how sorry I am and how deeply I regret my actions."*
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> D. Kozlowski on December 5, 2013 (K. Freifeld, "Ex-Tyco CEO Kozlowski says he stole out of pure greed," *Reuters*, December 5, 2013).

To survive in today's complex and highly competitive business environment, corporations, particularly the American multinationals develop international business and pursue transactional opportunities outside their countries.[1] Generally, companies entering the world of emerging markets tend to look for "specialized local agents and intermediaries,"[2] either by choice because they do not have a local presence to navigate through the systems and procedures, or because this is a requirement of the government of the EM – often in the Middle East – of any outside company that wants to do business there.[3]

Intermediaries provide several benefits. They allow corporations to enter a new market without having to actually set up an office. They provide knowledge of local customs, regulations, business networks, and sales opportunities, for instance, which would otherwise be hard to come by. Especially in India and China, the use of Intermediaries is believed to be a "key ingredient" to success.[4] But there could also be a sinister benefit of using a local partner. According to Bray, "The use of intermediaries is one of the most common strategies used to 'sneak through' in large-scale international business transactions."[5]

The author will also use the term intermediaries and/or business partners in this thesis to represent third parties, which includes foreign representatives, consultants, distributors, joint venture partners, etc.

1.2. Problem statement

1.2.1. Research question

This thesis has two objectives: first, to provide a theoretical framework for organizations to understand the risks that intermediaries pose to an organization, and, second, to give them a practical perspective on how to manage these risks. It will do so by addressing the following research question:

Can organizations effectively mitigate risks posed by their intermediaries when doing business? And if so, how and to what extent?

1.2.2. Practical and theoretical relevance

According to a World Bank report, by 2025, six major emerging economies—Brazil, China, India, Indonesia, South Korea, and Russia—will account for more than half of all global growth.[6] Emerging economies, including

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1 Indeed, American firms are looking outside the United States in part because of the "increase in globalization and the saturation of domestic markets." Koehler, Mike, "The façade of FCPA enforcement," *Georgetown Journal of International Law* 41, 2010, pp. 907, 997; see also Jones, Ashby, "Legal maze's murkiest corners," Wall Street Journal, December 24,2012, at B1, B5 (explaining that American "companies are rely[ing] on markets outside the U.S. for an increasing percentage of revenue").

2 Yockey, Joseph W., "FCPA settlement, internal strife, and the 'culture of compliance'," *Wisconsin Law Review*, 2012, p. 689.

3 Middlekauff, Lisa, "To capitalize on a burgeoning market? Issues to consider before doing business in the Middle East," *Richmond Journal of Global Law and Business* 7, 2008, p. 159.

4 Koehler, Mike, "The Foreign Corrupt Practices Act in the ultimate year of its decade of resurgence," *Indiana Law Review* 43, 2010, p. 399.

5 Bray, John, "The use of intermediaries and other 'alternatives' to bribery," in: J. Graf Lambsdorff, M. Taube and M. Schramm (eds.). *The New Institutional Economics of Corruption*. London: Routledge, 2005, p. 112.

6 *Global Development Horizons 2011—Multipolarity: The New Global Economy*. Washington DC: The World Bank, 2011, p. 3.

these six, will grow on average by 4.7 percent a year between 2011 and 2025.[7] Since the mid-nineties, emerging economies constitute the major growth opportunity in the evolving world economic order. The phrase 'emerging markets'[8] is being adopted in place of the previous phraseology, which included the expressions 'less developed countries,' 'newly industrializing countries,' or even 'Third World countries.' These formerly popular phrases emphasized these countries' sources of cheap raw materials and labor rather than their markets.[9] (For a list of emerging markets see Appendix I.)

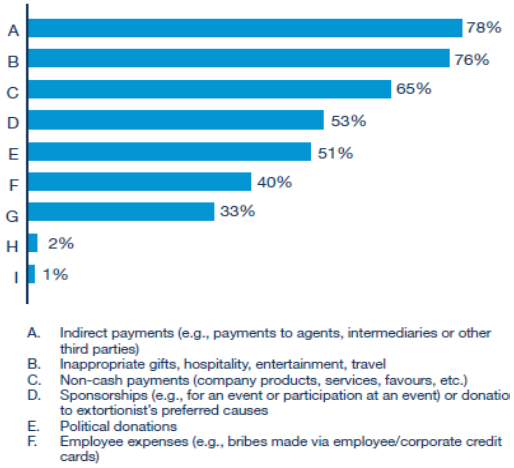

Figure 1. Forms of corruption believed to be prevalent among global companies

The potential of emerging economies has already affected a shift in sales for multinational corporations as most commercial enterprises, in today's complex world, need to develop international business relationships and pursue opportunities abroad. This is especially true for American corporations with growth ambitions.[10] In 1996, Coca-Cola, for example, predicted that its sales in China, India and Indonesia would double every three years for the indefinite future, compared with its 4 to 5 percent average annual growth in the U.S. market.[11] Continuing this trend, in 2013 Boeing China's president Mark Allen reported that 28% of the sales of Boeing 737 aircraft was to China, and that this would "*continue this year and in the future.*"[12]

At the operating level, organizations are confronted with a range of unfamiliar conditions and challenges in these emerging markets. For example sales and marketing infrastructure, distribution systems, communication channels, and regulatory structures are characterized by a propensity to change business regulations frequently and unpredictably. In addition, these markets are characterized by high levels of product diversion within or between countries, and opaque power and loyalty structures within complex networks of local business and political players. Emerging markets are principally distinguished by volatility and transition.[13]

In addition, many of these markets have historically been perceived as having high incidences of fraud, counterfeiting, bribery and corruption.[14] According to a conservative estimate by the World Bank annual bribery amounts to one trillion US dollars.[15] Corruption is identified as the top impediment to conducting

7 *Ibid*., p. 13.
8 Various investment firms have provided differing lists of emerging markets. This thesis will be using the countries identified as emerging markets by S&P. For an overview, please refer to Appendix III.
9 Arnold, David J., and Quelch, John A., "New strategies in emerging markets," *Sloan management*, 1998.
10 "Indeed, American firms are looking outside the United States in part because of the "increase in globalization and the saturation of domestic markets." Koehler, M., "The façade of FCPA enforcement," *Georgetown Journal of International Law* 41, 2010, pp. 907, 997.
11 "Coke pours into Asia," *Business Week*, 28 October 1996, pp. 77–81.
12 Wen, Wang, "Boeing sales in China soar to new heights," *China Daily*, January 23, 2014, derived from http://europe.chinadaily.com.cn/business/2014-01/23/content_17253858.htm.
13 Mody, Ashoka, "What is an Emerging Market?" *Georgetown Journal of International Law*, 2004, pp. 641, 643.
14 Since 1995, Transparency International (TI) has published the Corruption Perceptions Index (CPI) annually ranking countries "by their perceived levels of corruption, as determined by expert assessments and opinion surveys. CPI currently ranks 177 countries "on a scale from 100 (very clean) to 0 (highly corrupt)."(http://www.transparency.org). Please refer to Appendix II for an overview of 177 countries and their ranking on the CPI. In addition to the CPI, TI has also drawn up a Bribe Payers Index (BPI), which is shown in Appendix III.
15 "Six questions on the cost of corruption with World Bank Institute Global Governance Director Daniel Kaufmann," *The World Bank,* derived from http://go.worldbank.org/KQH743GKF1.

business in 22 out of 144 economies, as measured in the World Economic Forum's *Global Competitiveness Report 2013-2014*.[16] In a survey conducted by PwC,[17] corruption via "indirect payments" ranked highest (see the figure 1). Apart from the fact that incidences of corruption add significant costs to doing business in emerging economies, for organizations that may inadvertently have become embroiled in them, they also entail a growing risk from prosecution.

For American multinationals the Foreign Corrupt Practices Act (FCPA),[18] established in 1977 is the most important governing law.[19] This law has an extraterritorial reach and hence the arm of this law can reach beyond the borders of the US.[20] Those charged with enforcing the FCPA have long been focusing on emerging economies. This is demonstrated by the fact that of the 125 violations of the FCPA between its ratification and October 2008, seventy-seven occurred in emerging markets.[21]

Multinationals generally operate across the borders of several sovereign states and/or countries and potentially many jurisdictions could be involved. Under the UNCAC (United Nations Convention Against Corruption)[22], "Dual criminality" is a requirement that the relevant offence shall be criminalized in both the requesting and requested country, is considered fulfilled irrespective of whether the same terminology or category of offense is used in both jurisdictions. Under the OECD (Organisation for Economic Co-operation and Development)[23], a broad interpretation of the requirement of dual criminality is followed: The law does not require that the name by which the crime is described in the two countries needs to be the same, nor that the scope of the liability needs to be coextensive, or, in other respects, the same in the two countries. It is sufficient if the particular act charged is criminal in both jurisdictions.

The increase in FCPA enforcement, coupled with the reach of the FCPA, the statute's expansive language and till the release of the FCPA Resource Guide in 2012 [24] the absence of specific guidelines, lack of affirmative defence and the practical reality of the environment in the emerging markets has made this legislation one of the most feared legislations of the world for corporations.[25] The FCPA and its enforcement will be discussed in more detail in this thesis in the chapter titled 'Theoretical Framework'.

Almost all FCPA corporate enforcement is based on acts of intermediaries. This is further quantified and analyzed in Chapter 3 of this thesis. Corporations can deploy a variety of strategies to reduce their exposure and put preventive and detective measures in place when engaging with intermediaries.

The current regulatory environment demands that organizations understand who is conducting business on their behalf. At a corporate level there are several frameworks that companies use to map and mitigate their risks with respect to the use of intermediaries at a strategic and operational level. The two all-encompassing questions are:

1. What is the Intermediary doing on behalf of an organization?

2. Is this act on behalf of the organization in violation of any laws and legislation (local or international)?

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16 "Partnering against corruption initiative," *World Economic Forum*, derived from http://www.weforum.org/issues/partnering-against-corruption-initiative.

17 PwC, *Confronting corruption: The business case for an effective anti-corruption programme*, 2008, derived from http://www.pwc.com/gx/en/forensic-accounting-dispute-consulting-services/pdf/pwc-confronting-corruption.pdf.

18 Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd.

19 Koehler, Façade …, *supra*, note 1, p. 997.

20 The topic of extraterritorial reach of the FCPA is not discussed in length in this thesis. The FCPA's bribery prohibition is also applicable against U.S. citizens, foreign companies listed on a U.S. stock exchange, or any person who, while physically present in the U.S. pays, offers to pay, or promises to pay a foreign official anything of value to obtain or retain business. See 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1). The Act is applicable to U.S. parent corporations for the actions of their foreign subsidiaries. See *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, 2012 (hereafter: FCPA Resource Guide).

21 Spalding, Andrew B., *Unwitting sanctions: understanding anti-bribery legislation as economic sanctions against emerging markets*, 2009, p. 410.

22 https://www.unodc.org/unodc/en/treaties/CAC/

23 http://www.oecd.org/corruption/oecdantibriberyconvention.htm

24 A Resource Guide to US Foreign Corrupt Practices Act (http://www.justice.gov/criminal/fraud/fcpa/guide.pdf)

25 Koehler, Façade …, *supra*, p. 618.

The relevant laws and legislation cover various areas starting from environmental, health and safety, data privacy and protection, information protection, intellectual property, competition (anti-trust) and anti-corruption. Among all this applicable legislation, non-compliance with the anti-corruption and anti-bribery laws is perceived to pose significant financial and legal risks for an organization.[26] Companies that violate these laws could get prosecuted and be subject to substantial fines and imprisonment of those involved. Many violations are due to the actions of their intermediaries.[27]

In this thesis, the author discusses the risks associated with acts of corruption and mitigation options when using intermediaries especially in countries with a perceived index of high corruption. These guidelines are not meant to solve specific instances in companies, but help them pro-actively and structurally improve/implement effective measures.

1.3. Research methodology

The author has deployed a variety of methods. These include:

1. Review of already conducted research: The topic of anti-corruption and effective mitigation strategies is a well research subject. This step is essential to gain an understanding of the perspective of the various stakeholders.

2. Content analysis of various empirical studies: There are several surveys by various accounting firms, law firms and NGOs that have been conducted. Not wanting to re-invent the wheel and as these surveys are more thorough and deeper that the author could accomplish within the time-frame, the author will use these and appropriately reference them.

3. Various publically available prosecution statistics: the author has used accurate and up-to-date statistics on prosecutions and litigation, which the author derived from publicly available information.

4. Case studies from recent prosecutions in the USA

5. Case studies and settlements in the Netherlands

6. Interviews with Compliance Officers/employees as various organizations

1.4. Structure

The thesis is set out as follows:

Chapter 1 - Introduction

Chapter 2 - Theoretical Framework

Chapter 3 - Analysis and Results

Chapter 4 - Conclusions and Recommendations

Chapter 5 - References

Chapter 6 - List of Abbreviations

Chapter 7: Appendices

[26] Please refer to the chapter 3, "Analysis and results," section 3.4.2.
[27] *SEC Enforcement Actions: FCPA Cases*, U.S. Securities and Exchange Commission, derived from https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

2. Theoretical framework

2.1. The market place

Emerging Markets (EMs) provide the greatest potential for growth for multinational corporations. This has been so since the 1990s,[28] and continues at times when economic growth in the so-called West has been sluggish.[29] Entering and expanding in EMs is not without challenges that are specific to these market environments. They often constitute unfamiliar and, moreover, highly volatile territory. Macroeconomic and demographic data are often inaccurate or quickly outdated. The size of the economy, large in comparison to developed countries, is difficult to assess. At the same time, cultivating personal relationships are considered essential to doing business in many EMs. Those EMs that emerged from formerly command economies are characterized by highly influential national and local authorities.[30]

One way of dealing with these challenges is to seek a local business partner or intermediary, who is familiar with the local market conditions, has connections to other business partners (e.g. producers, distributors and retailers) and government authorities. There are many advantages of using an intermediary, apart from the fact that some EMs actually require foreign companies to enter into a joint venture (example: China, UAE) with a local business partner. However, this paper zooms in on a significant risk which the use of an intermediary entails: the fact that the multinational corporation can be held accountable for actions taken by the intermediary on its behalf, and which can be categorized as 'corruption'.

This risk is exacerbated by two factors:

1. high, endemic corruption in many EMs[31];
2. Increasingly strict enforcement by national and international governing bodies.

On the map below, the EMs are indicated by a color code (ranging from yellow to maroon). This code corresponds to the score assigned to each country in the Transparency International Corruption Perception Index (CPI). Any country scoring below 50 is described by Transparency International as being perceived of having a "serious corruption problem."[32] (See also Appendix II.)

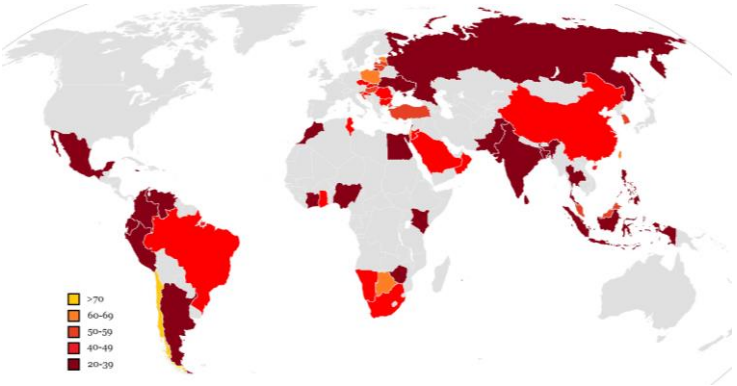

Figure 2. Map showing the EMs and their CPI-score

[28] Arnold and Quelch, *supra*.
[29] "For executives of multinationals, emerging markets are growth drivers amid stagnation and financial crisis in developed economies [...]."Khanna, Tarun, and Palepu, Krishna G., *Winning in emerging markets: A road map for strategy and execution*, Boston, MA: Harvard Business Press, 2010, p. 1.
[30] Arnold and Quelch, *supra*.
[31] See Transparency International's Corruption Perception Index (CPI) and Bribe Paying Index (BPI) (Appendix II and Appendix III). The BPI ranks 28 of the largest economies in the world in order of perceived likelihood that companies from these countries pay bribes abroad. The CPI shows how corrupt the public sector of each of 177 countries is perceived to be. Some emerging markets are perceived in a positive light when it comes to corruption by public officials, such as Chile, or Estonia, with scores of 71 and 68 respectively on the CPI (out of a maximum of 100 points). However, the average score for all EMs as listed in Appendix I is 42.1, which is well below a score of 50.
[32] *Corruption Perceptions Index 2013*, Transparency International, p. 6.

2.2. The legal framework

Cross-border transactions, and international businesses and organizations have witnessed a significant interest from various anti-corruption efforts, as countries and are introducing stricter laws to fight corruption. Governments from many countries are reaching a consensus that corruption must be countered. As a result, countries are becoming party to a number of international anti-corruption conventions, which require them to adopt a range of preventive and criminal law measures. Examples include Spain[33], France[34], Russia[35] and Brazil[36].

The most significant change in efforts to combat corruption at the international level is that individual countries are taking the lead, notably the United States and the United Kingdom. Acting on the basis of the US Foreign Corrupt Practices Act (FCPA),[37] and through the Department of Justice (DOJ) and the Securities Exchange Commission (SEC), the United States has ramped up its enforcement efforts considerably. The United Kingdom also scaled up its efforts against corruption through the enactment of the UK Bribery Act in 2010.[38] Before describing the workings of the FCPA and the UK Bribery Act, the author will first explain four of the most important international conventions to combat corruption.

2.2.1. The OECD working group on bribery and anti-bribery convention

The Organization for Economic Co-operation and Development (OECD), founded in 1961, requires its members to criminalize bribery of foreign public officials in international business transactions. On November 21, 1997, the OECD member states adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). As of April 8, 2014, there were 41 parties to the Anti-Bribery Convention: 34 OECD member countries and seven non-OECD member countries (Argentina, Brazil, Bulgaria, Colombia, Latvia, the Russian Federation, and South Africa). All of these parties are also members of the OECD Working Group on Bribery.[39] The Anti-Bribery Convention came into force on February 15, 1999.

2.2.2. U.N. convention against corruption

The United Nations Convention Against Corruption (UNCAC) was adopted by the U.N. General Assembly on October 31, 2003, and entered into force on December 14, 2005.[40] The UNCAC requires parties to criminalize a wide range of corrupt acts, including domestic and foreign bribery and related offenses such as money laundering and obstruction of justice. The UNCAC also establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, and enhanced accounting and auditing standards for the private sector.

2.2.3. Other anti-corruption conventions

The Inter-American Convention Against Corruption (IACAC) was the first international anti-corruption convention, adopted in March 1996 in Caracas, Venezuela by members of the Organization of American States

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33 On 14 March 2014, the Official State Gazette published Act 1/2014, of 13 March, which amended Judiciary Act 6/1985 of 1 July 1985 in relation to universal justice. One of the reforms introduced by the Act in article 23.4 is the possibility, given certain circumstances, for offences of corruption between private individuals and corruption in international business transactions being heard and judged by Spanish courts, even if committed by Spaniards or foreign nationals outside of Spain.

34 Decree 2013-960 of October 25 2013 established a new central authority within the criminal police, tasked with investigating corruption and financial and tax offences.

35 Russia's first comprehensive anti-corruption law, Federal Law No. 273 “On Combatting Corruption”, was amended to require companies to have compliance officers and programs. Specifically new Article 13.3 requires all organizations to develop and implement measures to prevent bribery. This provision is in force with effect from 1 January 2013.

36 On August 1, 2013, the President of Brazil, Dilma Roussef, signed the country’s new anti-corruption law: Law No. 12.846/2013 (Anti-Corruption Law). The law became effective on Jan. 29, 2014. The anti-corruption law is expected to strengthen Brazil's commitments under the Organization of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials. Such legislation is also required as part of the United Nations Convention against Corruption, which Brazil ratified in May 2005.

37 See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat.1494 (codified as amended at 15 U.S.C. §§ 78m(b),(d)(1), (g)-(h), 78dd-1 to 78dd-3, 78ff (2000)).

38 Bribery Act, 2010, c.23 (U.K.) (2010) [hereinafter UK BriberyAct]. This law is one of the most comprehensive international laws on bribery. The UK Bribery Act officially came into force three months after guidance is issued by the UK Ministry of Justice with respect to compliance with the new law: News Release, U.K. Ministry of Justice, Bribery Act Implementation (July 20, 2010), http://www.justice.gov.uk/news/newsrelease200710a.html

39 *Country Monitoring of the OECD Anti-Bribery Convention*, OECD (http://www.oecd.org/document/12/0,3746); http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus_May2014.pdf.

40 *United Nations Convention Against Corruption*, October 31, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 41 (http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08- 50026_E.pdf).

(OAS).[41] The IACAC requires parties to criminalize both foreign and domestic bribery. Subsequently, a Mechanism for Follow-Up on the Implementation of the IACAC (MESICIC) was set up, which monitors parties' compliance with the IACAC. As of November 1, 2012, 31 countries were parties to MESICIC.

The Council of Europe established the Group of States Against Corruption (GRECO) in 1999 to monitor countries' compliance with the Council of Europe's anticorruption standards, including the Council of Europe's Criminal Law Convention on Corruption.[42] These standards include prohibitions on the solicitation and receipt of bribes, as well as foreign bribery. As of November 1, 2012, GRECO member states, which need not be members of the Council of Europe, include more than 45 European countries.

2.2.4. The FCPA

2.2.4.1. Genesis and development of the FCPA

In the mid-1970's, in the US, the Congress held numerous hearings after news and disclosures of questionable corporate payments to numerous foreign recipients. Payments were made by, among others, Lockheed Aircraft Corporation, Gulf Corporation, United Brands Company, Northrop Corporation, Ashland Oil, and Exxon Corporation. Each of these instances involved allegations or admissions of payments directly or indirectly to traditional non –US ("foreign") government officials or foreign political parties in connection with a business purpose. The Congress then discovered that such payments were not directly prohibited under U.S. law, and set out to close this gap. Legislators and the administrations of Presidents Gerald Ford and Jimmy Carter were involved in seeking legislation to address these foreign corporate payments and approximately twenty bills were introduced in Congress.

Two competing legislative approaches were generally considered by Congress: an outright prohibition of certain foreign payments and a disclosure regime for a broader category of foreign payments. The Ford Administration favored the latter approach, but the Carter Administration, which took office in January 1977, favored prohibition and this approach ultimately became law.[43][44]

The FCPA establishes criminal and civil liability for the bribery of foreign government officials, political party officials, and candidates for political office, in order to obtain business.[45] It also imposes certain accounting requirements on domestic and foreign companies with securities publicly traded in the United States, requiring these companies to report such illicit payments.[46]

The FCPA was amended in 1988[47] for clarification purposes. It was again amended in 1998 to conform to the OECD Anti-bribery Convention.[48] These latter amendments expanded the FCPA's scope to include payments made to secure "any improper advantage"; reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; cover public international organizations in the definition of "foreign official"; add an alternative basis for jurisdiction based on nationality; and apply criminal penalties to foreign

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41 *Inter-American Convention Against Corruption*, Organization of American States, March 29, 1996, 35 I.L.M. 724, derived from http://www.oas.org/juridico/english/treaties/b-58.html.

42 *Criminal Law Convention on Corruption*, Council of Europe, January 27, 1999, 38 I.L.M. 505 (http://conventions.coe.int/Treaty/en/Treaties/html/173.htm).

43 http://en.wikipedia.org/wiki/Foreign_Corrupt_Practices_Act.

44 Posadas, Alejandro, "Combating corruption under international law," *Duke Journal of Comparative & International Law* 10, 2000, pp. 345-414.

45 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (West 2010). The FCPA was created in 1977 in response to findings by the SEC that numerous public companies had engaged in questionable payments overseas and falsified their accounting entries with respect to such payments in their books and records; S. REP. NO. 95-114, at 1–2 (1977); see also H.R. REP. NO. 95-640, at 1–3 (1977). The SEC had prepared an extensive report on problematic corporate payments on May 12, 1976 that "revealed the widespread nature of the practice of questionable corporate foreign payments." H.R. REP. NO. 95- 640, at 3; S. COMM. ON BANKING HOUS. & URBAN AFFAIRS, 94TH CONG., 2D SESS., REP. OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976).

46 15 U.S.C. § 78m(b)(2) (2006).

47 The FCPA was amended as part of the Omnibus Trade and Competitiveness Act of 1988: Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1415–25 (codified at 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3, 78ff (2000)).

48 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, December 17, 1997, 37 I.L.M. 1 (1998) (OECD Anti-bribery Convention) entered into force Feb. 15, 1999. The Member States of the Organization of Economic Cooperation and Development ("OECD") had adopted the OECD Anti-bribery Convention which obligates signatory countries to enact domestic laws similar to the FCPA that criminalize bribery of foreign officials.

nationals employed by or acting as agents of U.S. companies. In November 2012, the Criminal Division of the DOJ and the Enforcement Division of the SEC released "A Resource Guide to the US FCPA."[49]

The FCPA is divided into two substantive areas:

1. The anti-bribery provisions, which make it illegal to bribe foreign government officials for the purposes of obtaining or retaining business, directing business to another person, or securing any improper advantage;
2. The accounting provisions, which impose recordkeeping and internal controls requirements for publicly held companies[50].

The FCPA's broad third-party payment provisions prohibit those subject to its provisions from directly making payments meeting the above elements, as well as providing anything of value to "any person, while knowing" that all or a portion of the thing of value will be given, directly or indirectly, to a "foreign official" to "obtain or retain business." The enforcement agencies broadly interpret this knowledge requirement. The knowledge element may be satisfied when one has actual knowledge that a third party is providing "anything of value" to a "foreign official" to "obtain or retain business" and also when one "has a firm belief that such circumstance exists or that such result is substantially certain to occur" or "is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

2.2.4.2. The FCPA's anti-bribery provisions

The anti-bribery provisions of the FCPA have three core elements: "anything of value"[51] to a "foreign official"[52] for the purposes of "obtaining or retaining business."[53] This prohibition is both direct and indirect,[54] meaning that the FCPA explicitly prohibits corrupt payments made through third parties or intermediaries.[55] Specifically, it covers payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly," to a foreign official.[56] The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability. Under the FCPA, a person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if the person:

- is aware that [he] is engaging in such conduct;
- that such circumstance exists, or that such result is substantially certain to occur; or
- has a firm belief that such circumstance exists or that such result is substantially certain to occur.

Liability is imposed not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge.

2.2.4.3. The FCPA's accounting provisions

The accounting provisions of the FCPA require companies ("issuers")[57] to register or file reports with the SEC, maintain certain recordkeeping standards and internal accounting controls. An "issuer" is generally a company (U.S. or foreign) that has a class of securities (including so-called American Depository Receipts) traded on a U.S. exchange or an entity that is otherwise required to file reports with the Securities and Exchange Commission ("SEC"). A domestic concern is generally any business form (e.g., private corporations, limited liability companies, partnerships, sole proprietorships) with a principal place of business in the U.S. or organized under U.S. law. A domestic concern also includes "any individual who is a citizen, national, or resident of the U.S All issuers must "make and keep books, records, and accounts, which, in reasonable detail,

49 http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
50 15 U.S.C. § 78m(b)(2) (2006)
51 15 U.S.C. §78dd-l(a).
52 Id. § 78dd-l(a)(l).
53 Id. § 78dd- 1(a)(1)(B).
54 Id. § 78dd-l(f)(2)(A)-(B); see also Winer, K., and Husisian, G., "The 'knowledge' requirement of the FCPA Anti-Bribery Provisions: Effectuating or frustrating congressional intent?" *White-Collar Crime*, October 2009, quoted in Mike Koehler, "The Foreign Corrupt Practices Act in the ultimate year of its decade of resurgence," *Indiana Law Review* 43, 2010.
55 Third parties and intermediaries themselves are also liable for FCPA violations. Section 30A(a) of the Exchange Act, 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), and 78dd-3(a).
56 Section 30A(a)(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(3); 15 U.S.C. §§ 78dd-2(a)(3), 78dd-3(a)(3).
57 § 78m(b)(2). "Issuers" are those companies that are required to register with the SEC under Section 12 or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act"). 15 U.S.C. § 78l(g) (2006). This definition includes certain foreign companies that issue stock on a U.S. securities exchange as well as their personnel.

accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[58] The internal controls provision mandates that issuers create a system of internal accounting controls that will provide "reasonable assurances that transactions are executed in accordance with management's general or specific authorization." To be found criminally liable for violating the FCPA accounting provisions, a person must "knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in the provisions."

2.2.4.4. The enforcement of the FCPA

The FCPA is both a civil and a criminal statute. The DOJ is responsible for all criminal enforcement of the FCPA and for civil enforcement of the anti- bribery provisions against non-issuers subject to the FCPA's jurisdiction.

The SEC is responsible for all civil enforcement of the accounting provisions and for civil enforcement of the anti-bribery provisions with respect to issuers. The SEC enforces the books and records provision of the FCPA.

The DOJ's FCPA Unit regularly works with the Federal Bureau of Investigation (FBI). The FBI's International Corruption Unit has the primary responsibility for performing international corruption and fraud investigations. The FBI also has a dedicated FCPA squad, consisting of FBI special agents, which is responsible for investigating many, and providing support for all, of the FBI's FCPA investigations.

In addition, the Department of Homeland Security and the Internal Revenue Service-Criminal Investigation regularly investigate potential FCPA violations. A number of other U.S. government agencies are also involved in the fight against international corruption, including the Department of Treasury's Office of Foreign Assets Control, which has helped lead a number of FCPA investigations.[59]

The DOJ and SEC seek monetary penalties or settlements for violations of the FCPA. Organizations may face up to 2 million US dollars in penalties per violation.[60] One prosecution may concern several instances of corruption. Each instance could amounts to 2 million US dollars.

Since the inception of the FCPA, for about 25 years, the number of prosecutions was limited. This has been ramped up in the last ten years.[61] In November 2010, Assistant Attorney General Lanny Breuer stated that "FCPA enforcement is stronger than it's ever been—and getting stronger."[62] There are many reasons for this increase in enforcement, possibly including the recent financial crisis and related scandals, an increase in global business transactions, or the economic boom at the turn of the 21st century.[63]

> "[T]he so-called "head-in-the-sand" problem—variously described in the pertinent authorities as "conscious disregard," "wilful blindness" or "deliberate ignorance"—should be covered so that management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation."
>
> *A Resource Guide to the US FCPA*

2.2.4.5. Adequate procedures as a defense under the FCPA

There are two affirmative defenses under the FCPA and an exception for facilitating payments. They are:

1. Payment is lawful under the written laws of the foreign country (the local law defense),
2. Money was spent as part of demonstrating a product or performing a contractual obligation (the reasonable and bona fide business expenditure defense).

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58 15 U.S.C. § 78m(b)(2)(A) (2006). The term "reasonable detail" is defined to mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." Id. § 78(m)(b)(7).

59 http://www.justice.gov/criminal/fraud/fcpa/guide.pdf

60 See 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A)–(2)(A)

61 Koehler, Mike, "The Foreign Corrupt Practices Act in the ultimate year of its decade of resurgence," *Indiana Law Review* 43, 2010, p. 389.

62 See "Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act," November 16, 2010, derived from http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

63 Biegelman, Martin T., and Biegelman, Daniel R., *Foreign Corrupt Practices Act Compliance Handbook: Protecting Your Company from Bribery and Corruption*, Hoboken, NJ: John Wiley & Sons, 2010.

Because these are affirmative defenses, the defendant bears the burden of proving them.[64]

Outside the above two there are no others in the statute. Existence of adequate compliance procedures and programs seems to be more important for organization to be FCPA compliant and stay out of trouble. Writing on the subject of adequate procedures, Jordan states, "There is currently no compliance procedure defense under the FCPA. Nevertheless, compliance procedures can be taken into account in the sentencing phase relevant to the FCPA for violations of the anti-bribery statute."[65] He goes further to elaborate that the Federal Sentencing Guidelines,[66] which spell out what and when an "effective" compliance program can be taken into account as a mitigating factor. According to the Federal Sentencing Guidelines, an organization needs to have two crucial conditions in order to have an "effective" compliance program:

1. They need to "exercise due diligence to prevent and detect criminal conduct"
2. They must "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law"

Two recent cases witnessed this in part. As Wiebenga points out regarding the case of Ralph Lauren,[67] the US authorities took into account the following two factors: "(i) self-reporting followed by extensive, thorough, real-time cooperation with both the SEC and the DOJ, including complete disclosure of the violative conduct, and (ii) a thorough review." In the second case of Morgan Stanley,[68] the US authorities went one step further, "because Morgan Stanley voluntarily disclosed Peterson's misconduct, fully cooperated with our investigation, and showed us that it maintained a rigorous compliance program, including extensive training of bank employees on the FCPA and other anti-corruption measures, we declined to bring any enforcement action against the institution in connection with Peterson's conduct."[69]

2.2.5. UK Bribery Act of 2010

2.2.5.1. Genesis and development of the UK Bribery Act

The regulatory enforcers in the United States were not the only ones taking an aggressive approach toward enforcement of the anti-bribery laws. About 35 years after the FCPA entered into force, the United Kingdom took an important step in its fight against bribery with the enactment of the UK Bribery Act on April 8, 2010.

The Queen commented that the purpose of this Bill was to "Provide a modern and comprehensive scheme of bribery offenses to equip prosecutors and courts to deal effectively with bribery at home and abroad."[70] The Bribery Bill was also meant to implement the UN Convention against Corruption, the OECD Bribery Convention and the Council of Europe's Criminal Law Convention on Corruption, and replaces laws that had previously governed bribery in the United Kingdom.

The UK Bribery Act criminalizes bribery of domestic and foreign government officials,[71] commercial bribery, and the receipt of a bribe.[72] It also criminalizes the failure of corporations to prevent bribery.[73] Individuals

64 FCPA Resource Guide.

65 Jordan, Jon, "Adequate procedures defense under the UK Bribery Act – A British idea of the Foreign Corrupt Practices Act," *Stanford Journal of Law, Business and Finance* 17:1, 2011.

66 Federal Sentencing Guidelines Manual: §8B2.1. Effective Compliance and Ethics Program, derived from http://www.ussc.gov/guidelines-manual/2013/2013-8b21.

67 Non-Prosecution Agreement, U.S. Sec. and Exch. Comm'n and Ralph Lauren Corporation, Statement of Facts (Exhibit A) 5 (Apr. 22, 2013), http://www.sec.gov/news/press/2013/2013-65-npa.pdf.

68 Garth Peterson, a former managing director for Morgan Stanley's real estate business in China, was individually sentenced because Peterson, when bribing a Chinese official, had acted for "his own benefit" not "Morgan Stanley's." http://www.sec.gov/litigation/complaints/2012/comp-pr2012-78.pdf.

69 Wiebenga, Joost, *Ondernemen zonder corruptie*, Kluwer, 2013, p. 196.

70 Her Majesty Queen Elizabeth II, speech, November 18, 2009.

71 Section 6(5) of the UK Bribery Act defines a "foreign public official" as any individual who: (a) "holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom;" (b) "exercises a public function - (i) for or on behalf of a country or territory outside the United Kingdom, or (ii) for any public agency or public enterprise of that country or territory;" or (c) "is an official or agent of a public international organization."

72 The Ministry of Justice stated that the UK Bribery Act replaced various "fragmented" laws concerning bribery under the common law and the prevention of Corruption Acts 1889-1916 (http://justice.gov.uk/publications/bribery-bill.htm). The enactment of the this act is seen as an indirect response to controversy in the United Kingdom surrounding the closure of a case involving BAE Systems. (Hirsch, A., "New bribery law puts overseas payments under scrutiny," *Guardian*, April 12, 2010.)

73 UK Bribery Act, *supra*, note 2, at § 7.

found to have violated the UK Bribery Act face imprisonment for a term of up to 10 years, and both individuals and corporations found to have violated the new law face a fine of an unlimited sum.[74]

The UK Bribery Act clearly has an international reach. Section 6 of the UK Bribery Act provides that a person who bribes a foreign public official is guilty under the new law if the person doing so intended to obtain or retain business or a business advantage as a result of the bribe.[75] For a violation to have occurred the person making the bribe must have, directly or through a third party, offered, promised, or given a bribe to a foreign public official or to another person at the foreign public official's request, assent, or acquiescence.[76] The prohibitions apply to all United Kingdom companies, citizens, and residents, regardless of where the bribery occurred.[77] The bribery provisions also apply to any individual or company, irrespective of their nationality, when the relevant acts of violation take place in the United Kingdom.[78]

Section 7 of the UK Bribery Act establishes criminal liability for corporations that fail to prevent bribery. "A relevant commercial organization" violates the law, when a person "associated" with the organization bribes another person intending to obtain or retain business or a business advantage.[79] The term 'relevant commercial organization' includes corporations incorporated within the United Kingdom as well as any other corporation, wherever incorporated, "which carries on a business, or part of a business, in any part of the United Kingdom."[80] A person is considered to be "associated" with a commercial organization when that person "performs services for or on behalf" of the organization.[81]

The UK Bribery Act's "failure to prevent bribery" provision may seem a daunting task to many organizations. However, the law does provide a defense from liability under this provision. Organization can show that they have "adequate procedures" in place that are "designed to prevent" persons associated with them from engaging in the conduct that violates the Act.[82]

2.2.5.2. Adequate procedures as a defense under the UK Bribery Act

The UK Ministry of Justice (MoJ) released its long awaited "Guidance" on adequate procedures, "Guidance" on March 30, 2011.[83] This states that organizations need to formulate their policies and procedures in accordance with the risks they face and should be governed by six primary principles:

1. "Principle 1: A commercial organization's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization's activities. They are also clear, practical, accessible, effectively implemented and enforced.
2. Principle 2: The top-level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organization in which bribery is never acceptable.
3. Principle 3: The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.
4. Principle 4: The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.
5. Principle 5: The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training that is proportionate to the risks it faces.
6. Principle 6: The commercial organization monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary."[84]

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74 Id. § 11(1)-(3).
75 Id. §§ 6(1)-(2).
76 Id. § 6(3).
77 Id. § 12(4).
78 Id. § 12(1).
79 Id. § 7.
80 Id. § 7(5).
81 Id. § 8. The "capacity" in which a person "performs services for or on behalf" of a commercial organization "does not matter." Id. at § 8(2). The section specifically notes, as an example, that the associated person may be a commercial organization's "employee, agent or subsidiary." Id. § 8(3).
82 Id. § 7(2).
83 http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

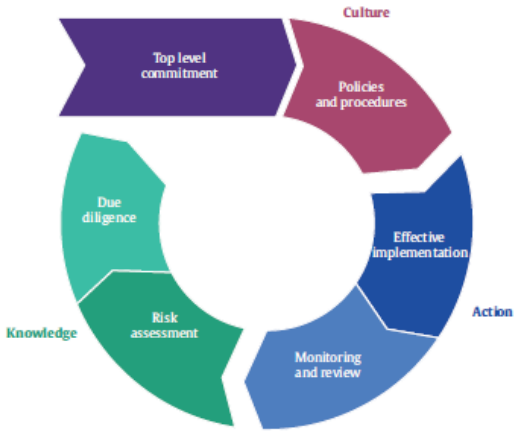

Figure 3. Interplay of culture, action and knowledge to prevent bribery

2.2.6. European Perspective

As part of a research project lead by Dr. Abiola Makinwa from The Hague University of Applied Sciences, in December 2013, questionnaires were sent to researchers the selected countries with backgrounds in anti-corruption law and policy. Appendix IV contains a list of contributors. These questionnaires covered the legal framework for enforcing anti-corruption rules including issues such as the legal prohibition of corruption in international business; the exercise of prosecutorial discretion; collaboration between prosecuting authorities and alleged wrongdoers; sentencing; other non-conviction mechanisms for sanctioning corruption as well as examples, where they exist, of past cases and settlements. In addition to this assessment of the legal framework for anti-corruption enforcement a seminar[85] was held to engage with experts who contextualize the issue of negotiated settlements from selected relevant viewpoints. Below is a collation of the responses:

Is corruption in international business a criminal offence?	
France	Even though it is punishable in relation to domestic officials (article 433-1 CC), trading in influence is not punishable in France where foreign public officials are concerned, the offence only applies in relation to officials of international organizations (article 435-4 CC) & members of the international judiciary (article 435-10 CC).
Germany	Corruption in international business is a criminal offence since 1998. Germany ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1998, by passing the Act on Combating International Bribery (Gesetz zu dem Übereinkommen vom 17. Dezember 1997 über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr, IntBestG), which came into force on 15.02.1999. This Act complements the provisions on bribery in the public sector (sections 331-335 of the German Penal Code).
Italy	Since 2000, when Italy ratified the OECD anti-bribery Convention, corruption in international business is a crime. According to Article 322 bis of the Italian Penal Code the domestic bribery offences are extended to foreign public officials. The provisions of the Penal Code concerning domestic corruption has been amended in 2012 according to the Statute n. 190/12 "Provisions for preventing and fighting corruption and illegality in public administration".
Poland	Corruption in international business is a criminal offence in Poland. However, there is no specific definition provided. Such cases fall within the scope of Article 296a of the Polish Penal Code. Of particular relevance here also is Article 1 (3a) of the Act on the Central Anticorruption Office. These articles closely reflect the provisions of the acts referred to in subparagraph 1.2 below
Netherlands	In the Dutch legal system, the use of the term 'corruption' does not have any formal legal value. Instead, the Dutch legislator criminalized the 'bribery' of public officials and persons other than public officials. The Dutch Criminal Code (CC) distinguishes between three types of bribery: 1. Active bribery of public officials. CC, Book 2 Title 8, Offences against Public Order (Misdrijven tegen het openbaar gezag), articles 177, 177a, 178, 178a; 2. Passive bribery as an offence by public officials. CC, Book 2, Title 28 Offences of Public Servants (Ambstmisdrijven), articles 362-364; 3. Private bribery. CC, Book 2, Title 25 Deceit (Bedrog), article 328ter.

84 http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

85 Seminar on Negotiated Settlements for Corruption offences 22 – 23 May 2014, Hague University of Applied Sciences, organized by Dr Abiola Makinwa, under the auspices of an Hercule II OLAF grant.

Norway	Norway criminalizes corruption, including bribes offered abroad, and has a uniform penal code with contents of international conventions incorporated into the law. The Criminal Code of 1902 regulates criminal liability for individuals and corporations.
Sweden	Swedish criminal law is to a large extent regulated in the Swedish Criminal Code (Brottsbalken 1962:700, BrB), that regulates which acts that are criminal, the punishments for these acts and the applicability of Swedish law (jurisdiction), whereas criminal procedure is mainly regulated in the Swedish Code of Judicial Procedure (Rättegångsbalken 1942:740, RB). Corruption, defined as bribe-taking and/or bribe-giving, is criminalized in Chapter 10 BrB, articles 5a to 5e. As can be seen BrB distinguishes between the giving of bribes and the taking of bribes. The provisions for these offences are to be applied separately. Article 5a to 5c concern bribe-taking, bribe-giving and the aggravated forms of these crimes. Article 5d criminalizes trading in influence and article 5e is about reckless financing of bribe-giving. Articles 5d and 5e are provisions of recent date (2012). The provisions make no formal difference between corruption in the public sector or the private sector, though they obviously protect different interests. Both types of corruption are considered detrimental to the public trust of both the public sector as well as the private sector. The same can be said about the risk of increased transaction costs and distortion of competition, among other problems. In other words, corruption in international business is a criminal offence in Sweden.
United Kingdom	Corruption in international business is a criminal offence in England and Wales and governed by a two primary pieces of legislation. The first is the Bribery Act 2010, which came into force on 1st July 2011. The second is by the Proceeds of Crime Act 2002 which governs money and creates an offence of dealing with 'criminal property'; i.e. property that constitutes or represents a person's benefit from criminal conduct.
Does your country provide for corporate criminal liability?	
France	According to article 121-2 of the CC: "Legal persons are criminally liable for the offences committed on their account by their organs or representatives."
Germany	German law departs from the presumption that a legal entity has no awareness of wrongdoing and therefore cannot be liable for criminal offences. However, Sections 30, 130 of the Act on Regulatory Offences ("OWiG") allow the imposition of a fine on a legal entity, provided that a representative or another person in a leading position has committed a criminal offence.
Italy	The Italian legal system does not provide for criminal responsibility of legal persons. Legislative Decree n. 231 on 8 June 2001 (LD 231/2001) introduced corporate administrative liability for the offence of foreign bribery committed by an agent.
Poland	According to the Act of 28 October 2002 on Liability of Collective Bodies for Acts Prohibited under a Penalty, Poland provides for corporate criminal liability. The Act applies to both criminal and fiscal offences referred to in Article 16 thereof.
Netherlands	Criminal liability for legal entities is provided for under article 51 CC, which states in 51(1) that all offences can be committed by both natural persons and legal entities.
Norway	According to Norwegian national law this is regulated by the Criminal Code of 1902 §48a. The decision to sanction the company, organization, one-man enterprise, foundation, estate or public activity in question is according to §48b a discretionary decision.
Sweden	Swedish criminal law is built on the idea of personal guilt (dolus and culpa). As such, only natural persons are considered able to possess guilt and consequently commit crimes. Mainly for this reason, Swedish law does not allow for corporate criminal liability, at least not in a strict sense.
United Kingdom	Criminal liability for corporations in the UK can normally only be established under the 'identification doctrine'; in other words the company's 'directing mind' must have committed the offence, and then such guilt can be ascribed to the whole corporation.
Can a corporation have criminal intent for bribery committed by an agent?	
France	According to article 121-2 of the CC: "Legal persons are criminally liable for the offences committed on their account by their organs or representatives."
Germany	As we do not have corporate liability in sensu strictu, corporations cannot be deemed to have criminal intent, only human beings are capable of that. According to sect. 130 of the Act on Regulatory Offences ("OWiG"), "whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel."
Italy	In Italy a corporation cannot have a criminal intent. The criminal intent is of the natural person acting as a representative, director or manager (de facto) of the company, of the natural person exercising powers of management and control, or of a person subject to the direction or control of one of the aforementioned persons. The offence must be committed for the benefit or interest of the corporation. No offence is committed where the person responsible commits the offence exclusively in his/her own interest or in the interest of a third party. The offence must be committed through non-compliance with the duties connected to the functions of the natural person.

Poland	A corporation (collective body) can be held liable for bribery by their agent if he or she was: 1. acting in their name or on their behalf under an authority or duty to represent them, to take decisions for them, or to carry out an internal control, or breaching any of such, 2. permitted to act as a result of the breach referred to in subparagraph 1 above, 3. acting in their name or on their behalf with an agreement or knowledge of the agent referred to in subparagraph 1 above, 4. acting as an entrepreneur cooperating directly with them in pursuing a legal objective, 5. and it brought or was likely to bring them an advantage, even a non-pecuniary one.
Netherlands	The Dutch criminal law contains no obstacle for corporations to be prosecuted for bribery committed by an agent or contractor. Even though the text of articles 177, 177a (and 328ter) does not explicitly refer to bribes made through intermediaries, the Dutch authorities explained to the OECD Working Group on Bribery that the term used within these articles "to make a gift or promise to a public servant or renders or offers him a service" is intended to be interpreted in a broad functional sense and accordingly, the case where an intermediary receives or transmits the payment, offer or other advantage, is covered under Dutch law. This position is supported by Supreme Court authority (Supreme Court 21 October 1918, NJ 1918, p. 1128).
Norway	Although it might be difficult to attribute a corporation 'criminal intent' in the strict sense, the corporation can be sanctioned for unlawful acts performed by others on behalf of the corporation (according to the Criminal Code § 48a), including for bribery committed by an agent acting on behalf of the corporation. If the corporation in any way is responsible for the agent's involvement in bribery, the corporation will have criminal intent also in the strict sense. This scenario is regulated by § 48a, and the discretionary decision regarding corporate liability will most likely lead to a sanction on the corporation (i.e. grave breach and criminal intent as required by §48b). In these cases the act must have been done on behalf of the corporation, i.e. the acting individual must have authorization, either by contract, custom or law, to act on behalf of the corporation. If such grounds do not exist, or the individual acts independently, the corporation is not responsible and cannot be sanctioned.
Sweden	Strictly speaking, a corporation cannot possess criminal intent in Swedish criminal law (see the beginning of 1.3). But it can, as a special legal effect of crime, be fined for the acts of natural persons connected to the corporation. Cf. 1.3 and 1.6.1.
United Kingdom	Normally, a company would be subject to the 'identification doctrine' as above, but section 7 of the Bribery Act creates strict liability for a company who fails to prevent an 'associated person' paying bribes on the company's behalf. Section 8 of the Act defines 'associated person' as anyone who performs services of the origination or on its behalf and may therefore include agents, suppliers etc.

2.3. Intermediaries

An intermediary is an economic agent that purchases from suppliers for resale to buyers or that helps buyers and sellers meet and transact.[86] Intermediaries specialize in facilitating the exchange between buyers and sellers by getting expertise in sellers' goods and buyers' needs, thus reducing search and bargaining costs while building a reputation for credibility and trustworthiness. Intermediation activities are an important part of the economy. Several studies have been conducted in the role of intermediaries and especially in corrupt activities.[87]

As companies expand into territories beyond their domestic markets and cross borders, often they look for a business partner or an intermediary who are better acquainted with the local norms. The employment of such intermediaries is legal and in some jurisdictions mandatory, for example, the United Arab Emirates where a local sponsor typically referred to as a national agent or local services agent is normally required to be

[86] Spulber, Daniel F., "Market microstructure and intermediation," *Journal of Economic Perspectives* 10(3), 1996, pp. 135-152.

[87] The following is a selection of studies into the relation between intermediaries and corrupt practices:
- Bac, Mehmet, "Corruption, connections and transparency: Does a better screen imply a better scene?" *Public Choice* 107(1-2), 2001: pp. 87-96.
- Bray, John, "The use of intermediaries and other alternatives to bribery," *The New Institutional Economics of Corruption*, London and New York, 2005: pp. 93-111.
- Drugov, Mikhail, Hamman, John, and Danila Serra, "Intermediaries in corruption: An experiment," *Experimental Economics*, 2011: pp. 1-22.
- Javorcik, Beata S., and Shang-Jin Wei, "Corruption and cross-border investment in emerging markets: firm-level evidence," *Journal of International Money and Finance* 28(4), 2009: pp. 605-624.
- Lambsdorff, Johann Graf, "Corrupt intermediaries in international business transactions: between make, buy and reform," *European Journal of Law and Economics* 35(3), 2013: p. 349-366.
- Olney, William W., *Impact of Corruption on Firm Level Export Decisions*, No. 2013-04, 2013.
- Otusanya, Olatunde Julius, Ajibolade, Solabomi Omobola, and Omolehinwa, Eddy Olajide, "The role of financial intermediaries in elite money laundering practices: evidence from Nigeria," *Journal of Money Laundering Control* 15(1), 2011: pp. 58-84.

appointed for each type of branch. In all cases, the sponsor must be a U.A.E. national or a company wholly owned by U.A.E. nationals.[88]

The FCPA defines an intermediary as a third party who knows that all or part of a corrupt payment will either be offered or otherwise makes it into the hands of any foreign official. An intermediary can include anybody that a company deals with who could make a payment to a government official on behalf of the company.[89]

The UK Bribery Act takes the definition wider and calls it, “Associated” person. Unlike the FCPA an "associated person" is not defined by reference to the nature of the relationship with, or the control exercised over, that associated person by the commercial organization. Under the UK Act an "associated person" is one which performs services on behalf of the organization. The definition is vague with a decision as to whether or not services have been performed to be determined by reference to all relevant circumstances and not merely to the relationship between the organization and the "associated person."

The basic premise of the FCPA and UK Bribery Act is that if one cannot make a payment themselves, then one cannot make it through someone else, an intermediary.[90] This would include distributors, sub-contractors, joint venture partners, consortium partners, agents, all types of consultants, service providers, intermediate customers (example – dealers).

The list of definitions in the table below has been compiled by the ‘Partnering Against Corruption Initiative’ (PACI)[91]:

Joint venture partner	An individual or organization which has entered into a business agreement with another individual or organization (and possibly other parties) to establish a new business entity and to manage its assets.
Consortium partner	An individual or organization which is pooling its resources with another organization (and possibly other parties) for achieving a common goal. In a consortium, each participant retains its separate legal status.
Agent	An individual or organization authorized to act for or on behalf of, or to otherwise represent, another organization in furtherance of its business interests. Agents may be categorized into the following two types: - Sales agents (i.e. those needed to win a contract) - Process agents (e.g. visa permits agents).
Adviser and other intermediary (e.g. legal, tax, financial adviser or consultant, lobbyist)	An individual or organization providing service and advice by representing an organization towards another person, business and/or government official.
Contractor and sub-contractor	A contractor is a non-controlled individual or organization that provides goods or services to an organization under a contract. A subcontractor is an individual or organization that is hired by a contractor to perform a specific task as part of the overall project.
Supplier/vendor	An individual or organization that supplies parts or services to another organization.
Service provider	An individual or organization that provides another organization with functional support (e.g. communications, logistics, storage, processing services).
Distributor	An individual or organization that buys products from another organization warehouses them and resells them to retailers or directly to end-users.
Customer	The recipient of a product, service or idea purchased from an organization. Customers are generally categorized into two types: - An intermediate customer is a dealer that purchases goods for resale. - An ultimate customer is one who does not in turn resell the goods purchased but is the end user.

Lambsdorff describes bribery by means of an intermediary as follows: “The idea would be to pay a “regular commission” to such middlemen who then undertake the “dirty work”, i.e. the payment of bribes. Payments to

88 Baker & McKenzie, *Doing business in the United Arab Emirates*, derived from http://www.bakermckenzie.com/files/Uploads/Documents/North%20America/DoingBusinessGuide/Dallas/br_dbi_uae_13.pdf.

89 15 U.S.C. § 78dd-1(a)(3) (explaining that the FCPA forbids U.S. companies from making a payment to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official," in violation of the FCPA).

90 U.S. Dep't of Justice, *supra*, note 4.

91 The World Economic Forum Partnering Against Corruption Initiative (PACI) is a global, multi-industry, multi-stakeholder anti-corruption initiative set up to raise business standards and to contribute to a competitive, transparent, accountable and ethical business society. (See http://www.weforum.org/issues/partnering-against-corruption-initiative.)

such middlemen can be based upon written contracts and appear to be legal. Such a middleman can pay out bribes and arrange deals, and after providing the corrupt service she can claim the promised return or; if rejected, threaten to use legal recourse."[92]

Husted refers to two forms of corruption involving middlemen[93]:

1. Market Corruption: "a competitive form of corruption with a high degree of transparency". An example would be someone who helps fix things or move them forward, like obtaining visas or permits and licenses.

2. Parochial Corruption: "transaction with potential contractors and thus restricted competition". A typical example would be an agent who can help obtain a contract with the government.

2.4. Risk assessment and mitigation

Generally, risk management is the identification, assessment, and prioritization of risks.[94] (For more on Enterprise Risk Management see Appendix V.) Risks are assessed by the probability of occurrence (likelihood) and the impact of the occurrence. The greatest probability of occurring with the highest impact are handled first, and risks with lower and lower are handled in descending order.[95] The probability of occurrence can be assessed, for example, on a scale from 1 to 3, where 1 represents a very low probability of the risk occurring and 3 represents a very high probability of occurrence. Similarly, the impact of the risk is also assessed on a scale of 1 to 3, where 1 and 3 represent the minimum and maximum possible impact of an occurrence of a risk. Once risks have been identified and assessed, all techniques to manage the risk fall into one or more of these four major categories[96]:

- Avoidance (eliminate, withdraw from or not become involved)
- Reduction (optimize – mitigate)
- Sharing (transfer – outsource or insure)
- Retention (accept and budget)

The basic step in designing an anti-bribery program is risk assessment. This will help determine the risks that an organization is exposed to. It, therefore, become essential to understand where and how does an organization operate. For example, if an organization only operates in a domestic market in a country with a relatively lower perception of corruption, the overall corruption risk may potentially be lower. The Organizational Sentencing Guidelines suggest that the failure to perform this type of risk analysis can be fatal to the effectiveness of the plan. "If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses.[97]

"*A company with few foreign operations or that does business only in jurisdictions in which bribery is unlikely to occur, faces a far different task in designing a compliance program than does one whose business is dependent on the award of government contracts in a jurisdiction where bribery is endemic*."[98]

Putting this in the context of intermediaries, the variety of different types of intermediaries and the variety of ways in which they interact and interface means that an anti-bribery program and measures need to be tailored to specific circumstances. The FCPA resource guide requires the assessment of risk as being fundamental to developing a strong compliance program. "One Size fits all compliance programs are generally ill conceived and ineffective …"[99] Not every third party and/or transaction has the same risk profile. Understandably for low risk

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92 Lambsdorff, Johann Graf, "Making corrupt deals: contracting in the shadow of the law," *Journal of Economic Behavior & Organization* 48(3), 2002, pp. 221-241.
93 Husted, Bryan W., "Honor among thieves: A transaction-cost interpretation of corruption in Third World countries," *Business Ethics Quarterly* 4(1), 1994.
94 ISO 31000 (ISO/DIS 31000 (2009). Risk management — Principles and guidelines on implementation
95 Hubbard, Douglas, *The Failure of Risk Management: Why It's Broken and How to Fix It*, Hoboken, NJ: John Wiley & Sons, 2009, p. 46.
96 Dorfman, Mark S., *Introduction to Risk Management and Insurance*, 2007.
97 USSG § 8A1.2, application note 3(k)(ii).
98 Goelzer, Daniel L., "Designing an FCPA compliance program: Minimizing the risks of improper foreign payments," *Northwestern Journal of International Law & Business* 18, 1997, p. 282.
99 Resource guide to the FCPA, Chapter 5, "Guiding Principles of Enforcement."

third parties, corporations do not want to spend valuable time or resources. The flip side of that coin is that for higher risk parties, corporations need to take extra steps.[100]

Transparency International's Corruption Perceptions Index ("CPI")[101] is widely used by organizations to assess the corruption risk related to doing business in or with companies in specific countries or regions. Since 1995, the CPI is published annually. It ranks the countries of the world according to the degree to which corruption is perceived to exist among public officials and politicians. The data are derived from a combination of surveys of perceptions of corruption through a variety of questions, ranging from: "Do you trust the government?" to "Is corruption a big problem in your country?" These surveys are filled out by third parties and public. A higher score means less (perceived) corruption. Academic studies using the CPI are on the rise as corruption becomes an increasing concern for international and global businesses. The literature review indicates that the CPI is accepted as a measure of corruption by both researchers and business decision-makers.[102]

2.5. Red flags

The FCPA resource guide[103] summarizes the common red flags associated with third parties as:

- Excessive commissions to third-party agents or consultants;
- Unreasonably large discounts to third-party distributors;
- Third-party "consulting agreements" that include only vaguely described services;
- The third-party consultant is in a different line of business than that for which it has been engaged;
- The third party is related to or closely associated with the foreign official;
- Rumors of improper payments or other unethical business practices by the target company, its employees, or its agents, consultants or representatives;
- Unusually large or frequent payments in cash.

Based upon the above, information compiled by several law firms and accounting firms, and publicly available literature[104], the red flags related to an intermediary can be broadly summarized under the following categories:

Gifts/Hospitality:

- Requests are made for a payment or gift for himself or another.

Payments Requests (including rebates, discounts, or bonuses):

- Requests for payments take an unusual form, for instance a substantial up-front payment or "success bonus."
- Requests for payments are made in an unusual way (e.g. in cash or through unusual or convoluted means for example off shore accounts or via another intermediary).
- Requests for payments are allegedly needed to secure the business, "seal the deal" or necessary to circumvent or expedite normal business or bid processes.
- Requests for payments are higher than normal.
- Requests for payments are made with false invoices or any other type of false or misleading documents.

Reputation:

- The intermediary has a reputation for bribery and corruption.
- A reference check reveals the intermediary has a flawed or suspicious background or reputation.
- There have been public accounts in the media alleging or reporting improper conduct by the intermediary, or a representative of the intermediary.

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100 DiBianco, Gary, and Pearson, Wendy E. "Anti-corruption due diligence in corporate transactions: How much is enough?" *Review of Securities & Commodities Regulation* 41, 2008, pp. 125-127.

101 www.transparency.org

102 Wilhelm, Paul G., "International validation of the corruption perceptions index: Implications for business ethics and entrepreneurship education," *Journal of Business Ethics* 35(3), 2002, pp. 177-189.

103 FCPA Resource guide.

104 Some examples of publically available information are:
Matteson Ellis, The Master List of Third Party Corruption Red Flags – FCPA Americas Blog, 2 April 2014(www.fcpamericas.com/english/anti-corruption-compliance/master-list-party-corruption-red-flags)
The Foreign Corrupt Practices Act: The FCPA checklist (http://www.acc.com/chapters/canada/upload/fore-corr-prac-acts.pdf)
The red flags that may indicate that you at risk of violating the FCPA (http://www.crowehorwath.com/ContentDetails.aspx?id=933)

- Conduct by the business partner is suspicious or is inconsistent with good business practices.

Laws/Legislation and Corporate Structure:
- Local laws or regulations restrict the desired intermediary relationship.
- Screening reveals that the intermediary is a shell company or has some other unorthodox corporate structure.
- The intermediary refuses to agree to comply with anti-corruption laws (for example the FCPA or the OECD Convention on Bribery) or objects to the ethical conduct language in the contract.

Technical Expertise/Knowledge:
- The intermediary lacks the technical knowledge, experience, facilities or staff to perform the service which it is to provide.
- The intermediary can only contribute "influence".

Connections to Public Officials:
- The intermediary has been appointed only for its connections with, or due to recommendations, from a public official(s) or public body.
- The intermediary, or an owner, board member or senior decision maker of the business partner, is (1) an active or retired public official, (2) related to or close with a public official or (3) owned at least in part by a public official or the relative of one.

Transparency:
- The intermediary requests:
    - that contract services be described in any way other than what they really are;
    - to keep normal commercial information such as their engagement or payment secret;
    - to enter into a relationship with another person or organization, particularly if the intermediary has discretionary authority over the latter person or organization.

How a Red Flag could be addressed will largely depend on the nature of the risk identified. However, some mitigating actions could include:
- Building additional contractual safeguards into the agreement, for example additional obligations with respect to internal controls or enhanced audit rights;
- Obtaining written certification from the individuals associated with the intermediary, recognizing their potential conflict of interest or the risk of bribery and corruption coupled with the individual undertaking to conduct themselves appropriately;
- Providing additional training to the intermediary and their staff on the organization's Code of Conduct;
- Conducting due diligence prior to engaging the intermediary.

2.6. Due diligence

As noted in the preceding sections, intermediaries can be a source of potential liability for corporations, especially if they engage in improper business practices under the provisions of anti-corruption legislation. One of the ways to safeguard against this liability is to conduct, and provide evidence of, a thorough review of the intermediary prior to entering into the business relationship, commonly referred to as due diligence.

The term 'due diligence' appeared for the first time in the US Securities Act of 1933, referring to the 'reasonable investigation into matters contained in a prospectus for the issue of securities'.[105] Nowadays, due diligence refers to a set of practices by which corporations go through the histories of their potential partners before closing a deal. It includes the verification and evaluation of various facts about a business or individual, and the check of the existence of any violations, previous legal disputes or illicit activities.

The theory behind due diligence is that performing this type of investigation contributes significantly to informed decision making as it enhances the amount and quality of information available to decision makers and ensuring that decision makers take into account the costs, benefits, and risks which the decision entails.[106]

[105] Spedding, Linda, *Due Diligence and Corporate Governance*, Croydon, UK: LexisNexis, 2004, p. 2.
[106] Flyvbjerg, Bent, "Quality control and due diligence in project management: Getting decisions right by taking the outside view," *International Journal of Project Management* 31(5), 2013, pp. 760-774.

Several national authorities and international organizations, involved in the fight against corruption, have stressed the importance – necessity even – of performing due diligence on intermediaries. This is evidenced by the following:

- According to the FCPA Resource Guide, "Businesses may reduce the FCPA risks associated with third-party agents by implementing an effective compliance program, which includes due diligence of any prospective foreign agents" and the degree of due diligence should be "fact-specific." The FCPA Resource Guide also says, "Risk-based due diligence is particularly important with third parties and will be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program."

- The US Federal Sentencing Guidelines state, "Exercise due diligence to prevent and detect criminal conduct" and "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[107]

- The UK Ministry of Justice has issued specific guidance on due diligence as this applies to the UK Bribery Act, Principle 4. Organizations must apply due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organization. In lower risk situations, commercial organizations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed relationship. Appraisal and continued monitoring of recruited or engaged could also be required. Due diligence could involve direct requests for details on the background, expertise and business experience, of relevant individuals.

- In 2009, the Council of the Organization for Economic Co-operation and Development (OECD) issued guidelines for an anti-bribery compliance program for global organizations. These OECD guidelines cover measures to prevent and detect bribery through third parties, which include a risk-based due diligence assessment of all business partners.

- The World Bank's Integrity Compliance Guidelines (Debarment with Conditional Release & Integrity Compliance) says in Section 5.1, "Conduct properly documented, risk-based due diligence (including identifying any beneficial owners or other beneficiaries not on record) before entering into a relationship with a business partner, and on an on-going basis."[108]

- Transparency International in Section 6.2.1.3 of the Business Principles for Countering Bribery says "Whether or not it has effective control over a business entity, the enterprise should undertake properly documented, reasonable and proportionate anti-bribery due diligence of business entities when entering into a relationship including mergers, acquisitions and significant investments."[109]

- The World Economic Forum's, Partnering Against Corruption Initiative in Section 5.2.3.1 of the Principles for Countering Bribery says, "The enterprise should undertake due diligence before appointing an agent, adviser or other intermediary, and on an on-going basis as circumstances warrant."[110]

The essence of legal or financial due diligence has been complemented over the years with other aspects. Terms like 'human due diligence,' 'cultural due diligence' and 'integrity due diligence' have come into use. Integrity due diligence is defined as "the process of mitigating risk arising from association with a third party who may be or may have been engaged in unethical or illegal practices. The risk may exist as a direct liability by the company through its association, or it may take the form of reputation damage as guilt by association."[111]

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107 §8B2.1.Effective Compliance and Ethics Program (http://www.ussc.gov/guidelines-manual/2010/2010-8b21)
108 http://siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf
109 http://www.transparency.org/whatwedo/pub/business_principles_for_countering_bribery
110 http://www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf
111 Price, Michael, "Case story: Integrity due diligence," in: *Business Against Corruption, Case Stories and Examples, Global Compact*, New York: United Nations Global Compact Office, 2006, p. 119.

2.7. A risk based approach to due diligence

Many organizations deploy hundreds and thousands of intermediaries.[112] These intermediaries are all labelled in different ways – agents, consultants, resellers, distributors, dealers, freight forwarders, export and import agents, visa facilitators, subcontractors, etc. to manage the risks posed by them. Many corporations no longer react passively to the challenges and/or risks posed by corruption in a host country. Increasingly, corporations tend to "shape and change structural properties of business systems of which they are a part through their own practices [...] that they recursively organize."[113] In a parallel sense, corporations may be seen as governing at a distance,[114] and enrolling clients, agents, and other actors on foreign markets into wider networks in which anti-corruption values are being articulated. As Garland observes: "Managing risk means steering it, controlling it, minimizing its detrimental effects while making the most of its positive potential."[115]

Conducting a uniform due diligence, and consistently monitoring all risks, can be a daunting task for an organization. The FCPA Resource Guide has this to say about due diligence:

> "[...]performing identical due diligence on all third party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks. DOJ and SEC will give meaningful credit to a company that implement 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. Conversely, a company that fails to prevent an FCPA violation on an economically significant, high-risk transaction because it failed to perform a level of due diligence commensurate with the size and risk of the transaction is likely to receive reduced credit based on the quality and effectiveness of its compliance program [...]. Factors to consider, for instance, 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. When assessing a company's compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces."[116]

The Resource Guide further provides directions and expectations on the extent to which due diligence needs to be conducted. This can be summarized as three things every organization needs to understand as a result of due diligence:

1. As part of the risk assessment, organizations need to understand the qualifications and associations of the intermediaries and relationship with government officials.
2. Organizations need to understand the use of the intermediary and the business rationale in the transaction.
3. Organizations need to take some form of ongoing monitoring of the intermediaries.

The degree of due diligence should increase as red flags are detected. Technological developments have also made it possible for smaller companies to get access to basic due diligence and numerous databases like PEP lists and watch lists. There are numerous suppliers, including the Big Four accounting firms and countless specialized consultancies and non-profits organizations who offer due diligence services. The technique of due diligence implies a particular mode of judgment based on specific methodologies.[117] At a high level, the process of due diligence involves collecting or procuring information about a target and analyzing the obtained information. While commercial database applications may make information gathering and analysis more efficient, they also raise new challenges. The likelihood that illegal methods are being used to obtain information poses a risk in itself.

The process of Integrity Due Diligence should be to obtain as much information as possible prior to entering the relationship with the intermediary. It should cover intermediaries' background, reputation, activities, affiliations etc. This process provides organizations with valuable information and/or red flags.

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112 Please refer to Chapter 3, section 3.4.2 for the results of the survey conducted by NAVEX Global.

113 Luo, Yadong, "Political behavior, social responsibility, and perceived corruption: a structuration perspective," *Journal of International Business Studies* 37, 2007, p. 761.

114 Rose, Nikolas, and Miller, Peter, "Political power beyond the state: Problematics of government," *The British Journal of Sociology* 43(2), 1992, pp. 173-205.

115 Garland, David, "The rise of risk," in R.V. Ericson and A. Doyle (eds.), *Risk and Morality*, Toronto: University of Toronto Press, 2003, p. 68.

116 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, 2012, p. 59.

117 Maurer, Bill, "Due diligence and 'reasonable man,' offshore," *Cultural Anthropology* 20(4), 2005, pp. 474-505.

At a high level, the following areas should be considered in carrying out the verification and completion of an Integrity Due Diligence process to obtain the necessary background intelligence about the intermediary[118]:

[118] The depicted model has been developed by the author of the thesis. The term Corporate Intelligence is used by several service providers, amongst which the big 4.

1. KYC = Know Your **C**ountry
2. KYI = Know Your **I**ntermediary

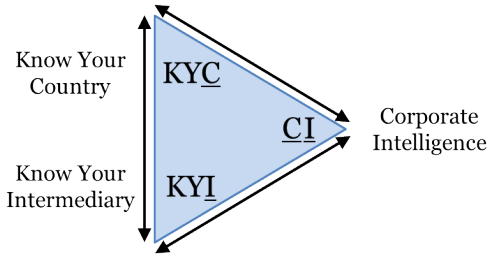

Figure 4. Knowing the country and your intermediary requires Corporate Intelligence

As explained in the previous sections, it is valuable to understand the country of the intermediary and more importantly the sales territory of the intermediary. Generally for this purpose the Corruption Perception Index could be used. With respect to knowing the intermediary, the following aspects should be considered:

- Incorporation details, management and ownership. Official registries of companies and other organizations usually make their records available.
- Principals' backgrounds, public profiles, business relationships and commercial footprints, current and prior directorships and shareholdings. ongoing political connections
- Government owned or controlled partnership, prior
- History of sanctions or barring by international regulatory agencies.
- Involvement in bankruptcy proceedings, litigation, or serious business dispute
- Involvement in illegal or unethical business practices by the third party or its principals, including but not limited to bribery, money-laundering, fraud, or corruption
- International blacklists relating to money-laundering, terrorist-financing and political exposure.
- Interviews and discreet source enquiries in case red flags are identified or for high risk transactions

Due Diligence is however, not a linear process, but a dynamic process where the output of one leads to another. (See figure 5 below). It is usually progressive. It begins with the acquisition of basic information directly from corporate records and further research is done. Depending on information found, further research is done into various elements.

Figure 5. The dynamic process of integrity due diligence

2.8. Methodology

The methodology applied by author in this thesis is based on a combined approach of the following:

1. Conceptual research which included literature (books, academic journals and other documented source materials);

2. Empirical research which included the following:

    a. Explorative discussions and brainstorming with a selection of chief legal officers and chief compliance officers of multinationals whom the author felt have something relevant to contribute. In order to safeguard the privacy of the persons, no names or other personal data have been disclosed.

    b. Survey questionnaire that consisted of 10 questions with a combination of Yes/No questions and descriptive questions (see Appendix VI). For reasons of confidentiality, the responses as presented in Appendix VII have been sanitized and anonymized.

    c. Surveys conducted and compiled by several organizations. These have been appropriately referenced in the footnotes.

3. Analysis and results

3.1. Enforcement

Economic crime has always been a concern to organizations in all sectors. Economic crimes such as bribery and corruption, money laundering and anti-competitive practices are more regularly examined by regulators; according to the 2014 Global Economic Crime Survey conducted by PwC.[119] Please refer to figure 6 below:

Figure 6. Perceived greatest relative economic crime risk (source: PwC 2014 Global Economic Crime Survey)

The World Bank which is a consortium of two international banking institutions that together provide loans to developing countries for capital programs with the official goal of eradicating extreme poverty and hunger worldwide. In Fiscal Year 2013, the World Bank publicly debarred 47 entities (and their affiliates) found to have engaged in prohibited practices.

The U.K. Bribery Act 2010 has yet to generate the large-scale international corruption prosecutions anticipated upon its passage, resulting thus far in only a handful of largely small-dollar value domestic corruption cases of cash for modest spoils such as taxi driver licenses and inflated grades on University exams. Answering "those who are impatient for the first prosecution," U.K. Serious Fraud Office ("SFO") Director David Green QC observed both that the Bribery Act applies only to conduct that post-dates its July 2011 coming into force and that it took U.S. enforcers decades after passage of the FCPA to "hit their stride."[120]

The table below summarizes enforcement initiatives in some countries (presented alphabetically)[121]:

Country	Enforcement activity(ies)
Algeria	On August 12, 2013, Algerian prosecutors unveiled an indictment against former Energy Minister Chekib Khelil, as well as his wife and two sons, on corruption, money laundering, and related charges arising from the "Sonatrach 2" scandal—named for the Algerian state-owned oil company.
Argentina	On December 27, 2012 an Argentinian magistrate judge indicted 18 individuals in connection with the Siemens AG national identity card scandal.
Canada	Enforcement Authorities of Canada's Corruption of Foreign Public Officials Act ("CFPOA") continued through 2013. Notably, on August 15, 2013, Canadian prosecutors secured their first CFPOA conviction of an individual and the first reported decision under the statute in the prosecution of Nazir Karigar. Karigar, an agent of technology company Cryptometrics Canada, was convicted of conspiring to bribe officials of the state-owned Air India and India's Minister of Civil Aviation in an effort to win a biometric security systems tender.
China	In July 2013, Chinese authorities detained 22 GlaxoSmithKline plc executives and employees in an expanding corruption investigation reportedly involving as many as 60 domestic and multinational pharmaceutical companies operating in China.
France	On July 8, 2013, a Paris regional criminal court acquitted Total, S.A. and 18 individual defendants for foreign corruption charges arising out of the U.N. Oil-for-Food Program administered in Iraq during the late 1990s and early 2000s.
Germany	German anti-corruption efforts have continued to advance at a robust pace in 2013, both on the enforcement and legislative fronts. The most noteworthy enforcement case has to be the unprecedented corruption charge against the former Federal President of Germany, Christian Wulff.

[119] The 2014 survey conducted by PwC included 5128 respondents from 95 countries globally.
[120] Quinn, James, SFO warns Bribery Act prosecutions on their way, *The Telegraph*, October 24, 2013, derived from http://www.telegraph.co.uk/finance/financial-crime/10401878/SFO-warns-Bribery-Act-prosecutions-on-their-way.html.
[121] This table has been compiled based on Gibson, Dunn & Crutcher, *2013 Year-end FCPA update*, January 6, 2014, derived from http://www.gibsondunn.com/publications/Documents/2013-Year-End-FCPA-Update.pdf.

India	The latter half of 2013 saw a number of high-profile corruption scandals, including political activists stepping up their calls for Prime Minister Manmohan Singh's resignation over alleged corruption involving the allocation of coal mining rights, former Bihar State Chief Minister Lalu Prasad being sentenced to five years in jail for his role in a scandal involving fraudulent withdrawals of public funds,
Japan	On September 11, 2013, a former senior managing director of auto parts supplier Futaba Industrial Co., Takehisa Terada, was arrested on charges that he paid more than $500,000 in bribes to Chinese customs officials as well as to halt an investigation into irregularities at the company's plant in China.
Korea	In October 2013, Korean authorities indicted 100 individuals on corruption charges stemming from a months'-long investigation into alleged collusion between officials at Korean state-run energy companies and parts suppliers.
Russia	Recent domestic enforcement activities include the two largest fines ever imposed by Russian courts for bribery: $29 million and $15 million upon a Moscow Region official and his accomplice for demanding a $500,000 bribe to issue a construction permit for a new apartment block

3.2. Continued enforcement: The omnipresent FCPA

FCPA was enacted in 1977, however remained dormant for most of its existence[122]. In the last ten years we have seen an emergence of new trends and continuation of aggressive enforcement by the DOJ and/or SEC. It is hard to deny the presence of the FCPA in an organization's life cycle. The long reaching arm and jurisdictional reach of the FCPA is only getting longer. Dr. Bleker examines this topic and when and how under can jurisdiction can be claimed in general and in particular by the US. She provides examples to demonstrate the impact of these on organization.[123]

Historically, the business community perceived, rightfully or wrongfully, as being applicable only to large multinationals. Koehler discusses the omnipresence of the FCPA in his research and publication. He points out to the increase in globalization, market saturation, particularly in a recession economy; it is no longer just large resource extraction companies doing business in overseas markets that need to be concerned with the FCPA. He states that larger companies may indeed have a higher FCPA risk profile, the "*FCPA equally applies to small and medium sized companies doing business or seeking business in countries such as China and India. If the increase in FCPA enforcement over the last decade has taught anything, it is that all companies, in all industries, doing business in all countries face FCPA risk and exposure.*"[124]

The graph below outlines the number of FCPA enforcement actions initiated by the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC"), during each of the past ten years.[125]

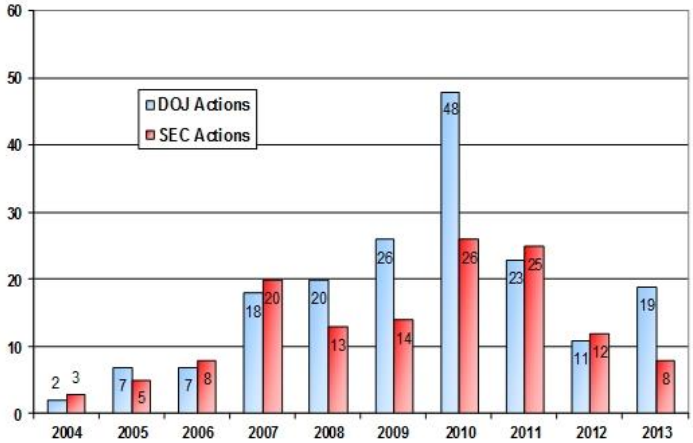

Figure 7. Number of actions initiated by the DOJ and the SEC between 2004 and 2013

[122] Searcey, Dionne, "U.S. Cracks Down on Corporate Bribes," *Wall Street Journal*, May 26, 2009, derived from http://online.wsj.com/article/SB 1 2432947723095268 9.html. Searcey notes that FCPA enforcement was "largely dormant for decades."

[123] Bleker-van Eyk, Sylvie C., "The gavel: The extraterritorial web," *Journal of Business Compliance*, 2(5), October 2013.

[124] Koehler, Mike, "The Foreign Corrupt Practices Act in the ultimate year of its decade of resurgence," *Indiana Law Review* 43, 2009, p. 389.

[125] Gibson, Dunn & Crutcher, *2013 Year-end FCPA update*, January 6, 2014, derived from http://www.gibsondunn.com/publications/Documents/2013-Year-End-FCPA-Update.pdf.

3.3. Involvement of intermediaries

The top 10 FCPA list as of year-end 2013 is listed below. The last column lists the intermediaries were involved.

Company	Total Resolution	Date	Brief summary	Intermediaries involved
Siemens AG	$ 800,000,000	12/15/2008	Siemens used numerous slush funds, off-books accounts maintained at unconsolidated entities, and a system of business consultants and intermediaries to facilitate the corrupt payments	Business consultants, agents, and other payment intermediaries
KBR/Halliburton	$ 579,000,000	02/11/2009	KBR pleaded guilty to conspiring with its joint-venture partners and others to violate the FCPA by authorizing, promising and paying bribes to a range of Nigerian government officials, including officials of the executive branch of the Nigerian government to obtain contracts.	Agents
BAE Systems	$ 400,000,000	02/04/2010	In 2000, BAE made commitments to the U.S. government that it would create and implement policies and procedures to ensure compliance with provisions of the FCPA. Before and after its commitments BAE regularly retained "marketing advisors" to assist in securing sales of defense articles. Payments were made to these advisors without the type of scrutiny and review required by the FCPA.	Offshore shell companies and marketing advisors
Total, S.A.	$ 398,200,000	05/29/2013	The France-based oil and gas company is charged for paying bribes to intermediaries of an Iranian government official who then exercised his influence to help the company obtain valuable contracts to develop oil and gas fields.	Unnamed third parties designated by the foreign official
Snamprogetti/ENI	$ 365,000,000	07/07/2010	Snamprogetti participated in a joint venture to obtain and perform EPC contracts to build and expand the Bonny Island Project for Nigeria LNG Limited. From August 1994 until June 2004, Snamprogetti and its partners in the joint venture allegedly authorized, promised, and paid bribes to Nigerian government officials.	Agents
Technip S.A.	$ 338,000,000	06/28/2010	Technip participated in a joint venture to obtain and perform EPC contracts to build and expand the Bonny Island Project for Nigeria LNG Limited.	Consultant, agents
JGC Corp.	$ 218,800,000	04/06/2011	From August 1994 until June 2004, senior executives, employees, and agents of JGC and its partners in the joint venture authorized, promised, and paid bribes to Nigerian government officials – including officials in the executive branch, employees of the government-owned Nigerian National Petroleum Corporation, and employees of government-controlled Nigeria LNG Limited – to win and retain Bonny Island EPC contracts.	Consultant and Japanese trading company, agents
Daimler AG	$ 185,000,000	04/01/2010	Between 1998 and 2008, Daimler AG ("Daimler") and its subsidiaries made hundreds of improper payments worth tens of millions of dollars to foreign officials to obtain vehicle contracts in at least 22 countries.	Various
Weatherford	$ 152,790,616	11/26/2013	According to the SEC's complaint, between	Subsidiary

Company	Total Resolution	Date	Brief summary	Intermediaries involved
			2002 and 2011, Weatherford and its subsidiaries made improper payments to government officials in Angola, Algeria, Albania, and Iraq to win lucrative oil services contracts and to gain significant market share.	companies; third-party distributors; third-party agents; joint ventures
Alcatel-Lucent	$ 137,372,000	12/27/2010	According to a complaint filed by the SEC on December 27, 2010, Alcatel S.A. ("Alcatel") and its subsidiaries, including Alcatel CIT, S.A., Alcatel Standard, A.G., and Alcatel de Costa Rica, S.A., paid bribes to government officials in Costa Rica, Honduras, Taiwan, and Malaysia, to obtain or retain telecommunications contracts.	Consultants and subsidiaries

The 2013 FCPA prosecution trends have been summarized as summarized by Ropes and Gray LLP can be summarized as below[126]:

- Broad geographic reach: Investigations and prosecutions in 2013 covered 19 countries on every continent except Australia and Antarctica.
- Higher settlement amounts: in 2013, DOJ and SEC collected over 635 million USD, which is nearly 2.5 times the total collected in 2012.
- Increase in self reporting:
- Focus on individual prosecutions
- Increased collaboration with foreign regulators

And finally …:

- Use of intermediaries: At a November 2013 international anti-corruption conference127, SEC FCPA Unit Chief Kara Brockmeyer noted that two-thirds or more of her team's cases have fact patterns involving the use of intermediaries. Examples include:
    - Ralph Lauren: The company's Argentinian subsidiary routed payments to a customs vendor, who in turn provided improper benefits to public officials in exchange for obtaining necessary paperwork for imports, approving customs clearance of items without documentation, and circumventing inspection protocols.
    - Parker Drilling: Improper payments and entertainment was provided to Nigerian government officials through an intermediary agent with whom Parker Drilling allegedly contracted through its law firm.
    - Stryker Corporation: The company's Mexican subsidiary directed a law firm to pay approximately $46,000 to a Mexican government official in order to win a contract bid, which payment was then booked by the Mexican subsidiary as a legitimate legal expense.

Dutch companies have not been exempted from cases of corruption, as the following recent examples attest. A prospectus for a planned claim emission by SBM Offshore in 2012 stated that "the concern has possibly violated anti-corruption legislation which could have an impact on its profits and revenues, and also possibly lead to fines, penal and civil-law sanctions, and other measures, such as postponement and exclusion of contracts." The internal investigation is expected to be finalized later this year. The subject of the investigation includes

126 http://www.ropesgray.com/news-and-insights/Insights/2014/March/Foreign-Corrupt-Practices-Act-Enforcement-Activity-2013-Year-in-Review-and-2014-Preview.aspx

127 ACI Conference Agenda, http://www.fcpaconference.com/agenda.html

"improper sales practices with third parties and evidence that significant payments have been made, 'mostly by intermediaries', to government officials."[128]

In December 2012 a press release by Ballast Nedam and the Dutch Public Prosecution Service read: "Ballast Nedam settles for several million euros with the Public Prosecution Service. By paying a fine of 5 million euro, the building company buys off prosecution for bribery. The company will also waive a claim of 12.5 million euro on the Tax Authorities. The settlement will cost Ballast Nedam 17.5 million euro in total." Ballast Nedam was suspected of paying bribes to foreign intermediaries between 1996 and 2004. The company itself brought the issue up with the Public Prosecution Service in January 2011. Subsequently, the Dutch fiscal intelligence service (FIOD) carried out an investigation. As part of the settlement, Ballast Nedam will toughen up its ethical policies.[129]

A bit further back in time, the Public Prosecution Service imposed sanctions on seven companies, including Saybolt International, Flowserve and Organon (a former division of AkzoNobel), in the context of the UN Oil-for-Food corruption scandal. Together, these companies paid a little less than 900,000 euro in fines and about 500,000 euro for having made illegal profits. AkzoNobel also paid a fine of 2.9 million dollars to the SEC for having paid about 280.000 dollars in bribes.[130] It is interesting to note that the U.S. Department of Justice balanced this fine with the 380.000 euro that AkzoNobel had to pay in the Netherlands as part of the transaction with the Dutch Public Prosecution Service mentioned above.[131]

In March 2013, the SEC fined Royal Philips in the U.S. 4.5 million dollars for bribery and corruption, as appears from information offered by the SEC. "This matter concerns violations of the books and records and internal controls provisions of the Foreign Corrupt Practices Act ("FCPA") by Philips. The violations took place through Philips's operations in Poland from at least 1999 through 2007. The violations relate to improper payments made by employees of Philips's Polish subsidiary, Philips Polska to healthcare officials in Poland regarding public tenders proffered by Polish healthcare facilities to purchase medical equipment."[132]

3.4. Surveys and Interviews[133]

3.4.1. Types and use of intermediaries

The author interviewed/surveyed Compliance and legal professionals of twenty five organizations with ten questions. Based on the preference of the respondents to provide feedback (written or verbal) answers were collated. Please refer to Appendices VI and VII for the questions used and a summary of the responses. To protect the anonymity of the organization and the privacy of the individuals, names have not been mentioned. In one such interview, a respondent said, "Agents play a valuable role, especially because they have close connections in a foreign country". Another respondent echoed the same sentiment and added that, "in many companies even today and more so in Netherlands, employees at high levels think that they can engage intermediaries to do things they would not do themselves and feel themselves protected for using this mechanism."

According to the survey, various types of intermediaries are used by organizations. They are labelled as agents, distributors, general contractors, sales consultants, and subcontractors, resellers, system integrators, service providers, channel partners, suppliers, dealers, traders, brokers, sub brokers, freight forwarders, and lead generators. The labels assigned to them depend on the sector and companies. Most respondents agreed that the labels/categories assigned to them "do not say anything … it is what an intermediary does for you or on your behalf … that is important … and above all is there a primary business purpose or is this intermediary engaged to bribe on your behalf."

Below is a summary of the key points from the responses to the survey:

- 100% of the organizations have an anti-corruption policy procedure in place.

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128 "SBM heeft mogelijk anti-corruptie wetten overtreden; impact op resultaten voorzien," *Dow Jones*, 3 april 2013,

129 Ballast Nedam schikt omkopingszaak, NU.nl, 21 december 2012.

130 Report of 17 December 2008 regarding the Netherlands (phase 2) of the OECD Working Group on Bribery in International Business Transactions.

131 Karpati B., Assistant Regional Director in the Enforcement Division of the SEC, in Navigating dangerous waters, FCPA: Managing international business and acquisition compliance risk, *ALM Legal Special Supplement to New York Law Journal and The National Law Journal*, PwC 2008.

132 SEC cease-and-desist order and disgorgement, administrative proceeding file no. 3-15265, in the matter of Koninklijke Philips Electronics N.V., http://www.sec.gov/litigation/admin/2013/34-69327.pdf.

133 All the quotes obtained from interviews in this section have not been referenced in footnotes to protect the privacy of the individuals.

- 82% of these policies cover intermediaries, third parties and/or business partners
- Nevertheless, risk assessments of intermediaries are less prevalent. As shown in figure 8, only 52% conduct risk assessments of intermediaries.
- 47% conduct some type of screening. The process and depth of the screening conducted varies from a high level search on incorporation to media searches for adverse information to fully outsourced due diligence.
- 23% re-screen their intermediaries at different intervals that vary from each quarter to once in 2 or 3 years.

To the question on the greatest areas of concerns, the responses are summarized below:

- Bribery, fraud, money laundering, unethical practices by intermediaries
- Value add to the business – "business justification of engaging the business partner"
- Wring connections that the intermediaries may have, Politically Exposed Persons (PEPs)
- Reputation of the third party
- Child labor, illegal behavior

Asked about current challenges to the due diligent process regarding third parties, the respondents mentioned inter alia:

- Costs and cost effectiveness (2);
- Regarding quality: keeping findings up to date, getting meaningful results from the process, obtaining qualified information, getting local input, and applying changing legislation (8). One respondent said, "It is difficult to obtain all the relevant information about the partner". Another respondent echoed the same sentiment and added that she "feared the danger of drowning in investigation questions and trying to make sense of all the information gathered" ;
- Regarding internal commitment: buy in and internal pushback as business is perceived to suffer from delays or impaired relationships (4) - "too much work and not necessary", as one respondent is said to have heard from the business. Another respondent said that this was viewed as "sales prevention".

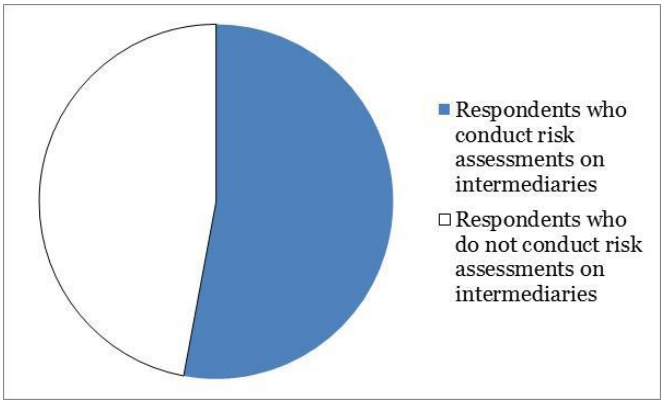

Figure 8. Proportion of respondents who perform risk assessments on intermediaries

Responses to the question of whether they also conduct due diligence on third parties were more varied. Six did not, and three to a limited extent (figure 9).

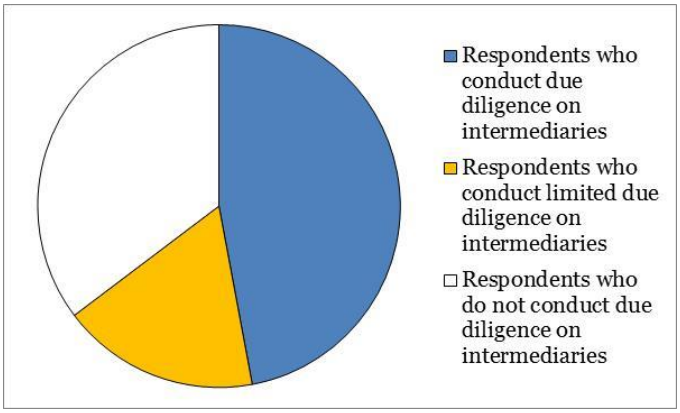

Figure 9. Proportion of respondents who perform due diligence on intermediaries

In a survey conducted by Control Risks,[134] respondents from six countries were asked if their country sought to circumvent anti-corruption legislation using intermediaries 'occasionally', 'regularly' or 'nearly always'. The results are summarized below:

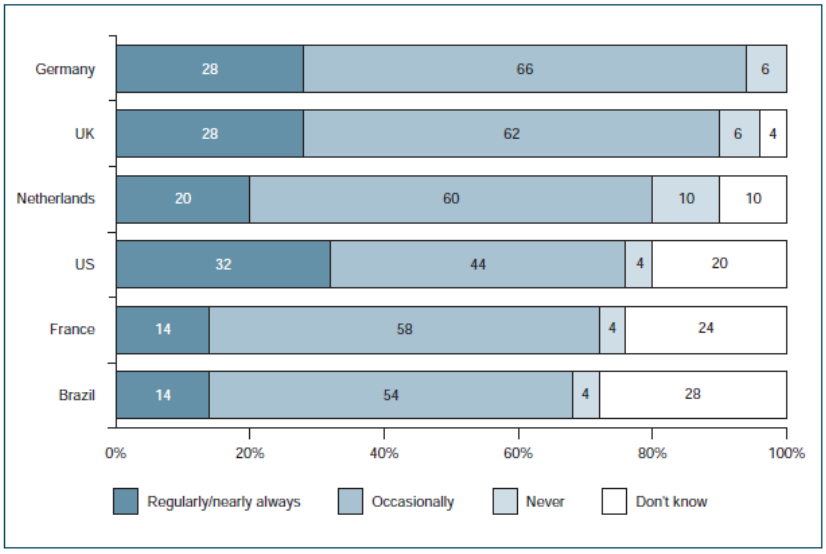

Figure 10. Practice of circumventing anti-corruption legislation using intermediaries

3.4.2. Awareness of risks imposed by intermediaries

Most organizations employ numerous intermediaries and this creates a daunting task to manage the risks. From the interviews conducted by the author, respondents who were primarily Compliance and Legal professionals, the awareness of these risks is quite high. Most respondents echoed that the awareness in the business is quite low or it is a "head in the sand mentality". The 12th Global Fraud Survey[135] conducted by Ernst & Young finds that the awareness of the risks posed by intermediaries is inconsistent. Please refer to figure 11 below:

134 *International business attitudes to corruption – survey 2006*, Control Risks Group Limited and Simmons & Simmons, 2006, derived from http://www.csr-asia.com/summit07/presentations/corruption_survey_JB.pdf

135 http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/Global-Fraud-Survey---a-place-for-integrity

	% disagree
Australia	14
Brazil	52
Chile	32
China	2
Germany	8
Japan	12
Malaysia	8
Poland	42
Spain	22
US	8

Figure 11. Recognition of risks related to investing in new markets

Another survey was conducted by NAVEX[136] of 300 compliance professionals. The findings are summarized as:

- 92 percent of the respondents indicated either they would increase the use of third parties in the coming 12 months or weren't sure. Only 8 percent expected to reduce reliance on third parties.
- Most companies do not conduct due diligence on third parties before onboarding them. A majority of respondents monitor some third parties for legal and ethical and compliance risks; however, most do not track this information for all of their third party relationships.
- Of those who do track their compliance risks, many are limiting their tracking to corruption issues and legal risks such as civil and criminal filings.
- 40 percent of respondents do not feel their organizations are well prepared to reduce ethics and compliance risks associated with third parties and, on a related note, close to half do not feel their organization is prepared to meet new supply chain and distribution disclosure requirements.

During one session of the 30th annual FCPA conference, held at the American Conference Institute in Washington, D.C. on November 19 and 20, 2013, Kara Brockmeyer, Chief of the SEC's FCPA Unit in the Division of Enforcement, and Charles Duross, Deputy Chief in the DOJ's Fraud Section and head of the FCPA Unit emphasized and summarized the risks posed by intermediaries as:

- A lack of a business purpose for the third-party relationship, or the offering of duplicative services already being provided to the company from another source
- Higher discount/lower price offered by the third party to the principal company than other third parties providing similar services or goods to the company or in the industry
- No infrastructure in place that would permit the third party to deliver the agreed services
- Problematic travel and entertainment

3.4.3. Mitigation of risks posed by intermediaries

Engaging and managing intermediaries is crucial. Good management practices include due diligence procedures to determine the background and integrity of intermediaries prior to engaging them. Such procedures are becoming more common, particularly in the US and, to a lesser extent, in Western Europe according to the survey conducted by Control Risks.[137]

136 http://www.navexglobal.com/resources/whitepapers/third-party-risk-global-environment-key-survey-findings

137 *International business attitudes to corruption – survey 2006*, Control Risks Group Limited and Simmons & Simmons, 2006, derived from http://www.csr-asia.com/summit07/presentations/corruption_survey_JB.pdf, pp.18.

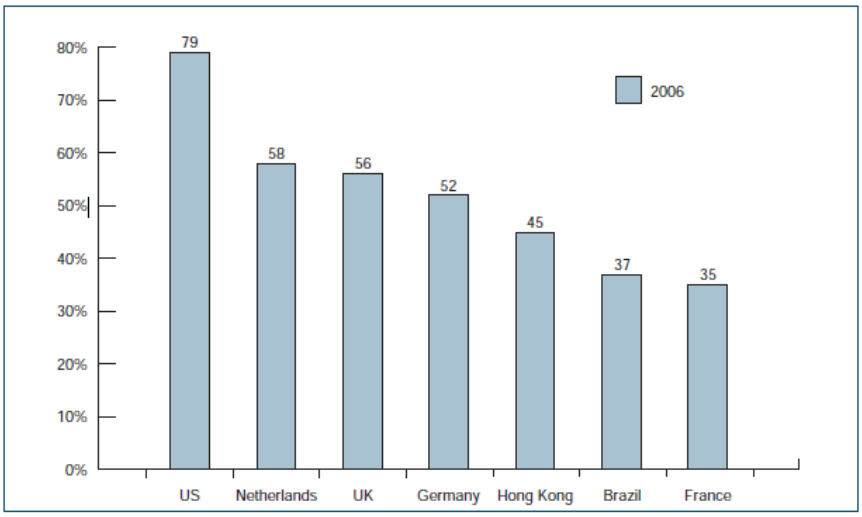

Figure 12. Percentage of companies that have a formal process to assess intermediaries' integrity record. By country.

In the interviews conducted by the author, several respondents who conduct due diligence procedures internally or outsource the exercise were however doubtful of the use of this exercise. Several respondents expressed and questioned the effectiveness of conducting due diligence. One respondent said, "the choice remains of not doing anything, meaning not conducting any due diligence and the business is happy as there are no additional costs and no lag in time or going the other extreme and searching the background of the intermediary to the last detail". She further elaborated, "the dilemma is to strike the right balance" and further illustrated this by a sketch[138] as below:

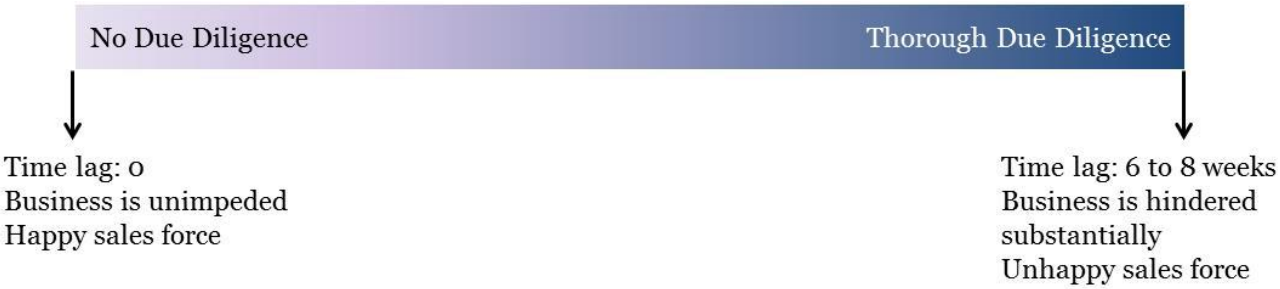

Figure 13. Continuum between the one extreme of no due diligence and the other of maximum ('thorough') due diligence

Either extreme is unwise. Doing nothing is not an option, but maximum due diligence overshoots the objective. The author recommends a risk-based approach as also recommended by guidance by the DOJ. This means that the thoroughness of the due diligence process is made dependent on the risk category of the intermediaries and other business partners that are to be assessed.

[138] The sketch was drawn on paper during the interview by the respondent and has been reproduced by the author with permission.

4. *Conclusions and recommendations*

With respect to an effective compliance anti-corruption program and specifically related to engaging intermediaries, putting one's head in the sand is not an option. On the other hand to get a complete grip of the situation may not always be possible given timelines and availability of information. There is a large grey area between not doing anything at one extreme and getting a full sense of comfort and assurance at another. Often the latter extreme is not even feasible. Some organizations at times opt strategically for not engaging the more risky intermediaries.[139] However, over time, such organizations do realize the need to work with intermediaries with the global economy on the rebound and a reinvigorating of organizations' appetite for expansion and risk-taking.

For the PwC's Global Crime Survey 2014,[140] respondents were asked if their organization had operations or was pursuing operations in high-risk areas, with a reference to the 2012 Transparency International Corruption Perception Index.[141] The survey results confirm that a large number of organizations operate in territories identified as posing a high corruption risk (50%) and/or plan to pursue opportunities in such areas in the next two years (8%). As noted in Chapter 3, FCPA and other enforcement actions frequently involve those with intermediaries. The financial costs and collateral damage caused by incidences of bribery and corruption especially in light of the penalties imposed by governments through increasingly aggressive anticorruption enforcement can be significant. Above all, as figure 12 below illustrates, regardless of their size, companies that experienced incidences of bribery and corruption more frequently reported losses of over US$5 million.[142]

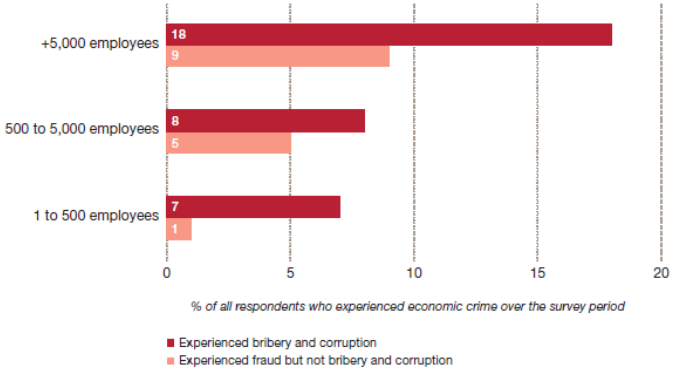

Figure 12. Losses over US$5 million considering bribery and corruption, by company size

Selective management of business partners with no methodology for the selection is risky. The regulators emphasize a risk based approach. However, they do not say that only selecting a sporadically selected business partner without a justifiable and consistent risk calculation methodology is a right approach. "All third parties engaged by a company need some form of due diligence, though an organization can adjust the level of due diligence based on the level of risk each third party poses.

During the 18th Annual Corporate Counsel Institute in Washington, DC, Kara Brockmeyer stated that the "best compliance programs are geared toward the risks" – both the risks associated with operating in particular geographies, as well as the risks presented by a company's particular industry or business model.[143] Brockmeyer observed that a compliance program must include a process for thoughtfully identifying and prioritizing risks, ideally through audits or risk-based testing. While speaking at two recent events, Brockmeyer also emphasized the crucial importance of third-party due diligence. At the SEC Speaks event, Brockmeyer identified failure to properly vet third-party representatives as one of the biggest issues in the FCPA arena today, and she stressed

139 "Alcatel Lucent says 'No thanks' to middlemen," *Businessweek*, January 2009, derived from http://www.cn-c114.net/577/a376794.html.
140 *Global Economic Crime Survey 2014*, PwC, derived from http://www.pwc.com/gx/en/economic-crime-survey/.
141 *Corruption Perceptions Index 2013*, Transparency International.
142 PwC Global Crime Survey 2014.
143 Kara Brockmeyer, Chief of the SEC FCPA Unit, 18th Annual Corporate Counsel Institute, Washington, DC (March 13, 2014).

the importance of effective third-party due diligence in a robust compliance program.[144] Just one month later, while speaking at the 18th Annual Corporate Counsel Institute, Brockmeyer again stressed that if companies elect to devote additional energy and resources to any component of their compliance programs, she would recommend devoting it to "the high-risk issues like the third-party agents whose job it is to get you the business."[145]

The endemic challenge for organizations is the demand side of corruption. Employees of organizations are caught between a rock and a hard place – the challenge of sales targets/revenues and high corruption demand cultures. This increases the possibility of participating in actions and schemes that an organization would otherwise not indulge in. This continuing challenge may pressurize organizations to engage in improper conduct and adds unnecessary layers in the distribution channel, allows "quid pro quo" transactions like hiring relatives of customer executives, creating marketing or advisory roles for customer employees, or increasing the discount to a distributor or travel agent to create a "slush" fund."[146]

There are several sources that now provide guidance on anti-corruption compliance programs and specifically related to intermediaries. Taking all these guidance into account the author has put together the following Ten Commandments:

1. Tone at the top and middle that exhibit zero tolerance and walk the talk

2. Clearly articulated policy and underlying policy and procedure related to anti-corruption and bribery and specifically related to engaging intermediaries. These policies and procedure apply consistently to employees at all levels in the organization

3. Compliance organization with qualified compliance professionals with a "license to operate"[147] with a strong and empowered Compliance Officer with a direct reporting line to the audit committee and access to the senior leadership[148].

4. Mechanisms put in place to ensure communications and mandatory training on policies and procedures and specifically related to engaging intermediaries. The training needs to be repeated at regular intervals. Anti-Bribery training should also be provided to business partners.

5. System in place where violations of the policies and procedures can be reported.

6. A structural risk assessment mechanism that takes into account the specific risks that an organization faces at the local entity level and specifically on the various types of intermediaries that an organization would use. It is to be noted that an anti-corruption program and specifically a business partner compliance program is recommended to be risk based to ensure that attention and focus is appropriately placed.

7. Appropriate risk based due diligence and oversight on all intermediaries. This is a crucial element of the anti-corruption program whereby an organization has procedures to ensure that that the organization enters into relationship with only qualified and reputable business partners. This would involve pre-retention due diligence and post-retention oversight. Periodic and regular monitoring of business partners (For example, due diligence, re-certification and re-training). At a high level, due diligence consists of gathering and evaluating the relevant information about the business partner. This information can be gathered by the organization or by conducting a background check on the business partner. The author has summarized the following 5 components in this respect:

144 http://www.metrocorpcounsel.com/articles/28697/understanding-government%E2%80%99s-stated-fcpa-priorities-2014#_ftn13
145 http://www.metrocorpcounsel.com/articles/28697/understanding-government%E2%80%99s-stated-fcpa-priorities-2014#_ftn14
146 PwC Global Crime Survey 2014, pp. 17.
147 The term "license to operate" has been borrowed from the charter of the postmasters program – Compliance and Integrity Management, Vrije University Amsterdam.
148 An example of this is a statement made by Dr. Sylvie Bleker-van Eyk (Program Director Postmasters program Compliance and Integriteit Management, Vrije University Amsterdam and Chief Compliance & Risk Officer, Ballast Nedam) De Compliance Officer, dated 9, maart 2013. "Ik ben geen gemakkelijke tante om in dienst te nemen. Ik word niet betaald om lief te zijn. Ik word betaald om mijn werk goed te doen." (Roughly translated as: "I am not an easy going woman to be hired. I am not paid to be nice and sweet. I am paid to do my job well.")

a. Business justification that should be completed by the person within the hiring organization that outlines the need for the business partner. This should include information on proposed compensation, relevant industry and technical expertise etc.

b. Information about the Business Partner that the business partner should provide. This should include at a minimum the legal trading name, incorporation, shareholding, management structure, adequacy of facilities, references etc.

c. In case of higher risk relationship (for example, commission paid agents), conduct interviews to gather information.

d. Written due diligence reports. The due diligence can be conducted internally or via an external provider. The choice depends on the availability and skills to conduct such type of due diligence. The reports need to be reviewed by qualified legal and/or compliance counsel and the management from the business. All identified red flags must be resolved.

e. A written anti-corruption compliance certification from the proposed business partner.

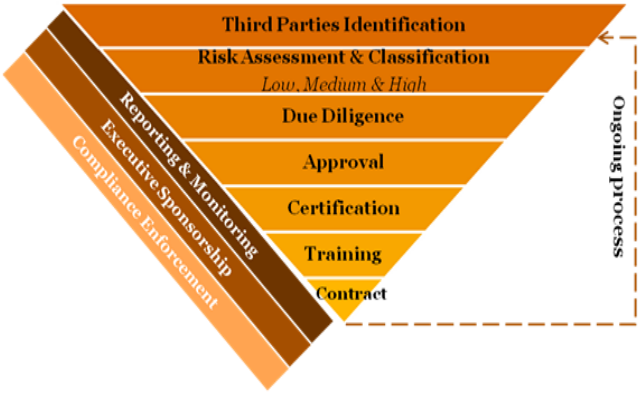

Figure 13. The due diligence process

8. Anti-bribery provisions in contracts of all business partners. Such clauses should include an undertaking by the intermediary to comply with the organization's code of conduct and specifically the relevant anti-corruption laws. Such provisions should also provide the organization the right to audit the books and records of its business partners and provide for termination of the business partner if there are suspected breaches of the anti-bribery laws or representation or undertakings.

9. Financial and accounting procedures in place including a system of internal controls that is designed to ensure maintenance of accurate books and records. This should include, for example, requiring detailed documents detailing the services provided on invoices.

10. Appropriate disciplinary procedures for employees in case of violations.

4.1. Limitations and Recommendations for further Research

Amongst other topics, Chapter 2 of this thesis set out the legislative framework of anti-bribery laws. Chapter 2 demonstrated the prosecutions statistics and especially the most aggressive of them all being the U.S. Foreign Corrupt Practices Act (FCPA) prohibits organizations from paying bribe to foreign officials to obtain or retain business, directly or via intermediaries. It is one of the most significant and feared statutes for companies operating abroad with penalties in nine digit figures. Most of these prosecutions are related to acts by intermediaries. This makes the implementation of robust FCPA compliance programs in accordance with the guidance published by the DOJ of crucial importance. With this increased enforcement of the FCPA and the practical difficulties of complying with this statute many organizations under the jurisdiction of this legislation experience a challenge with respect to the market place being a level playing field. Regarding recommendations for further research it may be worth exploring the following areas:

1. Adequate procedure defense not only under the FCPA, but also under the UK Bribery Act. There are some researches done on this topic by for example, Jon Jordan,[149] Mike Koeler,[150] Dieter Juedes,[151] etc. James R. Doty in his article[152] uses the phrase, adequate procedures defense because it consist of:
    - Procedures that must be in place that are designed to prevent bribery
    - Specific factors as described by DOJ and SEC to determine what is adequate
    - Specific projected outcomes associated with organizations being able to use the defense.

2. However, regardless of whether organizations have compliance measures in place, many firms report that they face bribe requests and extortionate threats frequently. The implications of these demand-side pressures have gone largely unexplored in the FCPA context. The current FCPA enforcement policy in cases of solicitation and extortion raises several unique corporate governance and compliance challenges. Research on deterring the demand side of the corruption equation is a subject that the author of this thesis proposes be researched. The author believed that this will require support from various governments, NGOs such as Transparency International and others. Yockey[153] in his article even goes so far as to conclude that regulators should be urged "to shift some of their focus from bribe-paying firms in order to directly target bribe-seeking public officials. Confronting the market for bribe demands in this way will help reduce corruption in general while also allowing employees and agents to spend less time worrying about how to respond to bribe requests and more time on legitimate, value-enhancing transactions."

4.2. Reflections

Third party compliance can be compared to the fable behind the saying, "A stitch in time saves nine." Please refer to Appendix VIII that outlines the story. In the heat of the moment to close a deal, organizations can make decisions that they deeply regret later, like that farmer in this story who did not stop to help his horse with a simple nail in his shoe. Conducting due diligence on intermediaries is like that one stitch that potentially can save an organization many stitches. And after that the horse is fit to ride, however, monitoring and maintenance of the horse is also essential. Due diligence cannot be a one-time check the box exercise. However, rules and guidelines alone are not enough. Controls upon controls do not accomplish compliance. There will always be grey areas that make employees at organizations uncertain on what to do in specific situations. A strong compliance culture with wanting to do the right thing event when no one is looking is key. Compliance is successful only when it embraces the letter and the spirit of the law.

In conclusion, as Benjamin Franklin said, an ounce of prevention is worth a pound of cure.

149 Jordan, Jon, "The adequate procedures defense under the UK Bribery Act: A British idea for the Foreign Corrupt Practices Act," *Stanford Journal of Law, Business & Finance* 17, 2011: p. 25.
150 Koehler, Mike, "Revisiting a Foreign Corrupt Practices Act Compliance Defense," *Wisconsin Law Review*, 2012: p. 609.
151 Juedes, Dieter, "Taming the FCPA overreach through an adequate procedures defense," *William & Mary Business Law Review* 4(1), 2013.
152 Doty, James R. "Toward a Reg. FCPA: A modest proposal for change in administering the Foreign Corrupt Practices Act," *Business Lawyer* 62(4), 2007.
153 Yockey, Joseph W., "Solicitation, extortion, and the FCPA," *Notre Dame Law Review* 87, 2011: p. 781.

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7. List of abbreviations

ABAC	Anti-Bribery and Corruption
BPI	Bribe Payers Index
CFPOA	Corruption of Foreign Public Officials Act (Canada)
CI	Corporate Intelligence
CPI	Transparency International Corruption Perception Index
CSR	Corporate Social Responsibility
DOJ	U.S. Department of Justice
EHS	Ecologische Hoofdstructuur
EMs	Emerging Markets
EPC	Engineering, Procurement and Construction
ERM	Enterprise risk management
FCPA	Foreign Corrupt Practices Act
GRECO	Group of States Against Corruption of the Council of Europe
IACAC	Inter-American Convention Against Corruption
KYC	Know Your Country
KYI	Know Your Intermediary
MESICIC	Mechanism for Follow-Up on the Implementation of the IACAC
NGO	Non-Governmental Organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PEPs	Politically Exposed Persons
SEC	U.S. Securities and Exchange Commission
SFO	U.K. Serious Fraud Office
UAE	United Arab Emirates
UNCAC	United Nations Convention Against Corruption

8. Appendices

8.1. Appendix I: Emerging markets

Emerging Markets
(Source: *S&P Emerging Markets Index: Index methodology*, Standard & Poor's, 2007)

Country	Country
Argentina	Mauritius
Bahrain	Mexico
Bangladesh	Morocco
Botswana	Namibia
Brazil	Nigeria
Bulgaria	Oman
Chile	Pakistan
China	Peru
Colombia	Philippines
Cote d'Ivoire	Poland
Croatia	Romania
Czech Republic	Russia
Ecuador	Saudi Arabia
Egypt	Slovakia
Estonia	Slovenia
Ghana	South Africa
Hungary	South Korea
India	Sri Lanka
Indonesia	Taiwan
Israel	Thailand
Jamaica	Trinidad & Tobago
Jordan	Tunisia
Kenya	Turkey
Latvia	Ukraine
Lebanon	Venezuela
Lithuania	Zimbabwe
Malaysia	

8.2. *Appendix II: The Corruption Perceptions Index*

Perceived levels of public sector corruption in 177 countries/territories
(Source: *Corruption Perceptions Index*, Transparency International, 2013)

Rank	Country	Score	Rank	Country	Score
1	Denmark	91	83	Zambia	38
1	New Zealand	91	91	Malawi	37
3	Finland	89	91	Morocco	37
3	Sweden	89	91	Sri Lanka	37
5	Norway	86	94	Algeria	36
5	Singapore	86	94	Armenia	36
7	Switzerland	85	94	Benin	36
8	Netherlands	83	94	Colombia	36
9	Australia	81	94	Djibouti	36
9	Canada	81	94	India	36
11	Luxembourg	80	94	Philippines	36
12	Germany	78	94	Suriname	36
12	Iceland	78	102	Ecuador	35
14	United Kingdom	76	102	Moldova	35
15	Barbados	75	102	Panama	35
15	Belgium	75	102	Thailand	35
15	Hong Kong	75	106	Argentina	34
18	Japan	74	106	Bolivia	34
19	United States	73	106	Gabon	34
19	Uruguay	73	106	Mexico	34
21	Ireland	72	106	Niger	34
22	Bahamas	71	111	Ethiopia	33
22	Chile	71	111	Kosovo	33
22	France	71	111	Tanzania	33
22	Saint Lucia	71	114	Egypt	32
26	Austria	69	114	Indonesia	32
26	United Arab Emirates	69	116	Albania	31
28	Estonia	68	116	Nepal	31
28	Qatar	68	116	Vietnam	31
30	Botswana	64	119	Mauritania	30
31	Bhutan	63	119	Mozambique	30
31	Cyprus	63	119	Sierra Leone	30
33	Portugal	62	119	Timor-Leste	30
33	Puerto Rico	62	123	Belarus	29
33	Saint Vincent and the Grenadines	62	123	Dominican Republic	29
36	Israel	61	123	Guatemala	29
36	Taiwan	61	123	Togo	29
38	Brunei	60	127	Azerbaijan	28
38	Poland	60	127	Comoros	28
40	Spain	59	127	Gambia	28
41	Cape Verde	58	127	Lebanon	28
41	Dominica	58	127	Madagascar	28
43	Lithuania	57	127	Mali	28
43	Slovenia	57	127	Nicaragua	28
45	Malta	56	127	Pakistan	28
46	Korea (South)	55	127	Russia	28
47	Hungary	54	136	Bangladesh	27
47	Seychelles	54	136	Côte d´Ivoire	27

49	Costa Rica	53	136	Guyana	27
49	Latvia	53	136	Kenya	27
49	Rwanda	53	140	Honduras	26
52	Mauritius	52	140	Kazakhstan	26
53	Malaysia	50	140	Laos	26
53	Turkey	50	140	Uganda	26
55	Georgia	49	144	Cameroon	25
55	Lesotho	49	144	Central African Republic	25
57	Bahrain	48	144	Iran	25
57	Croatia	48	144	Nigeria	25
57	Czech Republic	48	144	Papua New Guinea	25
57	Namibia	48	144	Ukraine	25
61	Oman	47	150	Guinea	24
61	Slovakia	47	150	Kyrgyzstan	24
63	Cuba	46	150	Paraguay	24
63	Ghana	46	153	Angola	23
63	Saudi Arabia	46	154	Congo Republic	22
66	Jordan	45	154	Dem. Republic of the Congo	22
67	Macedonia	44	154	Tajikistan	22
67	Montenegro	44	157	Burundi	21
69	Italy	43	157	Myanmar	21
69	Kuwait	43	157	Zimbabwe	21
69	Romania	43	160	Cambodia	20
72	Bosnia and Herzegovina	42	160	Eritrea	20
72	Brazil	42	160	Venezuela	20
72	Sao Tome and Principe	42	163	Chad	19
72	Serbia	42	163	Equatorial Guinea	19
72	South Africa	42	163	Guinea-Bissau	19
77	Bulgaria	41	163	Haiti	19
77	Senegal	41	167	Yemen	18
77	Tunisia	41	168	Syria	17
80	China	40	168	Turkmenistan	17
80	Greece	40	168	Uzbekistan	17
82	Swaziland	39	171	Iraq	16
83	Burkina Faso	38	172	Libya	15
83	El Salvador	38	173	South Sudan	14
83	Jamaica	38	174	Sudan	11
83	Liberia	38	175	Afghanistan	8
83	Mongolia	38	175	Korea (North)	8
83	Peru	38	175	Somalia	8
83	Trinidad and Tobago	38			

8.3. *Appendix III: The Bribe Payers Index*

Bribe Payers Index 2011
"Business executives were asked for each of the 28 countries with which they have a business relationship with (for example as supplier, client, partner or competitor), 'how often do firms headquartered in that country engage in bribery in this country?' Countries are scored on a scale of 0-10, where a maximum score of 10 corresponds with the view that companies from that country never bribe abroad and a 0 corresponds with the view that they always do." (Source: *Bribe Payers Index*, Transparency International, 2011)

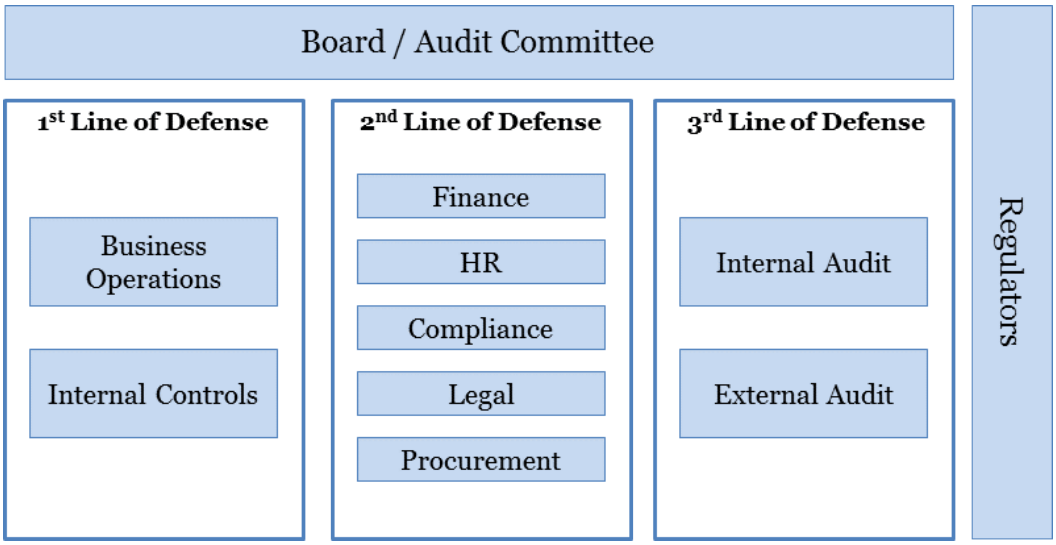
Rank	Country/territory	Score	Rank	Country	Score
1	Netherlands	8.8	15	Hong Kong	7.6
1	Switzerland	8.8	15	Italy	7.6
3	Belgium	8.7	15	Malaysia	7.6
4	Germany	8.6	15	South Africa	7.6
4	Japan	8.6	19	Taiwan	7.5
6	Australia	8.5	19	India	7.5
6	Canada	8.5	19	Turkey	7.5
8	Singapore	8.3	22	Saudi Arabia	7.4
8	United Kingdom	8.3	23	Argentina	7.3
10	United States	8.1	23	United Arab Emirates	7.3
11	France	8.0	25	Indonesia	7.1
11	Spain	8.0	26	Mexico	7.0
13	South Korea	7.9	27	China	6.5
14	Brazil	7.7	28	Russia	6.1

8.1. Appendix VI: Contributors to the European perspective

FRANCE:	**Ms. Maud Perdriel Vaissière**, free-lance legal consultant.
GERMANY:	**Dr. Anna Oehmichen**, Practicing Lawyer in a law firm.
ITALY:	**Prof. Paola Mariani**, Associate Professor of International Law and she is in charge of EU law and Private International Law courses at Bocconi University in Milano, Partner in an Associate Law Firm in Milano.
POLAND:	**Ms. Karolina Stawicka**, Karolina Stawicka is a Senior Associate and Head of the Employment Practice at Bird & Bird's Warsaw office.
POLAND:	**Mr. Arkadiusz Matusiak**, Arkadiusz Matusiak is a Senior Associate in the Dispute Resolution Practice at Bird & Bird's Warsaw office
THE NETHERLANDS:	**Dr. Gerben Smid**, Member of the expert committee on corruption of Transparency International Netherlands.
	Dr. Karin Wingerde, Assistant professor of criminology at the department of criminology at Erasmus.
	Dr. Abiola Makinwa, member of the faculty of the International and European Law program of The Hague University of Applied Sciences.
NORWAY:	**Dr. Tina Soreide**, postdoc researcher in law and economics at The Faculty of Law, University of Bergen in Norway.
SWEDEN:	**Prof. Claes Sandgren**, Professor of Law and former Dean of the Faculty of Law at the University of Stockholm.
UNITED KINGDOM:	**Mr. Alan Bacarese**, EU legal adviser to the Government of Montenegro on a Rule of Law reform programme, consultant (after being Special Counsel) and a leading UK and international anti-corruption expert with Peters & Peters, London.

8.2. *Appendix V: Three lines of defense*

Enterprise risk management (ERM) refers to the processes that facilitate management in its desire to effectively govern and manage the enterprise's approach to risks. Effective ERM involves the strategic implementation of three lines of defense, which is depicted in the figure below.



The first line of defense is made up of the front-line employees who must understand their roles and responsibilities with regard to processing transactions, follow a systematic risk process, and bear the consequences.

The second line of defense consists of the enterprise's compliance and risk functions. These functions provide independent oversight of the risk management activities that are executed at the first line of defense.

The third line of defense is that of internal and external auditors who report independently to the senior committee charged with the role of representing the enterprise's stakeholders relative to risk issues.

8.3. Appendix VI: Interview/survey questions

1. Do you have an anti-corruption policy at your company?
2. Does your anti-corruption policy cover intermediaries/third parties/business partners etc?
3. What types of intermediaries does your company use?
4. Do you conduct risk assessments on them? Can you describe how you do this?
5. Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?
6. In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?
7. If you have implemented third party due diligence process in your company, what were some of the challenges you faced during the implementation?
8. What do you see as current challenges in the due diligence process?
9. What are your suggestions?
10. How often do you screen a third party?

8.4. *Appendix VII: Response to survey/interviews*

Company	Do you have an anti-corruption policy at your company?	Does your anti-corruption policy cover intermediaries/ third parties/ business partners etc.?	What types of intermediaries does your company use?	Do you conduct risk assessments on intermediaries? Can you describe how you do this?	Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?	In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?	What do you see as your past and current challenges in the due diligence process regarding third parties?	How often do you screen a third party?
Company A	Yes	Yes	Agents, distributors, general contractors and subcontractors	Yes on higher risk relationships. We have established criteria (e.g. geography and business relationship) that we assign points against and we also check our third party data against sanction and PEP watch lists.	Yes, on those that score above a predetermined risk score. We outsource the due diligence to an external provider.	Compliance with anti-bribery laws as the culture in many jurisdictions does not recognize the payment of bribes as illegal.	Past: • Defining a process that protects the company but also support sales in winning new business. Current: • Cost and keeping the due diligence findings current	When they are on-boarded and every quarter.
Company B	Yes	Yes	Distributors, resellers, sales consultants, system integrators and service providers	Yes, using a compliance questionnaire with scoring methodology categorizing the partners in low, medium or high risk	Yes, screening for medium and high risk partners	N/A	Past: • N/A Current: • N/A	N/A
Company C	Yes	Yes	Agents	Yes	Yes, outsourced	Bribery	Past: • Tone at the top Current: • Getting meaningful results from due diligence	
Company D	Yes	Yes	Agents	Not really	Yes, as part of the onboarding, regarding financial and credit risk, primarily based on information from the media. Not specifically conducted	Fraud	Past: • Varying business models Current: • Buy in	not sure, at least twice a year.

Company	Do you have an anti-corruption policy at your company?	Does your anti-corruption policy cover intermediaries/ third parties/ business partners etc.?	What types of intermediaries does your company use?	Do you conduct risk assessments on intermediaries? Can you describe how you do this?	Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?	In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?	What do you see as your past and current challenges in the due diligence process regarding third parties?	How often do you screen a third party?
					re corruption.			
Company E	Yes	Yes	Resellers, channel partners, distributors	Yes. There is a formal screening process with an approval/rejection decision at the end. The depth of the screening is dependent on factors, such as volume, nature of services provided/ value add, risk profile of the country.	Yes. Applications with a predefined questionnaire are aimed at retrieving information re the candidate and the underlying business case. The application is reviewed by a dedicated approver, in the Compliance Organization who may request 3rd party due diligence if necessary.	The greatest concern relates to the value the intermediary adds to the business. What is the justification to have such intermediary involved, instead of doing the business case directly? This question is to be answered in a defendable way in order to avoid that any fake-engagement could be entered into for improper purposes.	Past: • Getting qualified information about the candidate and the business case, causing timing issues from application to decision and internal push-back tendencies (i.e. the compliance process slows down, if not jeopardizes business) Current: • Idem	Once for the first engagement, to be repeated after 2 years if business relation is ongoing. New deals of different nature, providing another risk profile also require repetition of the application at an easier level, since the details of the candidate are clear.
Company F					Yes. The entire process is run through a process tool, involving stakeholders in application and decision stage and providing full archiving of the case.			
Company G	Yes[154]	Yes[155]	Agents, distributors, consultants, suppliers, etc.	Yes, we apply a risk based approach (risk matrix based on CPI, type of third party, B2C/B2B/B2G, turnover for [company name] products) to	Yes. If the third party is in scope of DDP (risk matrix), we perform a screening prior to contract signing. We use an end2end [company name] IT	ABAC-related findings in CPI low countries (bribery, corruption, conflict of interest).	Past: • Buy-in from the business to truly become business partners. What is the program about and how does it affect "me"; why is it important and what is needed from "me", costs involved, lead time of DDP.	Once every three year a re-screening. Third parties that are out of scope of DDP are re-assessed every year (matrix).

[154] The respondent wrote: "We have our General Business Principles ("GBP"), which set out the fundamental principles on integrity and ethics related to our business."
[155] The respondent wrote: "Yes, we have a company-wide Due Diligence Process for selecting/reappointing third parties."

Company	Do you have an anti-corruption policy at your company?	Does your anti-corruption policy cover intermediaries/ third parties/ business partners etc.?	What types of intermediaries does your company use?	Do you conduct risk assessments on intermediaries? Can you describe how you do this?	Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?	In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?	What do you see as your past and current challenges in the due diligence process regarding third parties?	How often do you screen a third party?
				select the third parties in scope of DDP.[156]	system, where the business creates a partner entry and collects (some via the third party) relevant information (using the Standard Data Request Form) that is required for screening. We enter the screening results and recommendation on the business relationship in the system, which then moves to the business for further processing.		Current: • Staying cost effective for the business and keeping lead time as low as possible.	
Company H	Yes	Yes	Agents	Yes. All agents need a due diligence analysis including an analysis conducted with local input.	Yes. The due diligence must be done as well as an agreement on payment (hourly rate or on the payroll).	Corruption, wrong connections, PEPs	Past: • Always outside through Reuters Thomson Current: • Local input	Every 2 years
Company I	Yes[157]	Yes	Dealers, traders and in some cases brokers but our principal is always direct financing on end-customers	The dealers are continuously monitored but I believe more on commercial and financial aspects.	We introduced in the dealer development a CDD on new potential third parties. In our finance company we	As a big international quoted company, we cannot afford dealing with a customer who has a questionable	Past: • Perception that customer due diligence is too much work and not necessary. Current:	I want to screen a third party on a yearly basis and always when on-boarding.

[156] The respondent added: "We have a Standard Screening which addresses compliance, operational, financial, strategic risks via desktop research using various databases and OSINT. There is also the option to escalate to Full Screening (broader scope/targeted research on finding/more individuals included in search), which may also include local source inquiries (Enhanced DD). Enhanced DD is always performed by a supplier. Any potential issues of concern are address to the business. After review of the feedback received, we issue a recommendation on the business relationship with the third party."

[157] The respondent wrote: "We do not have a specific anti-corruption policy in Europe. We do have policies on Anti-Bribery, Competition, a specific Gift & Entertainment policy and trade restrictions. Due to the fact that we are a sub from a US parent company we definitely have corporate guideline on complying with the FCPA."

Company	Do you have an anti-corruption policy at your company?	Does your anti-corruption policy cover intermediaries/ third parties/ business partners etc.?	What types of intermediaries does your company use?	Do you conduct risk assessments on intermediaries? Can you describe how you do this?	Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?	In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?	What do you see as your past and current challenges in the due diligence process regarding third parties?	How often do you screen a third party?
			(customers who are using our truck).	Traders in our used equipment have not been checked yet. This is in process and will be done on an annually base by screening based on the sanction/ terrorist databases and through an identity check/ verification.	have not really a policy/ procedure for this. We do have a policy if we use a third party to identify our customer.	reputation. You don't want to be associated with these types of customers.	• Laid-back behavior • Irritation and perhaps embarrassment to ask the customer for identity or to screen the customer with our databases, as a result of a 'sales driven attitude' and fear for the customer relationship • The idea that you already know the customer ('we have been dealing with this customer for years already')	
Company J	Yes	Yes[158]	Distributors, Dealers, Resellers, Agents, Consultants, Freight Forwarders,	Yes. We use a questionnaire with a wide range of questions, and a rating system determining risk levels	Yes. Due diligence is conducted internally by Compliance or Legal.	Reputation. Child labor, illegal methods deployed by third parties. In countries with high CPI, corruption is a concern as well	Past: • N/A Current: • Obtaining all needed information about the business partner, as this is done internally	Only during on boarding unless there are signals that there are new risks
Company K	Yes	Yes	Licensed intermediaries within a banking environment.	Yes, we assess the inherent risk, make an inventory of the controls in place and define the mitigated risk to find the residual risk. Intermediaries dealing with customers are screened fully and have to have a valid license. Intermediaries for commercial parties are just screened.	The focus is no longer on the amount but on the match between delivered service / product and payment. The approver of the business partner bills needs to know the business very well.	In the real estate sector – the high number and the ultimate responsibility in the chain	Past: • A discussion with management whether to apply limits under which no screening/ actions are required (which does not make sense as smurfing will undermine this) Current: • Bad press checks	When onboarding and with every new contract.

[158] The respondent added: "In addition there is a specific policy related to BP risk management."

Company	Do you have an anti-corruption policy at your company?	Does your anti-corruption policy cover intermediaries/ third parties/ business partners etc.?	What types of intermediaries does your company use?	Do you conduct risk assessments on intermediaries? Can you describe how you do this?	Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?	In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?	What do you see as your past and current challenges in the due diligence process regarding third parties?	How often do you screen a third party?
Company L	Yes	Yes[159]	RWE is a very large company, which means that the type of intermediary depends on the type of business. An interesting type of intermediary are the ones doing business exploration or business development in new or existing markets. But we also make use of the more 'reseller' type of intermediary.	Yes we conduct risk assessments on them. I cannot go into detail here, but you may assume that we take a deep dive into their back ground, history, reputation (e.g. blacklisting), etc.	Yes, we sometimes also conduct a third party due diligence: that is mainly the case when we consider entering into a joint venture (or comparable).	The greatest areas of concerns with respect to third parties are reputational risks (corruption, labor infringements, unethical issues, etc.; UN Global Compact related one could say) and financial risks.	Past: • Some of the challenges while implementing were: a) developing the right processes, which means the ones that don't hamper execution processes too much, b) convincing commercial businesses, that this way of working doesn't cost business…; although we have implemented these procedures for a couple of years now, which have been accepted on a large scale, this issue keeps coming back once in a while: the continuous struggle between 'doing the right thing' and 'creating business' ('hurry up, you're delaying my business and my targets'…). Current: • Our current challenges in the due diligence process would be: keeping up the standards we have developed incl. keeping them up-to-date, improving them wherever possible.	Third parties are screened before we step into an agreement with them (see above)
Company M	Yes	Yes	Sub brokers ('onderbemiddelaars'), 'verbonden bemiddelaars' and lead generators.	Somewhat	Only incorporation	Financial	Past: • N/A Current: • Danger of drowning in investigations, questions, answers and trying to make	Every year we review all our third parties, and check on permits and correct registration with the Registry of

[159] The respondent added: "[T]hat's a very important part of our policy: intermediaries, third parties and business partners (the latter ones not being retail customers, which are being checked on other criteria however) need to be checked mandatory before we enter into an agreement with them. No agreement can be entered into without involvement of our (local) procurement departments. The procurement executes the more 'standardized' checks (which go pretty deep already), and the Compliance department will be involved if a more extraordinary situation is at stake."

Company	Do you have an anti-corruption policy at your company?	Does your anti-corruption policy cover intermediaries/ third parties/ business partners etc.?	What types of intermediaries does your company use?	Do you conduct risk assessments on intermediaries? Can you describe how you do this?	Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?	In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?	What do you see as your past and current challenges in the due diligence process regarding third parties?	How often do you screen a third party?
							sense of all information gathered.	Companies and the Authority for the Financial Markets.
Company N	Yes	Yes	Agents, (logistic) service providers, brokers, consultants	Not a formal risk assessment. There is a process in place before we contract a company to provide services. This means that multiple quotes should be reviewed and there must be a specific justification why we select this company. For export control we check anew against list of designated persons.	Each third party is checked against list of designated persons (EU and AC). For certain countries (referred to as sensitive countries) we have a procedure in place that requires prior approval (based on due diligence / end use certificate) from the corporate export control officer.	Bribery, money laundering, non-compliance with competition law of the principal, for certain countries – export control.	Past: • Making sure that all transactions are covered (in a decentralized organization that is moving to one ERP system, it is difficult to link the DD efforts to each and every transaction. Current: • Changing legislation, in transparency in the handling of certain process – example handling of our containers in harbor where third parties are involved for export or import activities.	
Company O	Yes	No	N/A	N/A	N/A	N/A	Past: • N/A Current: • N/A	N/A
Company P	Yes	No	Brokers for customs	Not yet.	Not yet; project has been started.	Risks in the sustainability area (including business continuity, EHS, CSR, business/labor ethics, human rights, etc.)	Past: • To be determined. Current: • Set up the proper process.	To be determined
Company Q	Yes	Yes	Consultants, law firms (no agents or similar parties)	Not sure about that, the 3rd party consultants are requested to provide details relevant to	I am not certain that the policy and how it is implemented is adequate and sufficient. Whether or	See answer in column to the left.	Personally I am not involved in the screening process	

How often do you screen a third party?	What do you see as your past and current challenges in the due diligence process regarding third parties?	In your view what are the greatest areas of concerns with respect to third parties? In other words what keeps you awake about them?	Do you conduct due diligence on your third parties prior to engaging them? If yes, can you please explain how this process works? If no, can you please comment?	Do you conduct risk assessments on intermediaries? Can you describe how you do this?	What types of intermediaries does your company use?	Does your anti-corruption policy cover intermediaries/ third parties/ business partners etc.?	Do you have an anti-corruption policy at your company?	Company
			not 3rd parties are being screened depends on the Business. The relevant BU needs to ask for it. My view is that [company name] is using a narrow interpretation of when a liability can arise under the FCPA.	FCPA and to sign a FCPA statement				

8.5. Appendix VIII: A Stitch in Time Saves Nine

The story below is how the author remembers her grandmother relating this.

A farmer rode on his horse to a fair to sell his cow. He sold the cow for a very good price. His money-bag was full of gold. In the evening he set out on his journey back home and on the way halted at an inn. The next morning as he set out to leave, the innkeeper said, "There is a nail out of one of the shoes. You had better wait and have it put on."

"No!" exclaimed the farmer, "I can't wait a minute. One nail does not matter." So he got on the horse and galloped out of the town. As night fell again, he stopped at another inn. In the morning he saw that his horse had lost the shoe. The innkeeper said the next morning, "Sir, you had better let me take your horse to the blacksmith to have the shoe put on."

"No!" exclaimed the farmer, "It does not matter much. I have only a few miles to go and my horse can take me there without a shoe." He got on to his horse again and rode away. After a few miles, however, the horse began to limp and soon it went lame. The farmer had to get off his horse and walk. It became dark and the farmer was far from home and had to sleep in the fields. Suddenly some robbers appeared and robbed him of his money bags by force and left him quite bruised. The farmer was sorry. He deeply regretted his negligence and his foolishness. He said, "I have been foolish, for want of a simple horse-shoe nail I have lost all my money."