

PUTTING THE ABC IN ESG: THE ROLE OF ANTI-BRIBERY AND CORRUPTION COMPLIANCE PROGRAMS IN ENHANCING ESG COMMITMENTS

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Investors and corporate stakeholders increasingly find insights into a corporation’s performance and long-term sustainability through an organization’s Environmental, Social, and Governance (ESG) program. But, even with the increased focus on ESG programs, gaps still exist for important social and governance risks. Organizations can address these gaps by implementing an anti-bribery corruption (ABC) compliance program as part of their overall ESG program. This article focuses on an ABC compliance program’s role within a broader corporate ESG framework, identifies key performance indicators that address corruption risks, and explains how to monitor and measure an ABC compliance program’s success over time. In addition, the article provides a list of objective and verifiable metrics to measure the quality of disclosures made to the public.

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I. INTRODUCTION

A comprehensive Environmental, Social, and Governance (ESG) program is now a table-stake for any large or public company. Investors, lenders, and other key stakeholders are frequently looking beyond the balance sheet to non-monetary metrics to assess corporate performance and long-term sustainability.¹ Despite this increased focus, commonplace ESG criteria often do not adequately address the entire spectrum of social and governance risks, including bribery, corruption, and integrity risk.² In addition to the focus on components such as climate change, health and safety, and diversity and inclusion, ESG strategies and commitments can be made more holistic and effective by implementing an integrated and fit for purpose anti-bribery and corruption (ABC) compliance program.³ This is particularly true for certain companies in higher-risk jurisdictions or when dealing with governments or other counterparties with less sophisticated or transparent ethics rules and policies, for example, regarding procurement. Some of these risks feature particularly in the energy and extractive businesses in Canada, such as dealings with multiple government entities, including Indigenous communities and other stakeholders.⁴ Further, companies can benefit from expansive ABC compliance programs due to the current international enforcement climate, where such companies are amongst the frequent targets.⁵

This article first provides an overview of a commonplace ESG framework and discusses its meaning, importance, reporting obligations, and relationship with ABC programs. It then describes how ESG reporting can be made stronger, more accurate, and more reliable by using objective and verifiable criteria. The article then introduces the components of an effective ABC compliance program, identifies key indicators by which objective measurements can be made, and addresses important considerations for corruption risks that commonly arise within the context of engagements with communities that may be small or particularly local, but with significant influence over an organization. While not unique to dealings with Indigenous communities, such features and risk factors are commonplace in that context, both in Canada and elsewhere. Finally, this article explains how an effective ABC compliance program can be measured and enhanced over time and incorporated into ESG reporting using objective, verifiable criteria.

II. OVERVIEW OF ESG

A. WHAT DOES IT MEAN?

ESG has evolved from a predominantly corporate slogan to an increasingly important framework that is frequently used by investors, financial institutions, and other key

¹ OECD, Committee on Financial Markets, *ESG Investing: Practices, Progress and Challenges* (Paris: OECD, 2020) at 21–22 [OECD, *ESG Report*].

² *Ibid.*

³ In referring to ABC compliance programs, the authors are referring not only to programs that address bribery of foreign public officials, but also those that address issues such as private bribery, facilitation payments, conflicts of interest, and money laundering.

⁴ OECD, Development Centre, *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives*, OECD Development Policy Tools Series, (Paris: OECD, 2016) at 31 [OECD, *Corruption Report*].

⁵ Stanford Law School, “Foreign Corrupt Practices Act Clearinghouse – Statistics & Analytics,” online: <fcpa.stanford.edu/industry?industry=Oil+%26+Gas>.

stakeholders. Each business and its respective stakeholders are different in nature, and accordingly, ESG criteria differs between organizations. This results in a varied understanding of material risks, stakeholder expectations, and use of subject criteria by organizations across several industries to measure and report on the success of their individual ESG commitments.

Despite certain overlaps, the more familiar Corporate Social Responsibility (CSR) model has not been displaced by ESG. This is because CSR serves a slightly different purpose than ESG's investor based focus. While the goal of ESG is "to capture all the non-financial risks and opportunities inherent to a company's day to day activities,"⁶ CSR reflects how an organization operates internally and its resulting responsibility for the impacts of its decisions and activities on society and the environment.⁷ While this article is focused on ESG, many of the criteria discussed are also meaningful as CSR initiatives.

Generally, ESG is defined as a set of factors relating to environmental, social, and governance issues in the context of a given organization. For the purposes of this article, ESG commitments relate to systems and processes aimed at achieving an organization's ESG objectives, which are measured by specific and tangible metrics related to each of the framework's three pillars. Examples of ESG objectives can be energy and water limits, pollution and emission restrictions, diversity and inclusion metrics, and internal governance standards.⁸ Given the variance in an organization's mission, vision, and stakeholder set, these objectives will inherently vary by organization, industry, and geographic region.

B. THE GROWING IMPORTANCE OF ESG TO INVESTORS

Historically, investors relied on corporate financial data and disclosures to forecast profitability and assess investment worthiness. While this remains true, companies have also started to incorporate long-term sustainability objectives into their mission, vision, and value propositions. This, in turn, requires a set of metrics by which companies can objectively measure and disclose their sustainability efforts, and ultimately lead to the increasingly widespread adoption of ESG frameworks. An example of the increasing importance of ESG to investors is demonstrated by the over 5,000 global signatories of the United Nations Principles for Responsible Investment, a collection of six principles aimed at developing a more sustainable global financial system.⁹ The corporate signatories collectively hold over US\$121 trillion in assets under management and have agreed to incorporate ESG into their investment analysis and decision-making processes.¹⁰

ESG is now an important factor that many investors will consider in their investment decision-making. Research shows that investors use ESG factors in their assessment

⁶ Réka Szücs, "ESG Explained | Article Series Exploring ESG From the Very Basics | #1 What Is ESG?" (27 October 2021), online: <www2.deloitte.com/hu/en/blog/esg-explained/2021/esg-explained-1-what-is-esg.html>.

⁷ Innovation, Science and Economic Development Canada, "Corporate Social Responsibility (CSR): An Implementation Guide for Canadian Business" (2014), online: <ised-isde.canada.ca/site/corporate-social-responsibility/en/implementation-guide-canadian-business>.

⁸ OECD, *ESG Report*, *supra* note 1.

⁹ PRI Association, "Principles for Responsible Investment, Signatory Update: April – June 2022" at 2, online (pdf): <www.unpri.org/download?ac=16742>.

¹⁰ *Ibid.*

primarily due to the “significant power attributed to the ESG disclosures and endeavors to affect companies’ values and financial performances.”¹¹ Investors may also receive greater returns on investment from companies that measure and disclose ESG metrics than from those that do not.¹² Academic studies support the positive relationship between greater ESG disclosure and financial performance of an organization.¹³ Moreover, many investors consider ESG information to be material to the organization’s profitability.¹⁴ Studies found that 82 percent of corporate survey respondents use ESG information because “it is financially material to investment performance.”¹⁵

ESG assessments may also engage the duties of investment advisors to investors seeking their advice.¹⁶ The United Nations Principles for Responsible Investment signatories have committed to acknowledge that ESG issues can affect the performance of investment portfolios and that assessing ESG issues are, therefore, a part of an institutional investor’s fiduciary responsibility.¹⁷ Similarly, the Royal Bank of Canada surveyed 809 global institutional investors and investment consultants and found that, of the 75 percent of global investors who included ESG in their investment assessments, 63 percent of Canadian respondents cited their fiduciary duty as the primary reason.¹⁸

C. HOW DOES ESG RELATE TO ABC PROGRAMS?

Bribery and corruption risks can be critical ESG factors for many companies. The relationship between ESG and bribery and corruption has been recognized by various regulators and major organizations. For example, the Canadian Securities Administrators listed bribery and corruption as an ESG factor that may be considered by investment funds in their investment decision-making processes.¹⁹ Similarly, the European Commission’s recently adopted, but not yet implemented, ESG reporting requirements for large and public companies specifically includes anti-bribery and corruption as risks subject to mandatory disclosure.²⁰

Organizations have followed suit in recognizing the relationship between bribery and corruption risks and ESG commitments. For example, anti-bribery and corruption risks,

¹¹ Ilze Zumente & Jūlija Bistrova, “ESG Importance for Long-Term Shareholder Value Creation: Literature vs. Practice” (2021) 7:2 J Open Innovation 127 at 2.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Amir Amel-Zadeh & George Serafeim, “Why and How Investors Use ESG Information: Evidence from a Global Survey” (2018) 74:3 Financial Analysts J 87 at 88.

¹⁵ *Ibid.*

¹⁶ Although this article is focused on ESG, several investment related considerations overlap with socially responsible investments.

¹⁷ PRI Association, “What Are the Principles for Responsible Investment?” online: <www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>.

¹⁸ Royal Bank of Canada Global Asset Management, “Global Adoption – Regional Divide: 2020 Responsible Investment Survey” (2020) at 4, 8, online: <institutional.rbcgam.com/documents/en/esg-executive-summary.PDF> [RBC, “Survey”].

¹⁹ Canadian Securities Administrators, “CSA Staff Notice 81-334 – ESG-Related Investment Fund Disclosure” (19 January 2022), online: *Ontario Securities Commission* <www.osc.ca/en/securities-law/instruments-rules-policies/8/81-334/csa-staff-notice-81-334-esg-related-investment-fund-disclosure>.

²⁰ European Commission, “Corporate Sustainability Reporting,” online: <ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en>.

training, or policies are listed as one or more ESG factors in ESG reporting²¹ published by Marathon Oil,²² Suncor,²³ British Petroleum (BP),²⁴ and Shell.²⁵ Marathon Oil discloses information on the communication and training on anti-corruption policies and procedures and considers anti-corruption measures under its social and governance ESG pillars.²⁶ Similarly, Suncor and BP publish the number of employees that have completed their business conduct training, and Suncor provides the quantitative breakdown of themes of complaints filed using its internal hotline.²⁷ Shell referred to a free training program in ABC practices that it offered in 14 languages to third parties in 16 countries, such as smaller suppliers that may lack adequate training resources.²⁸

Clearly, investors care about this level of disclosure and consider bribery and corruption as a material risk to an organization's sustainability. In a recent survey of institutional investors, among 18 ESG concerns identified, respondents selected anti-corruption as the top-ranked issue of concern when investing.²⁹ Notably, anti-corruption was selected ahead of both climate change and shareholder rights, which each tied for second.³⁰ This demonstrates that the largest investors are looking to issuers to disclose bribery and corruption risks as part of an organization's ESG reporting requirements. ESG considerations can also fit within ABC programs for many of the same reasons. For example, ESG factors such as air and water pollution, the use of conflict minerals, business ethics, and board governance can influence ABC programs.³¹ In 2021, ESG considerations were included in approximately 50 percent of ABC compliance programs in Canada and the United States.³² This underscores the fact that ABC and ESG considerations can be highly interrelated.

As further discussed below, bribery and corruption risks are ESG factors and are relevant to each of the three pillars of the ESG framework.

1. GOVERNANCE

An effective ABC program can directly influence the governance of an organization, mitigate against risks to the organization's reputation, and maintain shareholder value. In addition to an ABC program, the existence and promotion of a strong board structure, fair

²¹ The Global Reporting Initiative and the Sustainability Accounting Standards Board are two of the most commonly used standards for anti-corruption reporting. As of the date of this article there are several other potentially relevant regulations in proposal or comment stage. These include, but are not limited to, CSA NI 51-107, ISSB exposure draft, SEC climate rules, IFRS SI, and IFRS S2.

²² Marathon Oil Corporation, "2020 Sustainability Report," online: <cdn.sanity.io/files/ghcnw9z2/website/91744eb6ef8f8be59505a911c6b8d2e8dd9a537fa.pdf?dl> [Marathon, "Report"].

²³ Suncor Energy Inc, "Report on Sustainability 2021," online: <www.suncor.com/-/media/project/ros/shared/documents/reports-on-sustainability/2021-report-on-sustainability-en.pdf> [Suncor, "Report"].

²⁴ BP plc, "ESG Datasheet 2021," online: <www.bp.com/content/dam/bp/business-sites/en/global/corporate/xlsx/sustainability/bp-esg-datasheet-2021.xlsx> [BP, "Report"].

²⁵ Shell plc, "Sustainability Report 2021" (5 April 2022), online: <reports.shell.com/sustainability-report/2021/assets/downloads/shell-sustainability-report-2021.pdf> [Shell, "Report"].

²⁶ Marathon, "Report," *supra* note 22.

²⁷ Suncor, "Report," *supra* note 23 at 47; BP, "Report," *supra* note 24.

²⁸ Shell, "Report," *supra* note 25 at 11.

²⁹ RBC, "Survey," *supra* note 18.

³⁰ *Ibid.*

³¹ According to a survey conducted by Kroll of 200 compliance and risk professionals globally: Kroll, LLC, "2021 Anti-Bribery and Corruption Benchmarking Report" (November 2021), online: <www.kroll.com/-/media/kroll/pdfs/publications/2021-anti-bribery-and-corruption-benchmarking-report.pdf/> [Kroll "Report"].

³² *Ibid* at 11.

and transparent executive compensation, and a respected code of conduct are all factors that can result in enhanced sustainability performance and attract investors seeking to make responsible investments.³³

From a legal perspective, the most significant and frequent interactions between ESG and ABC programs are connected to the governance element. A Canadian organization operating internationally is still bound by certain Canadian laws; specifically, the *Corruption of Foreign Public Officials Act*,³⁴ and the *Criminal Code*³⁵ in some circumstances,³⁶ which prohibit foreign and domestic bribery, respectively. Directors and officers of an organization can be held personally liable and subject to a significant fine or imprisonment if they aid or abet a bribery offence by assisting or encouraging its commission.³⁷ Further, the recently enacted *Extractive Sector Transparency Measures Act* requires certain Canadian businesses in the extractive sector to make annual public disclosures of payments made to domestic or foreign governments, including Indigenous governments, and report payments made to government employees or public officeholders.³⁸ Finally, as a practical matter, companies alleged to have violated domestic or foreign corruption laws often suffer significant reputational damages which can affect an organization's stock performance, merger and acquisition strategies, employee recruitment and retention, arrangements with financial institutions, and regulatory disclosure requirements.³⁹ The result of an organization's or an individual's actions can lead to costly litigation brought by shareholders and other interested stakeholders against the organization.⁴⁰

2. SOCIAL

An organization's social policies are inextricably linked to an effective ABC program: the "S" in ESG requires organizations to frequently engage with stakeholders with potential influence over an organization's business and reputation. For many organizations in Canada, such engagements will frequently involve officials, both Indigenous and non-Indigenous.

In pursuit of social objectives, there are numerous activities that are required or are otherwise valuable for organizations to engage in, such as investments to mitigate impacts of energy development, engaging in consultation, sponsorships of community activities or interests, and sharing the economic benefits of development with communities, particularly those which are historically disadvantaged or have yet to fully experience the benefits of energy development. In practice, an ongoing challenge for an organization is to pursue the

³³ Kelly Tang, "Exploring the G in ESG: Governance in Greater Detail – Part I" (22 March 2019), online: *S&P Global* <www.spglobal.com/en/research-insights/articles/exploring-the-g-in-esg-governance-in-greater-detail-part-i>.

³⁴ SC 1998, c 34 [CFPOA].

³⁵ RSC 1985, c C-46.

³⁶ See e.g. *Libman v R*, [1985] 2 SCR 178.

³⁷ *Criminal Code*, supra note 35, s 21.

³⁸ *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376.

³⁹ Canadian Trade Commissioner Service, "Paying the Price: Confronting Corruption in International Business" (July 2016), online: <www.trade commissioner.gc.ca/canadexport/0000655.aspx?lang=eng>; United States Department of Justice & the United States Securities and Exchange Commission, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (14 November 2012) at 3, online: <www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [US, "FCPA Guide"].

⁴⁰ *City of Pontiac General Employees' Retirement System v Wal-Mart Stores, Inc*, Case No 5:12-cv-5162 (WD Ark 2019) [*Wal-Mart Order*].

important social objectives without using a social performance activity to procure improper influence over any individual, particularly government officials. This is particularly so if one considers not only the legal but also reputational risks surrounding improper influence. For this reason, engagement with influential stakeholders through social performance, such as charitable contributions or sponsorships,⁴¹ should often be identified as an area of risk.⁴²

In addition to voluntary social objectives, which are often undertaken to generate public goodwill or social licences, organizations frequently have legal obligations with social dimensions. For example, an organization may be obligated to mitigate impacts of certain activities or utilize local contractors.⁴³ In connection with these obligations or objectives, organizations will frequently engage communities and local, regional, federal, or Indigenous governments regarding consultation, mitigation of impacts, and sharing of benefits. While the risk is certainly not specific to Indigenous engagements by organizations, in general, frequent engagements with government officials or other potentially influential stakeholders should be treated as a risk factor in most ABC programs.⁴⁴

Energy-focused companies in Canada should be mindful of corruption risks that can arise by virtue of the community and government consultation, engagement, mitigation, and benefit sharing. One risk may arise where an organization, intending to form goodwill, may run afoul of anti-corruption laws in certain circumstances if community benefits are not properly vetted and structured, including the involvement of and relationship to government officials, whether directly or indirectly through third parties. Here, organizations should adopt and operationalize policies, procedures, and due diligence to reduce the risk that an organization might contribute, inadvertently or otherwise, to a corrupt regime's benefit or improperly to an individual government official. Such circumstances could directly contradict social objectives by negatively affecting the ethical reputation or legal standing of an organization for current or future projects. Therefore, an appropriately risk-based and tailored ABC program is key to properly executing an organization's social goals and commitments, particularly in the energy sector.

3. ENVIRONMENTAL

Corruption can negatively affect regulation and accountability with respect to the natural environment.⁴⁵ Organizations operating in environmentally sensitive areas, or areas that are subject to environmental regulations, commonly encounter government officials and other regulatory actors. Many organizations globally, or their third party consultants or contractors,

⁴¹ There are few examples of anti-bribery and corruption enforcement relating strictly to social performance or charitable investment. One example is the US Securities and Exchange Commission's enforcement action against Schering-Plough Corporation with respect to the company's improper payments to a charitable organization called the Chudow Castle Foundation: US Securities and Exchange Commission, Litigation Release, 18740, "SEC Files Settled Enforcement Action Against Schering-Plough Corporation for Foreign Corrupt Practices Act Violations" (9 June 2004), online: <www.sec.gov/litigation/litreleases/lr18740.htm>.

⁴² OECD, *Corruption Report*, *supra* note 4 at 108–109.

⁴³ Geoffrey Hale & Yale Belanger, "From 'Social Licence' to 'Social Partnership': Promoting Shared Interests for Resource and Infrastructure Development" (1 December 2015), online: *CD Howe Institute* <www.cdhowe.org/sites/default/files/2021-10/Commentary_440.pdf>.

⁴⁴ OECD, *Corruption Report*, *supra* note 4 at 110–11.

⁴⁵ Fortune Ganda, "The Influence of Corruption on Environmental Sustainability in the Developing Economies of Southern Africa" (2020) 6:7 *Heliyon* e04387.

regularly engage with government officials for permitting, monitoring and controlling the organization's waste and emissions, water and land use, and use of precious or hazardous materials. Without proper controls and tailored training in place, organizations face a higher-risk of their employees and agents not understanding what is required in terms of avoiding inappropriate influence when engaging with government officials. Further, the effect of corruption on environmental degradation can be higher in lower income countries, thus magnifying the need for appropriate controls by energy focused organizations operating in such jurisdictions.⁴⁶ A lack of adequate ABC controls can lead to misuse and abuse of a region's environment and erosion of the environmental regulatory authority.⁴⁷

III. THE NEED FOR OBJECTIVE AND VERIFIABLE CRITERIA IN ESG REPORTING

Companies reporting on ABC risks and compliance are wise to use objective, verifiable metrics to properly inform the public and satisfy securities law requirements. Otherwise, the risk of misleading or incomplete disclosure increases and can result in shareholder disputes and litigation. For example, in 2012, a class action was brought against a Canadian-based engineering firm for misrepresentations related to bribery and corruption risks in its overseas operations.⁴⁸ Specifically, the claim alleged that the organization made misrepresentations in its filings with regard to the corporation's responsible business practices and adequate controls important for accurate reporting and disclosure.⁴⁹ When the organization publicly disclosed the investigation in February 2012, the organization's shares lost approximately 23 percent of their market value. The market value of the shares dropped again in June 2012 when the organization released corrective information that two of its former employees had been charged under the *CFPOA*.⁵⁰ After more than six years of prolonged litigation, the organization settled the litigation in 2018 for approximately CDN\$110 million.⁵¹

Similarly, in December 2011, Walmart made a securities filing with the US Securities and Exchange Commission in which it disclosed that the organization was internally investigating a potential *Foreign Corrupt Practices Act*⁵² violation.⁵³ However, shareholders filed a class action against the organization in 2012 alleging that the statement was misleading since it failed to disclose that the allegations involved conduct dating back to

⁴⁶ Stephen Morse, "Is Corruption Bad for Environmental Sustainability? A Cross-National Analysis" (2006) 11:1 Ecology & Society J Art 22.

⁴⁷ *Ibid.*

⁴⁸ *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2012 ONSC 5288.

⁴⁹ *Ibid.* at 24.

⁵⁰ *Ibid.* at 28–29.

⁵¹ "SNC-Lavalin Announces Agreement to Settle Class Actions Brought in 2012" (22 May 2018), online: <www.snclavalin.com/en/media/press-releases/2018/22-05-2018>; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc* [Settlement Agreement], 2012 ONSC 5288.

⁵² Pub L No 95-213, 91 Stat 1494 (codified as 15 USC § 78 (1977)) [*FCPA*].

⁵³ Wal-Mart Stores, Inc, "Form 10-Q (Quarterly Report)" (8 December 2011) at 26, online (pdf): *Securities Exchange Commission* <www.sec.gov/Archives/edgar/data/104169/000119312511335177/d233066d10q.htm>.

2005 and that an internal investigation was conducted in 2006 unbeknownst to the shareholders.⁵⁴ Walmart settled the class action in 2019 for approximately US\$160 million.⁵⁵

Companies operating as joint ventures in the energy and natural resources sector are not exempt from anti-corruption laws or liability resulting from the actions of their joint venture partners or subsidiaries. For example, in April 2020, Italy-based Eni S.p.A, which held a controlling 43 percent interest in a joint venture, Saipem S.p.A., was found liable for anti-corruption offences in the US because the joint venture falsely characterized payments to an intermediary claiming to assist with contract awards for an Algerian state-owned oil company.⁵⁶ Accordingly, Eni S.p.A. was found to have violated the books, records, and internal accounting protocol provisions of the *FCPA*.⁵⁷

As these examples illustrate, in addition to the importance of maintaining an adequate ABC compliance program, when making related disclosures about such a program, organizations should use objective and verifiable criteria where possible. Using such objective and verifiable criteria or metrics may decrease the risks of potentially misleading disclosures and resulting litigation.

A. EXAMPLES OF OBJECTIVE AND VERIFIABLE CRITERIA IN ABC REPORTING

Numerous key components of an effective ABC program can be measured by using objective and verifiable metrics. As mentioned above, companies such as Suncor, BP, Marathon, and Shell have started to develop their own benchmarks tailored to the specific nature of their business.⁵⁸ Specifically, metrics related to employee and third party training and hotline complaints are being used to measure an organization's bribery and corruption risks and program.⁵⁹ Third party organizations, such as the Sustainability Accounting Standards Board and Global Reporting Initiative, also have created specific indicators and methodologies for bribery and corruption-related disclosures.⁶⁰ As discussed below, these bribery and corruption-related metrics are generally straightforward to implement as objective and verifiable criteria in an ESG report.

Many industries are moving toward incorporating ABC compliance as part of ESG reporting. A key example of an organization's use of objective and verifiable criteria is

⁵⁴ *City of Pontiac General Employees' Retirement System v Wal-Mart Stores, Inc.*, 278 F Supp (3d) 1128 (WD Ark 2017).

⁵⁵ *Wal-Mart Order*, *supra* note 40.

⁵⁶ *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order* (17 April 2020), Exchange Act Release No 34-88679, SEC Release No AAER-4124, online: *Securities and Exchange Commission* <www.sec.gov/litigation/admin/2020/34-88679.pdf>.

⁵⁷ *Ibid.*

⁵⁸ Marathon, "Report," *supra* note 22; Suncor, "Report," *supra* note 23; BP, "Report," *supra* note 24; Shell, "Report," *supra* note 25.

⁵⁹ *Ibid.*

⁶⁰ See e.g. Sustainability Accounting Standards Board, "Oil & Gas – Exploration & Production: Sustainability Accounting Standard" (October 2018), online: <www.sasb.org/wp-content/uploads/2018/11/Oil_Gas_Exploration_Production_Standard_2018.pdf>. See also Global Sustainability Standards Board, "Consolidated Set of the GRI Standards" (30 June 2022), online: *Global Reporting Initiative* <www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/>.

pharmaceutical conglomerate Novartis.⁶¹ The organization's ESG commitments include measuring its ABC compliance program, and in March 2022 it published its first-ever ABC report.⁶² The report contains several quantitative indicators developed in coordination with its industry peers, an investment bank, and the Switzerland-based Basel Institute on Governance.⁶³ The indicators include measurements related to:

- the frequency of references to ethics and compliance communicated by upper management;
- how many of its business functions are included in its anti-corruption risk assessment;
- key performance indicators used to assess the ABC compliance program;
- the percentage of third party reviews conducted; and
- the frequency of board reviews of ABC resource sufficiency.⁶⁴

These indicators are not unique to Novartis or a specific industry. Many other companies could adopt and tailor these indicators to bolster their existing ABC and ESG programs. These measurements can be tracked over time and could be disclosed where doing so furthers an organization's obligations or objectives. Should investors and other stakeholders continue to emphasize increased ESG reporting, more organizations may publish additional information about their mitigated bribery and corruption risks.

IV. ABC PROGRAMS: AN INTEGRAL PART OF ESG COMMITMENTS

A. COMPONENTS OF AN EFFECTIVE ABC PROGRAM

ABC compliance programs should be unique to an organization's specific risks and needs. However, there are certain common elements of an effective program that can be implemented by various organizations, regardless of industry. If properly implemented, these common elements can be disclosed by the organization to derive benefits from the organization's investors. Guidance from the United States Department of Justice,⁶⁵ the United Kingdom Ministry of Justice,⁶⁶ and the World Bank⁶⁷ provide a strong baseline of considerations that organizations can incorporate into their respective ABC compliance programs.⁶⁸

⁶¹ Novartis AG, "Anti-Bribery Report 2021," online: <www.novartis.com/sites/novartis_com/files/anti-bribery-report-2021.pdf> [Novartis, "Report"].

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.* at 5, 7, 13, 16, 22.

⁶⁵ US, Department of Justice Criminal Division, "Evaluation of Corporate Compliance Programs" (June 2020), online: <www.justice.gov/criminal-fraud/page/file/937501/download> [US Guidance].

⁶⁶ United Kingdom, Ministry of Justice, "The Bribery Act 2010 Guidance" (March 2011), online: <www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> [UK Guidance].

⁶⁷ World Bank Group, "Summary of World Bank Group Integrity Compliance Guidelines," online: *The World Bank Public Documents* <thedocs.worldbank.org/en/doc/06476894a15cd4d6115605e0a8903f4c-0090012011/original/Summary-of-WBG-Integrity-Compliance-Guidelines.pdf> [World Bank Guidance].

⁶⁸ Examples of other best practices include: OECD, Corporate Governance Committee, *OECD Guidelines for Multinational Enterprises*, (Paris: OECD, 2011); International Chamber of Commerce, "Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations" (2005), online: <iccwbo.org/content/uploads/sites/3/2005/10/Combating-Extortion-and-Bribery-ICC-Rules-of-Conduct-and-Recommendations.pdf>; Transparency International, "Business Principles for Countering Bribery"

The respective guidance documents help organizations understand the factors used by the various regulators to assess an organization's compliance program. However, the guidance documents also serve other purposes. For example, the US Guidance allows prosecutors to consider the "adequacy and effectiveness of the corporation's compliance program" to support their charging, sentencing, and resolution decision-making processes.⁶⁹ Similarly, the UK Guidance helps organizations determine whether their implemented policies were "adequate," which is relevant as a defence to certain violations of the *Bribery Act*,⁷⁰ if the organization can prove that it had implemented adequate policies to prevent the commission of the offence.⁷¹ In the same vein, the World Bank Guidance provides a framework for organizations seeking to end a debarment order from the World Bank.⁷² These orders are typically issued with a conditional release.⁷³ Upon the World Bank's satisfaction that an organization has implemented or improved its integrity compliance program, the debarment sanction can be lifted.⁷⁴ Companies can therefore look to this collection of guidance documents to derive meaningful and internationally recognized components to populate their respective ABC compliance programs.

Canada, however, does not have ABC compliance program guidance from the federal or provincial governments. In other areas of law, such as competition,⁷⁵ anti-money laundering,⁷⁶ and anti-spam, or sectors such as radio-television or telecommunications, the federal government has provided compliance guidance directives.⁷⁷ However, for ABC, Canadian companies and compliance professionals must look elsewhere for guidance about their ABC compliance programs. In Canada, the case of *R. v. SNC-Lavalin Construction Inc.* contains a significant amount of guidance.⁷⁸ Namely, the Superior Court of Quebec accepted a framework to establish the components of an effective anti-corruption compliance program for Canadian companies.⁷⁹ The monitor's proposed methodology for evaluating the structure of the defendant's program was guided in part by the US Guidance, UK Guidance, and World Bank Guidance.⁸⁰ Each component is discussed in further detail below.

1. SENIORITY, EXPERTISE, AUTONOMY, AND RESOURCES

An effective ABC compliance program is explicitly supported by senior level management who have the relevant expertise, autonomy, and resources to perform their

(2013), online: <images.transparencycdn.org/images/2013_Business-Principles_EN.pdf>; United Nations Global Compact, "The Ten Principles of the UN Global Compact," online: <www.unglobalcompact.org/what-is-gc/mission/principles>; World Economic Forum, "Partnering Against Corruption Initiative," online: <www.weforum.org/communities/partnering-against-corruption-initiative>.

⁶⁹ US Guidance, *supra* note 65 at 1.

⁷⁰ *Bribery Act 2010* (UK).

⁷¹ UK Guidance, *supra* note 66 at 6.

⁷² World Bank Guidance, *supra* note 67 at 1.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Competition Bureau Canada, "Creating an Effective Compliance Program," online: *Government of Canada* <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04297.html>.

⁷⁶ Financial Transactions and Reports Analysis Centre of Canada, "Compliance Program Requirements" (1 June 2021), online: *Government of Canada* <www.fintrac-canafe.gc.ca/guidance-directives/compliance-conformite/Guide4/4-eng>.

⁷⁷ Canadian Radio-television and Telecommunications Commission, "Compliance and Enforcement Information Bulletin CRTC 2014-326" (19 June 2014), online: <crtc.gc.ca/eng/archive/2014/2014-326.pdf>.

⁷⁸ 2019 QCCQ 18961 [*SNC*].

⁷⁹ *Ibid.*

⁸⁰ US Guidance, *supra* note 65; UK Guidance, *supra* note 66; World Bank Guidance, *supra* note 67.

duties.⁸¹ Compliance leaders should have the necessary authority and tools to meaningfully enforce organization rules, implement enhancements and changes, and participate in the strategic and operational decisions relevant to ABC compliance.⁸²

Compliance leaders should also have the staffing and financial resources proportionate to the organization's size and risk profile, which make it more likely that the organization has the necessary abilities to deliver, record, review, test, and enhance the ABC program.⁸³ Similarly, compliance leaders should have enough autonomy from management to perform their duties and typically should have a direct line to the organization's decision-makers, such as the Board of Directors or an executive committee.⁸⁴

2. POLICIES, PROCEDURES, AND CONTROLS

The foundation of an effective ABC compliance program is its policies, procedures, and controls. Accordingly, these tools should be created with input from an organization's business segments most likely to be impacted by risks targeted by the compliance program. Companies should take reasonable steps to ensure that its mitigation strategies are clear, practical, and proportionate to the corruption risks relevant to the business.⁸⁵ Further, clear descriptions of all relevant policies, procedures, or controls should be readily available and accessible by any employee or third party acting on behalf of the organization (for example, a supplier code of ethics).⁸⁶ This accessibility will allow for the program to be operationally integrated in a manner that is reinforced by a system of internal controls and understanding.⁸⁷

An effective ABC compliance program should, at the very least, consist of a Code of Conduct or Anti-Corruption Policy, which lists relevant organizational rules or guidelines and codifies the organization's commitment to adhering to anti-bribery and corruption laws.⁸⁸ Further, any basic policy should include some form of reporting mechanism and examples of disciplinary actions imposed for not following the organization's rules.⁸⁹

3. COMMITMENT TO COMPLIANCE THROUGHOUT THE ORGANIZATION

As noted above, effective ABC compliance begins with senior level management support.⁹⁰ When such support is in place, an organization's corporate culture can more easily

⁸¹ UK Guidance, *ibid* at 23–26; World Bank Guidance, *ibid* at 2.

⁸² US Guidance, *supra* note 65 at 11–13.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ UK Guidance, *supra* note 66 at 27; World Bank Guidance, *supra* note 67 at 4.

⁸⁶ World Bank Guidance, *ibid.*

⁸⁷ UK Guidance, *supra* note 66 at 21–22; World Bank Guidance, *ibid* at 2.

⁸⁸ *Ibid.*

⁸⁹ Effective ABC compliance programs should consider a requirement to comply with all applicable laws and regulations, requirements to comply with the ABC compliance program, a prohibition of bribery, corruption, and facilitation payments, a delegation of authority, processes and approvals for gifts and hospitality, political contributions, donations, sponsorship, the use of petty cash, and other payments to third parties or government officials. Companies can also consider rules, including mitigating the risks of hiring government-related individuals, maintaining accurate financial records, training, duties to report misconduct, whistleblower procedures and protections, and periodic reviews of the ABC compliance program: UK Guidance, *ibid.*

⁹⁰ UK Guidance, *ibid* at 23–24; World Bank Guidance, *supra* note 67 at 2; US Guidance, *supra* note 65 at 10–11.

adopt and promote compliance with ABC policies.⁹¹ Senior management can accomplish this by implementing the following changes. First, senior leadership should be knowledgeable of the content and operation of the organization's ABC compliance program and maintain ongoing oversight of the program.⁹² Second, senior leadership should conduct business in an ethical manner and follow the policy requirements.⁹³ Leaders, like other staff, should not depart from the core requirements — even in the face of other compelling and valid objectives — without first obtaining advice from legal advisors or other qualified professionals.⁹⁴ Third, senior leadership should engage in regular communication with employees and stakeholders about the program, the importance of ethical behaviour, and avoiding corruption risks.⁹⁵ Fourth, senior management should incentivize ethical behaviour by incorporating compliance into the organization's compensation and career advancement decision-making process.⁹⁶ Finally, the organization, from the top-down, should adopt a zero-tolerance policy toward corruption offences.⁹⁷ Such a policy should include consistent implementation of remedial and disciplinary actions pursuant to the terms set out in the ABC program and HR policies, regardless of the offender's level of seniority.⁹⁸

All levels of management should strive to implement and reinforce the organization's commitment to ethical business and compliance with ABC policies and procedures.⁹⁹ This can include group discussions with team members, acting ethically even if a business objective is not achieved, and not obstructing the organization's compliance teams from performing their duties effectively.

4. RISK ASSESSMENT AND REVIEW

Effective ABC compliance programs are tailored to an organization's specific corruption risk profile.¹⁰⁰ Anti-corruption risk assessments are used to accomplish this. An effective ABC compliance program should include a comprehensive risk assessment process which evaluates the inherent corruption risks facing an organization.¹⁰¹ Such a process should also regularly review the controls in place to address those risks and identify any gaps between the risks and controls.¹⁰² Organizations should address any gaps by making necessary changes to the program. Notably, the UK Guidance instructs enforcement authorities¹⁰³ to evaluate whether an organization's ABC compliance program fits its ABC risk profile, the effectiveness of an organization's risk assessment process, and the organization's process for

⁹¹ US Guidance, *ibid* at 10.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ For example, circumstances involving extortion or duress will not give rise to *FCPA* liability since the payment was made in response to extortionate demands under imminent threats of physical harm: US, "FCPA Guide," *supra* note 39 at 27.

⁹⁵ US Guidance, *supra* note 65 at 13.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 9–10.

⁹⁸ *Ibid* at 17.

⁹⁹ US, "FCPA Guide," *supra* note 39 at 57.

¹⁰⁰ UK Guidance, *supra* note 66 at 25–26.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* at 31.

¹⁰³ The term "enforcement authorities" refers to the US Department of Justice, the US Securities and Exchange Commission, the Royal Canadian Mounted Police, and the Public Prosecution Service in Canada.

ensuring its ABC risk assessment remains current through periodic updates.¹⁰⁴ Factors to consider when tailoring an ABC program include an organization's size, complexity, business sector, jurisdictions of operation, regulatory environment, interactions with government officials, use of third parties, expenses related to gifts, hospitality, entertainment and travel, political contributions, charitable donations, and sponsorships.¹⁰⁵

5. TRAINING AND COMMUNICATION

To increase the likelihood that the organization's policies are taught, learned, and understood at all levels of the organization, an effective ABC compliance program should require periodic training and certification for all directors, officers, relevant employees, and, where appropriate, third parties.¹⁰⁶ The understanding of all trainees should be assessed as part of the training and the organization should have mechanisms to address any comprehension issues among the trainees.¹⁰⁷ Training should be tailored to the size, sophistication, risk exposure, and subject matter expertise of the audience.¹⁰⁸ For example, training should be offered in the appropriate language, explain anti-corruption laws and the ABC compliance program, provide practical advice to employees and real-world examples, address and educate employees about any circumstances giving rise to past compliance incidents (on a genericized and anonymized basis where appropriate), and provide guidance on how to report issues and receive ethics advice on a case-by-case basis.¹⁰⁹

An organization's training programs should be reviewed and updated periodically so they remain up-to-date and effective. Training materials should also be readily available and accessible to employees.

6. PROACTIVE THIRD PARTY RISK MANAGEMENT

Some organizations interact indirectly with government using third party contractors, joint venture partners, or other business partners that act on behalf of the organization. The prohibitions in anti-corruption laws also capture indirect payments, which may create liability for an organization using third parties to interact with others on its behalf if the organization knew or was wilfully blind to the payment provided.¹¹⁰ Proactive third party risk management is a critical component of an effective ABC compliance program.¹¹¹ Key elements of third party risk management include risk-based diligence prior to engagement, using appropriate contract terms, implementing appropriate invoice review and payment controls, continuous and ongoing monitoring and assessment, periodic refreshments of due diligence efforts, and clear communication of the organization's compliance expectations.¹¹²

¹⁰⁴ UK Guidance, *supra* note 66 at 25–26.

¹⁰⁵ World Bank Guidance, *supra* note 67 at 2.

¹⁰⁶ *Ibid* at 4; see also US Guidance, *supra* note 65 at 5.

¹⁰⁷ UK Guidance, *supra* note 66 at 29–30.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ US, "FCPA Guide," *supra* note 39 at 22–23.

¹¹¹ US Guidance, *supra* note 65 at 7–8.

¹¹² UK Guidance, *supra* note 66 at 27–28.

Due diligence should be proportionate to the risk associated with specific third parties and include policies and procedures that identify the qualifications, reputations, beneficial owners, and associations of third parties, including any relationships between the third party and government officials.¹¹³ Due diligence efforts should be integrated within an organization's relevant procurement, vendor management, and payment control processes and tailored to identify whether a third party is associated with the risks most relevant to the organization.¹¹⁴ It is also important to maintain records of the organization's relationship with third parties by, for example, maintaining due diligence reports in accordance with applicable retention policies.

Post-engagement diligence should also be performed by the organization, which can include controls related to due diligence refreshers, training, and periodic compliance certification requirements.¹¹⁵ Contracts with higher-risk third parties should also contain audit rights and provisions requiring compliance with anti-bribery and corruption laws.¹¹⁶

Organizations engaged in merger and acquisition activity are also subject to an additional element of proactive third party risk management.¹¹⁷ During the negotiation process, risk-based anti-corruption due diligence should be performed to better understand whether there are existing corrupt practices or successor liabilities.¹¹⁸ If necessary, additional due diligence should be performed after closing to increase the probability that all relevant issues are identified and resolved.¹¹⁹ Acquired or merged entities should be incorporated into the organization's anti-bribery and corruption practices as soon as practicable, and, if there are gaps in the acquiring organization's policies as applied to the merged entities, these policies should be updated, including by potentially borrowing from the acquired or merged entity's ABC policy or practice.¹²⁰

7. CONFIDENTIAL REPORTING, INVESTIGATIONS, AND REMEDIATION

Key to any effective ABC compliance program is an operative and reliable process for employees to report incidents or suspicions of misconduct or non-compliance on an anonymous and confidential basis.¹²¹ Important supporting measures include:

- efforts to create a workplace environment that promotes speaking up without a fear of retaliation;
- the use of appropriate complaint submission and review processes by sufficiently independent personnel with appropriate investigative authority, whistleblower protection, and ability to conduct timely, thorough, and independent investigations; and

¹¹³ World Bank Guidance, *supra* note 67 at 3.

¹¹⁴ UK Guidance, *supra* note 66 at 27–28.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* at 39.

¹¹⁷ *Ibid* at 27–28.

¹¹⁸ US Guidance, *supra* note 65 at 9.

¹¹⁹ *Ibid.*

¹²⁰ US, “FCPA Guide,” *supra* note 39 at 62–63.

¹²¹ US Guidance, *supra* note 65 at 6–7.

- the creation and maintenance of detailed records of allegations and investigations, and proportionate discipline and corrective actions.¹²²

Continuous and ongoing reviews of allegations and the results of investigations should occur to identify potential opportunities to enhance the ABC compliance program.

8. CONTINUOUS REVIEW, PERIODIC TESTING, AND IMPROVEMENT

Organizations should consider including continuous review and periodic testing with an aim to improve ABC compliance program effectiveness.¹²³ To enable this process, organizations will need to rely on fair and accurate records about the ABC compliance program, including its strengths and weaknesses.

These records can be used to engage in meaningful efforts to measure its compliance culture. Organizations can also implement regular testing and reviews of internal controls and processes, including internal audits of higher-risk compliance areas to identify potential non-compliance and opportunities to resolve issues.¹²⁴ These findings should then be reported on a regular basis to the audit committee or other relevant body that is positioned to receive such information.¹²⁵ Any enhancements or appropriate corrective action related to any identified misconduct should be tracked and implemented in a timely manner.¹²⁶

Critical to benchmarking progress are key performance indicators. ABC compliance programs should seek to use indicators against relevant industry peers. Benchmarking allows organizations to measure the comparative maturity and effectiveness of its program and potentially learn of new or better strategies and controls used by others in the industry.

B. INDIGENOUS CONSIDERATIONS

Although organizations use different definitions of “government official” in their respective ABC compliance programs, some of which may not specifically include Indigenous officials, domestic and foreign corruption laws may apply to Indigenous officials, depending on the circumstances. To avoid inadvertent potential violations of such laws, organizations should make efforts to understand the legal status of Indigenous officials and parameters for ABC compliance regarding interactions with Indigenous government officials. In addition, for the reasons mentioned in Section II, interactions with local populations, including Indigenous governments, are commonly involved in performance of ESG commitments in each pillar. For organizations for whom dealing with Indigenous officials and governments in Canada is an important part of their ESG activities, it is important to understand this legal framework and incorporate the relevant ABC considerations.

¹²² UK Guidance, *supra* note 66 at 21–22, 29–31; see also World Bank Guidance, *supra* note 67 at 4.

¹²³ US Guidance, *supra* note 65 at 15–16.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ UK Guidance, *supra* note 66 at 31.

In Canada, the *Criminal Code* governs domestic corruption offences.¹²⁷ Pursuant to section 118 of the *Criminal Code*, the definition for “official” includes “a person who holds an office, or is appointed or elected to discharge a public duty.”¹²⁸ Sections 122 and 426 of the *Criminal Code* set out the primary domestic corruption offences applicable to dealings with Indigenous government officials and employees.¹²⁹

Section 122 prohibits officials who, “in connection with the duties of their office, [commit] fraud or a breach of trust, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.”¹³⁰ Canadian courts have found that officials of an Indigenous Nation in Canada can constitute an “official” for the purposes of section 122 of the *Criminal Code*.¹³¹ In *Yellow Old Woman*, the Alberta Court of Appeal held that an individual who served as Health Director, and later as Chief, for the Siksika First Nation was an “official” for the purposes of section 122 of the *Criminal Code*.¹³²

Section 122 can apply not only to the public official but also to private corporations or individuals who assist or encourage the official to breach the public trust.¹³³ An organization’s potential exposure to a breach of trust offence arises from party, or indirect, liability rather than direct liability; it is an offence for anyone to aid, abet, assist, or encourage an accused’s commission of an offence.¹³⁴

Section 426 of the *Criminal Code* makes it an offence to corruptly give, or offer to give, to an agent, which includes an employee, a reward, advantage, or benefit of any kind as consideration for the agent doing, or not doing, any act relating to the affairs or business of the agent’s principal or employer.¹³⁵ This offence applies equally to the payor and recipient of the reward, advantage, or benefit.¹³⁶ Secrecy is a hallmark of this offence; there is only an offence if the reward, advantage, or benefit is provided without the principal’s knowledge.¹³⁷ Canadian courts have convicted individuals found to have made secret commissions involving Indigenous bands. For example, in *R. v. Glen Bannon*, the Chief of the Anishinabek First Nations Police Service was responsible for the purchase of fleet vehicles for the Police Service.¹³⁸ The Ontario Superior Court of Justice found that the Chief received CDN\$142,437 in direct and indirect benefits from a car dealership as consideration for

¹²⁷ *Criminal Code*, *supra* note 35.

¹²⁸ *Ibid.*, s 118.

¹²⁹ *Ibid.*, ss 122, 426.

¹³⁰ *Ibid.*, s 122.

¹³¹ *R v Yellow Old Woman*, 2003 ABCA 342 [*Yellow Old Woman*]; courts have also applied this reasoning to find that a Band Manager for the Lhtako Dene Nation was an “official” for purposes of section 122 of the *Criminal Code*, *ibid.*: see e.g. *R v Buchan*, 2014 BCSC 2591.

¹³² *Yellow Old Woman*, *ibid.*

¹³³ *Criminal Code*, *supra* note 35, s 21.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, s 426; the Supreme Court of Canada has held that a benefit includes anything which could be construed as providing a “material or tangible gain”: see e.g. *R v Hinchey*, [1996] 3 SCR 1128 at 1161. Aside from the obvious examples of cash payments, the case law suggests that benefits sufficient to trigger *Criminal Code* liability may extend to items such as the provision of tickets to sporting events, a one-sided pattern of paying for meals (or even provision of one lavish meal), and payment for non-work related travel.

¹³⁶ *Criminal Code*, *ibid.*

¹³⁷ *Ibid.*

¹³⁸ 2011 ONSC 3000.

showing favour to the car dealership in its lease and purchase of vehicles on behalf of the Police Service.¹³⁹

The *CFPOA* does not expressly include Indigenous governments in its definition of “foreign public official”; however, the classification of Indigenous leaders as “officials” for the purposes of the *Criminal Code* may be an indicator of how courts could consider leaders of Indigenous governments in foreign jurisdictions for the purposes of the *CFPOA*.¹⁴⁰ Depending on the context and circumstances, the *CFPOA*, *FCPA*, and *Bribery Act* may apply to engagement with Indigenous government officials extraterritorially. However, given the significant differences between constitutional and legal frameworks regarding Indigenous governments within Canada and elsewhere, the *CFPOA*’s application to dealings with Indigenous government officials in other countries is likely case and context specific.¹⁴¹

V. USING EFFECTIVE ABC COMPLIANCE PROGRAMS TO ACHIEVE ORGANIZATIONAL ESG OBJECTIVES

A. RELEVANT METRICS TO MEASURE THE EFFECTIVENESS OF AN ABC PROGRAM

Continuous testing and improvement of an ABC compliance program can be among the most relevant metrics to measure its effectiveness.¹⁴² Testing provides key insights into whether and to what extent a program has been properly implemented and followed by an organization.¹⁴³ The examples of key indicators in the Novartis example discussed above provide companies with a point of reference to begin tailoring to their own business.¹⁴⁴ Metrics “should be straightforward, concrete, and relevant to providing an insight into an aspect of the program.”¹⁴⁵ Organizations should develop processes through which they can assess their ABC programs on a regular basis, which includes the re-evaluation of risk profiles, examining key controls with sampling and testing, measuring the frequency and completion rates of non-controls (for example, training and compliance culture), and

¹³⁹ *Ibid* at para 27.

¹⁴⁰ To date, Canadian courts have held that individuals in the following positions constitute “foreign public officials” for the purposes of the *CFPOA*: employees of government owned entities (*R v Karigar*, 2013 ONSC 5199; *Chowdhury v HMO*, 2014 ONSC 2635), ministers of foreign governments (*ibid*; *R v Griffiths Energy International*, [2013] AJ No 412 (QB) [*Griffiths*]; *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (ABQB); *SNC*, *supra* note 78), and ambassadors of foreign governments (*Griffiths*, *ibid*).

¹⁴¹ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, recognizes and guarantees that Indigenous peoples in Canada have an inherent right of self-government. However, formal recognition of the rights of Indigenous governments may become more widespread given the Government of Canada’s enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, which codified into Canadian law the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/Res/61/295 (2007), a legally non-binding resolution adopted by the United Nations in September 2007 that recognizes the minimum standards for survival and dignity. Although the legislation is limited to Aboriginal peoples in Canada, as defined in section 35(2) of the *Constitution Act, 1982*, the law may yet evolve to clarify the application to Indigenous governments in foreign jurisdictions.

¹⁴² US Guidance, *supra* note 65 at 15.

¹⁴³ *Ibid*.

¹⁴⁴ Novartis, “Report,” *supra* note 61.

¹⁴⁵ Jonathan Drimmer & Matthew Herrington, “Developing Key Performance Indicators and Tracking Metrics for an Anti-Corruption Program (Part One of Two)” (24 February 2016) at 4, online: *Anti-Corruption Report* <www.anti-corruption.com/2569156/developing-key-performance-indicators-and-tracking-metrics-for-an-anticorruption-program-part-one-of-two.html>.

benchmarking programs against a relevant industry peer set.¹⁴⁶ The results of testing efforts can then drive recommendations to bolster the program and should be communicated to the organization's leadership.

1. TEST AND MONITOR CONTROLS

Organizations should identify the main risks applicable to their business operations and hold discussions with stakeholders to identify the key controls that most directly respond to those risks.¹⁴⁷ For example, an organization that imports and exports goods to and from a higher corruption risk jurisdiction should test and monitor its customs and logistics processes to identify any risks and enhance its corresponding controls. Organizations can then test these controls to determine whether their existing processes are being effectively implemented in practice. This can be performed by audit or compliance teams. These findings should form the basis of recommendations that are presented to organization leadership and tracked over time. In turn, these metrics can help organizations to more directly satisfy their ESG commitments.

2. TEST AND MONITOR COMMITMENT AND TRAINING

Regular testing can help measure the frequency and completion rates of non-controls. Training, for example, is a key metric that organizations can implement, track, and measure over time. An organization can implement mandatory or time-based training and track completion rates for personnel at an individual and organizational level. Top-down communication is another key metric that organizations may benefit from tracking. For example, an organization could track how often senior and middle management distribute consistent, detailed communications about the importance of compliance, either in-person or electronically. Organizations should also consider evaluating employee culture and understanding of its policies via surveys which can then be used to develop targeted initiatives to further enhance compliance efforts and understanding.¹⁴⁸

3. CONDUCTING EXTERNAL BENCHMARKING

The most effective compliance programs often use external benchmarking to measure against other comparable organizations. Such comparisons can help the organization review its own processes or, subject to applicable competition laws, benchmark certain information by collaborating with its peers. Third party companies may also provide relevant information through surveys and aggregate responses from risk and compliance professionals to provide industry-wide ABC metrics.¹⁴⁹ With this information, organizations are better suited to understand where they exist in the market, not only compared to their industry peers, but also to non-industry peers that may engage in compliance measures of benefit to the organization.

¹⁴⁶ *Ibid.*

¹⁴⁷ UK Guidance, *supra* note 66 at 25–26.

¹⁴⁸ US Guidance, *supra* note 65 at 15.

¹⁴⁹ Kroll, "Report," *supra* note 31; see also Transparency International UK, "Corporate Anti-Corruption Benchmark," online: <www.transparency.org.uk/corporate-anti-corruption-benchmark>.

B. OBJECTIVE AND VERIFIABLE CRITERIA IN ABC REPORTING

The use of objective and verifiable criteria can be critical to effective ABC reporting. Although the nature of each reporting organization will be different, this article has outlined several metrics that an organization can consider when crafting its reporting style. Objective and verifiable criteria are important as they not only provide data points to be measured and tracked over time, but also provide a greater degree of certainty for companies to rely on when making public representations about their respective programs. This can reduce the risk of litigation, shareholder disputes, and loss of reputation.

The following is a list of objective and verifiable metrics that can be quantifiable representations of the effective ABC program components listed in the section above. These indicators can be implemented by many organizations and help to represent an organization's bribery and corruption risk profile. However, this list is not exhaustive, and appropriate criteria will vary based on each organization's operations, risk profile, ABC program maturity, and ESG disclosure objectives.

C. EXAMPLES OF OBJECTIVE AND VERIFIABLE ABC CRITERIA

1. The number of employees who have successfully completed anti-bribery and corruption training.
2. The number of ABC compliance personnel employed by the organization.
3. The bribery and corruption-related controls implemented by the organization.
4. The number of due diligence assessments performed on contractors, intermediaries, customs brokers, and other third parties that act on behalf of the organization, and the number of third parties rejected because of due diligence.
5. The number of internal and external anti-bribery and corruption risk assessments performed by or on behalf of the organization, the number of issues identified arising from those initial and follow-up assessments, and the percentage of the organization covered by risk assessments.
6. The number of third parties who engage with government officials in connection with the organization's business.
7. The number of third parties trained on anti-corruption expectations.
8. The number of compliance issues or infractions identified by the personnel of the organization, through direct complaints, whistleblower hotlines, or similar process, and the outcome of the investigations and disciplinary processes.
9. The number of communications from senior level and mid-level management related to anti-bribery and corruption compliance.

10. The number of periodic reviews and testing of the organization's ABC programs and policies.
11. The number of compliance presentations made to senior level management.
12. The number of active investigations, lawsuits, complaints, or allegations of violations related to anti-corruption laws and organization policies.
13. The number of customers, suppliers, or third parties acting on behalf of the organization in high corruption risk jurisdictions.
14. The number of engagements with joint venture operators regarding anti-corruption conduct.

Organizations should consider using some or all of these quantitative indicators as appropriate to their business. These indicators reflect the components of an effective ABC program and can help to measure the success of an organization's implementation of its program. As discussed above, the components of an effective ABC program provided in this article originate in part from the US Guidance, UK Guidance, and World Bank Guidance, and were accepted by a Canadian court as a methodology for assessing the effectiveness of a global organization's integrity program.¹⁵⁰ These indicators that flow from the components of an effective ABC program can provide reliable and accurate data points and insight for investors, management, and regulators. This can be especially important for organizations that choose to include bribery and corruption risks as part of their disclosures in response to market participants that are increasingly expecting the inclusion of bribery and corruption risks within ESG reporting.¹⁵¹

VI. CONCLUSION

An effective ABC compliance program can be an integral part of any organization's ESG commitment and reporting obligations. The components of an ABC compliance program fit squarely within one or more ESG category. Although industries have yet to adopt a single, objective standard for their respective ABC compliance programs, this article sets out a list of components that should comprise an organization's ABC platform. It also provides a set of objective and verifiable metrics by which an organization can measure and make disclosure to the public in a transparent manner. Even without a reporting obligation, organizations are incentivized to adopt effective ABC compliance programs to help bolster their ESG commitments. An objective and measurable ABC compliance program can provide greater commercial certainty, bolster corporate responsibility, and create a stronger sense of organizational transparency, all of which underscore the core values of an organization's ESG commitments.

¹⁵⁰ *SNC*, *supra* note 78.

¹⁵¹ RBC, "Survey," *supra* note 18; Kroll, "Report," *supra* note 31.

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