

# Understanding Anti-Corruption Issues in Africa

*An In-Depth Look at Recent Developments and  
Upcoming Trends*



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First Printing, 2010

10 9 8 7 6 5 4 3 2 1

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# Managing FCPA Risks in Sub-Saharan Africa

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## Introduction

For many U.S. investors, sub-Saharan Africa represents a land of great potential. Business opportunities abound, as do the natural resources. There are ample human capital, an unsaturated market full of potential customers, and the possibility for a high return on investment. With a growing middle class and a move toward greater urbanization, sub-Saharan Africa represents a frontier market with strong business potential. However, as with any business venture, doing business in sub-Saharan Africa can be fraught with risk. Corruption risks in the region represent one of the most significant risks facing foreign investors. And for U.S. companies and issuers who are subject to the Foreign Corrupt Practices Act (FCPA), a U.S. law that prohibits bribes to foreign government officials as a way to obtain or retain business, these risks can be substantial. As a result, understanding and minimizing FCPA risks is something of which all U.S. companies and issuers doing business in the region need to be aware.

## The Sub-Saharan Market

Sub-Saharan Africa is a thriving frontier market. Covering forty-seven countries and more than 24 million square miles, this region has made enormous economic strides in the past ten years. (World Bank, Sub-Saharan Africa Regional Brief Report [April 2010] and Country List [2010], [www.web.worldbank.org](http://www.web.worldbank.org)). South Africa has the largest and most diversified economy in Africa; Nigeria is the most populous nation on the continent; and Kenya has made a name for itself as a thriving technology/telecommunications hub for young programmers and other IT specialists. (Africa's Ten Largest Economies in 2005, ClickAfrique.com, Last Updated Jan. 17, 2005, <http://www.clickafrique.com/Magazine/ST014/CP0000000251.aspx>; Rosalind K. McLymont, "Africa Strictly Business—The Steady March to Prosperity," 145 (*The Network Journal* 2009). As former UN Secretary-General Kofi Annan has noted, "Africa is rich and its stock is rising. The value of its land and minerals is going up." (W. Wallis, "Africa's Frontier Market Ready to Score," *Financial Times* (June 1, 2010), <http://www.ft.com/cms/s/0/57214a8e-6da1-11df-b5c9-00144feabdc0.html>.)

Indeed, sub-Saharan Africa can proudly boast of its economic growth during the first decade of this new century. Foreign direct investment (FDI)

for Africa as a whole rose from \$7 billion in 2002 to \$88 billion in 2008, a twelve-fold increase. (“Direct Investment Inflows,” *African Economic Outlook* [June 7, 2010], [www.africaneconomicoutlook.org/en/outlook/external-financial-flows-to-Africa/direct-investment-inflows/](http://www.africaneconomicoutlook.org/en/outlook/external-financial-flows-to-Africa/direct-investment-inflows/).) “The rate of return of FDI in Africa has been increasing since 2004 and, at 12.1 percent, was the highest among developing host regions in 2007. Mergers and acquisitions (M&As) in Africa rose by an estimated 157 percent to USD 26 billion in 2008.” (OECD, *African Economic Outlook 2009: Overview*, 39 [African Development Bank 2009].)

In 2008, for example, sub-Saharan Africa received \$63.6 million (USD) in FDI. (Id.) Some of the top 2008 FDI destinations in Africa were found in sub-Saharan Africa (e.g., Nigeria [\$20.3 billion], Angola [\$15.5 billion] and South Africa [\$9 billion]). In 2009, West Africa’s commodity markets, in part particularly because of oil exploration in Ghana and Guinea, accounted for 80 percent of all FDI in West Africa. In Nigeria alone, oil expansion projects raised its 2009 FDI flows by 63 percent. (Id.) South Africa was also a big winner, pulling in 25 percent of sub-Saharan Africa’s total FDI in 2009. (Id.)

Africa is attractive to investors because of the vastness of its resources and the rest of the world’s need for them.

Africa has about 10 percent of global oil reserves, possibly more. South Africa has 40 percent of the world’s gold. The continent has more than a third of cobalt reserves and base metals abound. Its agricultural potential is barely touched.

In the past decade, Asian demand for African commodities has helped reverse the slump in prices that led to chronic past deficits. This in turn has encouraged investors from elsewhere, including Europe and the U.S., to rethink their approach. China, which has increased trade five-fold with Africa since 2003, has played a leading role in the turnaround.

(W. Wallis, “Africa’s Frontier Market Ready to Score,” *Financial Times* (June 1, 2010), <http://www.ft.com/cms/s/0/57214a8e-6da1-11df-b5c9-00144feabdc0.html> at 2.)

For example, six of the world's largest mining and steel companies have pledged to spend billions of dollars in the West African countries of Guinea, Liberia, and Sierra Leone, where some of the world's richest deposits of iron ore, the raw ingredient of steel, are found. (W. MacNamara, "Mining Groups Target West Africa," *Financial Times* [May 18, 2010], <http://www.ft.com/cms/s/0/abde38bc-62dd-11df-b1d1-00144feab49a.html>.) Oil-rich countries like Nigeria and Angola and countries like South Africa, Ghana, Uganda, and the Democratic Republic of Congo, with their rich deposits of gold, copper, diamonds, bauxite, coltan, and other precious metals, all make for very attractive business propositions for investors. There is no doubt that the region is replete with riches and opportunity, particularly in a time when global consumption is on the rise.

### **The Growth Factor**

While the recent global economic crisis has certainly taken its toll, the sub-Saharan African market found itself more resilient and able to recover more quickly, in part because of the relative health of its economies before the crisis hit and the region's favorable domestic policy reforms. (Id. at 1.) So in a time where the United States and parts of Europe are experiencing negative growth risks, the International Monetary Fund (IMF) is predicting that sub-Saharan Africa's economy is expected to grow by 4.75 percent in 2010, which is more than double its 2 percent 2009 growth. ("Africa's Growth Set to Bounce Back after Short Slowdown," IMF Regional Economic Outlook Report [April 23, 2010], available at [www.imf.org/external/pubs/ft/survey/so/2010/CAR042310A.htm](http://www.imf.org/external/pubs/ft/survey/so/2010/CAR042310A.htm).) The 2011 GDP projected growth is estimated at 5.9 percent, which outpaces the projected 2.4 percent growth for developed economies like the United States and Europe. (IMF, *World Economic Outlook: Rebalancing Growth*, [April 2010], 2, available at <http://www.imf.org/external/pubs/ft/weo/2010/01/pdf/text.pdf>.)

"Africa is the new frontier of the global economy." (C.W. Corey, "Africa Is New Frontier of Global Economy" [Oct. 10, 2008], <http://www.america.gov/st/econ-english/2008/October/20081010111004WCyeroC0.1286432.html>, quoting statement of John A. Simon, former U.S. ambassador to the African Union.) Many U.S. companies wholeheartedly agree, as can be seen by their expansion plans for the region. (M. Bleby,

“Africa: Continent is Unilever’s Market of the Future” [July 12, 2010], <http://allafrica.com/stories/201007120193.html>, estimating consistent double-digit growth in Unilever’s expanding African operations; “Merck Partners With South African Drugmaker,” CNBC [June 24, 2010], <http://www.cnn.com/id/37892693>, discussing how New Jersey-based pharmaceutical company Merck expects emerging markets like South Africa to represent 25 percent of its global revenue by 2013.) Indeed, some commentators believe that the region could be on the verge of joining the BRIC nations (Brazil, Russia, India, and China) as a premier emerging market. (F. Aquila, “Africa’s Biggest Score: A Thriving Economy” [June 29, 2010], *Bloomberg Businessweek*, MSNBC.COM, [http://www.msnbc.msn.com/id/37996960/ns/business-bloomberg\\_businessweek](http://www.msnbc.msn.com/id/37996960/ns/business-bloomberg_businessweek).)

A recent report conducted by management consulting firm McKinsey & Company, backs up this statement. The McKinsey report states “[t]he rate of return on foreign investment is higher in Africa than in any other developing region. ... [and] it’s time for global executives and investors to pay heed.” (C. Lourens, “Africa’s Growth Quickens; Prospects ‘Strong,’ McKinsey Says,” *Bloomberg Businessweek* [June 9, 2010], [www.businessweek.com/news/2010-06-09/africa-s-growth-quickens-prospects-strong-mckinsey-says.html](http://www.businessweek.com/news/2010-06-09/africa-s-growth-quickens-prospects-strong-mckinsey-says.html).) As World Bank vice-president Ngozi Okonjo-Iweala explains, “[a]n eminent businessman once commented that profit lies where the gap between perception and reality is greatest. That surely applies to sub-Saharan Africa.” (W. Wallis, “Africa’s Frontier Market Ready to Score,” *Financial Times* [June 1, 2010], <http://www.ft.com/cms/s/0/57214a8e-6da1-11df-b5c9-00144feabdc0.html> at 1.)

A healthy growth of business opportunities in the private sector further demonstrates how the region has used entrepreneurship to leapfrog twentieth century technologies and jump into an era of greater economic prosperity. For example, the region is experiencing the highest percentage of cell phone subscriptions in the world—up 550 percent in the last five years alone. (D. Smith, “Africa Calling: Mobile Phone Usage Sees Record Rise after Huge Investment,” *The Guardian* [Oct. 22, 2009] <http://www.guardian.co.uk/technology/2009/oct/22/africa-mobile-phones-usage-rise>.) The rate of computer usage is similarly on the rise, growing by 1,810 percent from 2000 to 2009. (Internet World Statistics,

*Internet Usage Statistics for Africa* (Dec. 31, 2009), <http://www.one.org/c/us/progressreport/775/>.) As the region gains greater wealth, consumer spending will grow, thus creating even more opportunities for savvy businesses and investors.

Other industries in the region are just beginning to recognize their potential. The banking and financial services sector, for example, will continue to grow as countries develop their credit systems and continue to move away from cash-based economies. Agriculture is another potential high-growth area, given the available land resources and the need for higher and more modernized production. Other industries that have significant growth potential include energy, manufacturing, defense, health care and pharmaceuticals, and infrastructure. In a recent survey of 5,000 African businesses across twenty-nine countries,

African entrepreneurs were asked to identify the biggest impediments to their success. Lack of reliable power topped the list—in many countries power outages occur more than half the working days each year—followed closely by inadequate roads and burdensome business regulations.

These problems can be fixed through the combined efforts of African governments, domestic and foreign investors, and technical assistance. ... Leapfrogging to solar electricity and other renewable sources offers the biggest chance for progress and profit. ...

Just as Africa skipped landlines and went directly to mobile phones, the same thing could happen with power.

(Center for Global Development, “Lacking Electricity, Africa Can Leapfrog to Solar and Other Renewables to Meet the Demands of Its Business Sector” (March 23, 2009), <http://www.cgdev.org/content/article/detail/1421353/>.)

Given the reforms occurring in the region, doing business in some countries in this region has gotten easier. (World Bank, “Sub-Saharan Africa

Regional Brief,” <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,menuPK:258652~pagePK:146732~piPK:146828~theSitePK:258644,00.html> at 1, noting Rwanda as the top reformer in the seventh edition of The World Bank’s publication, *Doing Business 2010*, which ranks 183 economies on the ease of doing business based on ten indicators.) Rwanda led the list as the top reformer, and Liberia ranked among the top ten reformers in the world—the first time a sub-Saharan African country has topped this list. (Id.)

As sub-Saharan Africa continues to develop and to participate more fully in the global economy, business opportunities in the region will continue to attract international investors, particularly American investors who have traditionally been strong supporters of the region. For example, the United States is one of the region’s strongest trading partners, along with China, Germany, and the United Kingdom. (U.S.-African Trade Profile, International Trade Administration (2009), [http://agoa.gov/resources/US\\_African\\_Trade\\_Profile\\_2009.pdf](http://agoa.gov/resources/US_African_Trade_Profile_2009.pdf).) In recent years, China has also exerted a stronger presence in the region. (Economist Debates, “Africa and China,” *The Economist* [Feb. 2010], <http://www.economist.com/debate/days/view/465>.)

Lately, China’s newfound dominance in business transactions in sub-Saharan Africa has been the subject of much debate. Some view China as a welcomed trading partner that will aid in the region’s development needs. Others are more skeptical, as China has not always been known for transparency in its business dealings and, in some cases, has come under fire for allegedly ignoring human rights violations to achieve its national interests and objectives. (Id.)

While the business opportunities in sub-Saharan Africa are plentiful and can be very financially rewarding, investors and companies doing business in the region must understand that the risk of corruption, particularly in deals involving a government interest or significant regulatory oversight, is a persistent problem for the region and must be assessed *before* undertaking any business venture. Failing to do proper anti-corruption due diligence and compliance planning at the onset of the venture can result in a very costly lesson for a U.S. company doing business in an emerging market like sub-Saharan Africa.

## The Corruption Risks

So what kinds of corruption risks should a U.S. company doing business in sub-Saharan Africa be on the lookout for? Public corruption is the most common form of bribery in the region. Sometimes it is done on a large-scale basis (e.g., high-ranking government officials who steal directly from public funds entrusted to their care), but corruption can also be found in routine business dealings (e.g., petty bribes committed by low-level civil servants, like a policeman who solicits bribes from freight drivers transporting goods on the public roadways or by a customs official who tacks on a “special fee” to be paid before goods can be cleared). Based on the recent high-stakes FCPA settlements coming out of the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) in recent years, there has been increased enforcement activity against companies that do business in the region.

The level and sophistication of the bribery schemes have also changed in recent years. Given that so many economies in the region are cash-based, the system provides ample opportunity for unaccounted or “off-the-books” cash payments to foreign officials (formerly called “brown envelope” payments). Nowadays, these corrupt payments also come in the form of kickbacks routed through a series of entities and other intermediaries using foreign bank accounts. Other times, the bribes are in the form of extravagant trips to foreign lands that have little to no real business purpose. Expensive gifts, lavish meals, and elaborate entertainment can also constitute other forms of bribery, as can political, social, or charitable contributions made at the behest of, or for the benefit of, a foreign government official in return for the official’s promise to take some official act (or inaction) that advances a company’s interests.

The impact of public corruption can be felt by all who live in the region. According to the African Union, \$140 billion is stolen from Africa *each year* because of corruption. (L.A. Adusei, “Graft in Africa: Where Does the Buck Stop?” *The African Executive* [2010], <http://www.africanexecutive.com/modules/magazine/articles.php?article=4156>.) This represents approximately 25 percent of the total GDP in sub-Saharan Africa. (“Corruption Cop, A Conversation with Nuhu Ribadu, Anti-Corruption Crusader,” *The Washington Post* [May 24, 2009], <http://www.washington>

post.com/wp-dyn/content/article/2009/05/22/AR2009052202025.html.) Corruption affects the ability of the government to provide necessary public services to offer the people a better quality of life. Public projects that are awarded cannot be completed because funds dedicated for the project have been diverted to the foreign official(s) responsible for overseeing the project. Bribery also affects the psyche of the citizenry—ordinary citizens come to accept bribery as simply the way business is done. It then creates a vicious circle—people pay bribes because bribery works, and those who are unwilling or unable to pay a bribe experience delays, lack of service, and unnecessary frustrations. Not to accept a bribe then becomes the anomaly, and people then get accustomed to offering bribes (and the government officials to accepting or demanding them). The result is that nations where corruption is prevalent and a persistent problem have not developed at the same rate as those nations that have been able to manage the scourge of corruption. Bribery and corruption not only hamper economic growth, but they also discourage investment by foreign and domestic entrepreneurs, which is a central driver to continued progress.

Pervasive and rampant corruption has distorted the economies of many African countries, as scarce resources are diverted from supporting economic growth and providing essential social services to service debt repayments accumulated by authoritarian and dictatorial regimes, corrupt politicians and bureaucrats. It is the poor who pay the high price of corruption—they are denied basic social services and have no resources to pay bribes to corrupt public servants.

(The Global Compact Regional Learning Forum, Business Fighting Corruption: Experiences from Africa, The United Nations [June 2007], at 11 n.3, [http://www.unglobalcompact.org/docs/news\\_events/8.1/bfc\\_web.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/bfc_web.pdf).)

Corruption also affects the ability of the region to grow and prosper in terms of its own economic development, as well as its connection to the global economy. In a world of increasing globalization and shrinking borders, public corruption serves to increase the cost of doing business and, if not controlled, can make the region a less desirable place for foreign

investment—another critical ingredient for economic development in the region.

Many factors can be attributed to the reasons corruption and bribery remain pressing concerns for the region. The recipients of the bribes are rarely held accountable for their misuse of public funds, given poorly funded enforcement mechanisms and areas where the rule of law is weak. Anti-corruption institutions and agencies are a relatively new invention for the region. Most of the anti-corruption legislation passed in sub-Saharan African countries is less than ten years old.<sup>1</sup>

Enforcement of these laws is also a challenge because bucking the establishment can create immediate enemies that can put one's professional and personal reputations, and in some cases their lives, at risk. (C. Dugger, "Battle to Halt Graft Scourge in Africa," *The New York Times* [June 9, 2009], <http://www.nytimes.com/2009/06/10/world/africa/10zambia.html>, that discusses how Nuhu Ribadu, who is widely hailed as Africa's anti-corruption hero, was removed from his post at the Nigerian Economic and Financial Crimes Commission when he challenged powerful Nigerian state governors and other national political figures for alleged corruption offenses. Mr. Ribadu sought refuge in the United Kingdom in 2008 after two attempts were made on his life and has only recently been able to return to Nigeria.)

Other causes of the corruption epidemic in sub-Saharan Africa relate to ineffective governance (corruption is seen as the quickest path to achieve wealth), and an inability of the general population to demand more of their leaders. High unemployment rates and a lack of educational opportunities also contribute to an increase in corruption. In some countries in the region, civil servants go unpaid for months at a time because of bureaucratic delays and mismanagement. Others are paid salaries that do

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<sup>1</sup> For example, the following is a representative sample of recent anti-corruption legislation passed in various countries in the region: Ghana Anti-Money Laundering Act (2008), Kenya Anti-Corruption and Economic Crimes Act (2003), Mozambique Anti-Corruption Law (2004), Namibia Anti-Corruption Act (2003), Nigeria Corrupt Practices and Other Related Offences Act (2000), Nigeria Advanced Fee Fraud and Other Fraud Related Offences Act (2006), South Africa Prevention and Combating of Corruption Act (2004), Tanzania Prevention and Combating of Corruption Act (2007), and Uganda's Anti-Corruption Bill (2009).

not meet their basic living needs, and bribes are considered an acceptable supplement. The only way to change the system is to increase anti-corruption law awareness and step up enforcement actions. Sub-Saharan African nations need to learn from the mistakes of the past and blaze a new trail for the future that ensures the stability and continued development of their people. To do so, corruption must be made public enemy number one.

### **So What Can Be Done to Curb Corruption in Sub-Saharan Africa?**

The necessary steps to battle corruption are multifold. Because corruption and bribery affect so many, all the stakeholders should be part of the solution. That means that the reigning governments in the region must empower themselves to take a strong stance against corruption, and Western nations and the rest of the international community need to lend a hand.

First, this requires passing effective anti-corruption laws that attack the problem head-on. In addition, those laws must then be enforced, and those responsible for enforcement must be given adequate funding and support. Empowering the anti-corruption law enforcement authorities to do their jobs and making the punishments for offenders sufficient to achieve future deterrence are critical. Prosecutions must be done on an objective and independent basis. Too often, the anti-corruption enforcement agencies have been used to satisfy other people's political agendas and prerogatives. This inevitably ends up undermining the reputation of the anti-corruption enforcement authorities, which should not be perceived or used, in fact, as a political tool.

But it is equally important that the funding and staffing for such initiatives be independent and remain outside the realm of politics. These agencies' agendas should not be allowed to be manipulated or shaped by the political winds. Also, having the support of an independent judiciary that will aggressively punish the offenders will give anti-corruption programs the "teeth" necessary for such programs to be viewed as effective. (M. Saltmarsh, "Efforts to Curb Foreign Bribery Lack Vigor, Report Finds," *The New York Times* [June 24, 2009], [www.nytimes.com/2009/06/24/business/global/24bribe.html](http://www.nytimes.com/2009/06/24/business/global/24bribe.html).)

Second, countries need to look beyond their borders for help in attacking the corruption problem. They should partner with other neighboring countries to share investigative techniques and best practices. The regional trade zones (e.g., Economic Community of Western African States [ECOWAS] and Common Market for Eastern and Southern Africa [COMESA]) should take an active role in ensuring compliance with various anti-corruption laws enacted by their member states. These organizations are best positioned to serve as a resource for companies entering their markets and to provide information on how companies or government personnel can report suspected corrupt activities and/or obtain information about prohibited business practices. These trade organizations can assist in fighting corruption by serving as clearinghouses of information regarding corrupt business activities to be aware of and by establishing anti-corruption guidelines for companies to follow. These groups can also maintain lists of ineligible firms that have been found to have engaged in corrupt business practices in their respective regions. The criteria for these lists could be similar to those maintained by the World Bank. (World Bank Listing of Ineligible Firms (2010), available at [http://web.worldbank.org/.](http://web.worldbank.org/))

Third, the international business community also has a role to play. As stated above, many of the public corruption schemes in the region involve monies being transferred to and among foreign bank accounts (before ending up in foreign officials' pockets). As such, the international banks need to be robust watchdogs to monitor their customers to ensure that they are not being unwittingly made part of a corruption scheme. Moreover, businesses with international operations can step up their anti-corruption compliance efforts. Companies should make clear that they will not do business based on bribery and adopt strong measures to enforce this message within the company and with its strategic business partners, consultants, and other third-party agents.

Fourth, Western nations can also lend a hand in the fight by continuing to go after multi-national companies that offer bribes to foreign officials as a way to get or keep business. This will send a clear message that bribery is not acceptable. Given that we now live in an age where terrorism is a constant threat, funds that are derived from an international public corruption scheme can also be used to fund terrorist activity. For this

reason alone, we should all worry about ways to reduce corruption, even in faraway places like sub-Saharan Africa.

In recent years, the United States has led the effort by dramatically increasing its FCPA enforcement efforts. (Obiamaka P. Madubuko, “Emerging Markets: Risky Business or Golden Opportunities?” *Inside The Minds: Foreign Corrupt Practices Act Compliance Issues* 87-88 [Michaela Falls ed., Aspstore Books 2010], for a discussion of recent FCPA cases, available at [http://www.mwe.com/info/pubs/Foreign\\_Corrupt\\_Practices\\_Act\\_Compliance\\_Issues.pdf](http://www.mwe.com/info/pubs/Foreign_Corrupt_Practices_Act_Compliance_Issues.pdf).) The FCPA, 15 U.S.C. §§ 78dd-1, *et seq.*, is one of the U.S. government’s main tools in the fight against international corruption. The FCPA prohibits the offer of any payments, gifts, or other things of value to a foreign official to get or keep business (regardless of whether the bribe resulted in any actual business).

The FCPA has a broad reach and applies to all U.S. persons, companies, and issuers doing business abroad, as well as to foreign companies with sufficient contacts in the United States (e.g., companies trading on U.S. exchanges or that use U.S. banks to transact business). The FCPA prohibits direct bribes to foreign officials, as well as improper payments or gifts made through agents, consultants, or other third parties. The statute also has books and records provisions requiring companies to keep adequate records and to have appropriate internal controls to prevent and detect possible FCPA violations. While FCPA prosecutions have resulted in significant financial penalties and related costs for companies found to have committed FCPA violations, it has also resulted in improved compliance functions across many industries.

In addition, the United States has also required more disclosure and transparency on payments U.S. energy and mining companies make to foreign governments. On July 21, 2010, President Obama signed new legislation that requires “resource extraction issuers” to publicly disclose in their annual reports and on their Web sites information relating to payments they make to foreign governments. (Dodd-Frank Act Wall Street Reform and Consumer Protection Act § 1504 (2010)).

Other countries, like Great Britain, have also signaled an increased effort to fight corruption in foreign markets. The UK Bribery Act, effective as of

April 2010, for example, in some ways is more stringent than the FCPA in that it criminalizes all bribery, including commercial bribery, and both sides of the bribery equation (i.e., the offering of a bribe and the acceptance of a bribe). It further eliminates the “facilitating payment” exception, which is permissible under the FCPA. (UK Bribery Act of 2010, available at: <http://www.justice.gov.uk/publications/bribery-bill.htm> (last visited July 30, 2010)).

Fifth, the ordinary citizens in sub-Saharan Africa also have to play their part. They need to demand more of their leaders. Money should not just go missing with futile effort made to locate the missing funds until the next budget is passed and the coffers are replenished. More public attention and pressure needs to be on the ruling parties to be held accountable for their procurement and spending decisions, particularly where significant portions of a country’s GDP is made up from one or two sectors, or otherwise involves significant foreign investment. More attention should likewise be paid to require complete transparency surrounding the amounts of revenue African governments receive from the sale of their natural resources. How this money is being tracked and spent is something that all Africans must take a greater interest in. One such effort is The Extractive Industries Transparency Initiative, commonly known as EITI. This initiative strives to increase transparency and accountability in this sector, and several sub-Saharan African countries are currently in the process of joining it. (<http://eiti.org/eiti>) Having more eyes watching the process may encourage more fiscal control and thereby reduce the opportunity for graft and corruption.

### **Dealing with the Reality of Corruption Risks in the Region**

Until the day comes when corruption is stamped out, or at least brought under better control, U.S. companies and issuers doing business in the region must still tackle the question of how they can adequately manage their FCPA risks while doing business in sub-Saharan Africa. The short answer is compliance, compliance, compliance. As a doctor would say, an ounce of prevention is worth more than a pound of cure.

In this context, companies need to think about potential corruption risks in the early stages of any proposed venture. Getting the right anti-corruption

compliance plan in place, setting the tone from the “top down,” and doing your homework before going in are proven strategies that work. Taking the following steps *before* starting a business venture in sub-Saharan Africa will minimize a company’s corruption risks.

### **Step One: Assess Your Corruption Risk Profile.**

One needs to assess the venture’s proposed corruption risk level. This is necessary so that the diligence efforts can be planned and budgeted accordingly. Certain industries may lend themselves to a higher FCPA risk level, particularly where there is substantial required interaction with government officials (e.g., energy, pharmaceuticals, health care, defense). Certain geographic areas may also call for more stringent scrutiny if there is a history of FCPA-related investigations involving that country. The type of relationships the U.S. company will have with its business partners or third-party agents in the foreign market may also influence its FCPA risk level. The more significant the relationship—e.g., if the partner or agent is responsible for a significant portion of the business—the more FCPA due diligence is needed. In every instance, however, a U.S. company or issuer looking to do business abroad should determine its FCPA risk level (e.g., low, medium, or high) and then conduct reasonable risk-based FCPA due diligence *before* entering into the transaction.

One resource for measuring the perception of public-sector corruption in an emerging market is the Transparency International Risk Level Index, which ranks 180 countries by their Corruption Perception Index (CPI) score. (“CPI 2009 Table,” Transparency International [2010], [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).) Remembering that sub-Saharan Africa is not a monolithic region, but rather comprises forty-seven countries with different corruption risk profiles that vary by industry and/or business endeavor, the company must adequately assess its own corruption risk profile for the venture that takes into account these various factors.

### **Step Two: Know How Business Is Done.**

Companies need to know the business climate of the region in which they are doing business. Sometimes this can be further localized to a particular

sub-region within the country (e.g., business customs in northern Nigeria can differ from those in the southern parts of Nigeria). Knowing how business is done, who the major players are in a particular industry or country, and how business decisions are made is crucial to the success of the project. A company may also consider hiring a subject matter expert and evaluate whether a legal opinion from a local law expert is needed to ensure that the proposed transaction complies with local law.

### **Step Three: Know with Whom You Are Doing Business.**

Companies should also know with whom they are doing business. I recommend using the tips listed below when vetting new business partners or third-party agents in business deals in the region:

- Require a formal application process and review publicly available information on the proposed business partner, third-party agent, or consultant.
- Do a background check and assess the new partner's or agent's business reputation. Request references and check them. Find out whether they have any government ties.
- Document all efforts and maintain those records for at least five years.
- Require written contracts with clear payment terms and structure. Define the scope of work in detail and itemize what documentary support is necessary for payment in the body of the contract.
- Require third parties to sign anti-corruption certifications and include FCPA or local law anti-corruption representations and warranties in contracts.
- Require centralized approval of all third-party contracts and expense reimbursements.
- Interview, as appropriate, those who will perform the actual services to ensure they are competent.
- Ask to review the anti-bribery policies and codes of conduct for your key business partners and agents. If they lack such policies, ask them to review and agree to abide by the FCPA (if a U.S. company is involved) and the U.S. company's anti-corruption policies.

- Conduct anti-corruption training for key sales agents, distributors, suppliers, consultants, and business partners. Require periodic anti-corruption certifications from them.

#### **Step Four: Conduct Reasonable Risk-Based Due Diligence.**

Anti-corruption-specific due diligence should be performed on any prospective business transaction being contemplated in the region. The diligence should be reasonable and based on the company's particular FCPA risk assessment or profile. An anti-corruption due diligence checklist should be part of the overall due diligence before starting any business dealings in the region. The checklist should include, among other things, a determination of whether there is any government interest in any entity that the prospective company will be doing business with.

The company contemplating the venture should also review the books and records of those parties it will do business with to assess whether there are any past or current corruption issues. Finally, the company also needs to ask the right questions of its business partners, foreign-based employees, and third parties to ensure that there are no corruption issues that need to be addressed. These questions should include whether the company or person it will be doing business with has an understanding of the FCPA's anti-bribery and books and records provisions or local equivalent anti-corruption regulations, and whether they agree to comply with these requirements (and whether they are currently in compliance with the FCPA and local anti-corruption laws). If a U.S. company is contemplating a venture in the region, it should also consider adopting FCPA compliance language in future contracts, retaining audit and termination rights if an FCPA violation is suspected, and requesting FCPA-specific representations and warranties.

#### **Step Five: Follow Up on Any Red Flags.**

Any red flags uncovered during the due diligence process should be investigated and resolved before a deal is completed or the business venture is scheduled to begin. Red flags do not necessarily mean that the transaction should be canceled, but all red flags require further investigation. Terms of the contract can be renegotiated or canceled, depending on how these red

flags are addressed and remedied. Red flags can include, but are not limited to, the following:

- History of corruption-related investigations in the region or industry
- Use of agents or third-party intermediaries (e.g., business development consultants, sales agents, etc.) without formal agreements, or entering into agreements after the business has been awarded, or use of “success fees”
- High compensation paid to third parties (e.g., agents, distributors, suppliers, etc.)
- Use of cash payments
- Third parties recommended by government officials
- Third parties who are former government officials
- Payments outside the country where the goods or services are rendered
- Use of shell companies
- Consultants who are not well-known in the industry, or who lack experience with the country at issue
- Lack of internal controls (e.g., anti-corruption policies and training; approval limits on travel, entertainment, gifts, and expenses; centralized contract review process for third parties)
- Lack of transparency in the accounting/books and records
- Failure of a party to sign anti-corruption certification, or otherwise failing to cooperate in the due diligence process

### **Step Six: Have an Effective Compliance Plan in Place.**

It is important for a company proposing to do business in the region to create a compliant culture within the company so that its employees and all who work with the company are aware that the company does not promote or accept bribery or corruption as a business method. To create such a culture, it is necessary to have rules in place so people know what is prohibited and what is expected. A strong code of conduct or ethics policy should be implemented and made widely available. The company should train its staff on corruption risks to look out for. Using concrete examples

that are relevant for the job functions of those being trained is helpful (e.g., when describing who may be considered a foreign government official under the FCPA, the policy should include concrete examples like Minister of Energy, doctor at a state-owned hospital, spouse of a government official, etc.). Using live trainings in the local language that are conducted by local persons is preferred. Attendance should be taken and those records maintained for at least five years.

### **Step Seven: Have a Point Person for Compliance Matters.**

Having a point person who is in charge of all compliance matters and communicating how the anti-corruption policy violations should be reported is another key element of an effective compliance program. Have a clear protocol on what people should do if they suspect an act of corruption has occurred. Some companies also use hotlines, surveys, and other anonymous reporting mechanisms to ensure candid responses. Having a chief compliance officer or point person who can monitor the training and enforcement of the anti-corruption policies will also ensure the consistency needed to measure the effectiveness of the compliance program. Having others (key customers, business partners, employees, management, etc.) buy into a company's compliance policies by utilizing periodic certifications, representations and warranties, audits, and termination rights will also help ensure a compliant workforce and will reduce the corruption risks of the venture.

### **Step Eight: Make Changes When Necessary.**

Finally, companies need to remain vigilant and stay abreast of any changes that could increase their corruption risks. The compliance program should be reviewed periodically so that modifications can be made as needed. The more lax a company is on its compliance regimen, the more it opens itself to exposure under the FCPA or other anti-corruption laws (particularly the internal controls requirement). Thus, periodic reviews of the compliance plan are strongly recommended.

## **What to Do If a U.S. Regulator Targets Your Company for an Anti-Corruption Inquiry**

If a U.S. company does receive an FCPA-related inquiry from a U.S. regulator, it must contemplate many considerations. First, it needs to consider whether to cooperate with the regulator making the request and, if so, to what extent. This determination may rest on a variety of factors, including the regulator making the request, the consequences for not complying with the request, and the type of information being requested. Concerns of privilege, disclosure of proprietary information, cooperation credit, and the impact on the business reputation of the company all need to be thoroughly considered.

Second, should the inquiry be the sort that calls for an internal investigation, in-house counsel needs to develop an internal investigation plan for addressing the matters under review. As part of this process, counsel needs to determine whether the internal investigation should be handled by the corporation and its internal auditors, or whether outside counsel and/or a forensic accounting firm is needed. If outside counsel is to be engaged, in-house counsel needs to further determine whether its regular compliance counsel or outside lawyer should be retained. From the perspective of the DOJ or SEC, independence of the counsel conducting the internal investigation will be a factor in its analysis of whether the company's internal investigation was creditable and properly conducted.

Third, determinations about the scope and methodology of the internal investigation need to be made. This includes how far back in time the review should cover, the geographic parameters for the internal investigation, what business units or subsidiaries should be included, and the order and methodology of gathering the relevant documents and interviewing witnesses. Counsel also needs to ensure that it does not create collateral damage by conducting its investigation—e.g., steps should be taken to ensure all relevant documents are preserved and the required disclosures are made (especially if the company is publicly traded). If the investigation involves places outside the United States, counsel needs to be cognizant of the local laws in the other jurisdictions involved to avoid conflict with local law (e.g., data privacy concerns in Western European countries).

Finally, an internal investigation can raise ethical concerns, including the point at which corporate or outside counsel needs to decide whether employees under investigation require separate counsel. If FCPA violations are uncovered in the internal investigation, the company needs to decide whether to voluntarily disclose the violation(s) to the federal authorities. Voluntary disclosure can be one way to mitigate damages, and, in some cases, it has been an effective way to completely eliminate any successor liability or other adverse action that could result from a proposed international business transaction. Go to the Department of Justice Opinion Release Procedures, <http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf>, for a description of how to request an Opinion Release from the DOJ on a proposed transaction that may pose FCPA-related risk.

Given all the complexities involved with conducting an FCPA investigation, it is not surprising that many companies choose to seek guidance from those knowledgeable about the process, rather than going it alone.

## **Conclusion**

While the business opportunities in sub-Saharan Africa will continue to multiply in the coming years, the risks of corruption must be acknowledged and safeguarded against so that U.S. companies doing business in the region do not face serious reputational or heightened FCPA enforcement risks. By following the above precautionary steps, companies will be able to enjoy a healthy business relationship in the region and ensure that the economic development facilitates not only the business interests of the parties involved but the overall well-being of the people living in sub-Saharan Africa.

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***Acknowledgment:*** *I would like to thank Diana Clavel and Lisa Hirakawa for all of their assistance with preparing this article for publication.*



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