

ESG and Bribery

A Practical Guidance® Article by Sharie A. Brown, Troutman Pepper Hamilton Sanders LLP



Sharie A. Brown
Troutman Pepper Hamilton Sanders LLP

Corporate Environmental, Social, and Governance (“ESG”) Initiatives

Environmental, social, and governance (ESG) compliance and reporting has been top of mind in 2021 and will remain a key focus in 2022 because investors increasingly want to make responsible investments. To respond to this groundswell of interest, many companies are already voluntarily communicating about environmental sustainability, social and human capital issues, and ethics and governance matters.

The connection between ESG and bribery and corruption is unfolding. Like other ESG topics, there is not a single, mandated, consistent ESG framework for bribery risks at this time. To help shed light on this evolving topic, this article explores some of the connections between ESG and the key, established anti-bribery risks and considerations that would likely have the most significant anti-bribery ESG impacts.

Similarly, a standard for reporting on these initiatives has not yet been established. With increased reporting on ESG issues, however, the U.S. Securities and Exchange Commission (SEC) has indicated that it will soon issue

regulations for U.S. public companies regarding such climate-related and human capital ESG risk statements and reporting to ensure that such statements are mandatory, accurate, comparable, reliable, auditable, and based on a consistent standard or framework. This intent is expressed in the [Prepared Remarks of Chairman Gary Gensler Before the Principles for Responsible Investment Climate Change webinar](#) as well as the [Remarks of Chairman Gary Gensler at London City Week](#). Practitioners in the compliance, ethics, and anti-bribery area seek to understand (at a very practical level) the connection between anti-bribery compliance objectives and ESG initiatives and reporting (voluntary and otherwise).

This article also explores how ESG compliance and reporting encompasses anti-bribery initiatives. Before tackling the ESG-bribery connections, a short overview of ESG and its components is helpful.

What is ESG?

Both public and private companies and organizations are becoming aware that many potential investors not only want to achieve good financial returns on their investment, they also want those returns to be achieved through practices that address or respect environmental concerns, social issues, and good governance goals and considerations. Companies that share information about various ESG topics are potentially more attractive to these responsible investors because ESG considerations and goals are integrated with commercial business objectives.

The United Nations (UN) has recognized this concept of responsible investing in the Principles for Responsible Investment (PRI), which was formerly known as the United

Nations Principles for Responsible Investment or UN PRI. PRI is an initiative developed in partnership with the United Nations Environment Program Finance Initiative (UNEP FI), and the United Nations Global Compact (UN Global Compact). Of particular interest here, the ten principles of the UN Global Compact include the protection of human rights and prevention of human rights abuses; labor protections involving freedom of association and rights to collective bargaining, elimination of forced labor, as well as abolition of child labor, and elimination of discrimination in employment; and environmental protection, green initiatives, and development of environmentally friendly technologies. Most relevant to ESG anti-bribery risks, the UN Global Compact includes a principle requiring corporate and organizational anti-corruption initiatives for the prevention of corruption, extortion and bribery. The [UN Global Compact](#) website has more information.

This partnership of the UNEP FI and the UN Global Compact principles and initiatives resulted in the UN PRI and its required affirmation by UN PRI signatories that as institutional investors they will act in the long-term interests of their beneficiaries based on the belief that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time). The UN PRI signatories should also integrate the six PRI principles of responsible investment (developed in a process convened by the UN Secretary-General) into their investment decisions, described below:

Principle 1: Incorporate ESG issues into investment analysis and decision-making processes.

Principle 2: Be active owners and incorporate ESG issues into ownership policies and practices.

Principle 3: Seek appropriate disclosure on ESG issues by the entities in which a signatory invests.

Principle 4: Promote acceptance and implementation of the Principles within the investment industry.

Principle 5: Collaborate to enhance effectiveness in implementing the Principles.

Principle 6: Report on our activities and progress towards implementing the Principles.

For more detailed information regarding the principles, visit the [UN PRI website](#).

The environmental issues in ESG currently primarily focus on activities and reports on climate change initiatives

and the reduction of greenhouse gas emissions, among other well-known environmental concerns, including an organization's numerical goals or objectives within a certain timeline regarding climate change goals involving reduced energy use or reduction in greenhouse gases in manufacturing, office operations, and customer product use, etc. For further information, read the [Prepared Remarks of Chairman Gary Gensler Before the Principles for Responsible Investment Climate Change" Webinar](#). The [UNPRI](#) and [UNEP FI](#) websites also contain further information. Investors may read, attempt to compare, and ultimately rely upon such statements in making investment decisions, as mentioned in the [Remarks of Chairman Gary Gensler at London City Week](#).

Similarly, depending on the industry involved, some investors will care about whether a company is addressing prominent social issues of the day, many of which are broadly encompassed in the above-described UN Global Compact and incorporated into the six above-referenced principles for UN PRI signatories. These issues include diversity and inclusion in employee staffing and board membership, social and racial justice, "human capital" or labor issues, including coerced or forced labor, child labor, and human trafficking, as well as human rights in employment and within the supply chain (third party vendors), among other issues. U.S. and non-U.S. companies and organizations already share a lot of information on diversity and inclusion, and several companies made racial justice statements during the George Floyd protests, and during the height of the #MeToo movement after victims came forward about sexual harassment and sexual misconduct in companies and organizations. Several of those statements or communications include commitments to achieve certain objective results within a chosen timeline, and to report on those goals and objectives.

Anti-Bribery and Corruption Measures

For corruption and bribery, many U.S. and non-U.S. companies and organizations have attempted to address these risks in earnest for nearly 20 years, influenced in part by frameworks developed over the years by the United Nations and prosecutors in the United States. With respect to the United Nations, the U.S. and other countries became a state party to the United Nations [Convention Against Corruption](#) (UNCAC), which was adopted in 2003, and entered into force in 2005. The UNCAC essentially requires parties (and their legislatures) to criminalize conduct which constitutes bribery, corruption, financial fraud, and money laundering, among other offenses. As of late 2021,

over 187 countries are parties to the UNCAC, which has resulted in a global multilateral legislative and legal commitment and collaborative framework for addressing both foreign and domestic bribery and corruption.

Many state parties to the UNCAC were influenced by U.S. criminal enforcement officials and the [U.S. Foreign Corrupt Practices Act](#) (FCPA) anti-bribery law in updating, amending, and designing their own country's anti-corruption legislation responsive to the UNCAC. In addition, the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention (which resulted from a multilateral anti-corruption task force that included U.S. FCPA prosecutors) required its member countries and signatories to criminalize the bribery of foreign public officials in international business dealings and transactions. Refer to the website for the [Organisation for Economic Co-operation on Combatting Bribery of Foreign Government Officials in International Business Transactions](#). To date there are 44 signatories to this convention, including all 37 OECD member countries, and 7 non-OECD countries (Argentina, Brazil, Bulgaria, Costa Rica, Peru, Russia and South Africa) are signatories. Thus, U.S. and non-U.S. governments, ministries, companies and organizations have already been working collaboratively on anti-corruption and anti-bribery risk prevention for a couple of decades, and they have also provided guidance on effective anti-bribery compliance programs and enforcement priorities involving bribery and corruption. For more information, refer to the [Resource Guide to the U.S. Foreign Corrupt Practices Act](#) (FCPA Resource Guide). Another helpful resource is the [UK Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing](#) (2011).

Many companies and organizations have in place compliance and ethics functions, departments, procedures and processes focused on addressing bribery and corruption risks, as well as internal data and other information about the effectiveness of their anti-bribery initiatives. Some companies already share information about their ethics and governance structure, practices, controls, and policies in their codes of business conduct, marketing materials, and government filings, including information on anti-bribery and anti-corruption activities and programs. As a result, some compliance practitioners and consultants view ESG as providing an expanded and necessary role for ethics, compliance, and risk management functions within a company or organization, particularly those organizational functions focused on addressing corruption and bribery risks.

This article does not comment on the ultimate value of utilizing traditional corporate compliance professionals in governance and anti-bribery ESG initiatives and reporting. Rather, it attempts to identify some of the anti-bribery areas, activities, and risks most likely to have a significant (positive or negative) ESG anti-bribery impact for responsible investors, while acknowledging that no single ESG anti-bribery standard or framework has been developed for ESG reporting. However, the anti-bribery compliance frameworks, requirements, activities, and protocols called for under the highly respected and influential US FCPA, the UK Bribery Act, the UN Convention Against Bribery, the OECD anti-bribery convention, and other regional anti-bribery conventions and local country anti-bribery laws (passed as a result of these and various international anti-bribery conventions and initiatives) have already identified particular risks, activities, and/or "best practices" that could readily be considered by responsible investors and companies/organizations that communicate about their ESG anti-bribery risks.

Below is a discussion of the most impactful anti-bribery compliance considerations for responsible investors focused on anti-bribery ESG investor information.

Impactful Anti-bribery Considerations Regarding ESG

More Inclusive Risk Assessment

For favorable ESG investor consideration on the anti-bribery front, it would be reasonable for a company or organization to seek to address, mitigate, or reduce the anti-bribery risks and conduct that are most likely to result in an anti-bribery violation within the company or organization's industry as determined by an organization's anti-bribery risk assessment. While there is no perfect anti-bribery risk assessment framework, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) (indisputably the most aggressive and prolific anti-bribery enforcers in the world) have indicated that companies should not unduly focus on the lower risk markets and transactions to the detriment of higher risk markets, transactions, and behaviors. This is reflected in the [FCPA Resource Guide](#) at page 37 and the [UK Bribery Act Guidance](#) at pages 25-26. Thus, in the context of ESG, the anti-bribery risk assessment should recognize that while all anti-bribery violations should be prevented, they are not all equal or equally harmful for the company or organization,

and the risk assessment should therefore expressly include a category and ranking for medium to higher risk activities for which a violation could produce a higher risk of legal liability, as well as greater financial, commercial, regulatory, and reputational damage. This assumes that the organization's risk assessment will include two types of rankings for a risk factor: i) not only for whether an activity carries (for example) a high, medium, or low risk for a violation in a particular country or industry, but ii) also a ranking based on the facts specific to the organization and its operations as to whether there is a high, medium, or low risk of it actually occurring due to the organization's type of products, business model, or market.

Assuming that the company or organization accurately identifies and ranks its anti-bribery risk factors for compliance purposes, some key items that have the greatest potential impact on ESG anti-bribery investment considerations might not necessarily include all ranked or articulated anti-bribery risks or "best practices" because some practices have less impact on anti-bribery compliance than others. But, the considerations should, at the least, include the following, depending on the company or organizational risk assessment facts, circumstances, and operations.

Effective Anti-Bribery Policies and Procedures

Companies and organizations should all have written policies and procedures commensurate with their anti-bribery compliance risks and exposures; but many still do not. The nature of the company's products and services, business model, country locations, use of third-party agents, and interactions with government officials, ministries, and agencies, among other factors, should be taken into account in designing effective anti-bribery policies and procedures. Review the [FCPA Resource Guide](#) at page 59. To the extent that a company or organization has "cookie-cutter" policies and procedures that do not take into account its true anti-bribery risks, or the company has no written anti-bribery policies or procedures that address its actual anti-bribery risks, there will be a higher probability of an anti-bribery violation, potentially resulting in a less favorable ESG anti-bribery organizational profile due to the increased risks of civil and criminal legal liability, as well as increased risks for financial, commercial, regulatory, and reputational damage.

Senior Management and Board Commitment

A responsible investor interested in ethics and preventing bribery within a company with a medium to high-risk anti-bribery profile would want strong, tangible assurance of the

anti-bribery commitment of senior management and the board of directors.

To meet this expectation, senior management and corporate boards should demonstrate a commitment to anti-bribery compliance and ethics that goes beyond ensuring implementation of effective anti-bribery compliance and ethics policies and procedures. This is reflected in the [FCPA Resource Guide](#) at pages 58-59, as well as the [DOJ Corporate Enforcement Policy](#) (CEP) on the DOJ Fraud Section's website, and the [UK Bribery Act Guidance](#) at page 23. Senior management and the board of directors of companies should be actual *role models* for ethical conduct and doing business with integrity in an effort to imbue the company or organization with the values that support anti-corruption compliance. It is helpful but not enough for them to also issue an annual letter supporting ethics and anti-bribery compliance, or to even noticeably participate in such anti-bribery training. Without those ethical values reflected by an organization's leadership in day-to-day operations, anti-bribery lapses will continue to occur, in spite of well-written anti-bribery policies and procedures. Such lapses could potentially negatively impact a company's ESG anti-bribery compliance profile.

Customized Anti-Bribery Training

Companies and organizations with anti-bribery compliance programs may already be providing some form of required anti-bribery training on existing policies and procedures, as well as anti-bribery risks. For more information about training, review the [FCPA Resource Guide](#) at pages 60-61, and also the [UK Bribery Act Guidance](#) at page 29 (discussing Principle 5, Communication [including training]). However, for cost and convenience reasons, that training is often too generic and unrelated to the specific types of serious anti-bribery compliance risks facing the company. In order to avoid anti-bribery lapses and violations in medium to higher risk anti-bribery activities and transactions, a company or organization should have training customized for the company, its operations, its business model and its risk profile. The increased cost and planning for such customized training is dwarfed by the stupendous costs of conducting an internal investigation of suspected misconduct or defending an anti-bribery enforcement or whistleblower action, or addressing a subsequent shareholders' derivative suit. A company's ESG anti-bribery profile will likely be negatively impacted by poor or inadequate anti-bribery training due to the increased risks for financial, commercial, regulatory, and reputational damage from an anti-bribery lapse or violation. A responsible investor should pause and reconsider an

investment before committing to a company with little or no anti-bribery training in an operating environment, industry, or location that has a medium to high anti-bribery risk profile.

Gift and Entertainment Restrictions

Business entertainment is generally acceptable around the world; however, the standards for what is reasonable and proportionate or bona fide business entertainment varies greatly and can create high anti-bribery compliance risks for organizations that operate in multiple jurisdictions. Companies and organizations should have policies and procedures governing gifts and business entertainment that incorporate the local law requirements as well as applicable extraterritorial legal requirements of such as those in the FCPA or the UK Bribery Act of 2010. The FCPA requirements are discussed in the [FCPA Resource Guide](#) at pages 14-16. Companies with clear and well-designed gift and entertainment policies covering the anticipated type of conduct seen in the company or industry are usually less at risk of an anti-bribery violation than those gift and entertainment policies that are purely prohibitive without addressing the actual risky gift and entertainment behavior (including travel) that the company or organization needs to address. Business entertainment, travel and gifts, while common, do not always pose the most egregious anti-bribery violations; but such unchecked expenses, when aggregated, can become quite large, thereby presenting a much more serious and problematic ESG anti-bribery compliance profile for responsible investors.

Third-Party Vetting/ Merger and Acquisition Required Due Diligence

While issues related to gifts, travel, and business entertainment may present more routine or common anti-bribery concerns, the harm that unvetted third-parties and business partners, such as consultants and agents, can cause is as great as having no anti-bribery policies or procedures, or no authentic senior management commitment to ethics and anti-bribery compliance, or having inadequate or no training that is customized to an organization's higher anti-bribery risk factors, all previously discussed above. This is reflected in the [FCPA Resource Guide](#) at pages 29-34 and also the [UK Bribery Act Guidance](#) at pages 27-28 (discussing Principle 4, Due Diligence). Due to the size and nature of transactions involving third parties and business partners, and the known higher successor liability risks of due diligence failures in mergers and acquisitions, as well as the imputation of liability (via "knowledge") to companies and organizations for corrupt payments made to obtain or retain business (or secure an improper advantage) by unvetted

third parties, the vetting or use of third parties/business partners in any transaction is considered to be higher risk.

The ESG anti-bribery profile of any company or organization that failed to conduct appropriate risk-based due diligence and/or vetting on third parties or merger and acquisition targets/joint venture partners could be highly negative because these types of anti-bribery risks could bring significantly increased risks for financial, commercial, regulatory, and reputational damage from an anti-bribery lapse or violation.

Other Risk Areas or Anti-Bribery "Best Practices"

Monitoring and Auditing

Active monitoring (in-person and digital) of the anti-bribery compliance of employees, third-party representatives, suppliers, and business partners, as required, should also enhance the anti-bribery ESG profile of companies and organizations, while significantly reducing the risks of an anti-bribery legal or policy violation for the monitoring entity. A more detailed discussion of monitoring and auditing is available in the [FCPA Resource Guide](#) at pages 59-62 and also the [UK Bribery Act Guidance](#) at page 30 (discussing Principle 6, Monitoring and Review). Similarly, periodic, risk-based independent auditing of the organization's anti-bribery legal and policy compliance, along with auditing of third-party and business partner anti-bribery compliance should help reduce anti-bribery liability, risk of enforcement, and any anti-bribery penalties for an organization or company addressing suspected anti-bribery misconduct. Anti-bribery professionals would likely assist responsible investors by ensuring that those ESG investors understand whether an organization's anti-bribery compliance monitoring and auditing is adequate or constitutes merely unfulfilled, unreliable statements.

Confidential Reporting, Investigation of "Red Flags" and Corrective Action

While there are several other activities, processes, and best practices that could positively or negatively impact an organization's anti-bribery risks, liability, and compliance (to varying degrees), the above-described items would undeniably have a significant impact on an organization's anti-bribery compliance and legal exposure, as well as its potential ESG anti-bribery profile or attractiveness to ESG responsible investors. This is discussed in the [FCPA Resource Guide](#) at pages 50-52, which cover the DOJ's Federal Principles of Prosecution of Business Organizations. Finally, how an organization receives confidential reports,

responds to a suspected violation or other “red flags” indicative of misconduct, and takes corrective and remedial action by addressing compliance gaps and disciplining anti-bribery offenders, are among the most important considerations in deterring anti-bribery misconduct and demonstrating an organization’s commitment to ethics and anti-bribery compliance. The requirements here are reflected in the [FCPA Resource Guide](#) at page 67 and also in the [UK Bribery Act Guidance](#) at page 22 (discussing Principle 1, Proportionate Procedures). These anti-bribery actions in addressing and punishing misconduct at all levels, as well as the related written procedures and processes, would likely also present key considerations for responsible ESG investors interested in an organization’s anti-bribery risks and compliance.

Conclusion

In conclusion, existing key anti-bribery enforcement agency compliance guidance, as well as long-standing multilateral anti-bribery treaties and related ESG responsible investing initiatives are available to provide reliable criteria and frameworks for ESG responsible investors to properly evaluate and assess the anti-bribery compliance risks of a

company or organization in connection with an investment decision without violating the attorney-client privilege or breaching an organization’s need to maintain certain confidential business information. Compliance and anti-bribery practitioners should be able to play a valuable role in helping these ESG-motivated investors make informed determinations about the anti-bribery ESG profile or standing of an organization or company using many, but not necessarily all, of the tools and regulatory enforcement guidance already available.

A heightened focus on anti-bribery and corruption considerations and risks in the governance segment of ESG could also have the result of improving ethics and anti-bribery compliance in companies and organizations. The business case for attracting ESG investors becomes as powerful for some companies as deterrence from the costly, commercially damaging, and reputationally harmful impacts of an anti-bribery enforcement action.

The above considerations are not exhaustive of all anti-bribery considerations that may be important to an ESG investor, but they are reasonable criteria for a responsible ESG investor to evaluate in connection with governance and bribery.

Sharie A. Brown, Partner, Troutman Pepper Hamilton Sanders LLP

As a partner in the white collar and government investigations practice group, Sharie was a recognized leader in ethics, compliance and internal investigations involving financial fraud, corruption, civil forfeiture actions, U.S. trade controls and Office of Foreign Assets Control (OFAC) sanctions for U.S. and global clients. Sharie was regarded as a trusted advisor, counselor and skilled investigator in financial fraud matters, FCPA/UK Bribery Act investigations, whistleblower matters, merger and acquisition due diligence, compliance risk assessments, and compliance program development/training, as well as OFAC trade sanctions, U.S. anti-boycott law, and USA PATRIOT Act anti-money laundering “best practices.” Her projects took her to virtually every continent.

Before joining the firm, Sharie chaired the white collar defense and corporate compliance practice group and the Foreign Corrupt Practices Act (FCPA), anti-corruption and corporate compliance practice group at two international law firms. Before that Sharie worked in Mobil Oil Corp.’s office of general counsel, where she served as an ethics and compliance officer. Prior to her tenure at Mobil, Sharie was an assistant U.S. attorney in the Eastern District of Pennsylvania, where she handled tax, bank fraud and securities fraud cases, and was commended by the FBI director. She clerked for the Honorable Richard M. Bilby, U.S. District Court for the District of Arizona.

Her experience, leadership and frequent media contributions regarding financial fraud and corruption made her an international thought leader in the field. She was a panelist on numerous FCPA, anti-corruption, anti-money laundering, compliance, OFAC sanctions and trade control panels in the United States, the Middle East, Africa, Asia and Europe.

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