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Stream 4: Strengthening Global Action for an Accountable Corporate World

Restoring Trust in Business – The Road Ahead

by Susan Cote Freeman

Public trust in business sank dramatically in several major economies following the 2008 financial crisis. Wall Street excesses and their devastating impact on the world economy shook confidence in business as never before.

Some gains in levels of trust, albeit fragile, have since been made according to the findings of the Edelman 2010 Trust Barometer. Interestingly, in the United States, the epicentre of the crisis, respondents ranked transparent and honest practices as the most important contributor to overall company reputation, well ahead of financial performance.¹

While this may sound encouraging, the corporate world is still falling short of this expectation. There is growing recognition that to be sustainable, businesses must act as responsible corporate citizens and adhere to comprehensive ethical standards that permeate all their activities. This includes being accountable to the interests of both shareholders and stakeholders. And whilst many responsible companies are deploying serious efforts to achieve this, daily media headlines continue to expose corporate scandals involving corruption.

Corruption is a complex problem that cannot be solved in isolation by governments, civil society or business. Each stakeholder group has its own role to play in strengthening measures of integrity and accountability needed to keep corruption in check. But the spectacular integrity failures of business over the past decade also make a pressing case for action on a global level to implement and enforce greater standards of corporate integrity and accountability.

Significant strides have been made in the past two decades in establishing a framework of international treaties, domestic laws, regulations and voluntary measures by business to address corruption globally. However, the impact of these efforts is too limited and will remain so until all governments, business and civil society follow through collectively with the implementation of policies and enforcement of laws to fight corruption.

Rebuilding trust through an effective global legal and regulatory framework

Governments acting collectively have made important changes to the legal environment in which companies operate and although advances have been made, shortcomings remain.

¹ Edelman Trust Barometer - 2010 Annual global opinion leaders study 2010.
http://www.scribd.com/full/26268655?access_key=key-1ovbgpawoot3hnsz3u

Transparency International (TI), in its 2010 Progress Report on the application of the Organisation for Economic Development and Cooperation (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, noted some encouraging trends in how signatory countries are actually enforcing foreign bribery laws.

The OECD Convention, adopted in 1997, requires each of the 38 signatory countries, including some of the world's biggest exporting nations, to make foreign bribery a crime.

Compared with last year's figures, the TI report notes an increase from four to seven in the number of countries where "active enforcement" was taking place.² European countries including Germany, Italy and Switzerland as well as the United States are noticeably ramping up enforcement.

According to a recent OECD report on the application of the Convention in the United States, from 1998 through to September 2010, 50 individuals and 28 companies were criminally convicted of foreign bribery and 69 individuals and companies were held civilly liable for foreign bribery. An additional 26 companies were sanctioned (but not convicted) for foreign bribery under non-prosecution agreements and deferred prosecution agreements.³

What is also noteworthy about the FCPA and the potential impact of the current enforcement trend is that this law casts a wide net applying not only to American companies but to any company listed on the US stock market or with a US footprint.⁴

The stakes are getting much higher as well, as illustrated by the size of the fines recently imposed on companies subject to foreign bribery prosecutions under US jurisdiction. A record amount of US \$ 1.6 billion was imposed in combined fines on a single company for foreign bribery.⁵

Highlighting the rising profile of the FCPA, a strategic communication blog recently reported with a tinge of humour that the FCPA had gone "mainstream" when it was included as a plot element in the long-running soap opera *The Young and the Restless*.⁶ But behind the occasional levity, the reality is that the net is beginning to close on what was once considered by too many to be routine business practices.

In the United Kingdom, a new Bribery Act due to take effect in April 2011 is regarded as the strictest anti-bribery legislation to date. Some of its provisions are ground-breaking. Importantly, it introduces a corporate offence of *failure to prevent bribery*. Unlike the FCPA, the Act prohibits facilitation payments and its stringent provisions related to foreign public officials will force companies subject to the Act to take a second look at their promotional expenses as well as their entertainment and hospitality policies.

But the kind of advances seen in the US and the UK are far from universal. The TI OECD Progress Report warns that with only seven of the 38 parties to the OECD convention showing active enforcement, current levels of enforcement remain too low. In particular, it deplored the

² See: http://www.transparency.org/publications/publications/conventions/oecd_report_2010

³ See: <http://www.oecd.org/dataoecd/10/49/46213841.pdf>

⁴ Similar extraterritorial application is provided for in the new UK Bribery Act.

⁵ See: <http://www.oecd.org/dataoecd/11/15/45450341.pdf>

⁶ See: <http://www.bulletproofblog.com/2010/09/29/the-fcpa-goes-mainstream-%e2%80%93-and-isn%e2%80%99t-going-anywhere-else-anytime-soon/>

non-existent or weak enforcement in 20 OECD countries, including Australia, Brazil and Canada, a member of the G8.

Another potentially powerful but lesser-known feature of the evolving legal landscape is the 2003 United Nations Convention Against Corruption (UNCAC) whose 148 signatories include, not only developed nations, but also many emerging economies. The wide geographical reach of UNCAC, combined with its broad scope, offers the possibility of a truly global instrument to curb corruption. Of all the conventions aimed at addressing the issue of bribery and corruption, UNCAC has the most extensive provisions on the ways, means and standards for preventive measures in the public and private sectors.

An important step was taken in late 2009 when states parties agreed on terms of reference for a monitoring mechanism for the implementation of UNCAC. The compromise agreement on monitoring did, however, fall short of civil society expectations on issues such as country visits, publication of reports and input from non-governmental organisations which are seen to be critical to the effective implementation of the convention.

Changes on other fronts have created additional safeguards against corruption. In April this year, the leading multilateral development banks instituted a deterrent to fraud and corruption in the development projects they finance when they jointly signed a cross-debarment agreement. This agreement closed a gap in the banks' sanctions regimes which meant that entities debarred by one multilateral development bank could still bid for contracts in another one. Under the new agreement, entities that are now debarred by one development bank may be sanctioned for the same misconduct by the other participating development banks.⁷

Progress has also been made by export credit agencies (ECAs), most of which now have anti-corruption programmes in place. A recent report by Transparency International into the anti-bribery practices of 14 ECAs found substantial discrepancies in implementation and approaches.⁸ One of the weaknesses identified by the TI report is that most ECAs appear to have reasonable policies and procedures in place, but there is little reported evidence of their operation in practice.

Rebuilding trust through voluntary measures to fight corruption

The pressure on companies to act as upright and transparent corporate citizens is coming from other corners as well. The corporate responsibility movement and growing stakeholder demands are pressuring companies to commit to higher standards of performance in areas such as the environment, human rights, labour rights and, more recently, anti-corruption.

In 2004, the United Nations, the world's largest corporate responsibility initiative, added a 10th Principle against corruption, integrating anti-corruption into corporate commitments to sustainability and corporate citizenship. The more than 8,600 participants in the Global Compact (of which 6,200 are businesses) must make a commitment to "work against corruption in all its forms, including extortion and bribery."⁹

⁷ See:

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22535805~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>

⁸ See:

http://www.transparency.org/news_room/latest_news/press_releases/2010/2010_06_29_export_credit_report

⁹ Numbers as of 30 September 2010. For more information on the 10th Principle see:

<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

Such voluntary initiatives are a desirable complement to an effective legal system of deterrence of bribery and corruption. However, to be meaningful and credible, these initiatives must impose reasonably demanding standards on their participants. In the case of the Global Compact, more substantive demonstration of the actions that participating companies are taking to implement the ten principles would enhance stakeholder perceptions of how companies are living up to their commitments under the 10th Principle against corruption.

One of the key commitments made by companies that sign up to the Global Compact is the annual submission of a *Communication on Progress*, which is a demonstration of a signatory's adherence to and progress on the principles. A special Global Compact task force chaired by Transparency International has developed comprehensive guidance materials to produce more thorough and consistent reporting on the 10th Principle and anti-corruption efforts across Global Compact signatory companies.¹⁰

In the investment community, some fund managers have called for the incorporation of the anti-corruption dimension into corporate responsibility work. In 2005, FTSE4Good¹¹, a socially responsible investment index, added countering bribery to its criteria covering environmental, social and governance standards. Bribery and corruption criteria were introduced on a phased basis, focusing first on companies that are deemed at high risk for corruption. Companies that are found not to meet the FTSE4Good countering bribery criteria are deleted from the Index.

Earlier this year, a coalition of investors managing assets worth US \$1.7 trillion wrote to 21 major companies in 14 countries requesting that they improve their disclosure of bribery and corruption risks and avoidance measures. The investors asked companies from eight sectors, including defense, construction and capital goods, whether their anti-corruption management systems adhered to international reporting frameworks developed by the International Corporate Governance Network and the reporting guidance developed by the UN Global Compact and Transparency International.

Recognising the value of voluntary initiatives aimed at promoting ethical conduct in business, some leading enterprises have joined collective efforts to develop voluntary principles and tools to combat bribery and corruption and participate in industry or civil-society mediated efforts whose ultimate aim is to create a level playing field. A case in point is the development of the Business Principles for Countering Bribery, a dedicated anti-bribery code for business which has become a good practice standard, which took place under the auspices of Transparency International and Social Accountability International in collaboration a multi-stakeholder group comprising major multinationals, civil society organisations, academia and trade unions.¹²

Many companies today understand the need for codes of conduct, including dedicated anti-corruption policies and management systems to fulfill their legal obligations. But keeping up with multiple legal and regulatory regimes can be demanding and lead to a piecemeal approach to compliance. This is why some enlightened companies have developed global principles and programmes that go beyond legal compliance and apply to all contexts. For example, a growing number of US companies are taking a zero tolerance stance on facilitation payments even though

¹⁰ The reporting matrix is comprised of two reporting levels: basic and desired. The matrix is accompanied by a companion document that includes descriptions of reporting elements and presents examples of appropriate reporting. www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/UNGC_AntiCorruptionReporting.pdf.

¹¹ See: http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp

¹² http://www.transparency.org/global_priorities/private_sector/business_principles

these small payments made to expedite routine governmental action are the subject of an exception under the FCPA. These companies hold the view that allowing such payments sends mixed messages to employees and undermines general efforts to combat bribery.

But for most companies, however, embedding an anti-corruption culture throughout the organisation and applying it to business relationships remains a major challenge. This requires commitment, training and investment that they have not yet fully understood or acted upon. For smaller companies the challenge is even greater.

SEDEX¹³, a not-for-profit membership organisation, offers participating companies a platform for the continuous improvement of the ethical performance of their supply chains. The organisation, which now has ca 19,000 member-companies worldwide with more than 23,000 sites of employment, provides a secure database for companies to store and share ethical data including self-assessments, audit reports and corrective action reports and status.¹⁴ The data covers four pillars: human rights, labour standards, environment and business integrity.

Rebuilding trust through greater transparency

Despite some of the progress depicted above, corporate corruption scandals continue to erupt on a regular basis. This may be in part a consequence of the uptick in enforcement of anti-bribery laws, but these scandals are nevertheless feeding stakeholder scepticism of the claims made by enterprises about their commitment to corporate responsibility, including anti-corruption.

From a stakeholder perspective, what is needed to dispel the prevailing cynicism is more transparency built on engagement with stakeholders as well as more measures that can attest to the credibility of corporate claims.

Transparency International believes that companies have a responsibility to communicate and be more transparent about their work on corporate responsibility, in particular efforts targeting corruption. Many companies have made strides in communicating their corporate responsibility programmes and reporting on their performance with the help of frameworks such as the Global Reporting Initiative (GRI)¹⁵, which sets out the indicators for economic, environmental and social performance.¹⁶

To be credible non-financial reports produced by companies as part of corporate responsibility programmes must provide consistent and meaningful information that is comparable across corporations. In its own research, TI has found this to be seriously lacking. TI's Transparency in Reporting on Anti-Corruption – A Report of Corporate Practices (TRAC)¹⁷ assessed the extent to which leading companies have reported the strategies, policies and management systems they had in place for fighting bribery and corruption. In spite of some exemplary practices, only seven

¹³ For more information on SEDEX see:

<http://www.sedex.org.uk/sedex/go.asp?u=/WebSite/home&pm=6&location=Home>

¹⁴ Data as of 1 November 2010.

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The Global Reporting Initiative (GRI) has developed the world's most widely used sustainability reporting framework through a consensus-building dialogue with actors from business, civil society, labour, and professional institutions. The framework provides principles and indicators for organisations to measure and report their economic, environmental, and social performance. See: www.globalreporting.org.

¹⁶ Information on the indicators used for the GRI G3 Guidelines can be found at:

www.globalreporting.org/ReportingFramework/G3Online/PerformanceIndicators

¹⁷ http://www.transparency.org/policy_research/surveys_indices/trac

of the 486 companies reviewed achieved the top score, while 151 received the lowest. Across the board, companies tended to report on the presence of high-level policies addressing anti-bribery and corruption but were mostly silent on the systems that support them. This absence of detail weakens the credibility of such reporting and can throw into question company commitment to broader corporate responsibility efforts towards internal and external stakeholders.

In response to the growing expectations of stakeholders that enterprises should be open and transparent about how they manage a range of non-financial issues, including bribery and corruption, TI has developed a “Framework for Voluntary Independent Assurance of Corporate Anti-Bribery Programmes”.¹⁸ The TI Framework sets out the steps enterprises should take to prepare for independent assurance and, most importantly, proposes criteria for the evaluation by assurance providers of an enterprise’s anti-bribery programme. The TI Framework was developed with the support of the World Economic Forum Partnering Against Corruption Initiative¹⁹ and in consultation with representatives of leading accounting firms. The ultimate aim of the initiative is to encourage business to consider public reporting and independent third-party assurance of anti-bribery programmes as a means of substantiating company claims about their efforts to counter corruption.

For companies in sectors that are known to be prone to corruption such as the extractive sector, not only is transparency essential to credibility but it creates the accountability necessary to ensure that extractive revenues promote economic and social development rather than fuel poverty, conflict and corruption. The Extractive Industries Transparency Initiative (EITI)²⁰ aims to provide an antidote to the resource curse by requiring signatory countries to disclose the extractive revenues they receive and companies to publish their payments to host governments. This information is externally validated.

Further addressing transparency in the extractive sector, the Promoting Revenue Transparency (PRT)²¹ project, led by Transparency International in partnership with Revenue Watch Institute²², reviews and encourages the pro-active disclosure of information by extractive companies that ultimately allows citizens of resource-rich countries to know how value is being shared between oil and gas companies and their governments.

Another important development towards greater transparency in the oil and gas sector came by way of a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act which was signed into law by the US Congress in July 2010. In an important step forward for transparency and accountability, the Act provides for the amendment of US securities law so that it requires the disclosure of company payments relating to the acquisition of licenses for exploration, production, including fees, production entitlements, bonuses, and other material

¹⁸ A public consultation on the exposure draft of the TI Framework for Independent Assurance is taking place until 31 December 2010. To view the Framework see: http://www.transparency.org/global_priorities/private_sector

¹⁹ <http://www.weforum.org/en/initiatives/paci/index.htm>

²⁰ See: <http://eiti.org/eiti>

²¹ See: http://www.transparency.org/policy_research/surveys_indices/promoting_revenue_transparency

²² Jointly with Transparency International, Revenue Watch Institute published the Revenue Watch Index in October 2010. The index is an assessment and comparison of information published by governments about revenues, contract terms and other key data. For more on the Index see: <http://www.revenuwatch.org/rwindex2010/index.html?q=rwindex>

benefits. This will in effect cover many of the world's major oil and gas companies registered with the US Securities and Exchange Commission.

Some challenges ahead

With the worst of the financial crisis hopefully behind us, companies are again looking for growth opportunities, particularly in new markets where corruption risks are often high. This provides a unique opportunity to resume global business on a more ethical footing and rebuild public trust. But challenges lie ahead. The work that has already begun to achieve corporate integrity and accountability must be both widened and deepened.

The international legal framework must continue to extend its net to make it truly global. Countries that have not yet signed up to UNCAC must do so and those that are signed up must undertake serious efforts to implement domestic laws that will give force to the Convention's provisions. When it comes to national anti-bribery laws, the rise in enforcement must continue and spread to more countries.

As for companies, anti-bribery practice remains uneven in spite of consensus on what constitutes robust programmes to address bribery. Too many enterprises, particularly small and medium-sized, lag behind.

A 2010 corporate fraud survey reported that even in North America where compliance regimes are thought to be well-established, 75% of compliance respondents said they "struggled to demonstrate the value their function brought to their organisation."²³ This highlights the fact that it remains a challenge to embed compliance, including anti-corruption compliance, in corporate culture.

In addition, company policies are often misaligned with their professed ethical standards. Sales and human resource policies may fail to be adjusted to reflect a company's commitment to zero tolerance of bribery and corruption still rewarding employees for winning business at any cost. These inconsistencies can lead to internal and external scepticism about a company's commitment to fighting bribery and corruption

In spite of some incentives for whistleblowers to report corporate misconduct, they continue often meet with internal hostility and in many cases, retaliation. The Dodd-Frank Act provides for new protections and monetary incentives for financial industry employees to report wrongdoing to the Securities and Exchange Commission. But too many whistleblowers will continue to experience exclusion, loss of promotion and dismissal as a consequence of having reported wrongdoing in their organisation.²⁴

Some recommendations going forward

Restoring trust and creating true accountability in the corporate sector will require more painstaking work on the part of all stakeholders working individually and collectively.

Some of the following measures can help achieve this:

²³ See:

[http://www.ey.com/Publication/vwLUAssets/EY_11th_GLOBAL_FRAUD_Survey/\\$FILE/EY_11th_GLOBAL_FRAUD_Survey.pdf](http://www.ey.com/Publication/vwLUAssets/EY_11th_GLOBAL_FRAUD_Survey/$FILE/EY_11th_GLOBAL_FRAUD_Survey.pdf)

²⁴ Ethics Resource Center National Ethics Survey 2009: <http://www.ethics.org/files/u5/Retaliation.pdf>

For governments:

- Join regional and international efforts to put in place a coherent and effective legal framework to fight corruption by signing up to instruments such as UNCAC and other anti-corruption conventions;
- Implement conventions by translating their provisions into domestic laws;
- Enforce anti-corruption laws;
- Foster greater transparency in public procurement;
- Encourage good governance in international aid and trade development.

For companies:

- Implement anti-bribery programmes based on zero tolerance to bribery and corruption. Monitor and improve these programmes. Be transparent and accountable through meaningful public reporting and consider independent verification for programme improvement and greater credibility;
- Work to eliminate facilitation payments;
- Join other businesses and stakeholders in initiatives aimed at reducing corruption;
- Ensure that supply chains adhere to company standards
- Ensure that corporate whistleblower policies fully protect whistleblowers against retaliation.

For civil society:

- Be accountable - Adopt professional codes of ethics;
- Work collaboratively with business and other stakeholders to develop effective anti-corruption standards and initiatives aimed at reducing corruption in business;
- Demand more coherent and meaningful reporting on company measures to mitigate the risk of corruption;
- Encourage the use of independent verification of corporate anti-bribery programmes;
- Embed anti-corruption in corporate responsibility initiatives.

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