

Non-Governmental Organizations: Anticorruption Compliance Challenges and Risks

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Abstract

Despite the drastic consequences, corruption and anticorruption compliance risks associated with the activities of international non-governmental organizations (NGOs) have not received adequate attention. NGOs face many of the same risks as traditional business organizations, like violating the Foreign Corrupt Practices Act and other foreign bribery laws, as well as susceptibility to becoming a victim of corruption. An anonymous survey of international NGOs conducted by the authors demonstrates that, for various reasons, NGOs have tended to languish behind business organizations in addressing their corruption-related risks. Unlike a business, the basis for an NGO's funding often limits what resources can be devoted to compliance. Yet, unlike a business, an NGO's reputational risk is much greater. For this reason, NGOs must give greater attention to putting in place robust anticorruption compliance programs like those instituted by business organizations.

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Introduction

Over the course of the past decade, enforcement of the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA),¹ prohibiting the bribery of foreign officials,² has experienced tremendous growth.³ The growth of foreign bribery prosecutions under the FCPA has been exponential in nature⁴ when consideration is also given to the use of the FCPA's accounting and record-keeping provisions as an alternative means of prosecuting behavior prohibited by the anti-bribery provisions.⁵

As Lanny Breuer, the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice (DOJ) has stated, "we are in a new era of FCPA enforcement; and we are here to stay."⁶ This statement accords with the recent record of the DOJ and the Securities and Exchange Commission (SEC), the government agencies charged with enforcement of the FCPA. In 2010 alone, the DOJ and SEC resolved twenty-three FCPA enforcement cases with \$1.8 billion in fines and disgorged profits.⁷ Over fifty individuals were indicted, tried, or sentenced for FCPA violations during the same period of time—a record number since the FCPA's adoption in 1977.⁸ In 2009-2010, the DOJ alone collected nearly \$2 billion from FCPA cases.⁹

Entire industries have become the focal point of FCPA investigations. For example, in November 2009, Mr. Breuer announced that the pharmaceutical industry would be the

1. Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m (2010), 78dd-1,2,3 (1998), 78ff (2002).

2. *Id.* § 78dd-1,2,3.

3. Thomas R. Fox, *FCPA Enforcement: Why the Increase Between the First 25 Years and the Last 5?*, FCPA COMPLIANCE AND ETHICS BLOG (Mar. 11, 2011, 6:48 AM), <http://tfoxlaw.wordpress.com/2011/03/11/fcpa-enforcement-why-the-increase-between-the-first-25-years-and-the-last-5/>.

4. *Id.*

5. Often overlooked in the dramatic increase in FCPA enforcement is the critical role of the FCPA's accounting and record-keeping provisions. See FCPA § 78m. In addition to prohibiting improper inducements to foreign officials, the FCPA placed new and significant obligations on issuers to maintain records that accurately reflect transactions and dispositions of assets and to maintain systems of internal accounting controls. *Id.* They apply to foreign and domestic issuers of securities as defined by Section 3 of the Securities Exchange Act of 1934 as entities required to register under Section 12 or file reports under Section 15(d). See *id.* §§ 78a-c, 78o(d), 78l. Issuers can include foreign entities with American Depositary Receipts (ADRs). Unlike the FCPA's anti-bribery provisions, the accounting and record-keeping provisions also apply to majority-owned foreign subsidiaries of an issuer. *Id.* § 78m(b)(6). The anti-bribery provisions and accounting and record-keeping provisions "were intended to work in 'tandem' and thereby complement one another." Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 468 (2006) (citing S. REP. NO. 95-114, at 7 (1977)), reprinted in 1977 U.S.C.A.N. 4098. "For example, the Senate Report associated with the FCPA's passage stated that 'a U.S. company "which looks the other way" in order to be able to raise the defense that they were ignorant of bribes made by a foreign subsidiary, could be in violation of [the accounting and record-keeping provisions] requiring companies to devise and maintain adequate accounting controls.'" *Id.* at 468, n.14 (citing S. REP. NO. 95-114, at 11).

6. Press Release, Dep't of Justice, Assistant Att'y Gen. Lanny A. Breuer Speaks at the 24th Nat'l Conference on the FCPA (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

7. The FCPA Blog, 2010 FCPA Enforcement Index (Jan. 3, 2011, 7:02 AM), <http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html>.

8. *Id.*

9. See Press Release, Dep't of Justice, *supra* note 6.

next focus of the DOJ's FCPA enforcement efforts.¹⁰ Freight-forwarding, telecommunications, oil and gas, and tobacco industries also drew considerable attention from the DOJ and SEC in 2010 and 2011.¹¹

Even though the United States and much of the developed world are home to many nonprofit and non-governmental organizations (NGOs) that operate in countries where corruption is rife, this large sector has yet to be the special focus of enforcement activity. But NGOs and nonprofits suffer many of the same corruption-related risks as traditional business organizations. Are NGOs and nonprofits subject to the FCPA, and can they and their officers, employees, and agents be held liable for FCPA violations? Could the NGO and nonprofit sector be the next frontier in FCPA enforcement?

Related questions include: What are the implications for NGOs and nonprofits as a result of the other anti-bribery legal regimes being implemented and increasingly enforced by other countries? What special provisions are made for NGOs or nonprofits? Are they in any way exempted from the prohibitions on foreign bribery? If not, what are the implications? How else can corruption affect the activities of international NGOs? What proactive steps are they taking? What steps should they be taking? What considerations are unique to NGOs and nonprofits?

Many of these questions cannot be adequately addressed in this article. Rather, the article seeks to draw the attention of NGOs and nonprofits engaged in international endeavors to the growing nature of their compliance risks and the implications of those risks. At the same time, this article seeks to alert policy makers and the legal community to the unique problems that exist in this arena and highlight areas for future research and practice development.

In addressing these and related issues, the acronym "NGO" will be used to refer to both non-governmental organizations and nonprofit or not-for-profit organizations. In the United States, and elsewhere, these terms are often used interchangeably to refer to organizations that pursue some wider social aim; that do not distribute surplus funds to owners or shareholders; and that are normally exempt from income and property taxation. Unless the context dictates otherwise, the term "NGO" will be used throughout this article.

10. Press Release, Dep't of Justice, Assistant Att'y Gen. Lanny A. Breuer's Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), available at http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharma_speech.pdf.

11. See, e.g., Press Release, Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve FCPA Investigation (Dec. 27, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>; Press Release, Dep't of Justice, Alliance One Int'l Inc. and Universal Corp. Resolve Related FCPA Matters Involving Bribes Paid to Foreign Gov't Officials (Aug. 6, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-crm-903.html>; Press Release, Dep't of Justice, Oil Servs. Cos. and a Freight Forwarding Co. Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties (Nov. 4, 2010), available at <http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html>.

I. NGOs and International Assistance

The most recent edition of the *Yearbook of International Organizations* lists 64,523 international “civil society organizations” in 300 countries and territories.¹² The United States and much of the developed world are home to many NGOs involved in an immense variety of activities domestically and abroad. These activities include education and cultural development, conservation and preservation, fighting poverty and disease, humanitarian assistance, and other forms of foreign aid and disaster relief. Geographically, many of the larger NGOs operate in scores of countries all over the world. For example, among U.S.-based NGOs in 2010 alone, the American Red Cross assisted more than sixty-eight million people in sixty-six countries;¹³ AmeriCares Foundation was active in ninety-seven countries;¹⁴ and CARE USA worked in eighty-seven countries, reaching more than eighty-two million people.¹⁵ Faith-based organizations are not far behind, and some even surpass secular NGOs in the reach of their overseas activities. World Vision, a Christian humanitarian relief and development organization, works in nearly 100 countries¹⁶ while the Catholic Relief Services’ activities spread to more than 100 countries on five continents.¹⁷

The geographic extension of these NGOs is matched by their hefty budgets. According to the *Chronicle of Philanthropy*, in fiscal year 2009, the latest year for which complete data is available, each of the four largest U.S.-based NGOs focusing on international charitable work, AmeriCares Foundation, Feed The Children, Food For The Poor, and World Vision, had a total revenue of over \$1 billion.¹⁸ Even during the recent economic downturn when charitable giving was down by eleven percent,¹⁹ Food for the Poor and World Vision reported that their net income in 2010 stayed above \$1 billion, at \$1.047 billion and \$1.041 billion respectively.²⁰ The revenue of the American Red Cross for 2010 was almost \$3.6 billion, with over \$252 million spent on programs outside the United States.²¹

12. Union of Int’l Ass’ns, *Yearbook of International Organizations Online*, <http://www.uia.be/yearbook> (last visited Jul. 10, 2011).

13. AMERICAN RED CROSS, *GLOBAL IMPACT REPORT, FISCAL YEAR 2010*, available at <http://www.redcross.org/www-files/Documents/pdf/international/10ISDreport.pdf>.

14. AMERICARES FOUND., *2010 ANNUAL REPORT*, available at <http://www.americares.org/newsroom/publications/>.

15. CARE USA, *CARE’s Work*, <http://www.care.org/careswork/index.asp> (last visited June 5, 2011).

16. World Vision, *Our International Work*, <http://www.worldvision.org/content.nsf/learn/our-international-work> (last visited June 5, 2011).

17. Catholic Relief Services, *About Catholic Relief Services*, <http://crs.org/about/> (last visited June 5, 2011).

18. The Chronicle of Philanthropy, *Philanthropy 400 Data*, available at http://philanthropy.com/premium/stats/philanthropy400/index.php?search=Search&category=International&year=2010&sort=income_total (last visited June 26, 2011).

19. William P. Barrett, *America’s Biggest Charities*, FORBES.COM, Dec. 6, 2010, <http://www.forbes.com/forbes/2010/1206/investment-guide-charity-americares-united-way-ymca-biggest-charities.html>.

20. FOOD FOR THE POOR, *2010 ANNUAL REPORT*, available at http://www.foodforthe poor.org/about/finances/annual_report_2010b.pdf; Larry Probus, *World Vision CFO, Financial Assessment of 2010 and Outlook for 2011*, available at [http://www.worldvision.org/resources.nsf/Main/annual-review-2010-resources/\\$FILE/AR_2010LetterFromCFO.pdf](http://www.worldvision.org/resources.nsf/Main/annual-review-2010-resources/$FILE/AR_2010LetterFromCFO.pdf).

21. Bryan Rhoa, *American Red Cross CFO, FY10 Financial Results*, available at <http://www.redcross.org/portal/site/en/menuitem.d229a5f06620c6052b1ecfb43181aa0/?vgnextoid=666b13eb7d83e210VgnVCM10000089f0870aRCRD&vgnextchannel=0bf26a5e61dce110VgnVCM10000089f0870aRCRD>.

Significant parts of the budgets of many NGOs are financed by the U.S. government through the U.S. Agency for International Development (USAID), the U.S. State Department, the Millennium Challenge Corporation, and other government entities, as well as by international governmental and other organizations, such as the United Nations and the World Bank.²² The traditional U.S. government foreign aid model, as represented by USAID,²³ relies on private-sector contractors, including NGOs, for the vast majority of program implementation.²⁴ In 2008, eighty-five percent of USAID's budget was committed to contracting organizations through direct grants, cooperative agreements, or contracts.²⁵ NGOs routinely compete for USAID grants and contracts along with for-profit entities. NGOs may also sub-contract for other organizations receiving government funding.²⁶

A well-developed network of regular USAID contractors and subcontractors includes both for-profit and not-for-profit organizations. Some of them have been working with USAID for decades, administering projects worth hundreds of millions of dollars and encompassing scores of countries.²⁷ A number of large NGOs, such as CARE, Catholic Relief Services, and Save the Children, are major USAID contractors. Among the top twenty "vendors" that USAID lists for 2010 are eight U.S.-based nonprofits, with the amounts of money awarded to them ranging from \$165 million to over \$432 million.²⁸

The World Bank also recognizes NGOs as "important actors in the development process" and frequently relies on them in the delivery of its programs.²⁹ Projects supported by the World Bank often involve national and international NGOs³⁰ because of the "skills and resources they bring to emergency relief and development activities and because they

22. Though many U.S. government agencies are involved in international development and foreign assistance, in the interest of brevity this article will largely focus on USAID as the primary source of funding.

23. In 2010, USAID administered about \$22 billion in programs. CURT TARNOFF & MARIAN LEONARDO LAWSON, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY, CONG. RESEARCH SERV. R40213, at 21 (2011), available at http://assets.opencrs.com/rpts/R40213_20110210.pdf.

24. *Id.* at 26; see also Save The Children, Supporting Local Ownership & Building National Capacity: Applying a Flexible and Country-Based Approach to Aid Instruments (May 2010), <http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/Save-the-Children-Aid-modalities-for-country-ownership-May-2010.pdf>.

25. Save The Children, *supra* note 24, at 1.

26. For example, USAID awarded a two-year grant to Catholic Relief Services for the Community Resettlement and Rehabilitation Project in post-civil war Liberia. The latter selected World Vision as a sub-grantee to conduct food distribution and food-for-work projects, parts of the USAID grant. See World Vision, World Vision Statement Regarding Alleged Fraud in Liberia, <http://www.worldvision.org/content.nsf/about/20090604-liberia> (last visited June 5, 2011).

27. For example, Chemonics International Inc., a USAID contractor since 1975, worked in almost 140 countries managing more than 900 projects in all key development areas. USAID, About Chemonics Int'l, <http://ghiqc.usaid.gov/hpi/contractor/chemonics.html> (last visited June 5, 2011). It "currently manages more than 105 contracts for USAID in some 70 countries." *Id.*

28. USAID, USAID Budget: Where Does USAID's Money Go?, <http://www.usaid.gov/policy/budget/money/> (last visited June 5, 2011) (listing the following nonprofits: Partnership for Supply Chain Mgmt., Int'l Relief and Dev., Academy for Educational Dev., Catholic Relief Services, Family Health Int'l, Mgmt. Sciences for Health, Research Triangle Institute, and Mercy Corps).

29. The World Bank, Civil Society—Involving Nongovernmental Organizations in Bank-Supported Activities, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,print:Y-isCURL:Y-contentMDK:22511723~pagePK:220503~piPK:220476~theSitePK:228717,00.html> (last visited Aug. 8, 2011).

30. CHRISTOPHER GIBBS, CLAUDIA FUMO & THOMAS KUBY, NONGOVERNMENTAL ORGANIZATIONS IN WORLD BANK-SUPPORTED PROJECTS: A REVIEW I (The World Bank 1999), available at <http://lnweb90>.

foster participatory development processes.”³¹ The World Bank also uses NGOs as contractors and grantees.³² Thirty-three large international NGOs are listed on the World Bank’s website as those “with whom the Bank maintains ongoing relations through policy dialogue, training, and/or [sic] operational collaboration.”³³ At least a dozen of them are based in the United States or have U.S. branches.³⁴

Acknowledging the role played by NGOs and other nonprofits, the World Bank calls civil society organizations—the term that includes such diverse entities as “community groups, non-governmental organizations, . . . labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations,”³⁵—“significant players in global development assistance.”³⁶ The World Bank estimated that, as of 2006, civil society organizations “provided approximately . . . \$15 billion in international assistance.”³⁷

II. NGOs and Corruption Risks

Many NGOs, especially those providing humanitarian assistance and engaged in development projects, operate in developing countries where they face the same risks as traditional business organizations. One of those risks is corruption. NGOs face two kinds of corruption-related risks. One is the risk of becoming an offender by paying a bribe to a government official, violating the FCPA or other anti-bribery laws. The other risk is becoming a victim of corruption, such as when the funds or assets of an NGO are misappropriated or otherwise misused.

A. THE RISK OF VIOLATING FOREIGN BRIBERY LAWS

Under the FCPA, mere status as an NGO does not exempt an entity from being subject to the anti-bribery provisions.³⁸ NGOs fall into the category of “domestic concerns” subject to the anti-bribery provisions.³⁹ No legal basis exists for distinguishing between a traditional commercial enterprise and an NGO in determining what qualifies as a “domes-

worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/167F2AAEA498DBC185256817004C81BE/\$file/NGO_Book.pdf.

31. *Id.* at vii.

32. See The World Bank, Civil Society—Frequently Asked Questions, <http://go.worldbank.org/Q4JHC82S80> (last visited June 26, 2011); The World Bank, Civil Society—Civil Society Organizations, <http://go.worldbank.org/KK5KGT24X0> (last visited June 26, 2011); The World Bank, Projects—Contract Awards Search, <http://go.worldbank.org/GM7GBOVGS0> (last visited June 26, 2011).

33. Civil Society Organizations, *supra* note 32.

34. See, e.g., Action Aid Int’l, Where We Work, <http://www.actionaid.org/where-we-work> (last visited June 26, 2011); The Access Initiative, TAI Countries, <http://www.accessinitiative.org/countries> (last visited June 26, 2011); Environmental Defense Fund, Our Offices, <http://www.edf.org/page.cfm?tagid=361> (last visited June 26, 2011).

35. The World Bank, Civil Society—Defining Civil Society, <http://go.worldbank.org/4CE7W046K0> (last visited June 26, 2011).

36. *Id.*

37. *Id.*

38. See Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-2(h)(1) (1998).

39. *Id.*

tic concern.”⁴⁰ No “carve out,” “safe harbor,” or other express exception exists, nor does an exception exist for an NGO that is strictly charitable in nature.⁴¹

The definition of what constitutes a “domestic concern” is broad. In addition to “any individual who is a citizen, national, or resident of the United States,”⁴² a “domestic concern” includes “any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of State of the United States or a territory, possession, or commonwealth of the United States.”⁴³

Though not binding as precedent, in a recent Opinion Procedure Release the DOJ explicitly found a nonprofit organization to be a “domestic concern” subject to the terms of the FCPA’s anti-bribery provisions.⁴⁴ It involved “a non-profit, U.S.-based microfinance institution . . . whose mission is to provide loans and other basic financial services to the world’s lowest-income entrepreneurs.”⁴⁵ To support its mission, the microfinance institution received grants and investments from the “United States government, other governmental . . . aid agencies and development banks, nongovernmental organizations . . . and private investors.”⁴⁶

Arguably, the only categorical exception may relate to whether the business of the NGO falls within the prohibitions of the FCPA’s anti-bribery provisions. No clarity is provided as to whether the business that is sought to be obtained or retained must be commercial in nature or whether it extends more generally to the business of an individual or entity. What constitutes “business” under the anti-bribery provisions has yet to be clearly defined.⁴⁷ Neither the language of the statute nor the legislative history provide clear guidance as to whether activities of an NGO constitute “business” as that term is used within the context of the anti-bribery provisions.

While the legislative history of the anti-bribery provisions focuses on business in the classic commercial sense,⁴⁸ the legislative history also demonstrates that “the business nexus requirement [was] not to be interpreted unduly narrowly.”⁴⁹ “When the FCPA is

40. *Id.*

41. *See generally id.* § 78dd-2.

42. *Id.* § 78dd-2(h)(1)(A).

43. *Id.* § 78-2(h)(1)(B).

44. FCPA Review, 10-02 Op. Dep’t of Justice 5 (2010), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf>. In two other opinion procedure releases, the DOJ implicitly found the non-profit entities to be domestic concerns subject to the FCPA. *See* FCPA Review, 08-03 Op. Dep’t of Justice 1 (2008), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf>; FCPA Review, 96-01 Op. Dep’t of Justice 1 (1996), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/1996/9601.pdf>. In the more recent of the two releases, the entity seeking the opinion was found to be a domestic concern. 08-03 Op. Dep’t of Justice, at 1. But no reference was made to it being a non-profit. *See id.* Yet it is a matter of public record that the entity, TRACE International, Inc., is a non-profit organization. *See* Trace Int’l, About Us, <https://secure.traceinternational.org/about> (last visited June 26, 2011). The older opinion procedure release made no express finding that the entity seeking the opinion was a domestic concern. *See* 96-01 Op. Dep’t of Justice, at 1. However, only issuers and domestic concerns are eligible to obtain an opinion pursuant to the opinion procedure release. 28 C.F.R. § 80.1 (1992).

45. 10-02 Op. Dep’t of Justice, *supra* note 44, at 1.

46. *Id.*

47. *See* FCPA § 78dd-2(a).

48. Reference was made to “corporate bribery.” S. REP. NO. 95-114, at 4 (1977), reprinted in 1977 U.S.C.A.N. 4098, 4101.

49. *United States v. Kay (Kay II)*, 359 F.3d 738, 754 (5th Cir. 2004).

read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner.⁵⁰ The FCPA was enacted not only because foreign bribery was “morally and economically suspect, but also because it was causing foreign policy problems for the United States.”⁵¹

Like the FCPA, none of the international anti-bribery conventions provides an express exception for NGOs. Of the three that the United States has ratified, the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention),⁵² the Inter-American Convention Against Corruption (OAS Convention),⁵³ and the United Nations Convention against Corruption (UN Convention),⁵⁴ all make reference to there being a need for a business or commercial nexus in order for the conduct to be prohibited. The OECD Convention and the UN Convention make specific reference to the prohibition applying to “the conduct of international business.”⁵⁵ The OAS Convention refers to the prohibition applying “in connection with any economic or commercial transaction.”⁵⁶

But the business nexus requirements of the most important of the international anti-bribery conventions, the UN and OECD Conventions,⁵⁷ are not narrow in scope. The UN Convention expands on what may be viewed as a more customary definition of “international business” to include “the provision of international aid” within the meaning of “the conduct of international business.”⁵⁸ The Interpretative Notes for the Official

50. *Id.* at 761.

51. *Id.* at 746.

52. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

53. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter OAS Convention].

54. United Nations Convention Against Corruption, Oct. 31, 2003, 43 I.L.M. 37 [hereinafter UN Convention].

55. OECD Convention, *supra* note 52, art. 1; UN Convention, *supra* note 54, art. 16.

56. OAS Convention, *supra* note 53, art. VIII.

57. The basis for giving primacy to the OECD and UN Conventions is summarized in the following:

The OECD Convention is narrowly tailored to focus specifically on bribery of foreign officials in the context of obtaining or retaining business. Given its narrow focus and its effective follow-up mechanism for ensuring active and uniform enforcement, the OECD Convention has already had a dramatic impact in a relatively short period on the number of countries actively investigating and prosecuting individuals and entities for improper inducements to foreign officials. As enforcement activity increases and as more countries accede to the OECD Convention, the body of law associated with the OECD Convention will become a principal resource for defining the international norms.

Due to its global nature, and the vast number of ratifications that have already taken place, the UN Convention . . . will play the critical role in the globalization of the international norms. Initially, the UN Convention will serve to expand the scope of cooperation and prompt the adoption of domestic legislation in parts of the world less inclined to participate in the other international and anti-bribery conventions. Over time, with the exception of the OECD Convention, the UN Convention will surpass many of the regional anti-bribery conventions in becoming the focus of [future] developments.

STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 306 (2d ed. 2010) (footnotes omitted).

58. Ad Hoc Committee for the Negotiation of a Convention Against Corruption, *Report on the Work of Its First to Seventh Sessions*, Addendum, art. 16, U.N. Doc. A/58/422/Add.1 (Oct. 7, 2003), available at https://www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf.

Records, *Travaux Préparatoires*, of the Negotiations of the UN Convention (Interpretative Notes to the UN Convention), state that the “phrase ‘the conduct of international business’ is intended to include the provision of international aid.”⁵⁹ By its very nature, the provision of international aid includes the work of NGOs in foreign settings.

The significance of the Interpretative Notes to the UN Convention cannot be overstated. The UN Convention is the only globally negotiated anti-bribery convention that addresses the bribery of foreign officials in the conduct of international business. With 154 parties, the UN Convention has been signed and ratified by most of the world and virtually the entire developed world.⁶⁰ Notable is the absence of any reservations or declarations with respect to Article 16, the prohibition on the bribery of foreign officials in the conduct of international business.⁶¹ This includes the United States.⁶² The absence of any reservations or declarations is also likely to influence how the implementing legislation of many countries is interpreted and applied.⁶³

59. *Id.*

60. UN Convention, *supra* note 54. The one notable exception is Germany. But Germany is a party to the OECD Convention and has been active in the enforcement of its anti-bribery legislation. See FRITZ HEIMANN, GILLIAN DELL & KELLY MCCARTHY, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 5 (Transparency International 2011), available at http://www.transparency.org/global_priorities/international_conventions. For the status of the UN Convention, see United Nations Treaty Collection, United Nations Convention against Corruption, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsq_no=XVIII-14&chapter=18&lang=en (last visited Aug. 26, 2011).

61. See UN Convention, *supra* note 54.

62. *Id.*

63. See, e.g., *United States v. Kay (Kay II)*, 359 F.3d 738, 756 (5th Cir. 2004). In determining that U.S. law fulfilled the obligations of the United States under the UN Convention without the need for implementing legislation, the Senate Report stated that “[n]o implementing legislation is required for the [UN] Convention.” S. EXEC. REP. NO. 109-18, at 6 (2006), available at <http://ftp.resource.org/gpo.gov/reports/109/er018.109.txt>. “The United States of America declares that, in view of its reservations, current United States law, including the laws of the States of United States, fulfills the obligations of the [UN] Convention for the United States.” *Id.* at 10. There was no express reservation, declaration, or understanding directly addressing Article 16 of the UN Convention relating to transnational bribery. *Id.* at 9-10. U.S. ratification may thereby have implicitly broadened the construction to be applied to the business nexus requirement. Or, alternatively, the FCPA was, in effect, deemed to be already sufficiently broad to include such an interpretation. In the prepared remarks of Attorney General John Ashcroft associated with the submission of the UN Convention to the U.S. Senate for ratification, he specifically responded to a question as to the authoritative nature of the Interpretative Notes of the UN Convention. In his answer, he stated:

The Interpretative Notes for the official records (*travaux préparatoires*) preserve certain points relating to articles of the instruments that are subsidiary to the text, but nonetheless of potential interpretive importance. In accordance with Article 32 of the Vienna Convention of the Law of Treaties, to which the United States is not a party but that reflects several commonly accepted principles of treaty interpretation, preparatory work such as that memorialized in the Interpretative Notes may serve as a supplementary means of interpretation, if an interpretation of the treaty done in good faith and in accordance with the ordinary meaning given to the terms of the treaty results in ambiguity or is manifestly absurd. Thus, the Interpretive Notes, while not binding as a matter of treaty law, could be important as a guide to the meaning of terms in the Convention and Protocols.

Id. at 60.

Prior to the U.S. ratification of the UN Convention, the settlement reached in *United States v. Metcalf & Eddy, Inc.*, No. 1:99CV12566 (D. Mass., filed Dec. 14, 1999), reprinted in 5 FCPA REP. 2d 699, 749, suggested that the FCPA’s anti-bribery provisions might extend to the provision of international assistance. In *Metcalf & Eddy, Inc.*, in providing foreign assistance to Egypt, USAID awarded contracts to Metcalf & Eddy, a

In terms of the OECD Convention, the OECD Working Group on Bribery in International Business Transactions (OECD Working Group) has "recommend[ed] that Canada amend its foreign bribery offence so that it is clear that it applies to bribery in the conduct of all international business, not just business 'for profit.'"⁶⁴ Under Canada's Corruption of Foreign Public Officials Act "business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit.⁶⁵ The OECD Working Group emphasized that the OECD Convention "does not distinguish between 'for profit' and 'not for profit' business transactions."⁶⁶ It went on to explain:

Article 1 of the [OECD] Convention applies to bribery of a foreign public official "in order to retain business or other improper advantage" . . . The [OECD] Convention does not limit its scope to transactions that are profitable, and specifically includes benefits to the briber other than pecuniary gain. [T]he Convention applies to bribery by "any person" under Article 1, and "legal persons" under Article 2, without any qualification that the business carried out by the person or [the] nature of the legal person is or is not for profit. [Otherwise] . . . numerous organisations that, while not set up to make a profit for themselves, might still bribe in order to secure business, including state owned and controlled enterprises.⁶⁷

The Council of Europe Criminal Law Convention (CoE Convention),⁶⁸ one of the other major international anti-bribery conventions, contains no business nexus requirement. It requires parties to the CoE Convention to adopt "legislation and other measures as may be necessary to establish as criminal offences under its domestic law . . . [the bribery of] a public official of any other State."⁶⁹ The Explanatory Report to the CoE Convention emphasizes that there is "no restriction as to the context in which the bribery of the foreign official occurs."⁷⁰ Significantly, most Western and Eastern European coun-

U.S. company, for the construction, operation, and maintenance of wastewater treatment facilities for a local unit of government in Egypt. The chairman of the local unit of government did not participate in the evaluation of bidders for further work on the wastewater treatment facilities. But officials of Metcalf & Eddy knew that the chairman could influence his subordinates who were involved in the evaluation process and that the chairman could make his preferences known to USAID officials involved with awarding the contracts. Metcalf & Eddy provided the chairman and his wife and children with two trips in first class to the United States, which included travel to tourist destinations. He was also paid cash per diems despite having already been paid in advance for the trips.

64. OECD WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON CANADA 4 (Mar. 18, 2011), available at http://www.oecd.org/document/46/0,3746,en_2649_37447_44572654_1_1_1_37447,00.html [hereinafter OECD Phase 3 Report on Canada]. The perspective of the OECD Working Group is particularly significant. It is the body that was principally responsible for drafting and negotiating the provisions of the OECD Convention.

65. Corruption of Foreign Officials Act, 1998 S.C., ch. 34, § 2, available at <http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcpea/guide.pdf>.

66. OECD Phase 3 Report on Canada, *supra* note 64, at 10, ¶ 17.

67. *Id.* at 11, ¶ 21 (emphasis in original and footnote omitted).

68. Criminal Law Convention on Corruption, Jan. 27, 1999, Europ. T.S. No. 173, 38 I.L.M. 505.

69. *Id.* art. 5.

70. Criminal Law Convention on Corruption Explanatory Rep., art. 5, Jan. 27, 1999, E.T.S. No. 173, available at <http://conventions.coe.int/treaty/en/Reports/Htm/173.htm>.

tries, including the United Kingdom, France, Switzerland, and Spain, have ratified the CoE Convention.⁷¹

In general, mere status as an NGO or a nonprofit organization is not likely to insulate an entity from the prohibitions of the FCPA and other foreign bribery laws. Moreover, many NGOs and nonprofit organizations compete directly against traditional for-profit organizations for USAID, World Bank, UNDP, and other entities' contracts and grants. Indeed, activities of nonprofit organizations are often similar to or interchangeable with those of for-profit organizations.⁷² As a result, NGOs and nonprofit organizations should be presumed to be fully subject to the anti-bribery provisions of the FCPA and other foreign bribery laws.

The facts and circumstances of a particular situation will ultimately determine whether all of the elements necessary for an FCPA or other foreign bribery law violation are present. Whether corrupt intent can be established is likely to be the critical factor.⁷³ But until a well-founded determination is made that the elements required for a violation cannot be met, an NGO must be presumed to be subject to the terms of the FCPA's anti-bribery provisions and its foreign counterparts.

1. *Risks Factors*

How often do NGOs face corruption risks associated with violating foreign bribery laws and what factors determine these risks? In a limited survey of international NGOs (the survey),⁷⁴ the answers to the first question ranged from "never" to "all the time."⁷⁵ The

71. Criminal Law Convention on Corruption, *supra* note 70 (charting signatures and ratifications). Though the United States has not ratified the CoE Convention, it is a signatory. *Id.*

72. For example, the work of medical organizations, educational institutions, and adoption agencies is performed by both for-profit and nonprofit organizations. Nonprofits and NGOs with high pay scales for senior officials are also less likely to be perceived as being entirely charitable or humanitarian in nature. According to a *USA TODAY* review, "[f]our chief executives whose government-funded non-profit corporations are paid to deliver U.S. foreign assistance earned more than half a million dollars in 2007." Ken Dilanian, *Review: High Salaries for Aid Group CEOs*, *USA TODAY*, Sept. 1, 2009, http://www.usatoday.com/news/world/2009-08-31-us-aid-groups_N.htm; see also Barrett, *supra* note 19 (listing salaries of the CEOs of the ten largest U.S. charitable organizations). The highest paid CEOs on the list are the President of American Cancer Society, at \$1.3 million, and of United Way, at \$715,000. In 2010, President of the American Red Cross received \$995,718 in pay while the CEO of AED in 2009 was paid over \$870,000 in total compensation. See Charity Navigator, American Red Cross Rating, <http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=3277> (last visited June 22, 2011); CEO Update, 2011 Executive Compensation in Associations, <http://www.ceoupdate.com/articles/articleDetails.htm?articleid=1720> (last visited June 22, 2011).

73. As the degree to which a nonprofit organization's work is providing non-commercial humanitarian relief increases, the likelihood that an inducement will not be perceived as having the requisite corrupt intent also increases. A poignant example of the latter is a situation where payments are made to facilitate the movement of medical supplies or food to people in danger. The payment arguably falls within the duress exception that U.S. law and, especially, other common law jurisdictions generally recognize. See, e.g., DEMING, *supra* note 57, at 15. Practical realities associated with a jury trial may also bear upon the exercise of prosecutorial discretion in such a situation.

74. Survey of NGOs and Other Nonprofit Organizations on the Issue of Corruption and Anticorruption Compliance (Jan. 2011-Feb. 2011) [hereinafter Survey] (data on file with the authors). The survey was conducted by one of the authors on the condition that the information provided, as well as its source, would remain confidential. For the purpose of anonymity, survey participants will be referenced hereinafter as "Participant 1," "Participant 2," etc. when information obtained from a participant is referenced.

75. *Id.*

factors that were determinative of an NGO's exposure to bribery risks include the nature of its activities, the countries it operates in, the structure of the organization, the pattern of communication with its field offices, and the level of internal reporting and other internal controls.⁷⁶

The nature of an NGO's activities is the most important factor in determining whether it will face significant bribery risks. An NGO that conducts, for example, environmental or conservation programs, provides education and vocational training, or organizes camps for children would be at a lower risk of violating the FCPA and its counterparts than an NGO involved with providing humanitarian aid or relief and development services. It matters little that both NGOs might be operating in the same high-corruption country. In contrast to a situation where an NGO sends experts, volunteers, and others to do the work and provide services, much greater opportunities are afforded to local government officials to demand improper payments when an NGO is distributing or awarding certain assets or funds.

The general level of corruption in a country raises a red flag.⁷⁷ In countries where corruption is a way of life, local culture may be highly tolerant of graft, even tacitly approving of it as a means of survival. An NGO's indigenous staff or its local partners may not see a problem with paying bribes, especially small ones, like facilitating payments, to "keep things moving."⁷⁸ As one survey participant noted, "[b]ribes may be paid on our behalf by local partners but we do not have an ability to monitor them."⁷⁹ Local employees and partners may also be highly susceptible to conflicts of interests. They may be subject to influence by family members, by tribal or ethnic groups, or by other relationships that may not be easy to discern. This may lead to the second type of corruption risks: the misappropriation or misuse of the funds and resources of an NGO.⁸⁰

Whether an NGO operates in a country perceived as being very corrupt is not,⁸¹ by itself, determinative of whether an NGO becomes subject to bribery demands. Though a country's level of corruption certainly raises concerns as to possible corruption risks involved in operating in that country, it does not necessarily mean that the bribery risks are imminent. Two of the survey participants, an NGO engaged in environmental projects in a number of developing countries and an NGO working with young people and families on educational, recreational, and other similar programs in a multitude of countries, have never encountered demands for corrupt payments.⁸² On the other hand, another survey

76. *Id.*

77. "[I]n general, a red flag is a set of facts that, in a given context, would prompt a reasonable person to have a basis for concern as to whether prohibited conduct took place or is intended or likely to occur." DEMING, *supra* note 57, at 654.

78. Survey, *supra* note 74, Participants 1 & 2.

79. *Id.* Participant 2.

80. See *infra* Part II, 2.

81. Transparency International's (TI) annual surveys and indexes can be very helpful in assessing risks. TI's Corruption Perceptions Index identifies and compares countries based on the perception of corruption in a particular country. Transparency Int'l, Corruption Perceptions Index, http://www.transparency.org/policy_research/surveys_indices/cpi (last visited June 22, 2011). TI's Bribe Payers Index provides a breakdown by sector in terms of relative degree of perceived corruption. Transparency Int'l, Transparency International's Bribe Payers Index, http://www.transparency.org/policy_research/surveys_indices/bpi (last visited June 22, 2011).

82. Survey, *supra* note 74, Participants 4 & 5.

participant stated, “every country we work in generates corruption-related concerns.”⁸³ Generally, the survey participants most frequently named African countries, Afghanistan, and Pakistan as the most difficult places in which to operate in terms of corruption risks.

The structure of the organization also plays a role in determining the level of risk of violating foreign bribery laws. More centralized NGOs with reasonable oversight by their headquarters appear to have lower risks than NGOs with a highly decentralized structure.⁸⁴ This is particularly so where the NGO has a multitude of foreign offices with significant autonomy that are staffed, for the most part, with local employees.⁸⁵ Similarly, NGOs relying heavily on indigenous NGOs to carry out their activities face greater chances of violating foreign bribery laws than NGOs that employ expatriates, at least in management positions.⁸⁶

Moreover, organizational structure influences patterns of communication between the headquarters and field offices. To reduce their risk, some NGOs actively pursue collecting compliance-related information and investigate complaints.⁸⁷ But in highly decentralized NGOs, local offices have significant autonomy which extends, among other things, to what issues are reported to headquarters. Most problems are supposed to be addressed at the local level. As a result, headquarters may rarely hear compliance-related concerns from the field offices.⁸⁸ If they do learn of them, it is several months later and often too late for headquarters to intervene.⁸⁹ No common practice appears to exist among NGOs on the related issues of internal reporting and internal controls.

2. *Types of Risks*

The types of risks of violating foreign bribery laws faced by international NGOs vary according to the country and activities involved. Some organizations have to deal mostly with requests for what are often referred to as facilitating or expediting payments for such things as having documents approved, goods released by customs, or a license for a vehicle issued or renewed.⁹⁰ Facilitating payments, typically relatively small in amount, are bribes “the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . .”⁹¹ Under the FCPA, such payments are not prohib-

83. *Id.* Participant 1.

84. *Id.* Participant 2.

85. *Id.*

86. *Id.* Participant 3.

87. *Id.*

88. *Id.* Participants 1 & 3.

89. *Id.*

90. *Id.* Participant 1.

91. Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1(b), 2(b), 3(b) (1998). The FCPA further defines “routine governmental action” as:

- an action which is ordinarily and commonly performed by a foreign official in—
- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - (ii) processing governmental papers, such as visas and work orders;
 - (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

ited.⁹² But other foreign bribery laws, such as the Bribery Act 2010 adopted by the United Kingdom (UK Bribery Act), do not contain exceptions for facilitating payments.⁹³ Thus, authorities in the United Kingdom may prosecute a U.S.-based NGO with a U.K. branch for facilitating payments in a third country.⁹⁴

Other NGOs may see more serious extortionist demands, for example, from police or military at road checkpoints for the right to proceed further into the territory with humanitarian assistance or from local officials or tribal leaders eager to receive “their” share of food or other assistance.⁹⁵ While some checkpoint demands may be satisfied with a payment as small as a twenty-dollar bill,⁹⁶ other bribery requests may involve significant amounts of goods or money.⁹⁷

Some NGOs encounter even greater bribery demands.⁹⁸ Anecdotal information indicates that occasionally, some NGOs get requests from senior government officials to pay significant bribes for the right to operate in their country. Though such demands are usually withdrawn, especially when major donors like USAID or the World Bank get involved, the mere existence of such demands is reflective of the gravity of corruption-related risks for NGOs.

B. THE RISK OF BECOMING A VICTIM OF CORRUPTION

Despite the general unease among international NGOs regarding possible FCPA violations, outright requests for bribes do not appear to be their main corruption-related concern.⁹⁹ Most NGOs’ primary compliance concerns are related to corruption in their programs and activities, such as diversion of aid,¹⁰⁰ misuse of funds,¹⁰¹ fraud in procure-

(v) actions of a similar nature.

Id. § 78dd-2(h)(4)(A).

92. *Id.* § 78dd-1(a), 2(a), 3(a).

93. Bribery Act 2010, c. 23 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

94. Aside from the compliance concerns, practical reasons may justify the need to ensure that even facilitating payments are prohibited. Keep in mind that a host country considers a facilitating payment a bribe. In many countries, NGOs can become the focal point of threats and various forms of retaliation by the host government or groups that may resent or fear their presence. See, e.g., Center for the Development of Democracy and Human Rights, Report Prepared for the 4th Round of EU-Russia Consultations on Human Rights, *Deteriorating Situation of NGOs and Infringement of the Right to Association in Russia* (Nov. 2006), available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/centerfordevelopment_/centerfordevelopment_en.pdf; *Uzbek N.G.O.s Under Threat*, VOANEWS.COM, July 28, 2006, <http://www.voanews.com/policy/editorials/a-41-2006-07-31-voa1-83105557.html>.

95. Survey, *supra* note 74, Participant 1.

96. *Id.* Participant 2.

97. Theoretically, even a twenty-dollar payment can get an NGO in trouble. It would be a legal violation in the host country. For many countries, like the United Kingdom, that do not allow facilitating payments, it would also be a violation. The circumstances of the road checkpoint situation may also not fall within the FCPA’s exception for facilitating payments. See FCPA 15 U.S.C. § 78dd-2(b) (1998). The particular facts will dictate whether the circumstances fall within the category of expediting or securing “the performance of a routine governmental action.” *Id.* § 78dd-2(b), (f)(3).

98. Survey, *supra* note 74, Participant 1.

99. *Id.* Participant 3.

100. *Id.* Participants 2 & 3.

101. *Id.*

ment,¹⁰² fraud in reporting documents, and accounting irregularities.¹⁰³ The consequences of corruption in these areas can be even more daunting for NGOs than the prospect of an enforcement action for an FCPA or other foreign bribery law violation.

Diversion and misuse of aid, when food, medicines, construction materials, and other items are sold for cash or otherwise embezzled or misused, occur frequently in international assistance programs. For example, the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), financed by the United Nations, many national governments and private organizations,¹⁰⁴ came to the spotlight in January 2011 after the Global Fund Inspector General's report revealed that "as much as two thirds" of the Global Fund's grants in Djibouti, Mali, Mauritania, and Zambia had been "eaten up by corruption."¹⁰⁵ The Associated Press story that broke the news cited forged or non-existing receipts for "training events," forged signatures on travel and lodging claims, questionable bookkeeping, and outright theft.¹⁰⁶ Subsequent audits uncovered more violations in other Global Fund programs. To date, the total amount of money lost to corruption stands at nearly \$53 million.¹⁰⁷ In a recent case involving World Vision, a large California-based NGO subcontracting for a USAID project in Liberia, two of the organization's Liberian managers diverted ninety-one percent of USAID-funded humanitarian aid for their personal benefit.¹⁰⁸ As a result, USAID was defrauded of \$1.9 million.¹⁰⁹ An anonymous tip prompted an internal audit that uncovered the problem; both managers were later charged and convicted of fraud.¹¹⁰ World Vision had to reimburse USAID for the misappropriated funds.¹¹¹

According to one survey participant, fraud in reporting and accounting irregularities may range in scope from several hundred dollars to much greater amounts involving well-coordinated and systemic fraud schemes.¹¹² The same is true about corruption and fraud in procurement, which may include collusion, favoritism, lack of transparency, fictitious bidders, bogus vendors, fake tender processes, overpricing, conflicts of interest, and lack

102. *Id.* Participants 3 & 4.

103. *Id.* Participants 2, 3 & 4.

104. "The Global Fund is a unique, public-private partnership and international financing institution dedicated to attracting and disbursing additional resources to prevent and treat [several diseases]." The Global Fund, About the Global Fund, <http://www.theglobalfund.org/en/about/> (last visited June 5, 2011). The Global Fund provides billions of dollars in assistance to developing countries. *Id.*

105. AP: *Fraud Plagues Global Health Fund*, CBS NEWS, Jan. 24, 2011, <http://www.cbsnews.com/stories/2011/01/24/world/main727776.shtml>.

106. *Id.*

107. John Heilprin, *Global Fund Retinks Transparency Policy after Corruption Scandal*, HUFFINGTON POST, May 10, 2011, http://www.huffingtonpost.com/2011/05/10/global-fund-transparency_n_860004.html.

108. Press Release, Dep't of Justice, *Former Humanitarian Workers Convicted for International Fraud Scheme* (Nov. 16, 2010), available at <http://www.justice.gov/opa/pr/2010/November/10-crm-1305.html>; Nedra Pickler, *Workers Charged with Stealing US Aid to Liberia*, NEWSVINE.COM, June 4, 2009, http://www.newsvine.com/_news/2009/06/04/2895439-workers-charged-with-stealing-us-aid-to-liberia.

109. Press Release, Dep't of Justice, *supra* note 108.

110. Press Release, Dep't of Justice, *Former Humanitarian Workers Each Sentenced to 142 Months in Prison for Defrauding USAID of \$1.9 Million* (Apr. 26, 2011), available at <http://www.justice.gov/opa/pr/2011/April/11-crm-525.html>.

111. *Id.*

112. Survey, *supra* note 74, Participant 2.

of competition.¹¹³ Not infrequently, fraud is committed by the local employees or partners in collusion with local government officials. An example is the Academy for Educational Development (AED) programs in Afghanistan and Pakistan that caused USAID to suspend AED and the Global Fund's projects in several African countries where local nonprofits fared no better, in terms of corruption and fraud, than government entities.¹¹⁴

The consequences of this kind of corruption for NGOs are difficult to overstate. In December 2010, USAID suspended AED after uncovering "serious corporate misconduct, mismanagement, and a lack of internal controls that raise[d] serious concerns of corporate integrity."¹¹⁵ USAID undertook a review of every program "associated with AED."¹¹⁶ AED's suspension prevented it from bidding on or receiving any further awards from the U.S. government.¹¹⁷ As a result, on March 3, 2011, after nearly fifty years in existence, thousands of development projects, and hundreds of millions of dollars in USAID funds, AED announced that it would sell its assets and dissolve itself.¹¹⁸ A single program termination was sufficient to bring the organization down.¹¹⁹

C. CORRUPTION-RELATED RISKS: TRADITIONAL BUSINESS ORGANIZATIONS V. NGOs

Do NGOs face the same corruption-related risks as more traditional forms of business organizations? The answer is both yes and no. Obviously, both types of entities are sub-

113. Robert Appleton, Office of the Inspector General, Presentation on Fraud, Misappropriation and Financial Abuse in Global Fund Grant Programs and the Role of the LFA (Nov. 2010), available at http://www.theglobalfund.org/documents/lfa/workshops/2010november/LFA_FraudAbuseInGFGrants_Presentation_en.pdf.

114. Dana Hedgpeth & Josh Boak, *USAID Suspends District-Based Nonprofit AED from Contracts amid Investigation*, WASHINGTON POST, Dec. 8, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/08/AR2010120807665.html>; Office of the Inspector General, Country Audit of Global Fund Grants to Zambia, Audit Report No: GF-OIG-09-15 (Oct 5, 2010), available at http://www.theglobalfund.org/documents/oig/GF_CountryAudit-GF-Grants-Zambia_Report-GF-OIG-09-015.pdf. The audit focused on three government agencies and one nonprofit organization, the Christian Health Association of Zambia, and identified "significant financial management and control weaknesses, episodes of misappropriation and fraud, and losses of grant funds" in all four recipients of the Global Fund's grants in Zambia. *Id.*

115. Press Release, USAID, USAID Suspends Academy for Educational Development from Receiving New U.S. Government Awards (Dec. 8, 2010), available at <http://www.usaid.gov/press/releases/2010/pr101208.html>.

116. *Id.*

117. *Id.*

118. Press Release, AED, Statement from the AED Chairman of the Board, Edward W. 'Peter' Russell to AED Staff (Mar. 3, 2011), available at <http://www.aed.org/News/AED-to-Seek-Orderly-Acquisition-and-Transfer-of-its-Programs-and-Assets.cfm>. AED sought a single purchaser and in early June 2011, it was announced that "FHI and AED have signed an asset purchase agreement for FHI to acquire the programs, expertise, and other assets of AED," with the acquisition to be completed "within the next month, ensuring that projects continue uninterrupted." Press Release, AED, FHI and AED Sign Asset Purchase Agreement (June 8, 2011), available at <http://www.aed.org/News/Releases/asset-purchase-agreement.cfm>. FHI is a "global health and development organization." FHI, Who We Are, <http://www.fhi.org/en/AboutFHI/index.htm> (last visited June 13, 2011).

119. Press Release, AED, AED Pursuing Orderly Transfer and Sale of Its Programs and Assets to a Single Acquirer (Mar. 10, 2011), available at <http://www.aed.org/News/Releases/aed-pursuing-orderly-transfer-and-sale.cfm>.

ject to the FCPA and other foreign bribery laws.¹²⁰ But, unlike issuers, which are publicly held companies that are required to register with the SEC,¹²¹ NGOs are not subject to the accounting and record-keeping provisions of the FCPA.¹²²

Otherwise, a number of factors are common for businesses and NGOs. Individuals associated with either type of entity, whether officers, directors, employees, or agents, can be prosecuted for violations of the FCPA and its counterparts in other parts of world.¹²³ If convicted, a business organization and an NGO can face serious fines, reputational damage, and debarment by governmental agencies, multilateral development banks, and other funding sources.¹²⁴ Collateral litigation of various types may also arise.¹²⁵

Yet for NGOs, the consequences of an investigation and conviction of a corruption-related offence, like foreign bribery, can be far more devastating. The biggest threat for most businesses is financial loss, whether stemming from the loss of business opportunities, profits, decline in stock price,¹²⁶ or the impact of financial sanctions. Except for those businesses that rely heavily upon procurement opportunities, long-term survival is less likely to be in question.

For NGOs, the loss of reputation, and hence donor money, is most feared. In addition to being barred in many instances from pursuing grants, other charitable funding that is highly dependent upon goodwill can be expected to decrease or simply dry up as the result of a corruption-related investigation. Unlike most businesses, NGOs do not have a prod-

120. See discussion, *supra* Part II. NGOs are treated the same as more traditional business organizations in being "domestic concerns" under the FCPA. Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78-dd (2) (1998).

121. See *supra* text accompanying note 5.

122. FCPA § 78m, ff; 17 C.F.R. § 240.13b2-1, 2 (2011).

123. *E.g.*, FCPA § 78dd-2(a) provides:

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official

Id. § 78dd-2(a) (emphasis added).

124. A host of statutes and regulatory regimes exist that provide for the debarment from government contracts of individuals and entities found to have engaged in fraud and other forms of corrupt conduct. See, *e.g.*, 48 C.F.R. 9.406-2 (2011); see also Council Directive 2004/18, 30.4.2004 O.J. (L 134) 114-240 (EC) (on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). The World Bank and many of the other multilateral lending institutions have instituted a series of procedures providing for debarment and cross-debarment of individuals and entities found to have engaged in fraudulent or corrupt activities. See, *e.g.*, Stuart H. Deming, *Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks*, 44 INT'L LAW. 871, 871 (2010).

125. For example, for a publicly-held company, a derivative action brought by shareholders against the board and management might follow. See, *e.g.*, Mass Device, Johnson & Johnson Shareholders Sue Over \$78 Million Bribery Settlements, <http://www.massdevice.com/news/johnson-johnson-shareholders-sue-over-78-million-bribery-settlements> (last visited June 5, 2011).

126. See, *e.g.*, Ellen Byron, *Avon's Stock is Hit by New Worries about a Widening Bribery Probe*, WALL ST. J., May 6, 2011, <http://online.wsj.com/article/SB10001424052748703992704576305291564861446.html>.

uct to sell.¹²⁷ In most situations, funding sources can look elsewhere for a vehicle to meet their needs or address issues of concern to them:

Aid agencies exist in a relationship with their public and funders where they are seen as holding funds in trust. They are the vital link between those with compassion and those with need. Those with compassion want their dollar to go to the needy and are perceived as only giving if they are sure their wishes are being met. Aid agencies feel they are caught in a bind. They seek to ensure that their reporting emphasizes how little they spend on overheads (to suggest that "every cent" goes to the needy), yet without systems of financial tracking, checks on authority, internal audits properly funded, and training and monitoring, aid may go astray. . . . If an aid agency admits either internal corruption or being the victim of corruption, it risks losing the confidence of its aid provider public and thus its funding life-blood.¹²⁸

III. NGO Anticorruption Compliance Programs

Since NGOs face many of the same corruption risks as traditional business organizations, the remedy is also similar: putting in place a robust compliance program. A number of large, well-established NGOs now have, or are in the process of establishing, anticorruption compliance measures as part of their broader compliance programs. But unlike compliance programs at many large publicly held companies, anticorruption compliance programs at NGOs are generally a relatively new development.¹²⁹

Most of the major NGOs have policies that govern all their operations, including fundraising, delivering programs, meeting donor requirements, employment, finance, legal, and other issues. In addition, many of them have adopted codes of ethics or codes of conduct that govern conflicts of interest, whistleblower policies, and other corruption-related concerns.¹³⁰ Global hotlines, both telephone and internet, are becoming more routine.¹³¹ Due diligence practices, however, seem to be at an early stage of development, with some NGOs only recently turning their attention to this aspect of compliance.¹³² Putting in place policies and procedures and other components of a compliance program are less challenging than conducting due diligence and actively monitoring and enforcing

127. Due to the risk to their business, defense contractors have historically been at the forefront in addressing compliance issues relating to foreign bribery. Like many NGOs, they are highly dependent upon governmental sources of revenue. But, in many instances, the nature of their product, such as a sole-source contract, makes it less likely that the long-term survival of the business will ultimately be put in serious jeopardy.

128. Peter Walker, *Opportunities for Corruption in a Celebrity Disaster*, in CURBING CORRUPTION IN TSUNAMI RELIEF OPERATIONS 100 (2005), available at <http://www.adb.org/Documents/Books/Curbing-Corruption-Tsunami-Relief/curbing-corruption-tsunami-relief.pdf>.

129. Survey, *supra* note 74, Participants 1, 3, & 4.

130. Charity Navigator specifically includes this information in the "Accountability" section for each NGO it rates. See, e.g., Charity Navigator, Compassion International, <http://www.charitynavigator.org/index.cfm?bay=search.accountability&orgid=3555> (last visited June 27, 2011).

131. See, e.g., American Red Cross, Concern Connection Line, <https://www.integrity-helpline.com/Red-Cross.jsp> (last visited June 13, 2011); Feed The Children, Report Fraud or Abuse, http://www.feedthechildren.org/site/PageServer?pagename=org_report_fraud (last visited June 5, 2011); IRD, Who We Are: Compliance, <http://www.ird.org/who/compliance.html> (last visited June 13, 2011).

132. Survey, *supra* note 74, Participant 3.

a compliance program.¹³³ A whole range of extremely challenging and often-controversial decisions can be anticipated.

For some NGOs, the move towards instituting more formal compliance programs was driven by public revelations of questionable practices, pressure from major donors, or the prospect of losing USAID funding. “Compliance was a condition for improvement, for resolving critical issues,” said one survey participant referring to the problems his organization has encountered with one of the U.S.’s government agencies.¹³⁴ Losing government funds can be deadly, as demonstrated by the recent demise of AED, one of the largest and oldest NGO contractors for USAID.¹³⁵ Another major NGO, Oklahoma-based Feed The Children, was recently engulfed in a scandal that drew media attention due to its \$1 billion budget and the global scope of its activities.¹³⁶ Feed The Children’s board of directors, after ousting its charismatic president and facing a significant decline in donor support, put in place elements of a compliance program, including a new ethics policy, a nepotism policy, and a fraternization policy.¹³⁷

A. ANTICORRUPTION COMPLIANCE PROGRAMS FOR NGOS: GENERAL CONSIDERATIONS

The same general principles that apply to compliance programs of issuers and other companies that are subject to the FCPA and to the UK Bribery Act should apply to NGOs. Consideration also needs to be given to harmonizing compliance policies governed by the FCPA and the UK Bribery Act.¹³⁸ The basic contours of an effective internal compliance program should resemble those set forth in the U.S. Federal Sentencing Guidelines for organizations and the U.K.’s Ministry of Justice’s Guidance issued in conjunction with the UK Bribery Act.¹³⁹

133. See discussion *infra* pp. 138-39.

134. Survey, *supra* note 74, Participant 2.

135. See discussion, *supra* pp. 130-31.

136. See, e.g., Ken Miller, *Feed The Children Charity Under Criminal Investigation By Oklahoma Attorney General*, HUFFINGTON POST, Jan. 26, 2011, http://www.huffingtonpost.com/2011/01/26/feed-the-children-founder_n_814537.html; Debra Blum, *A Beleaguered Charity Giant Turns to a Veteran Leader to Restore Its Reputation*, PHILANTHROPY, Dec. 16, 2010, <http://philanthropy.com/article/Scandal-Ridden-Charity-Seeks/125728/>.

137. Nolan Clay, *Feed The Children No Longer Billion-Dollar Charity*, NEWSOK, Apr. 23, 2011, <http://newsok.com/feed-the-children-no-longer-billion-dollar-charity/article/3561299>.

138. For example, since the UK Bribery Act provides no exception, facilitating payments will need to be prohibited throughout an organization. Similarly, the UK Bribery Act’s prohibitions on improper inducements to private individuals or entities, often described as “private bribery,” will also need to be implemented throughout an NGO. Bribery Act, 2010, § 1 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>. On the other hand, since the definition of a foreign official is broader under the FCPA, prohibitions on the payment of improper inducements to foreign officials will need to include candidates as well as political parties and party officials. See Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-2(a)(2) (1998).

139. U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 (2011); UK Ministry of Justice, *The Bribery Act 2010—Guidance about Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing*, www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf (last visited Aug. 8, 2011) [hereinafter Bribery Act 2010—Guidance].

1. *Critical Components of an Effective Compliance Program*

In implementing a compliance program, the DOJ's policy guidance must always be kept in mind. "[T]he critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether . . . management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives."¹⁴⁰ It must determine whether a "compliance program is merely a 'paper program' or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner."¹⁴¹

The considerations for an anticorruption compliance program are essentially the same whether a traditional business organization or NGO is involved.¹⁴² A separate anticorruption compliance program is not required if an entity has in place an effective compliance program for other legal or policy concerns.¹⁴³ An anticorruption compliance program can serve as an adjunct or a supplement to existing compliance programs.

a. Proportionate Procedures

An "organisation's procedures to prevent bribery by persons associated with it" must be "proportionate to the . . . risks [of corruption] it faces and to the nature, scale, and complexity of the organisation's activities."¹⁴⁴ The procedures must be tailored to meet the organization's needs. They must be clear, practical, and relevant. Sufficient staff should be in place "to audit, document, analyze, and utilize the results of the [entity's] compliance efforts."¹⁴⁵

b. Commitment from the Top

An organization's top management must be committed to preventing the prohibited conduct by individuals and entities associated with it.¹⁴⁶ A "culture" of anticorruption compliance must be "fostered" throughout the organization and extend to its agents, consultants, and representatives.¹⁴⁷ An effective compliance program must be more than a

140. U.S. ATTORNEYS MANUAL § 9-28.800 (2008).

141. *Id.*

142. As was evident from the analysis in the opinion procedure release previously discussed regarding non-profit involvement with micro-financing in developing countries, many of the proactive measures discussed and recommended were essentially similar to those employed by more traditional business organizations. FCPA Review, 10-02 Op. Dep't of Justice 5 (2010), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf>; see also *supra* note 44 and accompanying text.

143. An organization's compliance program should not necessarily be separate from its system of internal accounting controls. An effective system of internal accounting controls includes a range of review and approval guidelines designed to detect and deter questionable conduct. Indeed, the planning, implementation, and monitoring of a compliance program should be closely linked to, if not intertwined with, an entity's system of internal accounting controls.

DEMING, *supra* note 57, at 49-50.

144. Bribery Act 2010—Guidance, *supra* note 139, Principle 1; see also U.S. SENTENCING GUIDELINES MANUAL, *supra* note 139, § 8B2.1, Applications Notes, § 2(A) (2011).

145. U.S. ATTORNEYS MANUAL, *supra* note 140, § 9-28.800.

146. Bribery Act 2010—Guidance, *supra* note 139, Principle 2; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 139 § 8B2.1(b)(2)(B).

147. Bribery Act 2010—Guidance, *supra* note 139, Principle 2.

series of policies and procedures. Employees must be “adequately informed about the compliance program and [be] convinced of the [entity’s] commitment to it.”¹⁴⁸ Sanctions must be enforced against senior and lower-level officials as well as employees, agents, and other intermediaries.¹⁴⁹

Genuine efforts also need to be made to ensure that anyone seeking, in good faith, to secure guidance or to make appropriate disclosures is not subject to retaliation.¹⁵⁰ Procedures need to be put in place so that knowledgeable officials can quickly answer questions and respond to concerns.¹⁵¹ The procedures must not be cumbersome or perceived as being punitive in nature. Otherwise, guidance will not be sought and corrective action will not be taken.

c. Risk Assessment

The organization must assess the nature and extent of its exposure to potential external and internal risks of corruption of persons associated with it.¹⁵² “The assessment must be periodic, informed, and documented.”¹⁵³ Factors and considerations can change over time.

d. Due Diligence

The organization must undertake due diligence procedures, taking a proportionate and risk-based approach.¹⁵⁴ In each situation, the extent of the inquiry should be governed by the circumstances. But regardless of the context, due diligence must always be conducted in good faith. It cannot be perfunctory. “It requires a dispassionate consideration of all relevant factors.”¹⁵⁵

Due diligence “also entails determining whether the basis for concern is unfounded and, if not, whether effective means are available to avoid the risks associated with the concerns raised.”¹⁵⁶ For example, written agreements by themselves seldom suffice, but they may deter prohibited conduct by incorporating a series of compliance measures and providing a basis for termination.

e. Communication and Training

An organization must ensure that its anticorruption policies and procedures are understood throughout the organization.¹⁵⁷ Ongoing education and training must be proportionate to the organization’s risks.¹⁵⁸ Compliance policies and procedures must be simple, clear, and readily available to individuals acting on behalf of the organization.¹⁵⁹ To be

148. U.S. ATTORNEYS MANUAL, *supra* note 140, § 9-28.800.

149. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 139, § 8B2.1 (b)(6).

150. *Id.*

151. DEMING, *supra* note 57, at 650-51.

152. Bribery Act 2010—Guidance, *supra* note 139, Principle 3; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 139, § 8B2.1(c), Applications Notes, § 6.

153. Bribery Act 2010—Guidance, *supra* note 139, Principle 3.

154. *Id.* Principle 4; see also U.S. SENTENCING GUIDELINES MANUAL, *supra* note 139 § 8B2.1(a)(1), (b).

155. DEMING, *supra* note 57, at 653.

156. *Id.*

157. Bribery Act 2010—Guidance, *supra* note 139, Principle 5; DEMING, *supra* note 57, at 648.

158. DEMING, *supra* note 57, at 648.

159. *Id.*

effective, the policies and procedures must be understandable to a person unsophisticated or unfamiliar with the issues.

f. Monitoring and Review

“On an ongoing basis, [a] compliance program must be monitored, regularly reviewed, and modified as necessary to address weaknesses and to be made more effective.”¹⁶⁰ The challenge is to develop a compliance program that effectively addresses areas of concern without becoming unduly burdensome, unresponsive, and unable to adjust to ever-changing needs.

2. NGO Compliance Programs: Challenges

In practice, what do NGO anticorruption compliance programs look like?¹⁶¹ Are they in fact similar to their counterparts at business organizations? If not, what accounts for the difference? And what challenges do NGOs face in anticorruption compliance?

According to the survey, anticorruption compliance programs at large NGOs are generally similar to those established by major U.S. corporations.¹⁶² Typically, they include general information about corruption and an explanation of the FCPA; things to watch for, like red flags; instructions on what to do in certain circumstances; an internal reporting system, including a telephone and internet hotline; and rules on the investigation and punishment of those who violate the NGO's policies.¹⁶³ This is accompanied by in-per-

160. *Id.*; see Bribery Act 2010—Guidance, *supra* note 139, Principle 6; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 139 § 8B2.1(b)(5), (c), Applications Notes, § 6.

161. A number of resources originating within the international NGO community are useful in the development of some elements of an anticorruption compliance program. Last year, Transparency International published a guide, PREVENTING CORRUPTION IN HUMANITARIAN OPERATIONS: HANDBOOK OF GOOD PRACTICES, to help address the corruption risks that potentially affect humanitarian operations. The Handbook was developed in cooperation with seven large international NGOs involved in delivering humanitarian aid around the world. See TRANSPARENCY INTERNATIONAL, PREVENTING CORRUPTION IN HUMANITARIAN OPERATIONS: HANDBOOK OF GOOD PRACTICES, available at http://www.transparency.org/publications/publications/humanitarian_handbook_feb_2010. Several organizations took on the accountability agenda in foreign aid in general. Humanitarian Accountability Partnership International (HAP), the first humanitarian sector's international self-regulatory body, established certification and accreditation standards and the complaints handling system. HAP, About Us, <http://www.hapinternational.org/about.aspx> (last visited June 6, 2011). The Sphere Project defines and upholds the standards of humanitarian response to disasters through a set of guidelines. The Sphere's main document, the HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE (the Sphere Handbook) requires members to adopt a code of conduct prohibiting, among other things, corruption in humanitarian operations. THE SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN HUMANITARIAN RESPONSE (2011), available at http://www.sphereproject.org/component/option,com_docman/task,cat_view/gid,17/Itemid,203/lang,english/. A number of other organizations and initiatives, such as Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), People in Aid, and Good Humanitarian Donorship also target compliance and accountability at NGOs. THE GOOD ENOUGH GUIDE: IMPACT MEASUREMENT AND ACCOUNTABILITY IN EMERGENCIES is a set of basic guidelines on accountability and program impact measurement in emergencies developed by the Emergency Capacity Building Project, a joint venture of several major international NGOs. See EMERGENCY CAPACITY BUILDING PROJECT, THE GOOD ENOUGH GUIDE: IMPACT MEASUREMENT AND ACCOUNTABILITY IN EMERGENCIES, available at <http://www.ecbproject.org/Pool/good-enough-guide-book-en.pdf>.

162. Survey, *supra* note 74, Participant 4.

163. *Id.* Participants 1, 2 & 4

son and other forms of training, including, in some NGOs, “electronic training,” with the help of written materials developed at the NGO’s headquarters.¹⁶⁴ The goal is to raise the staff’s corruption and fraud awareness and to teach them how to deal with corruption-related situations.¹⁶⁵ As one of the survey participants stated, “[i]f our people must pay, they need to get approval from a high-level person and record the payment properly.”¹⁶⁶

When asked to compare their compliance programs with those of business organizations, some survey participants saw only one difference—a lack of concern about complying with the accounting and record-keeping provisions of the FCPA.¹⁶⁷ Other participants perceived a major distinction between the nature of activities carried out by businesses and NGOs resulting in different compliance risks.¹⁶⁸ Yet most participants in the survey stated that the most significant difference is the degree to which there is a lack of funds and capacity. These are two of the principal factors that significantly lower the effectiveness of NGO anticorruption compliance programs.¹⁶⁹

To attract donor money, NGOs need to demonstrate that they have reduced their expenses to the absolute minimum. According to the Forbes Charity 200, among large U.S. NGOs, the average charitable commitment, “calculate[d] [as] how much of a charity’s total expense went directly to the charitable purpose . . . as opposed to management, certain overhead expenses and fundraising,” in 2010 was 86%.¹⁷⁰ Some charities survive and operate on much less than 14%.¹⁷¹ For example, the top four charities in the Forbes list,¹⁷² in terms of charitable commitment, have an efficiency rate of 100%.¹⁷³ All four of these charities concentrate their activities on “international needs.” The next eleven charities on the list, ten of which are international in orientation, have a charitable commitment rate of 99%.¹⁷⁴

Since most donors give money for specific projects and programs and not for general operations, they want their donations spent on aid and other forms of assistance. This means that there is practically no money for compliance.¹⁷⁵ Unrestricted grants that NGOs could use to build and operate compliance programs are scarce, and there are always many competing demands. With the attitude often being, “[t]his stuff does not apply to us,”¹⁷⁶ anticorruption compliance rarely tops the list of the most urgent or vital needs to win these funds.¹⁷⁷ Lack of reliable information about what is going on in the

164. *Id.*

165. *Id.* Participant 1.

166. *Id.*

167. *Id.* Participant 4.

168. *Id.* Participants 1 & 3.

169. *Id.* Participants 1, 2 & 3.

170. William P. Barrett, *America’s 200 Largest Charities*, FORBES, Nov. 17, 2010, <http://www.forbes.com/2010/11/16/forbes-charity-200-personal-finance-philanthropy-200-largest-charities-charity-10-intro.html>.

171. *Id.*

172. The four largest charities according to the Forbes list are: Brother’s Brother Foundation, Christian Blind Mission International, Gifts in Kind International, and Operation Compassion. See *The 200 Largest U.S. Charities*, FORBES, Nov. 17, 2010, http://www.forbes.com/lists/2010/14/charity-10_land.html (list sorted by charitable commitment).

173. *Id.*

174. *Id.*

175. Survey, *supra* note 74, Participants 1, 2 & 3.

176. *Id.* Participant 1.

177. *Id.* Participants 1 & 2.

field also makes it difficult to compete for funds.¹⁷⁸ As one survey participant explained, "to argue for the [FCPA compliance] budget, for funds for training and so on, I would have to present the board with a report justifying the need. It would be difficult for me to come up with such a report due to the lack of information."¹⁷⁹

Similarly, only a few donors are prepared to pay for anticorruption training and education.¹⁸⁰ Again, NGOs must take money for these programs from other sources, like the same rarely available unrestricted grants.¹⁸¹ Some NGOs include anticorruption and antifraud components in the training programs for their procurement officers and internal auditors,¹⁸² but even that does not appear to be prevalent in many NGOs.

Some NGOs do not even train their country leaders in anticorruption and fraud detection matters.¹⁸³ With some NGOs having difficulties in "getting local staff with capacity to perform, especially in post-conflict countries where educated people have not been produced for decades,"¹⁸⁴ they often have to start with general education of their local employees before more complex compliance issues, like anticorruption and antifraud, can be addressed in their training programs. Education and skill level of the local staff seem to be major issues for NGOs operating in developing countries.¹⁸⁵ Overall, the majority of the survey participants recognized that the lack of formal anticorruption and other compliance-related training and education represents a major gap in their compliance programs.

An insufficient number of internal auditors and forensically-trained accountants is another consequence of a lack of funding for compliance-related issues. Many NGOs employ staff accountants who conduct audits of their programs, including in overseas offices. But these are regular accountants who have no special training in uncovering fraud or other financial irregularities.¹⁸⁶ The result is that many instances of corruption and fraud may go undetected. Even if they are discovered, the headquarters office may never hear about them, or hear several months later because of problems in the organization's structure, namely the significant autonomy of country offices and patterns of limited internal communication.¹⁸⁷

Plus, in an emergency response, such as when a major disaster strikes a country, NGOs delivering humanitarian aid must hire local staff very quickly. In these circumstances, they have no time to do any sort of background or reputational check and no chance to get to know the people involved, which may mean that some of the local staff may sell aid for cash or otherwise misappropriate it.¹⁸⁸ But even when there is no urgency, it may be

178. See *supra* notes 88-89 and accompanying text.

179. Survey, *supra* note 74, Participant 2.

180. *Id.* Participants 1 & 2.

181. *Id.* Participant 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* Participant 3; see also generally *supra* notes 88-89 and accompanying text.

188. Survey, *supra* note 74, Participant 3. An experienced practitioner in the sector noted that in a response to an emergency,

[a]gencies need to hire large numbers of local staff rapidly, often with little understanding of cultural, religious, or ethnic backgrounds and affiliations. In many former major operations, aid

nearly impossible in some countries to have a reliable background check performed even on key local employees. NGOs instead rely on word of mouth to gain a sense of a situation.

Having a very lean administrative structure also means that NGOs often do not have people dedicated specifically to compliance work. Most NGOs have an operations officer and a general counsel who handle all kinds of issues, including compliance.¹⁸⁹ Inadequate understanding among the NGO's senior staff of "what a compliance program is about" sometimes means that the compliance officer may get a lot of other work sent to him or her, thus limiting the time the officer can spend on compliance issues and reducing the overall efficiency of the program.¹⁹⁰ Only a few large NGOs have one or two dedicated compliance officers.¹⁹¹ As one survey participant put it, "[o]ne person (myself) is reaching out to [several dozen] field offices."¹⁹²

This outreach is not always easy. As several survey participants pointed out, it is hard to explain the jurisdictional reach of U.S. anti-bribery laws to foreigners, especially if the local culture is conducive to corruption.¹⁹³ Even more difficult is to make these persons comply. The problems may range from foreign employees ignoring the headquarters' compliance procedures to much more complex situations, like one described by a survey participant:

How do you communicate to the lower level and local employees that we need to comply with law no matter what? We work in dangerous places. Our people travel around countries where bad guys are. If they are stopped at a checkpoint and a police officer asks for \$20 before he allows them to continue their travel, or they are under a gun, would you not pay? How do you say, "You need your superior's approval for such a payment," if you are under a gun? And then, if you give permission to pay under certain circumstances—will it not undermine the general message of compliance?¹⁹⁴

Since anticorruption compliance creates extra work for overseas offices, local staff can often be reticent to become actively involved. "People want to do [projects], not paperwork."¹⁹⁵ Compliance may also strain the NGO's relationship with local officials. "When we invite a foreign government official to attend our workshop, we require additional information and additional paperwork [to comply with the anti-bribery part of the NGO's compliance program], and they don't like it."¹⁹⁶

agencies found themselves spending months if not years trying to undo the webs of nepotism and minor exploitation they had inadvertently put in place. Other issues apply to the rapid buildup of international staff where, because of a lack of available experienced personnel, relatively inexperienced agency staffers may find themselves administering relatively large and complex operations.

Walker, *supra* note 128, at 99.

189. Survey, *supra* note 74, Participant 2.

190. *Id.* Participant 3.

191. *Id.* Participant 2.

192. *Id.* Participant 3.

193. *Id.* Participants 3 & 4.

194. *Id.* Participant 1.

195. *Id.* Participant 4.

196. *Id.*

Administering programs funded by different donors, each having different requirements as to how "their" programs must be administered, means that, in practice, NGOs often must comply with many arbitrary requirements.¹⁹⁷ As one survey participant put it,

One grant may require the approval by the central staff of all purchases over \$10,000 while the other one, of all purchases over \$25,000. One grant may require direct reporting of corruption issues; the other may not. These requirements are more difficult to meet as our operations are scattered around many countries.¹⁹⁸

Such arbitrary obligations put additional strain on the already lean administrative staff of most NGOs. It is not surprising that some NGO representatives bemoan a bygone time when USAID was their only donor and the NGO had to comply with a single standard.¹⁹⁹

These are some of the reasons why compliance programs at NGOs may seem "soft" compared to those of business organizations. With funding and staffing shortages, compliance programs must rely heavily on the personal contacts that the compliance officer, general counsel, or assistant general counsels establishes with the employees in overseas offices. One survey participant stated:

The way I operate, I create a contact, a network of people in the field offices who are conducive to what I do, and I work with them . . . We gather information, reach out and build relationships with local officers . . . I work less formally than a business compliance officer would.²⁰⁰

Another survey participant, whose organization has one of the most advanced global compliance programs in the sector, echoes this statement: "[w]e have compliance coordinators in all regions where we operate . . . But, these are not formal positions. They are just helping us. We are also supported by a number of lawyers and the HR department."²⁰¹ Internal auditors may be used to communicate the compliance message to local staff when they "go to the field offices and explain policies, rules, and legal issues."²⁰² In the end, reliance on personal contacts and informal cooperation tends to weaken the effectiveness of a compliance program as compliance turns into a voluntary, rather than obligatory, matter.

The semi-voluntary character of compliance at some NGOs is underscored by their reluctance to issue firm anticorruption and, sometimes, other compliance-related guidelines for their overseas offices, relying instead on the "good judgment of local senior management."²⁰³ As an alternative to firm guidance, compliance programs may contain a set of recommendations on how to act in certain situations. In the words of one survey participant, "[w]e issued the FCPA guidance but did it cautiously. We like to be consulted in case of a problem rather than issue firm requirements. We also described the record-keeping requirements and asked to inform the regional controller in case of problems."²⁰⁴

197. *Id.* Participant 2.

198. *Id.*

199. *Id.*

200. *Id.* Participant 3.

201. *Id.* Participant 4.

202. *Id.* Participant 3.

203. *Id.*

204. *Id.* Participant 2.

As was mentioned earlier,²⁰⁵ such consultations are not always possible; therefore, decisions made *in loco* may not be the ones that the headquarters would prefer.

IV. Conclusion

The dangers of corruption in NGO projects and the consequences of such corruption are ever-present and may cost NGOs their reputation, funding sources, and donors. International NGOs also increasingly fear the risks of violating foreign bribery and other anticorruption laws.²⁰⁶

Yet the mood in the international non-profit circles appears to be that of general concern and cautious waiting. One survey participant reported that “[e]verybody in our space is concerned . . . It is a matter of time before the attention [of the Department of Justice] will be turned to NGOs.”²⁰⁷ Another noted, “[w]e are watching the UK Bribery Act closely as perhaps it applies to NGOs.”²⁰⁸ Still another survey participant is sure that “USAID will keep pressure on the NGOs it works with,” demanding greater accountability.²⁰⁹ But there also seems to be a consensus that “without a lawsuit, an indictment, or debarment, nonprofits will do little in this area.”²¹⁰ Some NGOs are simply relying on the nature of their activities for some protection: “The Department of Justice is less likely to target NGOs than businesses, which gives us a little more comfort.”²¹¹

Special protective legislation is not suggested for NGOs.²¹² Unlike most industries, NGOs with a truly charitable nature are unlikely to be targeted by enforcement authorities for foreign bribery violations. A public backlash and considerable political fallout from such an agenda can be expected. Practical considerations such as the receptivity of juries and judges are also likely to discourage the targeting of NGOs in general. But in egregious situations, enforcement authorities will not, and cannot be expected to, overlook clear violations, even for NGOs that undertake the most laudable of missions.

For NGOs that are not fundamentally of a charitable nature, and that compete with more traditional business organizations, the DOJ can be expected to be aggressive in its enforcement efforts when warranted by the facts and circumstances. While it is less clear what enforcement officials will do in other jurisdictions, over time NGOs can and should

205. *See supra* notes 88-89 and accompanying text.

206. As an indicator that the time for anticorruption compliance at NGOs has arrived, the roundtable on the FCPA and anticorruption good practices in the NGO sector, organized last November by InsideNGO, an umbrella organization for the international relief and development nonprofit community, attracted representatives from about two dozen NGOs. Survey, *supra* note 74, Participant 1.

207. *Id.*

208. *Id.* Participant 3.

209. *Id.* Participant 2.

210. *Id.* Participant 3.

211. *Id.* Participant 1.

212. The underlying basis for the FCPA and other anti-bribery legislation should apply equally to NGOs. If the NGOs objectives are truly laudable in nature, no basis should exist for the payment of a bribe. Whether it is in the form of exercise of prosecutorial discretion, an absence of the requisite elements to establish a violation, or the duress or necessity exceptions, sufficient flexibility currently exists to address extraordinary situations. Moreover, NGOs have not been subjected to a history of unwarranted prosecutions. To the contrary, an NGO has not been charged to date with a violation of the FCPA. If any special legislation or regulations were to be considered, they would relate to requiring that sufficient resources be dedicated to addressing compliance needs.

be expected to be fully subject to investigations and enforcement actions. In general, NGOs can expect to face increasingly greater scrutiny.

International NGOs are also more likely to be targeted by donors and other funding sources for corruption in their programs and activities. The unique position of many NGOs, being almost solely dependent on donors as well as governmental and quasi-governmental funding sources, dictates the need for greater accountability with a particular focus on anticorruption compliance. Despite the lack of resources and an assortment of challenges, NGOs must find efficient and cost-effective ways to implement and enforce compliance programs that adequately address their corruption risks. The key for the international NGO community is to be proactive and not reactive.