



Anti-Corruption and Export Development Canada

Recommendations for an Effective Policy and Improved Regulatory Oversight

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Recent media coverage regarding the sale of a Bombardier jet to a company owned by South Africa's infamous Gupta family has triggered an important public debate about the accountability and transparency of Canada's export credit agency. The deal, which was financed by Export Development Canada (EDC), is just one of several transactions the agency has supported despite clear evidence of high corruption risks.¹ Such decisions call into question EDC's claim of "zero tolerance"² for business obtained through corruption and point to the need for improved government oversight of EDC decision-making.³

EDC's governing legislation – the *Export Development Act* – is scheduled for parliamentary review this year. The review, which takes place only every 10 years, offers a timely opportunity to evaluate the effectiveness of EDC's anti-corruption policy and reassess the scope of EDC's anti-corruption commitments.

In this report, we examine reforms needed to raise EDC's anti-corruption client screening to a more robust standard. Section one outlines the need for change, providing contextual information about the regulatory environment in which EDC operates and critical analysis of the agency's current anti-corruption policy. Section two provides recommendations for amendments to the *Export Development Act* and EDC's anti-corruption policy. The recommendations are informed by leading anti-corruption policies and guidance documents from other export credit agencies, international financial organizations and the private sector.⁴

Section One: The Need for Reform

A. EDC and Corruption Risk

EDC is a Crown corporation. Its mandate is "to support and develop trade between Canada and other countries and Canada's competitiveness in the international market-place."⁵ To fulfill this mandate, EDC provides a variety of financial services to Canadian and foreign businesses. These include loans, insurance, bonds and guarantees. EDC is income generating and pays dividends to the Government of Canada, its sole shareholder.

¹ Several examples are examined in this report, starting at p 5.

² EDC, *Doing Better Together: 2016 Corporate Social Responsibility Report* (2017) at p 34:
http://www1.edc.ca/publications/2017/2016csr/en/_img/pdf/2016-EDC-CSR-Report-ENG.pdf

³ Parliamentarians have remarked on this need. See, for example, Charlie Angus, Brian Masse and Tracey Ramsey, "Letter to Minister François-Philippe Champagne about EDC Ethics" (19 Mar 2018):
https://www.scribd.com/document/373328782/Letter-from-NDP-MPs-to-Minister-of-International-Trade-Francois-Philippe-Champagne#from_embed

⁴ Above Ground would like to thank Canadian lawyer and anti-corruption expert Mora Johnson (<http://www.morajohnsonlaw.ca>) for her substantial contributions to this report.

⁵ *Export Development Act* (RSC, 1985, c E-20). Since 2017 EDC has also had the mandate, as the parent company of Canada's new development finance institution, to "provide development financing and other forms of development support." Ibid. This new EDC role will not be discussed in the present report.

EDC engages with sectors with serious corruption problems. According to Transparency International, the highest-risk sector for corruption is construction, including in relation to mining, oil and gas projects.⁶ These industries made up almost 30 percent of EDC's business portfolio in 2017.⁷

There are three principal categories of corruption risks faced by EDC:

- Bribes given or offered by an EDC employee.
- Corruption associated with business activity that is financed, insured or guaranteed by EDC. For instance, EDC might provide a loan to a client for a deal secured as a result of bribery.⁸
- Corruption associated with an EDC client's business activities that are not directly related to the EDC-supported transaction. For instance, EDC might provide a loan to a company for business activity that is free of corruption, while the company or its subsidiary faces allegations of corruption related to other business activity.

B. EDC's Regulatory Environment

Despite the significant corruption risks associated with the business sectors in which EDC works, the agency operates in a weak regulatory environment. Most other financial institutions in Canada are regulated to prevent and detect money laundering through the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA).⁹ This statute obligates financial institutions to perform significant due diligence to assess and mitigate risks associated with their clients,¹⁰ which helps these institutions avoid participating in money laundering and other crimes including corruption.¹¹ EDC is not subject to the PCMLTFA. Nor does its governing statute, the *Export Development Act*, contain analogous provisions to control for the risk of EDC support to high-risk clients, or loan repayment with the proceeds of corruption. In fact, the act does not address the issue of corruption in any way.

EDC is subject to the *Corruption of Foreign Public Officials Act* (CFPOA), which criminalizes the offering or paying of bribes to foreign officials, and other bribery-related offenses. However, the statute does not prohibit EDC from providing services to companies that offer or pay bribes to foreign officials.¹² The CFPOA could, however, be infringed if an EDC employee were to engage in bribery-related offences prohibited under the act.

⁶ EDC, "Managing Non-Credit Risks of International Business" (2015), video, at 3:20: <https://www.edc.ca/EN/Knowledge-Centre/Multimedia-Centre/Pages/managing-non-credit-risks.aspx>

⁷ In 2017, "Construction & Infrastructure," "Mining" and "Oil and Gas" represented 28.4 percent of EDC's business volume. EDC, "Canadian Industry Sub-sector 2017": <https://www.edc.ca/EN/About-Us/Disclosure/Reporting-on-Transactions/Pages/industry-sub-sector-2017.aspx>

⁸ Another scenario involves the provision of a loan for general corporate purposes to a company whose overseas subsidiaries are engaged in corruption. Such a loan can be used at a company's discretion, throughout its global operations.

⁹ EDC is not subject to the PCMLTFA because it does not accept deposits (i.e. flow-through transactions) from clients, which largely eliminates the risk of EDC's direct participation in money laundering.

¹⁰ For example, *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (SC 2000, c 17) at s 9.3(1)-(2).

¹¹ See FINTRAC, "Guidance on the risk-based approach to combatting money laundering and terrorist financing" (2017): <http://www.fintrac-canafe.gc.ca/guidance-directives/compliance-conformite/rba/rba-eng.asp>

¹² Offering financial services to entities committing bribery offences would not be an offence in itself, although participation in the agreement or plan to offer or pay a bribe could result in criminal liability.

C. EDC's Anti-Corruption Policy

In the absence of legislative direction, EDC exercises absolute discretion in the development and application of its anti-corruption policy. This policy, which is focused on the corruption of foreign public officials, is set out in several corporate documents:

- *EDC Code of Business Ethics and Code of Conduct*
- *EDC's Anti-Corruption Policy Guidelines*
- *EDC's Approach to Combatting Bribery and Corruption in International Business Transactions*

EDC's code of ethics commits it to not "knowingly give, offer or agree to give or offer a bribe," to not "support a transaction that involves the offer or giving of a bribe" and to "exercise reasonable diligence and care not to support unknowingly such a transaction."¹³ These commitments and EDC's anti-corruption due diligence process are based on the non-binding *Recommendation on Bribery and Officially Supported Export Credit* of the Organisation for Economic Co-operation and Development (OECD) issued in 2006 (OECD recommendation).¹⁴

EDC's policy sets out a due diligence process to be carried out for each transaction in the following stages: i) before approval; ii) for the duration of a contract; and iii) after a contract has ended.

- i) Prior to approval of support, EDC undertakes screening measures. EDC reviews "all available information" concerning the client and associated corruption risks.¹⁵ It requests that prospective clients sign an anti-corruption declaration and disclose whether they or anyone acting on their behalf has been charged or convicted within the last five years for violating anti-bribery laws. If EDC suspects corruption risks related to a prospective transaction, the agency suspends approval of the application and undertakes "enhanced" due diligence, i.e., further fact-finding.¹⁶ If during that process the agency determines that there is "credible" evidence of a violation of the CFPOA, EDC alerts Canadian law enforcement authorities and refuses support unless the client is cleared by those authorities.¹⁷
- ii) If EDC becomes aware of evidence of bribery related to an ongoing transaction, the agency undertakes enhanced due diligence measures and will "consider" such "appropriate" actions as interrupting loan disbursements.¹⁸ If, based on its enhanced due diligence, the agency determines

¹³ EDC, *EDC Code of Business Ethics and Code of Conduct* (2017) at pp 6-7:
<https://www.edc.ca/EN/Promotions/Documents/code-business-ethics.pdf>

¹⁴ Working Party on Export Credits and Credit Guarantees, *OECD Council Recommendation on Bribery and Officially Supported Export Credit* (2006): <https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/oeed-council-recommendation-bribery-officially-supported-export.pdf> [ECG, "Recommendation"].

¹⁵ EDC, *EDC's Approach to Combatting Bribery and Corruption in International Business Transactions* at p 1:
<https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/complementary-anti-corruption-approach.pdf> [EDC, "Approach"].

¹⁶ Ibid; EDC, *EDC's Anti-Corruption Policy Guidelines* at pp 1-2: <https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/anti-corruption-guidelines.pdf> [EDC, "Guidelines"].

¹⁷ Ibid at p 2; see also Working Party on Export Credits and Credit Guarantees, "Export Credits and Bribery: 2016 Review of Responses to the Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits" (2017) at p 22: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=TAD/ECG%282017%294/FINAL> [ECG, "Survey"].

¹⁸ EDC, "Guidelines" at p 2.

that there is “credible” evidence of a violation of the CFPOA, EDC will alert Canadian law enforcement authorities and deny access to further support until the client is cleared¹⁹ or until EDC is satisfied that the client has “address[ed] past failures.”²⁰

- iii) Where “credible” evidence of bribery related to a completed transaction emerges, EDC will “consider” the “appropriate” action, such as refusing to support future transactions with the same client²¹ or alerting Canadian law enforcement.²²

D. Key Weaknesses of the Policy

Significant discretion

EDC’s due diligence process is highly flexible. The agency exercises broad discretion regarding the measures it uses to screen, monitor and sanction clients. Consider the following examples, which illustrate the breadth of EDC’s discretion regarding critical anti-corruption measures.

- A number of international financial institutions produce debarment lists of firms that are ineligible for support because of past misconduct, such as corruption-related offences. EDC states that, while it uses the World Bank debarment list “as an indicator of potential risk for bribery and corruption,” a company’s presence on the list is “not always a prohibition for support.” Rather, it merely “serves as an indicator of cases where [enhanced] due diligence is required.”²³
- EDC relies on written anti-corruption declarations by its customers as a key component of its anti-corruption program. However, in FAQs addressed to potential clients, EDC indicates that it does not rule out supporting a client who refuses to sign the declaration: “Although we will respect a decision not to sign the declaration, we *may* not be able to proceed with the transaction” [emphasis added].²⁴
- EDC states that it refuses to provide support or requires corrective measures of a client when it becomes aware of “credible” evidence of corruption.²⁵ However, it does not define in its anti-corruption materials what constitutes “credible” evidence of corruption. EDC may be employing a *prima facie* standard consistent with the OECD recommendation, namely, “evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted.”²⁶
- EDC states that it will bar any party convicted of bribery from receiving support “until EDC considers that such party has taken appropriate measures to deter further bribery.”²⁷ However, in a separate document the agency states that it looks for certain measures when considering “reforms [a] company may have undertaken to address past failures to comply with anti-

¹⁹ Ibid; ECG, “Survey” at p 22.

²⁰ EDC, “Approach” at p 2.

²¹ Ibid.

²² Ibid; ECG, “Survey” at p 22.

²³ EDC, “Approach” at p 2.

²⁴ EDC, “Business Ethics: Anti-Corruption FAQs”: <https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/business-ethics.aspx>

²⁵ EDC, “Guidelines” at p 2.

²⁶ ECG, “Recommendation” at p 3.

²⁷ EDC, “Guidelines” at p 2.

corruption laws,” and that it “*may* suggest areas for improvement in order to meet EDC’s requirements” if the company has none of these measures in place [emphasis added].²⁸ This vague language does not give a clear picture of precisely what the agency requires, and leaves open the possibility that EDC might provide support to a company convicted of corruption even in the absence of corrective measures.

Minimal disclosure

The vast discretion afforded to EDC under its governing statute and in its anti-corruption policy is not balanced with adequate disclosure mechanisms. EDC’s due diligence process is an internal assessment about which the agency discloses very little information. EDC does not report how many prospective clients are subject to enhanced due diligence reviews or are deemed ineligible due to corruption concerns, how often it has imposed the adoption of anti-corruption measures as a condition for support, or how it monitors compliance in such cases. Nor does EDC disclose information about its anti-corruption due diligence in relation to any particular transaction.

Inadequate attention to corruption risks across clients’ business operations

EDC’s anti-corruption policy focuses on preventing the agency’s involvement in corrupt *transactions* — as opposed to its involvement with corrupt companies. For instance, EDC describes its “zero tolerance policy” on “bribery and corruption in a transaction we are supporting,” and commits that it “will not support a transaction that involves the offer or giving of a bribe.”²⁹ The policy contains no clear commitment to avoid supporting a company associated with credible or even proven allegations of corruption unrelated to the EDC-supported activity. In fact, the agency has provided support to companies in these very circumstances.

E. Troubling Outcomes in EDC’s Application of the Policy

EDC’s client list includes companies associated with serious corruption risks. Some of these companies were approved by EDC after being denied support by other financial institutions on the basis of corruption concerns. A few illustrative cases follow.

Airbus

In July 2016 Britain’s Serious Fraud Office opened an investigation into “allegations of fraud, bribery and corruption in the commercial aviation business of Airbus.”³⁰ Airbus allegedly used third-party commercial agents to pay bribes to secure commercial and military jet deals.³¹ Within a year, fraud prevention authorities in France opened a similar investigation.³² Since 2016 the British, French and German export

²⁸ EDC, “Approach” at p 2.

²⁹ *Ibid* at p 1.

³⁰ “Serious Fraud Office starts Airbus inquiry,” *The Guardian* (7 Aug 2016):

<https://www.theguardian.com/business/2016/aug/07/uk-office-launches-inquiry-into-airbus-deals>

³¹ “Airbus braces for a difficult landing after corruption allegations,” *The Guardian* (5 Nov 2017):

<https://www.theguardian.com/business/2017/nov/04/airbus-year-corporate-confessions-difficult-landing>

³² “Airbus Probed by French Authorities as UK Fraud Case Widens,” *Bloomberg* (17 Mar 2017):

<https://www.bloomberg.com/news/articles/2017-03-16/airbus-under-investigation-in-france-over-fraud-allegations>

credit agencies have blocked support for Airbus on the basis of bribery concerns.³³ In the second half of 2017, EDC provided Airbus with between \$750 million and \$1.5 billion in financing.³⁴

SNC-Lavalin

In March 2018, EDC provided SNC-Lavalin Group Inc. with a loan of between \$100 and \$250 million for the company's general operations. At the time EDC approved the loan, SNC-Lavalin arguably represented an unreasonably high risk of involvement in corruption. SNC Lavalin Group Inc. and two of the company's international subsidiaries had been charged in Canada under the CFPOA for corruption-related offences in Libya — charges for which they are being criminally prosecuted.³⁵ The subsidiaries have been on the World Bank's debarment list since 2013, when they were banned from bidding on World Bank contracts for a period of 10 years due to "misconduct" involving "conspiracy to pay bribes."³⁶

The Guptas and Bombardier

EDC's due diligence procedures manifestly failed to effectively assess the risks posed by a 2014 loan to a company owned by the South Africa-based Gupta family for the purchase of a Bombardier luxury jet. At the time, the Guptas were subject to widely reported allegations of corruption tied to their close association with the South African president. There was a clear risk that the Guptas were acting as proxies for then-President Zuma, that the Guptas would use the jet to provide special favours to government officials, and that the loan might be repaid with the proceeds of corruption. The Guptas had been denied loans from other financial institutions before being approved by EDC.³⁷

Allegations have emerged that Bombardier sold the jet to the Guptas at a discount to gain favour in its bid on a locomotive contract it was later awarded by a state company controlled by Gupta allies. EDC also issued financing in support of that contract, which is now the subject of a parliamentary inquiry.³⁸

Bombardier, which is one of EDC's most frequent clients, also faces allegations of corruption in other

³³ The policy remained in place as of January 2018. See "Airbus in talks with insurers to fill export funding gap," Reuters (22 Jan 2018): <https://uk.reuters.com/article/uk-aviation-finance-exportfinance/airbus-in-talks-with-insurers-to-fill-export-funding-gap-idUKKBN1FB26C>

³⁴ All EDC transactions noted in this report are from EDC, "Individual Transaction Information": <https://www19.edc.ca/edcsecure/disclosure/DisclosureView.aspx>

³⁵ "RCMP charges SNC-Lavalin with fraud and corruption linked to Libyan projects," *Financial Post* (19 Feb 2015): <http://business.financialpost.com/news/rcmp-charges-snc-lavalin-with-fraud-and-corruption-linked-to-libyan-projects>; SNC-Lavalin is awaiting trial in Quebec for corruption-related charges in connection with a contract in Montreal. See "MUHC fraud trial set for Jan 8, 2019 – six years after arrests," *Montreal Gazette* (27 Sept 2017): <http://montrealgazette.com/news/local-news/muhc-fraud-trial-set-for-jan-8-2019-six-years-after-arrests>

³⁶ World Bank, "World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years" (17 Apr 2013): <http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>; World Bank, *World Bank Listing of Ineligible Firms & Individuals* (2018): <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>

³⁷ See details about the allegations against the Guptas and other institutions' denial of financing in "Export Development Canada is the Death Star in the Canadian economy," *The Globe and Mail* (9 Mar 2018): <https://www.theglobeandmail.com/opinion/article-export-development-canada-is-the-death-star-in-the-canadian-economy/>

³⁸ "Questions Mount over Bombardier's deals with the notorious Gupta family," *The Globe and Mail* (7 Mar 2018): <https://www.theglobeandmail.com/report-on-business/questions-mount-over-bombardiers-deals-with-notorious-guptafamily/article38230152/>

jurisdictions and is under investigation by South African and Swedish authorities.³⁹ EDC has financed four new Bombardier deals since it cancelled the Gupta loan in December 2017.

Kinross

In March 2018, the U.S. Securities and Exchange Commission (SEC) reached a settlement with Kinross Gold regarding violations of the *Foreign Corrupt Practices Act* at its operations in Ghana and Mauritania.⁴⁰ EDC approved at least two general loans to Kinross Gold during the period that the company was under investigation by the SEC — an investigation that had been widely reported in mainstream Canadian media. In a recent public statement regarding Kinross Gold, EDC affirms that: “[p]rior to signing a loan (...), EDC conducts a due diligence process under its risk management framework where it assesses the strength of the environmental, social, and financial controls and policies that an organization has in place. This due diligence has been applied on all corporate facilities for Kinross (...), both at the corporate and subsidiary levels.”⁴¹

Section Two: Recommendations

A. Amendments to the *Export Development Act*

To ensure clarity, consistent application and public accountability, EDC’s anti-corruption policy and practice should be grounded in law. The *Export Development Act* should be amended to include a statutory duty that prohibits EDC from supporting business transactions that involve corruption. This could be achieved by amending the act to make it an offence for EDC to support activity that involves corruption. This new offence should be applicable to all natural and legal persons—that is, to EDC staff and to EDC as a corporation. It should be a strict liability offence, meaning that EDC or its staff could be held criminally responsible even if they had no knowledge of the corruption or no intent to commit an offence, but failed to take appropriate measures to prevent it.

The *Export Development Act* and its regulations should also be amended to create new anti-corruption due diligence obligations for EDC. Compliance with these provisions would provide EDC and its staff with a defence to the offence described above. In other words, the agency and its employees would have an available defence from prosecution in relation to corruption so long as they carried out reasonable anti-corruption due diligence.

Furthermore, the *Export Development Act* should be amended to prohibit EDC support of any kind to a company

- involved in legal proceedings concerning corruption-related offences in any country;
- convicted on corruption-related charges in any country within the last five years;

³⁹ “How Bombardier’s ‘success fees’ gave the transport giant an inside track to deals around the world,” *The Globe and Mail* (30 Dec 2017): <https://www.theglobeandmail.com/news/investigations/bombardier-success-fees-inside-track-deals/article37454077/>

⁴⁰ Securities and Exchange Commission, “Administrative Proceeding File No. 3-18407” (26 Mar 2018): <https://www.sec.gov/litigation/admin/2018/34-82946.pdf>

⁴¹ EDC, “Export Development Canada Response,” *Business and Human Rights Resource Centre* (20 Feb 2018): [https://business-humanrights.org/sites/default/files/documents/BHRRRC response - Feb 19.pdf](https://business-humanrights.org/sites/default/files/documents/BHRRRC%20response%20-%20Feb%2019.pdf)

- that has settled an action regarding corruption-related charges in any country within the last five years;
- named on the debarment list of the World Bank Group, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development or the Inter-American Development Bank; or
- listed on the Canadian government’s ineligible and suspended suppliers list under the Integrity Regime.⁴²

Finally, the *Export Development Act* should be amended to mandate the Auditor General of Canada to audit the design, implementation and effectiveness of EDC’s anti-corruption policy and practice on a regular basis, and to submit reports to the board of EDC, the Minister of International Trade and both houses of Parliament.

B. Strengthened Anti-corruption Policy

Below we outline the essential elements of a robust anti-corruption policy. Our recommendations are informed by leading anti-corruption policies at international financial organizations and in the private sector, and by authoritative guidance documents such as the International Chamber of Commerce’s *Rules on Combatting Corruption*,⁴³ the OECD’s *Anti-Corruption Ethics and Compliance Handbook for Business*⁴⁴ and Transparency International’s *Business Principles for Countering Bribery*.⁴⁵

We divide the recommendations into nine categories: internal controls; staff training; communication to clients; mandatory no-bribery declarations; due diligence reviews; clear ineligibility criteria; contractual measures; standard operating procedures following allegations of bribery; and transparency and disclosure.

1. Internal controls

1.1. “Tone from the top”

- EDC’s board of directors and senior management must communicate to all employees a strong and explicit commitment to the policy.⁴⁶

1.2. Oversight

- Responsibility should lie with a high-ranking officer, such as the CEO, to ensure that the policy is carried out through clear and consistent lines of authority.⁴⁷

⁴² Government of Canada, “Ineligible and suspended suppliers under the Integrity Regime” (2018): <https://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html>

⁴³ ICC, *ICC Rules on Combatting Corruption* (2011): <https://iccwbo.org/publication/icc-rules-on-combating-corruption/> [ICC, “Rules”].

⁴⁴ OECD et al., *Anti-Corruption Ethics and Compliance Handbook for Business* (2013): <http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>

⁴⁵ TI, *Business Principles for Countering Bribery* (2013): https://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery [TI, “Principles”].

⁴⁶ See ICC, “Rules” at art 10(a) and Torys LLP, “When your anti-bribery and corruption policy isn’t enough” (16 Jan 2017): <https://www.torys.com/insights/publications/2017/01/when-your-anti-bribery-and-corruption-policy-isnt-enough>

- One or more senior officers should be appointed to oversee implementation of the policy. They should have adequate levels of resources, authority and independence, and should report periodically and directly to both the CEO and audit committee of EDC's board of directors.⁴⁸

1.3. Protected whistleblowing measures:

- EDC should offer channels to raise concerns, seek advice or report in good faith suspected violations of the policy in full confidentiality and without fear of retaliation. Channels should include an option for anonymous reporting,⁴⁹ and all reports made in good faith should be investigated.

1.4. Disciplinary measures

- Adequate and proportional corrective and disciplinary measures should be created for officer, director or employee violations of the policy.⁵⁰

1.5. Monitoring and improvement

- Senior officers appointed to oversee the policy should monitor the policy and its implementation and make improvements as necessary.⁵¹
- An independent audit of the adequacy and effectiveness of the policy should be carried out annually, with the report delivered directly to the CEO and the audit committee of the board.

2. Staff training

- Corruption prevention and detection training should be mandatory for all relevant EDC staff, including all those responsible for approving EDC transactions.⁵²
- Training should be mandatory every two years for all relevant employees, and promptly provided to new employees.
- An easily accessible staff guide should communicate relevant operational standards and practices, as a supplement to training.
- Annual reviews of EDC employees should include an evaluation of their adherence to the policy.

3. Communication to clients

⁴⁷ TI, "Principles" at 6.1.2.

⁴⁸ ICC, "Rules" at art 10(e).

⁴⁹ Ibid at art 10(m).

⁵⁰ Ibid at art 10(n).

⁵¹ TI, "Principles" at 6.8.

⁵² EDC should also consider best practices set by other export credit agencies in adopting mandatory staff training in key anti-corruption policy elements, such as no-bribery declaration forms, mandatory contract provisions, due diligence reviews and reporting channels. See Transparency International, *Export Credit Agency Anti-Bribery Practices* (2010):

https://www.transparency.org/files/content/pressrelease/20100629_TI-S_ECA_Anti-bribery_Practices.pdf [TI, "Practices"].

- EDC should clearly communicate its anti-corruption policy and expectations to all prospective and existing clients.
- Relevant existing EDC publications⁵³ should be reviewed to ensure they are useful, accessible to the general reader, and consistent with the new, strengthened anti-corruption policy. They should be dated and located in a clearly-marked anti-corruption section of the EDC website.

4. Mandatory no-bribery declarations

The no-bribery declaration that EDC asks prospective clients to sign in their application for credit, insurance and other services should be strengthened as follows:

- The declaration should be mandatory. Any client that fails to sign the declaration should be ineligible for EDC support.
- The declaration should explicitly apply to all third parties engaged by the client (e.g., agents and intermediaries), making the applicant clearly responsible for its agents and other third parties engaged in the EDC-supported transaction.
- The declaration should state that the applicant will be required to provide to EDC the identity of all persons acting on the applicant's and its affiliates' behalf, and the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons.
- Consequences for making a false statement in the no-bribery declaration, including civil and criminal penalties, should be clearly communicated in the declaration.⁵⁴
- If an existing client is found to have made a false statement, the transaction with that client should be terminated, and the client should be deemed ineligible for EDC support for a period of five years.
- Applicants should attest that they understand they are required to develop, implement and document a management control system for fighting corruption.
- Applicants should have a positive obligation to notify EDC of any changed circumstance with respect to a non-bribery declaration.
- Applicants should be required to renew the declaration each time support is issued by EDC.

5. Due diligence reviews

Following the example of most financial institutions and companies, EDC should adopt mandatory "know your counterparty" due diligence procedures that it applies when entering into each new transaction with a client. Such procedures will enable EDC to adequately assess the risks each client presents and to identify red flags. Any red flags should be thoroughly investigated in proportion to the risk presented and should

⁵³ Such as EDC, *Financial Crime in International Trade* (2016): <https://edc.trade/financial-crime-international-trade/> and EDC, *Keeping Corruption Out: EDC's Guide for Canadian Exporters* (2017): <https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/keeping-corruption-out.pdf>

⁵⁴ For example, the U.S. export credit agency, EXIM Bank, states that "[a]ll information provided to EXIM Bank is subject to the provisions of 18 U.S.C. §1001, which provides for civil and criminal penalties for a person that knowingly and willfully (1) falsifies or conceals a material fact; (2) makes any materially false or fraudulent statement or representation; or (3) makes or uses any false writing or document to EXIM Bank, whether in connection with an application or otherwise." EXIM, "Requirements and due diligence standards": <https://www.exim.gov/policies/due-diligence-standards>

be resolved. When corruption risk is high, EDC should decline to support the company.⁵⁵ Due diligence should be ongoing throughout the life of EDC's relationship with its client.

EDC's "know your counterparty" due diligence process should, at a minimum, include the procedures outlined below.

5.1. Entity, director, officer and beneficial owner due diligence

- When assessing a potential client, EDC should collect and verify information about the client and its directors, officers and beneficial owners. Identification documents for these individuals and entities should be sought and copies kept on record. Names should be run through a "World Check" or similar due diligence commercial database, to identify criminal convictions, politically exposed persons (PEPs),⁵⁶ family members and close associates of PEPs, organized crime connections, presence on United Nations and other sanctions lists, etc.
- EDC should conduct a search for red flags reported in the public domain, such as reporting in reputable news outlets.

5.2. Debarment lists

- EDC should review all relevant federal and provincial Canadian debarment lists, such as the Canadian government's ineligibility and suspension list.
- EDC should review the debarment lists of the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and World Bank Group.

5.3. Due diligence on third parties

- The use of agents or other third parties is linked to a higher risk of corruption. As indicated above, the no-bribery declaration signed by the applicant for EDC services should indicate that the applicant will be required to provide to EDC the identity of all persons acting on the applicant's and its affiliates' behalf in relation to the transaction to be supported, and the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons.⁵⁷
- EDC should not provide services to any client or prospective client without a full and satisfactory due diligence review of any third parties involved in the transaction.⁵⁸

⁵⁵ TI, "Principles" at 6.2.1.4.

⁵⁶ A politically exposed person is "a person entrusted with a prominent position that typically comes with the opportunity to influence decisions and the ability to control resources." FINTRAC, "Politically exposed persons and heads of international organizations – Securities dealers" (2017): <http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide13/13-eng.asp>

⁵⁷ This is the case with Norway's export credit agency, GIEK, which requires that in the application for services, the applicant disclose all other persons or companies acting on its behalf in the transaction, along with their role and the accompanying fee, including how the fee is calculated and payable. GIEK, "Application Process": <https://www.giek.no/application-process/requirements-and-documentation/>

⁵⁸ EDC, *Financial Crime in International Trade* (2016) at p 7: <https://edc.trade/financial-crime-international-trade/>

6. Clear ineligibility criteria

EDC should publish clear criteria for client ineligibility. A company should be ineligible for support if it

- is involved in legal proceedings concerning corruption-related offences in any country;
- has been convicted on corruption-related charges in any country in the past five years;
- has settled an action regarding corruption-related charges in any country in the past five years;
- is listed on the debarment list of the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and World Bank Group;⁵⁹ or
- is listed on the Canadian government's ineligible and suspended suppliers list under the Integrity Regime.

7. Contractual measures

Anti-corruption clauses should be included in all contracts EDC makes with its clients, as follows:

7.1. Anti-corruption warranties

- This contractual clause warrants that the EDC client will comply with all applicable bribery laws and refrain from bribery and corruption offences. The consequences for a breach should be made clear in the contract: loans should be terminated, and insurance and guarantees cancelled if corruption is uncovered.⁶⁰ The standard of proof need not be a *prima facie* case, which is a very high threshold to meet before taking action.⁶¹

7.2. Effective management control systems

- The contract should require that the client maintain effective management control systems (also called internal compliance programs) to combat bribery. These programs would bolster applicants' no-bribery declarations.⁶²

7.3. Audit rights

⁵⁹ World Bank Group, "Quick Brief: Cross-Debarment":

http://siteresources.worldbank.org/INTDOII/Resources/Cross_Debarment_Brief.pdf

⁶⁰ In 2010, an unnamed export credit agency disclosed to Transparency International that it includes a standard warranty in all of its contracts. The warranty "expressly obliges an exporter to (a) comply with applicable anti-bribery laws, (b) make good-faith efforts to prevent and detect bribery [...], (c) provide notice of potential violations of law or breach of contract and (d) cooperate in law enforcement investigations." TI, "Practices" at p 26.

⁶¹ EXIM Bank reserves the right to reject or cancel any transaction where there are "reasonable" grounds to believe that bribery has occurred. EXIM, "Foreign Corrupt Practices Act (FCPA)": <https://www.exim.gov/policies/foreign-corrupt-practices-and-other-anti-bribery-measures>. The World Bank and other multilateral development banks use the following threshold: "The Standard of Proof that shall be used to determine whether a complaint is substantiated is defined for the purposes of an investigation as information that, as a whole, shows that something is more probable than not." International Financial Institutions Anti-Corruption Task Force, *Uniform Framework for Preventing and Combating Fraud and Corruption* (2006): <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/30716700-EN-UNIFORM-FRAMEWORK-FOR-COMBATTING-FRAUD-V6.PDF> [IFI Task Force, "Framework"].

⁶² Transparency International, *Export Credit Agency Anti-Bribery Practices* (2010) at p 24:

https://www.transparency.org/files/content/pressrelease/20100629_TI-S_ECA_Anti-bribery_Practices.pdf

- Contracts should include audit rights that permit EDC to inspect a client’s accounts, records and other documents relating to the supported transaction, and to have them audited by, or on behalf of, EDC.⁶³ Clients should also be required to turn over all documents requested by EDC.

7.4. Cooperation with any investigation

- Contracts should also require EDC clients to cooperate fully with any internal or external investigation into allegations of corruption in connection with the supported transaction.

8. Standard operating procedures following allegations of bribery

If bribery allegations surface regarding an existing EDC client, a standard operating procedure should be applied. It should include:

- immediate interim suspension of EDC support pending an internal review;
- an internal review with clear, transparent guidelines in writing;⁶⁴
- referral to law enforcement authorities if there is credible evidence of corruption; and
- a meaningful sanction in any case where it is more likely than not that an incidence of bribery occurred relating to an EDC-supported transaction: the transaction should be terminated and the company should be suspended from receiving EDC support for five years.

9. Transparency and disclosure

As EDC’s anti-corruption due diligence process will necessarily include some measure of discretion, it should be accompanied with meaningful disclosure by EDC. Subject to *bona fide* commercial confidentiality restrictions and other legitimate privacy constraints, all information regarding EDC’s anti-corruption policy and practice should be made available for public scrutiny.

Conclusion

Over the last 20 years, Canada has progressively strengthened its strategy for fighting international corruption.⁶⁵ It ratified OECD and United Nations anti-corruption conventions, enacted the CFPOA and the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, and it participates in an international anti-corruption task force.⁶⁶

⁶³ EXIM Bank requires that all participants in EXIM Bank transactions “cooperate with all requests of EXIM Bank for documents and information related to any transaction involving EXIM Bank which, in EXIM Bank’s sole discretion, are necessary to review any participant’s due diligence process, underwriting, know your customer practices, documentation, funding and operation of any and all EXIM Bank transactions, both before and after approval and consummation of a transaction.” EXIM, “Requirements and due diligence standards”: <https://www.exim.gov/policies/due-diligence-standards>

⁶⁴ For detailed examples, see IFI Task Force, “Framework.”

⁶⁵ For a discussion regarding outstanding areas for improvement, including the need for additional resources for CFPOA investigations and prosecutions, see The International Centre for Criminal Law Reform and Criminal Justice Policy, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* (2017): <https://icclr.law.ubc.ca/wp-content/uploads/2017/06/Final-Paper-Corruption-20170523-1-1.pdf>

⁶⁶ Global Affairs Canada, “Canada’s Fight against Foreign Bribery: Eighteenth Annual Report to Parliament” (2017): <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-18.aspx?lang=eng>

Yet Canada lacks the mechanisms necessary to ensure that EDC's operations are aligned with government objectives. EDC operates in a weak regulatory environment and lacks robust anti-corruption screening procedures. Each time EDC loans are repaid by clients that have not been subject to adequate anti-corruption screening, EDC risks paying dividends to the Canadian government that are tainted by corruption.

To address these deficiencies, it is essential that the *Export Development Act* be amended to prohibit EDC support for companies engaged in corruption, and that EDC adopt a new, more robust anti-corruption policy. Canadians expect all public institutions to operate at the highest standards of integrity; strengthened legislative oversight of EDC and reform of its anti-corruption due diligence practice will make a crucial contribution towards fulfilling that expectation.