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FCPA HANDBOOK

for **CORPORATE DIRECTORS**

Board Members, Meet the New FCPA

The Global Transformation in Laws Against Foreign Bribery

Board Oversight of FCPA Compliance

To Disclose or Not to Disclose—A Recurring FCPA Question

Costs of FCPA Investigations—A Board Issue?

Becoming an FCPA-Savvy Director

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BECOMING AN FCPA-SAVVY DIRECTOR

How can directors, who are not management, but whose responsibilities extend to their companies' anti-corruption compliance programs, meaningfully help the companies they serve? One answer is: by becoming FCPA-savvy directors.

In defining how a board member can be a knowledgeable and valuable company resource in managing FCPA issues, the following may be helpful benchmarks.

Know Yourself. By this we mean, of course, know your company. The principle that effective compliance programs need to be tailored to a company's particular circumstances reflects the reality that an off-the-shelf compliance program will almost always be less effective than one that is tailored to the particular corruption risks that a company faces. Risk assessments have become a commonly recommended part of compliance because they help companies deploy their compliance dollars to maximum effectiveness.

A company that sells high-cost services directly to a single government ministry in the Middle East has a different risk profile than a company that sells large quantities of inexpensive products to numerous government-controlled companies through a network of distributors in China. Factors such as the prevalence of official corruption in particular markets, whether sales reps are paid on commission, a tradition of promoting products by entertaining customers, a recent acquisition of another company, local management consisting entirely of local nationals, all are examples of factors that may affect risk.

Recognize the Highest Risk Factors. Statistically, recent enforcement has focused overwhelmingly (80-90 percent of recent cases) on corrupt payments made by third parties affiliated with companies rather than company employees. Sales reps, consultants, brokers, local agents, and joint venture partners who cross the line can all create vicarious liability for the company that uses them. State-dominated economies, as in China, also present inherently high risks because state-owned companies are ubiquitous and the FCPA defines all employees of "instrumentalities" as "foreign officials" to whom making an illicit payment is a crime.

Be Alert to False Positives. A report that a company doing business abroad has had no hotline reports raising FCPA issues may say more about the hotline than about the absence of corruption. Likewise, an assurance from a third-party agent or representative that he or she knows "all about the FCPA" should not be

taken at face value. And the fact that a company has a compliance program, or particular program elements, is not, in and of itself, a guarantee that all company employees resist the demands or temptations of official corruption. It is useful to appreciate that compliance program elements are preventive tools, not an end in themselves—and not a legal defense.

Consequently, although board oversight may well focus initially on features of a company's compliance program, it should never end there. Rather, the harder and more important question is how thoroughly the compliance program is publicized, understood, accepted, and assimilated into the daily conduct of company employees who are working in the field in a competitive international business context.

Remember Articles 1-5. If this is the only article of this series you have read, you need to go back and confirm that you appreciate points previously covered, including:

- That the anti-corruption legal landscape has changed quickly and dramatically, and is still evolving. To date, 140 countries have committed to adopt and enforce laws like the FCPA, and enforcement is gradually increasing. Changes in the rules of the game worldwide are slowly leveling the playing field.
- As FCPA issues increasingly come to corporate boards, directors can facilitate effective board oversight by knowing the contours of anti-corruption law prohibitions, by understanding what their company's highest risks are, by being independent and inquisitive when potential issues arise, and by ensuring that the company's audit and compliance functions have direct access to the board.
- Authoritative guidance on effective anti-corruption compliance programs is now available and can be readily understood. Long a subjective, moving target, compliance "best practices" are now less elusive and consistently include, for example, risk assessments, credible senior management commitments to ethical conduct, user-friendly travel and hospitality guidelines, due diligence, and field-testing the effectiveness of the program.
- Voluntary disclosure presents two sets of risks. The government is putting an increasingly heavy thumb on the scale to encourage voluntary disclosure, including the promise of "tangible benefits." But disclosing also presents risks, and disclosure decisions can now potentially lead to a variety of possible scenarios.
- The extraordinary costs of FCPA investigations that have been reported in the press and SEC filings are often avoidable. Board oversight and input can help avoid cost escalators that have pushed the costs of some investigations off the charts, sometimes even beyond the penalties imposed.

Know That There Are Two Realities. One reality is the enforcement agencies' views on issues and enforcement policies, positions on which they are rarely challenged in court. The other is what knowledgeable counsel believe the

government could sustain in court, should their interpretations or positions be challenged. The two may not be the same. The operative rules of the game are the agencies' views unless a company is prepared to go to court or to mount a serious challenge within the agencies.

Stay Ahead of the Curve. At all stages, staying ahead of the curve pays valuable dividends. Learning of potential issues and evaluating them as quickly as possible can sometimes enable companies to head off violations, and can always help minimize exposure. Remediating quickly and aggressively will position a company well, whether it remains a step ahead of the sheriff or gets a call.

The bottom line is that although board members do not need to be FCPA experts, they can be highly valuable to their companies if they make certain that, as directors, they are FCPA-savvy.