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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

HOMER E. MOYER, JR.

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COSTS OF FCPA INVESTIGATIONS —A BOARD ISSUE?

Even major corporations consider a $10 million FCPA investigation to be a large expenditure. But investigations costing that much or more are no longer aberrational, as public reports and SEC filings in 2013 have made clear.

Companies that are not transnational behemoths – Nordion, Diebold, and Dun & Bradstreet – reported spending $21.6, $22.3, and $18.8 million, respectively, on FCPA investigations. Costs of other investigations, some still ongoing, have been reported to be $75 million (Stryker), $106 million (News Corp), and $130 million (Weatherford). From 2010 through 2012, Avon spent $90-100 million a year; its total costs thus far exceed $345 million.

Walmart, in an investigation begun relatively recently, reportedly has already rung up more than $300 million in costs, with quarterly costs ranging from $44-82 million. So even without reference to the $1 billion total for Siemens's massive investigation and global remediation, reported costs of FCPA investigations are at levels widely regarded as breathtaking.

Since other large investigations have been expertly and successfully handled at a fraction of those costs, such reports raise the question whether the cost of FCPA investigations should become an issue for companies' boards of directors. If so, what can board members do to help manage costs while assuring a thorough and rigorous investigation?

One step is to recognize factors, such as the following, that can contribute to soaring costs.

Retaining an Efficient Law Firm. Although management, not the board, typically hires law firms, board oversight can help avoid common mistakes that lead to excessive costs. With the sharp rise in interest in the FCPA area, it is prudent for companies to press law firms on the extent of their prior FCPA work, the depth of their expertise, the costs of past engagements, and familiarity with the unwritten views of enforcement officials. A firm with limited experience may innocently over-staff, over-investigate, and charge for steep learning curves.

A cost-conscious board member may also appreciate that utilizing multiple regional offices because they are convenient to investigation sites will likely inflate, not reduce, costs. Using lawyers in several locations multiplies the number of lawyers involved. Since a primary driver of costs is the number of timekeepers, a single traveling team will almost always be less costly than multiple teams, most of which have uneven expertise and require additional time for coordination and synthesizing disparate investigation results.

Whether To Retain Forensic Accountants. Skilled forensic accountants are often indispensable, and failing to retain them can be a grievous error. Where investigating entails "following the money," experienced, inquisitive forensic accountants can be invaluable.

At the same time, forensic accountants, who often come in teams, are sometimes unnecessary. For example, some payment schemes, once exposed, can readily be understood and remediated without a separate forensics team, or with a small one.

Defining the Scope of the Investigation. At the outset, the ultimate scope of an investigation may not be known, and successive government requests may expand the scope. Nonetheless, a clear meeting of the minds on staffing and scope, even if for just the first segment of an investigation, can help prevent runaway costs.

Knowing When to Stop. Closely related is knowing when to stop. To be credible with government agencies, investigations must be thorough and objective and must test whether abuses are isolated or systemic. Credibility may not require turning over every proverbial rock, however. If an investigation finds consistent patterns of misconduct, it may make more sense to remediate aggressively than to investigate further.

Government enforcement agencies will rarely tell a company to stop or to narrow its investigation. Independent investigations are cost-free benefits for government agencies. Similarly, counsel may sometimes recommend expanding an investigation in the name of satisfying government expectations. A company, however, should want knowledgeable counsel who sees when additional investigation will add little, will so advise their client, and is prepared to make that case to enforcement agencies.

FCPA and due diligence investigations are generally managed by management, not the board of directors. With the reported cost of many FCPA investigations, however, investigation costs may become a board-level issue. When they do, savvy board members who understand potential cost escalators can provide great value to their companies by helping them avoid runaway costs.