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FCPA HANDBOOK
for CORPORATE DIRECTORS

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The Global Transformation in Laws Against Foreign Bribery

Board Oversight of FCPA Compliance

To Disclose or Not to Disclose—A Recurring FCPA Question

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TO DISCLOSE OR NOT TO DISCLOSE—A RECURRING FCPA QUESTION

Directors are increasingly pulled into the debate about whether to disclose a Foreign Corrupt Practices Act (FCPA) violation to enforcement authorities—voluntarily. “Isn’t that like calling the artillery in on your own position?” ask some, whose wartime metaphor is intended to suggest that “self-reporting” is a self-evidently bad idea.

The issue, however, has become more common and less simple. Critics of voluntary disclosure argue that the benefits, if any, are unpredictable and, in any event, outweighed by the risks. The number of voluntary disclosures continues to grow, however, explicitly encouraged by enforcement agency promises of credit for disclosing. Indeed, not only have disclosures become a driver of U.S. enforcement statistics, they have prompted some other countries to modify their legal systems to allow disclosures and plea bargaining.

Deciding whether to disclose voluntarily is no longer a binary question of yes or no. Rather, it now necessitates considering pros and cons of multiple possible scenarios. Even for purists—those categorically for or categorically against—the calculus has become trickier.

The starting point is that there is no affirmative obligation to self-report even a serious violation. Unlike certain securities laws and anti-boycott laws, there is no FCPA requirement to disclose. Thus, the question is what course of action, on balance, is likely to be in the best interests of the company and its shareholders.

The inducement the government advertises for stepping forward is “real and meaningful benefits.” Enforcement officials emphatically assure audiences that companies that disclose will be treated more leniently than those that don’t—implicitly saying also that those that withhold evidence of wrongdoing will be treated relatively more harshly. To underscore the promise, the agencies’ FCPA Guide cites several examples of past declinations, and all were voluntary disclosures.

Companies may disclose for their own reasons. Taking the initiative gives a company the opportunity to deal with a violation, remediate, discipline as appropriate, and then present the matter in a context that is as favorable as possible. If the government otherwise learns of the matter, bad facts, not extenuating circumstances or a company's strong response, are likely to be featured.

Some companies view disclosure as consistent with their company's ethic; some don't want the lingering uncertainty that enforcement agencies may later learn about the matter; and directors, with an eye to possible shareholder suits or Sarbanes-Oxley implications, may favor disclosure.

In weighing their options, companies frequently assess the likelihood that a violation may become public. Press coverage, whistleblower reports, and complaints by former or disciplined employees can alert the agencies, and any of these would preclude credit for disclosing voluntarily. And, if a public company's securities counsel advises that the company will have to report a matter in its quarterly 10-Q, the company may then be in the position of making what might be called an "involuntary voluntary disclosure."

Reasons for not disclosing, on the other hand, begin with the point that you don't have to. And, disclosing will introduce a different set of risks.

Most obvious is that a disclosure may lead to a government enforcement action and penalties. If the company has not already conducted a thorough and independent investigation, the risk of a government inquiry rises. In any event, the government will likely want a briefing on the facts, the company's response, and the company's compliance program— then and now.

Unless the government elects not to pursue the matter (which does happen), a period of extended uncertainty may follow, and a final decision may not come until the slower of the two agencies has made its decision.

To this debate, opponents of disclosure add skepticism about whether and how much benefit would come from disclosing voluntarily and cooperating with the government. They may add that some companies that have disclosed have nonetheless ended up paying substantial financial penalties. In almost all such instances, however, the penalties are less than the maximums allowable, which the agencies cite as "real and meaningful credit." And it may be.

The nightmare disclosure scenario is that, once engaged, enforcement agencies may find it difficult to bring an investigation to closure. Worse yet, the agencies become intrigued with other, unrelated issues, as they have in some so-called "industry sweeps," and make exploratory, open-ended requests for information, delaying the final disposition and sharply increasing the costs.

A middle path that companies sometimes follow is to investigate, remediate, make related compliance program enhancements, and be prepared should the government call. While this is a better plan than responding half-heartedly to a problem, it still carries with it the risk that the government will separately learn of the incident, allowing someone else to frame the issues and causing the company to lose credit for not having disclosed itself.

Given these many variables, a decision tree for voluntary disclosure today looks more like a tree in summer than a tree in winter. The variables are many, and the question of benefit is a question of “compared to what?” Not disclosing a matter that does not otherwise come to the government’s attention makes not disclosing look smart, in hindsight. By contrast, making that same call only to have the government receive an angry, vengeful whistleblower call may lead to longer uncertainty, higher costs, and heavier penalties.

For directors, the bottom line advice is, first (unhelpfully), that each situation is fact-specific and should be individually assessed. But the good news is that when board members and other decision-makers are faced with the Shakespearean question—to disclose or not to disclose—they can at least identify the many variables and make informed judgments consistent with the risk tolerances and best interests of their companies.