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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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FOREWORD

The crescendo of enforcement of the U.S. Foreign Corrupt Practices Act over the last two decades has commanded the attention of both U.S. multinational corporations and their foreign counterparts – multinationals headquartered abroad that are subject to the FCPA because of a presence in the United States or on an American stock exchange. Broad corporate anti-corruption training programs now are designed to reach senior management and remote expat employees alike. Even, to their great dismay, foreign nationals retained by U.S. companies as consultants or agents in distant countries have sometimes found that they themselves can be directly subject to this law.

The ascendancy of the FCPA has had ripple effects in corporate board rooms. It is no longer rare for corporate directors to read detailed press accounts of FCPA investigations or eye-popping financial penalties. Corporate compliance officers now typically have at least a "dotted line" path directly to board committees, and the prospect of an enforcement action is likely to trigger a board level discussion. Moreover, the aftermath of an FCPA enforcement action may include shareholder lawsuits alleging, in hindsight, that by failing to prevent FCPA violations, corporate directors were negligent in their oversight responsibilities.

The incoming tide of concern about the possible implications of an FCPA case has prompted many corporate directors to ask themselves, and one another, what they can do, being one step removed from management, to reduce their company's risk, and their own. It is this question to which this booklet seeks to provide some practical guidance.

Today, a passive board with uninquisitive directors can itself create corporate risk, and, by making missteps, a board can make an effective response to a potential foreign bribery issue more difficult. Directors may, however, play a valuable, constructive role in minimizing FCPA and related risks. The six brief chapters that follow, originally published as a six-part series by *Corporate Board Member*, offer specific ways that directors can add value when an unwelcome bribery issue arises and how, by reading as far as chapter six, a director can become an "FCPA-savvy" director.

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BOARD MEMBERS, MEET THE NEW FCPA

The interest that corporate board members have, and should have, in the U.S. Foreign Corrupt Practices Act (FCPA) has risen sharply over the last 15 years. The elevated level of attention being paid to this law has been driven by a confluence of factors, some related to the FCPA, some not. The net takeaway is that directors who fail to become conversant with this far-reaching law and the expectations it has created may invite or exacerbate risk for their companies and for themselves.

As most board members know, the *Caremark* case, decided in the mid-1990s by the Delaware Chancery Court, was a watershed pronouncement on the oversight responsibilities of directors. Sarbanes-Oxley legislation and the Federal Sentencing Guidelines similarly heightened board sensitivities, as has the continuing phenomenon of shareholder litigation in which directors are individually named as defendants.

These corporate law developments were followed by a rising tide of FCPA enforcement actions—including prosecutions of more than three dozen senior executives and a handful of directors. These developments have caught the attention of corporate board members, as evidenced by growing awareness and involvement by boards of directors and audit committees in foreign bribery matters.

The series of articles (of which this is the first) will examine the implications of this trend, focusing specifically on how board members can recognize and help avoid today's FCPA risks. Topics will include the inexorable escalation of "best practices" in anti-corruption compliance programs; dramatic changes in the global legal structure of anti-bribery law; shifts in enforcement patterns and penalties that make today's FCPA risks quite different from those of a decade ago; and, finally, practical guidance on what steps directors may take, and should take, to discharge their obligations and reduce risks that they and their companies face.

A useful starting point is the various roles that the boards and audit committees, or their equivalents, can play in minimizing FCPA risks. Given the structure of the FCPA, these responsibilities are generally broader for directors of public companies than for directors of privately held companies. That is because listed public companies ("issuers" under the FCPA) are subject to FCPA accounting

requirements as well as anti-bribery provisions. Not only must issuers meet these accounting requirements themselves, but they also will violate the law if they fail to ensure that their controlled foreign subsidiaries meet the same standards.

In discharging their responsibilities, individual directors and audit committee members can serve functions that enforcement officials view as essential. A constant theme that runs through standards for board members is independence, and boards and audit committees must exercise independence if management is seeking to minimize or deflect a potentially serious FCPA issue that could harm the company and its shareholders.

In the context of the FCPA, board responsibilities can be structured to enhance both board knowledge and independence. Having a direct reporting line from the head of internal audit and the chief compliance officer to the board's audit committee, whether by solid line or dotted line, can not only shelter auditors and compliance officers from management pressures and give them direct access to an independent authority within the company, but also keep board members informed. In independent investigations of possible wrongdoing within a company, the audit committee may exercise an oversight role, or it—rather than the corporation or its general counsel—may retain outside counsel and become "the client." Occasionally, audit committees or boards may wish to obtain separate legal advice for themselves. But it is also true that retaining a second law firm can sometimes be redundant, an unnecessary expense, and put too many cooks in the kitchen.

Specifics for how board members can manage issues such as these will be addressed in the articles to follow. The message of this first piece is simply that the legal environment is now such that it would be a good idea for directors to take a look at the upcoming articles, or other articles like them, as they wish.

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THE GLOBAL TRANSFORMATION IN LAWS AGAINST FOREIGN BRIBERY

Board members, who need to be vigilant about the corruption risks their company faces and about its anti-corruption program, will benefit from being aware of profound changes that are underway internationally in laws prohibiting bribery of government officials. Although board members need not become legal experts, they can better perform their oversight responsibilities if they are literate and current on the evolving picture of international conventions and national laws that prohibit bribing foreign officials.

Examples of the rapidly changing landscape are not just the new UK Bribery Act, now two years old, but also a changing of the guard in the UK enforcement regime, which has brought new approaches to enforcement and the advent of deferred prosecution agreements. Of the 40 countries that are signatories to the OECD Convention on Combating Bribery, in 2013, 15 were prosecuting 18 entities and 148 individuals, and 24 countries report a total of more than 320 investigations now underway.

The short history of international anti-corruption law began with a serendipitous statute—the U.S. Foreign Corrupt Practices Act, or FCPA. It was serendipitous because, in 1976, when Watergate investigators found that corporations were using off-book slush funds to make unlawful campaign contributions, they also discovered that many were also using those funds to bribe foreign government officials in order to get business. Congress's response, in 1977, was to enact the world's first national law prohibiting bribery of foreign officials. Then, in 1988, in response to corporate complaints that this unilateral U.S. law had put U.S. companies at a competitive disadvantage, Congress formally urged the executive branch to try to negotiate international anti-corruption conventions.

The first breakthrough came in 1996. After being maligned for years as quixotic and naive, the FCPA became the template for a series of international anti-corruption conventions. In the late 1990s, four conventions were agreed to in quick succession, and in 2003, negotiations on a UN anti-corruption convention—far more ambitious than the FCPA—were concluded. Today, 166 countries are parties to that convention. The result, at least on paper, has been a transformation in the international legal landscape of anti-bribery law.

For the proposition that companies should not bribe government officials to get business, there is now abundant legal support. With a half dozen anti-corruption treaties in place, there now exists what one UK lawyer has called "convention congestion." However, the commitment to implement and enforce those conventions has been, not surprisingly, far short of ubiquitous. Enforcement, both literally and figuratively, is all over the map.

The implications for corporate board members are several. Even though enforcement of this panorama of new anti-bribery laws is sluggish and random, they are beginning to undercut the universal excuse that "everybody does it." Many companies still do, but customs officials and government ministers in countries around the world are no longer strangers to anti-corruption laws. Because of its global reach, the FCPA is now recognized around the world, and has even been referenced in movies, and at least one soap opera.

Because escalating enforcement has upped the stakes for the corporate anti-corruption compliance programs that board members are mandated to oversee, board members who raise FCPA issues are no longer seen as officius or moralistic. Today, financial penalties in nine figures and prosecutions of individual executives are not unusual in FCPA cases. Nor are jail sentences, or shareholder suits against board members that sometimes follow. Moreover, the emergence of overlapping national laws has made becoming the target of parallel, multi-jurisdictional investigations a real risk.

Increased press exposures of official corruption have reinforced public indignation, as has growing awareness that the economic costs of official corruption are huge, that it creates gross distortions in free markets, and that it facilitates crimes such as arms smuggling, drug cartels, and human trafficking.

For these reasons, being conversant with international anti-corruption law is a practical asset for today's corporate board members. An appreciation of enforcement trends and the rapidly changing legal landscape can provide context for board discussions, explain management's insistence on a strong compliance programs, and help guide directors in discharging their fiduciary responsibilities effectively.

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BOARD OVERSIGHT OF FCPA COMPLIANCE

A board member's duty of care and oversight extends to the company's anti-corruption or FCPA compliance program. That responsibility, however, invites some basic questions: Is it enough that my company has a compliance program? How can I tell if it is an effective program, or an ineffective one? What standards should I use in evaluating and benchmarking my company's program?

The answers are not found in the FCPA itself. Apart from a requirement that public companies maintain "a system of internal accounting controls," the FCPA does not address compliance programs. Nor is guidance found in the OECD Convention on Combating Bribery, or even the comprehensive UN Convention against Corruption.

Consequently, for years companies turned for guidance to annexes sometimes appended to settlement agreements between enforcement agencies and companies. These occasional annexes, often keyed off the facts of the case being settled, specified compliance program elements that the company was required to establish. FCPA conferences and publications also sometimes enabled companies to benchmark their own compliance programs against programs considered to be state-of-the-art, such as those of Baker Hughes, GE, and, later, Siemens.

Not until 2010, when the OECD's Working Group on Bribery published "Good Practice Guidance on Internal Controls, Ethics, and Compliance" (OECD Guidance) did official, systematic guidance become available. The OECD Guidance, which was surprising both because of the multinational consensus it reflected and because it set the compliance bar reasonably high, set forth a dozen "non-legally binding" elements of effective compliance programs.

Twenty-one months later, the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), also issued guidance through an unprecedented, joint publication entitled "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (FCPA Guide). The Guide, though legally not binding, includes a detailed 11-page discussion of what these agencies consider to be an effective compliance program.

A rough amalgam of the compliance program elements these two publications stress is as follows:

- A strong commitment to compliance by senior management and boards of directors (FCPA Guide: a commitment to creating a corporate "culture of compliance");
- A clear, explicit, and visible policy prohibiting foreign bribery;
- Oversight by senior executives and direct access to boards of directors and board committees;
- A risk-based program, tailored to the company's business and FCPA risk profile;
- Guidelines and procedures on gifts, travel, and entertainment, charitable and political contributions, the use of agents and other third parties;
- Due diligence on the business need to retain third parties, their qualifications, and their integrity;
- M&A due diligence, including immediate compliance integration post-acquisition;
- Training for employees at all levels of company, for third parties (FCPA Guide) and for subsidiaries (OECD Guidance);
- Resources and autonomy for compliance personnel and access to the board;
- Accurate books and records and a system of internal financial and accounting controls;
- Availability of internal advice and channels for confidential reporting of violations;
- Prompt responses to issues, including, as needed, independent investigations;
- Accountability and discipline for violations;
- Continuous improvement through testing, review, and updates.

Both the OECD Guidance and the FCPA Guide are useful references for directors. Both stress that a check-the-box approach to compliance is insufficient. The test of whether a company's compliance program creates a "culture of compliance" obviously goes far beyond simply having a written compliance program. It requires that the program be understood, accepted, and implemented in offices far flung from corporate headquarters. It explains why, when enforcement authorities require a company to retain an Independent Compliance Monitor to assess its compliance program, they insist that the monitor get out into the field and "kick the tires."

Of the best practices noted above, board members are perhaps best situated to evaluate their company's "tone at the top"—the genuineness of senior management's commitment to compliance, particularly in the face of potentially lucrative, but high-risk, business opportunities. Boards may also have insights into the level of resources devoted to compliance, another indicator of commitment.

Statistically, the single greatest FCPA risk today comes from doing business through consultants, sales agents, or other third parties over whom the company has limited control. Under the FCPA, companies may be held vicariously liable if

third parties they retain pay bribes, even unauthorized ones. Also on the high-risk list may be doing business in China, where government-owned companies are the norm, thus making all their employees "foreign officials" under the FCPA. Recent enforcement actions in China suggest a prevalence of elaborate schemes by which local employees have defrauded companies and bribed officials.

Other FCPA risks may come, for example, from doing business in high-risk countries, having governments or government-owned companies as customers, being highly regulated under local law, or having an untrustworthy joint venture partner.

Board members can help reduce such FCPA risks by understanding their company's risk profile, by being accessible to company compliance officers, and by second-guessing management, if necessary. A working knowledge of the kind of corruption risks their company is likely to face and the basics of applicable anti-bribery laws, together with continuing inquisitiveness, can ensure that board oversight itself meets the standard of "best practice."

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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.

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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.

ARTICLE 6

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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.

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Homer Moyer, the architect of the firm's preeminent international practice, is regarded as one of the country's leading Foreign Corrupt Practices Act (FCPA) lawyers. He has written and spoken extensively on anti-corruption law, was the first chair of the International Bar Association's Anti-Corruption Committee, has chaired more than 30 national and international anti-corruption conferences, is the editor of *Anti-Corruption Regulation*, produced "Comply But Compete," a training video, served as an SEC-appointed Independent Compliance Consultant, and represented scores of corporate clients.

In recent editions of *Chambers USA* and *Chambers Global*, market commentators noted: "In Homer Moyer, the (Miller & Chevalier) team has one of the deans of the international trade bar. An expert in FCPA, Moyer is renowned among corporate clients for his calm and thoughtful approach to difficult regulatory issues, and has a huge number of contacts in the relevant agencies. His ability to organize and execute a strategy is beyond compare."

A former General Counsel and Counsellor to the U.S. Secretary of Commerce, Mr. Moyer was a political appointee of both political parties. In other areas of international law, he has represented numerous clients on export controls and economic sanctions matters, co-authored the book *Export Controls as Instruments of Foreign Policy*, and testified as an expert witness. While in government, he co-authored the Anti-Boycott regulations of the Export Administration Act.

Mr. Moyer has also advised clients on World Trade Organization (WTO) disputes, represented governments in free trade agreement negotiations, and successfully litigated before bi-national tribunals under the NAFTA and CFTA. He has been counsel in landmark antidumping and countervailing duty cases, in international trade and investment disputes, and on issues of international law in federal courts. He has represented clients before all levels of federal courts, including the United States Supreme Court.

Mr. Moyer has also developed and guided pro bono projects that have been hailed for their global impact. He co-founded and chaired (1990-2002) the American Bar Association's Central European and Eurasian Law Initiative (CEELI), a project that provided technical legal assistance to former Soviet bloc countries, a project that former Attorney General Janet Reno described as "the worthiest pro bono project that American lawyers have ever undertaken." He also founded and chairs the CEELI Institute, a post-graduate lawyer and judicial training institution in Prague. In 2008, the American Bar Association's International Law Section honored Mr. Moyer with a Lifetime Achievement Award, and Justice Sandra Day O'Connor described him as his generation's "pioneer in rule of law reform and its greatest proponent."

Mr. Moyer founded Miller & Chevalier's International Department, chairs the firm's Policy Committee, and is a member of its Executive Committee. Before serving in government, Mr. Moyer practiced with Covington & Burling; wrote *Justice and the Military*, a treatise on military law; and served in the Office of the Judge Advocate General of the Navy, with collateral duty at the White House. A graduate of Emory University (B.A.) and Yale Law School (LL.B.), he is the father of four and author of the best-selling book, *The R.A.T. (Real-World Aptitude Test): Preparing Yourself for Leaving Home* (Capital Books, 2001).

MILLER CHEVALIER

MILLER & CHEVALIER'S INTERNATIONAL ANTI-CORRUPTION EXPERIENCE

Having represented clients in Foreign Corrupt Practices Act (FCPA) matters for more than 30 years, Miller & Chevalier has a wealth of experience in anti-corruption work. As a result, our clients benefit from our familiarity with hosts of fact patterns and legal issues, first-hand experience in numerous industries and scores of countries, minimal learning curves, and the reduced costs of experienced advice and efficient problem solving.

Our Experience. Our experience includes not only decades of FCPA counseling, but also internal investigations, global due diligence investigations, government enforcement actions, formal opinions, litigation and arbitration, compliance program development, training, and many novel issues.

We have helped develop more than 75 anti-corruption compliance programs for clients; been involved in six monitorships, either as the Independent Compliance Monitor or as counsel to the company; conducted well more than 100 independent internal investigations; advised on due diligence and other issues in transactions exceeding $60 billion in total value; testified as expert witnesses; and represented clients in enforcement actions presenting a great variety of factual circumstances and issues of first impression.

Our Resources. Our lawyers range from the "dean of the bar" to junior but experienced FCPA lawyers. Our FCPA team includes multiple leading FCPA practitioners, former prosecutors, former in-house counsel, white collar defense counsel, and Independent Compliance Monitors – more than 25 experienced FCPA lawyers in all. We are thus able to tailor resources to individual situations and provide efficient, responsive assistance. Our lawyers are frequent speakers or commentators, and more than 20 have published articles on FCPA or anti-corruption topics.

From our offices close to U.S. enforcement agencies, we can put experienced anti-corruption lawyers on the ground around the globe on short notice, often taking advantage of language skills in more than a dozen different languages to bring local language abilities to the matter. In the last two years, our lawyers have worked in more than 30 different countries. Our clients have found this rapid response approach to be cost-effective, regardless of the location or complexity of the issue.

Since anti-corruption rankings have been made by *Chambers, U.S. News – Best Lawyers® "Best Law Firms*," and other publications, Miller & Chevalier and its lawyers have been among those most highly ranked.

Distinguished Clients. Our clients, representing more than 15 different industries, are perhaps our strongest credential. Our corporate clients range from start-ups to many of the world's largest corporations. We frequently advise their boards of directors, audit committees, and senior management, as well as individual executives, accounting and auditing firms, governmental entities, and other law firms.

Our Track Record. We deal frequently with enforcement agencies. Although we expect no special treatment, our experience does afford us insights into the judgments and questions that enforcers bring to FCPA issues. Whether in fairly disclosing investigative results, urging a declination, or advocating a point of law, we believe that credibility and consistency serve us and our clients well.

Matters that we have handled include the first FCPA Deferred Prosecution Agreement accepted by the government; the first Deferred Prosecution Agreement that the government agreed to terminate before its term had run; and a number of cases that resulted in declinations, including some that included lengthy government investigations. The variety of matters has included multi-jurisdictional investigations; cases in which the SEC, but not DOJ, had jurisdiction; and vice versa; cases resulting in declinations; cases with multiple parties and counsel; and cases of both systemic failures and isolated violations of company policy.

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MILLER & CHEVALIER'S INTERNATIONAL ANTI-CORRUPTION LAWYERS

Kathryn Cameron Atkinson
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Kathryn Cameron Atkinson is the Chair of the International Department and a member of the firm's Executive Committee. Her practice focuses on international corporate compliance, including, in particular, the Foreign Corrupt Practices Act (FCPA), as well as export controls and economic sanctions, and anti-money laundering laws. She advises clients on corruption issues around the world. Ms. Atkinson served as the government-appointed Independent Compliance Monitor for KBR, Inc. in an FCPA matter settled with the DOJ and SEC. She was a member of the original Transparency International task force that developed a compliance toolkit for small and medium-sized entities. She co-produced, with Homer E. Moyer, Jr., "Comply But Compete," a versatile, video-based FCPA training program.

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Leila Babaeva's practice focuses on corporate compliance and white collar defense. She advises U.S. and international companies on Foreign Corrupt Practices Act (FCPA) compliance, including creating and performing assessments of company-wide anti-corruption programs, and advising companies on all areas of compliance program implementation. She has also assisted in cross-border investigations conducted by multiple Fortune 500 companies in various industries, including managing the e-discovery process, conducting witness interviews, and participating in presentations to the SEC and DOJ.

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James Bensfield is Chair of the firm's White Collar & Internal Investigations Practice. His practice involves representing corporations and individuals in complex white collar criminal and civil fraud matters. His cases have focused on, among other issues, allegations of federal and state procurement fraud, tax fraud, antitrust violations, securities fraud, bribery (including violations of the Foreign Corrupt Practices Act (FCPA)), violations of export control and sanctions laws, illegal gratuities, and conflicts of interest.

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Marc Alain Bohn focuses on the Foreign Corrupt Practices Act (FCPA), export controls and economic sanctions, and other international trade and policy issues. He regularly advises multinational companies on compliance and enforcement matters and has broad experience conducting internal investigations and representing companies before the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). He has also conducted numerous compliance-focused audits and assessments and regularly assists companies in developing risk-tailored compliance policies and procedures

John Davis
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John Davis focuses his practice on international regulatory compliance and enforcement issues, and has over 20 years of experience in advising both U.S. and non-U.S. clients on corruption issues around the world. This advice has included compliance with the Foreign Corrupt Practice Act (FCPA) and related laws and international treaties (including the Organisation for Economic Co-operation and Development (OECD), Organization of American States (OAS), and UN treaties), as well as related criminal and civil laws. He regularly handles internal investigations related to potential FCPA violations, compliance assessments and audits of compliance programs, due diligence in M&A and other corporate transactions, disclosures of issues to the Securities and Exchange Commission (SEC) and U.S. Department of Justice (DOJ), and negotiations with relevant agencies in civil and criminal enforcement proceedings. He has worked on both sides of the independent compliance monitor process established by enforcement agencies, and is a regularly speaker and trainer on anti-corruption issues around the world.

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Matteson Ellis has extensive experience in international anti-corruption compliance and enforcement, including the U.S. Foreign Corrupt Practices Act (FCPA). He has worked on anti-corruption matters in multiple capacities, including prevention, detection, remediation, investigation, defense, and enforcement. Mr. Ellis focuses particularly on the Americas, having spent several years in the region working for a Fortune 50 multinational corporation and a government ethics watchdog group. He is fluent in Spanish and Portuguese and is a frequent speaker on corruption matters in Mexico, Brazil, Colombia, Argentina, and other Latin American markets.

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Jacqueline Ferrand's practice focuses on corporate compliance and white collar defense, primarily involving the Foreign Corrupt Practices Act (FCPA). Her experience includes conducting internal investigations, compliance assessments, and M&A due diligence on behalf of multinational companies with respect to the FCPA and export controls regulations.

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Jian Bin (Ben) Gao's practice focuses on corporate compliance and white-collar defense, primarily involving the Foreign Corrupt Practices Act (FCPA), export controls, and economic sanctions. He has broad experience conducting internal investigations on behalf of multinational companies and representing them in enforcement actions. Mr. Gao also regularly helps companies to measure compliance risks, assess adequacy of compliance programs, and develop and implement compliance enhancements. Drawing on his fluency in Mandarin and Chinese culture, Mr. Gao frequently advises companies on compliance issues arising out of China.

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Nathan Lankford's practice focuses on matters involving the Foreign Corrupt Practices Act (FCPA) and other areas of international corporate compliance. He has created tailored compliance programs for U.S. and international companies in several industries, and advised companies on all areas of compliance program implementation. He has conducted internal investigations, compliance audits, third party due diligence, and due diligence in the context of mergers and acquisitions.

Homer Moyer
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Homer Moyer, the architect of the firm's preeminent international practice and member of the firm's Executive Committee, is regarded as one of the country's leading Foreign Corrupt Practices Act (FCPA) lawyers and has been recognized as a premier lawyer in other international legal fields as well. A former General Counsel and Counsellor to the Secretary at the Department and past chair of the ABA Section of International Law, Mr. Moyer has been counsel to scores of corporate clients, including a number of the country's largest corporations. A political appointee of both political parties, he has also developed and guided pro bono projects that have been hailed for their global impact.

Matthew Reinhard
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Matthew Reinhard focuses his practice on white collar crime, internal investigations, and complex civil litigation. He works with multinational companies on a variety of international investigation and counseling matters, including reviews and analysis of anti-corruption compliance and controls policies and procedures, and due diligence of potential business partners and agents. He frequently conducts internal investigations on behalf of clients, including into allegations of violations of the Foreign Corrupt Practices Act (FCPA), fraud, and harassment.

David Resnicoff

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David Resnicoff's practice focuses on helping heavily regulated companies, and in particular healthcare companies, meet their U.S. and international compliance obligations, drawing on his extensive experience in the areas of compliance counseling and education, risk assessment, monitoring, global investigations, government enforcement issues, and M&A compliance due diligence.

Mark Rochon
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Mark Rochon, Chair of the Litigation Department and a member of the firm's Executive Committee, practices in the area of white collar defense in criminal and civil matters. He has conducted extensive internal investigations on behalf of multinational corporations and has represented them in significant matters under the Foreign Corrupt Practices Act (FCPA).

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Ann Sultan is an associate in the International practice focusing on the Foreign Corrupt Practices Act (FCPA), including internal investigations, and a range of international trade regulatory areas.

James Tillen
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James Tillen is Vice Chair of the International Department. His practice focuses on Foreign Corrupt Practice Act (FCPA) and money laundering matters. He has had significant experience with every facet of an FCPA enforcement matter, from inception to completion, including developing work plans for internal investigations, conducting internal investigations (including in-country witness interviews and document collections and reviews), developing remediation strategies (including employee discipline, compliance program enhancements, and employee training), drafting voluntary disclosures to the U.S. government, negotiating resolutions with the U.S. government, developing strategies for collateral issues (including public relations and related litigation), selecting independent monitors, and interfacing with independent monitors on behalf of clients. Mr. Tillen also has managed FCPA due diligence reviews and compliance audits, drafted numerous FCPA compliance programs, developed FCPA training programs, and performed FCPA training for client operations throughout the world.

Daniel Wendt
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Daniel Wendt's practice is focused on the Foreign Corrupt Practices Act (FCPA) and United States customs laws. Regarding FCPA compliance and enforcement, Mr. Wendt assists corporations with pre-acquisition due diligence reviews, internal investigations, and compliance program design and implementation, including third party due diligence reviews. Mr. Wendt has performed anti-corruption training and spoken on anti-corruption topics at conferences in the United States and abroad.

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Saskia Zandieh's practice focuses on corporate compliance and white collar criminal defense, primarily involving the Foreign Corrupt Practices Act (FCPA) and U.S. Customs laws. Ms. Zandieh has represented multinational companies in connection with potential and ongoing Securities and Exchange Commission (SEC) and Department of Justice (DOJ) investigations and has advised clients on a variety of corruption issues around the world. To all of these matters, Ms. Zandieh brings her native French, her fluency in Spanish, and her past experience living and working in France, Argentina, and Costa Rica to a practice that consistently requires language skills and cultural sensitivities. In addition, Ms. Zandieh is International Bar Association Anti-Corruption Committee Communications Officer.

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