



MILLER & CHEVALIER CHARTERED

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.

MILLER
CHEVALIER

millerchevalier.com

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 officious 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.