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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.

MILLER CHEVALIER

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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.