

Board Members and Corruption Liability

Directors Face Increased Scrutiny, Civil and Criminal Liabilities for FCPA Violations

The global fight against corruption has led to increased enforcement efforts in a number of jurisdictions. Recent highlights include the entry into force of Brazil's Clean Company Act earlier this year and the announcement of its first publicly known investigation. Across the Atlantic, Ukraine is on its way to passing a landmark anti-corruption bill that would provide for public official asset monitoring, beneficial ownership transparency, and the creation of an anti-corruption bureau.

While much of the rest of the world develops its anti-corruption legal framework, the United States continues to enforce its own anti-corruption tool, the Foreign Corrupt Practices Act (FCPA), with implications even for the highest levels of a company. Through shareholder and derivative class actions as well as SEC and DOJ enforcement actions, Board members are coming under greater scrutiny when it comes to ensuring that a company has effective internal controls in place and that it has established a top-down corporate compliance culture.

The government agencies charged with enforcing the FCPA have made it explicitly clear that they want Board members to actively participate in company compliance efforts.

Beyond liability for the corporation, Board members are obliged to take an active role or face the risk of being found civilly and criminally liable as individuals for FCPA violations.

The penalties for individual violations are just as severe as the corporate penalties. Under the FCPA anti-bribery provisions, directors may be subject to fines of up to \$250,000 and five years in prison. Violations of the FCPA accounting provisions can lead to fines of up to \$5 million and 20 years in prison.

Under the U.S. Sentencing Guidelines, Board members must be “knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.” The joint Department of Justice/Securities and Exchange Commission 2012 Resource Guide to the Foreign Corrupt Practices Act provides guidance for companies on how to involve their Boards of Directors in compliance efforts, noting that “compliance begins with the Board of Directors and senior executives setting the proper tone for the rest of the company.” Additionally, compliance personnel should have “direct access to an organization’s governing authority, such as the Board of Directors and committees of the Board of Directors (e.g., the audit committee).” And the company should provide “periodic training and certification for all directors” as well as other personnel. Finally, Board members must also take action when corruption issues bubble up to the surface.

From top-down tone to active oversight of the company compliance program, Board members have the ability to limit corruption liability for both themselves and their shareholders.

The Center for Responsible Enterprise And Trade (CREATE.org) is a non-governmental organization helping companies around the globe prevent piracy, counterfeiting, trade secret theft, and corruption.