

Corporate Governance Issues in Response to Potential FCPA Violations

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Corporate Board members face even more risks in today's aggressive FCPA enforcement environment. They have adjusted to the new post-Sarbanes-Oxley environment. Today, they face the perils of FCPA enforcement.

As the Justice Department and the SEC bear down on more and more companies, Board members have to be even more sensitive and careful when it comes to FCPA enforcement.

If you read between the lines of recent DOJ and SEC settlement filings, the message is clear that corporations that cooperate fully will be rewarded versus those companies that resist acknowledging potential violations and cooperating with the government. With so much at stake, the actions of the Board are critical.

The Board has a fiduciary duty to the company to ensure compliance with the law. The Board's initial response to potential FCPA violations is critical. If the Board is divided on this issue, the possible risks multiply.

For example, what if the Board disagrees as to whether or not company employees' conduct violated the FCPA? What if top management is divided? The General Counsel may conclude one way, while the CEO reaches a different conclusion. What if top management is alleged to participated, or reviewed the conduct?

A divided board and management raises very significant risks for each player. The company's actions can devolve into individual actions taken by Board members and top management to protect themselves. Board members and management may seek individual representation and prosecute their positions through aggressive internal disclosures and claims. This is a nightmare scenario.

This is not an unheard of situation. But the risk to the future of the company is significant. The Justice Department and the SEC are likely to view this dysfunction with suspicion, and it will certainly undermine company claims that it will comply in the future.

In this situation, the Board needs to seriously consider hiring special counsel or creating a special committee to review and report back to the board. The Board's fiduciary duties demand some kind of action. Corporate cover ups are not unheard of, but are rarely successful given the risk of detection, of a leak or a possible whistleblower claim. Board members have to recognize that and seek to resolve the problem through outside counsel.

One other possible protection against this nightmare scenario is the creation of a "Blue Ribbon" panel within a company which will resolve any disagreement as to whether or not the conduct is prohibited by the FCPA. Several companies have utilized an independent panel to review such issues, and the

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Justice Department recently listed such a committee as a component of an “enhanced” FCPA compliance program.

Whatever vehicle is used — a special counsel, independent committee or “Blue Ribbon” panel, the Board has to act to protect the future of the company. Any delay will result in possible loss of cooperation benefits and a loss of credibility with the Justice Department and the SEC. The stakes are high and any company which moves slowly will definitely end up paying a price.

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