

TOP TAKEAWAYS

The Board's Oversight Over FCPA Risks

1. The US regulators are expecting more from FCPA/anti-bribery compliance programs than simply policies, procedures, and training. All of that is important, but SEC/DOJ expects companies to operationalize anti-bribery compliance and to ensure that the program is appropriately resourced.
2. The US regulators expect board-level involvement in FCPA/anti-bribery compliance. Participating companies report that they share anti-bribery compliance policies with their boards, train directors, and report on significant bribery issues that come to the attention of compliance.
3. Enforcement of the UK Bribery Act is heating up, and UK regulators' compliance expectations are for the most part aligned with the expectations of the US regulators.
4. Auditing and monitoring – including transactional testing – is becoming more and more of a "best practice" in anti-bribery compliance programs and is an issue to which directors should pay attention.
5. Third-party intermediary auditing and monitoring remains a challenge for many companies. While it is well-recognized that third-party intermediaries pose the greatest FCPA risk for many companies, effective auditing of their activities has proven to be difficult.
6. Compliance counsel and professionals struggle with the appropriate level of disclosure to the board of bribery-related incidents. All agree that significant matters raising the prospect of enforcement actions against the company must be disclosed to the board and discussed in detail. But there are different views on disclosure of minor or unsubstantiated bribery issues.
7. Participants noted the continuing emergence of a whistleblower culture under Dodd-Frank that has impacted the operation of FCPA and anti-bribery compliance programs. All decisions about handling complaints must take into account the potential for whistleblowing activity and it is critically important to avoid taking any steps in response that could be construed as retaliation.
8. Compliance counsel and professionals are thinking about the DOJ Yates Memo when conducting internal investigations. While few major changes have been observed as a result of DOJ's expressed intention to focus more on prosecuting individuals, the Yates Memo has forced compliance to consider issues around employee interviews and engagement of individual counsel earlier in the investigative process.
9. The questions of who should conduct internal investigations – outside counsel? inside counsel? forensic accountants? others? – and who should oversee internal investigations – the board? the executive management team? the general counsel? – are nuanced and fact-specific. There are no strict formulas, but participants agreed that it is important to think through what is appropriate for a given fact pattern.
10. Voluntary self-disclosure of FCPA violations is a difficult decision for companies, and one that almost always requires heavy board involvement. Participants are watching the DOJ self-disclosure "pilot program" carefully, and are hoping to see tangible benefits to participating companies.

For more information on The Board's Oversight Over FCPA Risks, please feel free to contact the moderator directly:

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