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Governance Implications of DOJ's New Compliance Focus

ON BOARD

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The board of directors' audit committee agenda just got quite a bit busier, thanks to a new U.S. Department of Justice staffing decision.

On July 30, Fraud Section Chief Andrew Weissman disclosed the DOJ's decision to create the position of "compliance counsel," the specific role of which will be to help determine whether corporations subject to DOJ investigation have maintained a good faith compliance program. The DOJ's Principles of Federal Prosecution of Business Organizations (a/k/a the "Filip Guidelines") make it clear that the existence and effectiveness of a corporation's pre-existing compliance program is a factor DOJ will take into consideration when making a prosecution decision. This perspective has been underscored in a series of recent public speeches by DOJ Criminal Division officials.

The new compliance counsel is expected to (a) help DOJ prosecutors distinguish between an effective compliance program and a "near-paper program" (i.e., one that is essentially a fiction); (b) provide businesses with guidance on compliance program elements that may be appropriate for a particular industry; and (c) assist the Fraud Section in civil and criminal investigations, including health care and securities fraud. Another expectation is that if a decision is made to prosecute a company, the compliance counsel's review will impact the terms and conditions of any settlement.

While in private practice, Weissman was noted for his advocacy of a "compliance defense"; i.e., the use of a corporation's good faith compliance program to insulate the corporation from the criminal acts of a low-level, "rogue" employee. Although DOJ's action should not be interpreted as acknowledging such a compliance defense, Weissman views the role of DOJ's compliance counsel as helping prosecutors "separate out the companies that really don't get it—those with sham or paper programs—from those that do get it".

The person selected for this position (who is currently undergoing internal vetting) has, ac-

cording to media reports, worked in the financial, health care and technology industries. The appointment is somewhat controversial, particularly among some academics and other observers who question whether prosecutors need such assistance. Others see the appointment as enhancing the ability of DOJ to provide more industry-specific guidance on the elements of an effective compliance program. Such guidance might be particularly helpful to companies subject to the Foreign Corrupt Practices Act, and to health care companies subject to Medicare fraud and abuse statutes (health care being particularly mentioned by Weissman as a subject of increased DOJ focus).

This DOJ initiative has notable governance implications. It is the most recent and tangible evidence to the organization (and its leadership) of the significant benefits of an effective compliance program. For executives who haven't "gotten it" in the past, DOJ is essentially making the "business case" for compliance. And, as the *Caremark* series of decisions make clear, the responsibility to assure program effectiveness falls squarely on the shoulders of the board and its relevant committees. Corporate governance is expected to help set the compliance tone of the organization, not only in the context of the program itself, but also in the broader context of management conduct, policies that incentivize compliant behavior and an organizational culture that promotes compliance. Given that the stakes associated with compliance program effectiveness just got higher, it will be difficult for the board to take a pass on this development; i.e., to not take action that may ultimately help the corporation avoid prosecution entirely, or at a minimum mitigate any potential penalties associated with prosecution.

It is not difficult to chart the board's pathway forward in this regard. The Federal Sentencing Guidelines set forth the basic elements of an effective compliance plan, so that should be the starting point. Working closely with the general counsel, the audit and compliance committee can compare program design and operation against each element of those guidelines.

An ultimately more productive exercise might be, however, evaluating the organization's program against the criteria set forth in DOJ's Filip Guidelines. These are significantly more practical in nature and, as such, are uniquely well suited for committee member understanding and appreciation. Is the program well-designed? Is it being applied earnestly and in good faith? Is it truly supported by the board? And perhaps most importantly, does it work?

The general counsel and the audit and compliance committee certainly will want to solicit the input of the organization's compliance officer in this important internal "tire-kicking" exercise. The perspectives of this valued employee will no doubt be helpful. But the board should not get confused by DOJ's use of the term "compliance counsel." It is absolutely critical that an organization's overall internal effort be directed by the general counsel who, by the nature of her legal training, is in the best position to understand and advise the board. That's because this new DOJ initiative has implications beyond the four corners of the compliance program. It involves the interpretation of DOJ guidance on compliance program issues; the ability of the corporation to defend itself in the context of a criminal investigation or prosecution; and the exercise by board members of their *Caremark* obligations. Addressing those specific implications are properly the responsibility of the general counsel and not the compliance officer.

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