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Directors Challenged to Respond to New DOJ Corporate Fraud Initiative

Posted by Michael W. Peregrine, McDermott Will & Emery LLP, on Monday, December 13, 2021

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The US Department of Justice's (DOJ's) new policy on corporate fraud enforcement and individual accountability is a significant development around risk, and corporate directors should be aware.

As Deputy Attorney General Lisa O. Monaco **announced on October 28**, the new policy represents a return to the stricter enforcement posture of the administration of Barack H. Obama. In that regard, the policy has implications for board oversight of the corporate legal function and will likely affect how boards evaluate risk and oversee the effectiveness of compliance and ethics programs.

According to Monaco, this shift in enforcement policies reflects the confluence of three developments: the increasing national security dimension associated with corporate crime, the dramatically increased role that data analytics is playing in corporate criminal investigations, and criminals' interaction with emerging companies in the technology and financial sectors in a way that exploits the investing public. The DOJ's overarching goal is to "protect jobs, guard savings, and maintain our collective faith in the economic engine that fuels this country," Monaco said.

The leading theme of the new policy is its unambiguous prioritization of individual accountability in corporate criminal matters. This translates, in part, to a reminder for federal prosecutors to concentrate on individual accountability—at every level of the corporate hierarchy—from the beginning of a criminal investigation.

To this end, the DOJ is restoring prior guidance that premises the receipt of cooperation credit on a company providing the government with all non-privileged information about all individuals involved (not simply those "substantially involved") in alleged misconduct, regardless of their position, status, or seniority. This disclosure expectation may create significant tension between governance and management during internal reviews, risk evaluations, and investigations.

Reflecting its commitment, the DOJ is providing "surge resources" to its prosecutors, including by embedding a squad of Federal Bureau of Investigation agents in the department's Criminal Fraud Section and by establishing a Corporate Crime Advisory Group. The DOJ is also urging prosecutors not to be deterred by the fear of losing cases but instead to "be bold" in holding individuals accountable for corporate crime.

The new DOJ policy also includes a series of initiatives related to companies' prior misconduct and how that may affect DOJ decisions concerning the appropriate corporate resolution. The DOJ's underlying message is that enforcement at any level should be a matter of concern because the new guidance says that essentially all former enforcement actions are relevant.

In addition, the policy makes clear that the DOJ will consider imposing corporate monitors in the resolution of any corporate criminal investigation when it is appropriate to do so in the interests of continuing compliance.

There is little doubt that the new DOJ policy represents a marked change from the approach of the previous administration. Reorienting strategy, risk evaluation, and executive sensitivity may be challenging and require particular emphasis on tone at the top from the board. The increased risk of enforcement is not just management's problem.

Thus, it will be important for boards to direct management to reinvigorate its compliance and related protocols, ensuring that they are adequate to respond to this new enforcement environment. Boards should also encourage management to support corporate citizenship efforts, prioritize remediation, and promote cultural change even when seemingly inconsequential (i.e., low-dollar-value) penalties are imposed on the company by a governmental entity. For as Monaco noted, the new policy "is a start—and not the end" of the DOJ's focus on corporate crime.

Managers and employees may be cynical about the extreme shifts in enforcement policy that seem to arise with each change in administration. It's the "I've seen this movie before" attitude that can disincentivize management or employee buy-in. The board should anticipate such cynicism and move vigorously to ensure that the organization's culture remains committed to ethical conduct and to legal compliance. That may not be an easy task.

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