

The Chief Legal Officer's 'Monaco Messaging' Tasks

Analysis of the DOJ's new enforcement principles, which create significant new leadership education, policy design and culture support tasks for the Chief Legal Officer.

By Michael W. Peregrine

The Department of Justice's long-standing commitment to corporate crime enforcement and executive accountability, as recently re-emphasized by Deputy Attorney General Lisa O. Monaco, creates significant new leadership education, policy design and culture support tasks for the Chief Legal Officer (CLO).

By her announcement, Monaco has introduced aggressive new guidelines ("the Monaco Guidelines") by which the Department of Justice will engage with corporate wrongdoing; a course that combines an expedited approach to the investigative process and a sharpened application of individual accountability, with a "carrot and stick" approach to enticing and eliciting corporate cooperation and incentivizing compliant personal conduct.

The CLO will be at the center of most organizations' response to the new DOJ enforcement principles, given her role as technical legal advisor, business partner to management and wise counselor. This CLO will be called upon to brief organizational constituents on the practical impact of the new DOJ enforcement guidelines, and the options for organizational response.

These steps can be accomplished through targeted internal communications that speak to the following themes, among others:

Message #1: This is serious business.

The Monaco Guidelines should not be taken lightly by the organization, despite the decline in recent years in corporate criminal prosecutions. DOJ has invested over a year in the development of these guidelines. It seeks to make clear that it "won't accept business as usual" when it comes to responsible corporate behavior. In particular, DOJ is pursuing a complementary level of empowerment: of companies, "to do the right thing;" and of prosecutors, "to hold accountable those who don't."



Photo: Diego M. Radzinski/ALM

U.S. Department of Justice building in Washington, D.C., on January 12, 2022.

Message #2. The CEO must be supportive.

Many CEOs are compliance-weary, for understandable reasons. They're concerned about the size of legal and compliance budgets in the context of a volatile economy. They don't sense an aggressive criminal enforcement environment. They've long forgotten the lessons of Sarbanes-Oxley. Yet the "smart play," for many reasons, is for the CEO to acknowledge the Monaco Guidelines, and support a thoughtful organizational response. The risk may be substantial if the CEO does not.

Message #3. The board must be engaged.

Even with direct CEO involvement, the governing board must lean in whenever the subject is the corporation's commitment to compliance with laws. Directors are ultimately "on the hook" when it comes to responding to the Monaco Guidelines. It's not just because of their Caremark-grounded oversight obligations, but also their broader duty to protect the reputation of the

corporation. They have to be informed; they need to be engaged.

Message #4: The deterrence must be acknowledged.

A central focus of the Monaco Guidelines is on how corporations choose to reflect corporate values in their compensation systems. On the deterrence side, DOJ is prompting corporations to use those systems to impose financial penalties (e.g., claw-backs, escrowing compensation) on employees and executives for misconduct. For public companies, these efforts can be coordinated with measures intended to respond to similar SEC guidelines.

Message #5: The incentives must be considered.

On the incentives side, DOJ is prompting corporations to apply affirmative metrics and benchmarks to reward compliance-supportive behavior. Moreover, the emphasis on prompt self-disclosure appears intended to incentivize corporations to strengthen their compliance programs' ability to identify and respond to indications of misconduct before DOJ becomes involved. The message seems to be, if the corporation makes a voluntary disclosure and remediates the alleged misconduct, DOJ will not seek a guilty plea. That can be a pretty big "carrot."

Message #6. Timing may indeed be everything.

Corporate leadership should understand that "speed" seems to be an essential element of voluntary disclosure and corporate cooperation. Ms. Monaco has expressed the "need to do more and move faster" when it comes to corporate criminal prosecutions, and to "expedite" DOJ's investigations of individuals. Prosecutors and corporate counsel alike are being told by DOJ to feel that they are "on the clock" when it comes to expediting investigations—especially as to (allegedly) culpable individuals. All of which creates significant timing and strategic pressures for the company and its legal counsel.

Message #7. Acknowledge the board-management tension.

It will be important to recognize the "800-pound gorilla" in the room: how the government's focus on individual accountability can create conflict between the board (and its focus on corporate cooperation) and management (not wanting to be "thrown under the bus") in times of internal corporate controversy. And there's also the concern that informed corporate risk-taking may be chilled by excessive fears of executive criminal exposure.

Message #8. Prior conduct really counts.

There's always been the concern that some companies will simply assume the risk of government investigation as a cost of doing business. But the Monaco Guidelines makes clear that corporations may suffer more directly for a history of prior misconduct. Prior wrongdoing involving the same members of leadership or personnel will be the focus of special concern. All of which relates to how seriously the corporation applies its own compliance enforcement measures.

Message #9. It's always about tone at the top.

Leadership may get tired of hearing it, but it's a business truism: when it comes to corporate culture, the board and its executives must "talk the talk" and "walk the walk." And the Monaco Guidelines makes clear that prosecutors will evaluate "what companies say and what they do" when it comes to identifying and responding to misconduct. Boards may thus look more closely at the substance and presence of the corporate compliance program.

Message #10. It takes a village.

Given the breadth of the Monaco Guidelines, other members of the senior leadership team should be important partners with the CLO in developing an appropriate corporate response. Internal partners would include the chief compliance officer, of course, as well as the head of human resources, the chief risk officer and the chief governance officer. External partners would logically include the corporation's white collar, governance and executive compensation advisors.

The sky is not falling. Corporate America is not being besieged by criminal prosecution. But DOJ's aggressive enforcement posture, as re-emphasized in the Monaco Message, represents an enterprise risk to which boards will expect management to respond. The chief legal officer is the logical executive to lead that response, working in concert with the chief compliance officer and other valued executive colleagues. And given the likelihood of further guidance from DOJ on these enforcement topics, the leadership response can be expected to be ongoing.

Michael W. Peregrine, a partner at *McDermott Will & Emery*, advises corporations, officers and directors on matters relating to corporate governance, fiduciary duties and officer and director liability issues. His views do not necessarily reflect the views of the firm or its clients. The author thanks his partners **Sarah Walters** and **Justin Murphy** for their contributions to this article.