CONFIDENTIAL

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GOVERNING HEALTH UPDATE

from Michael W. Peregrine

Re: Governance Implications of New Department of Justice Focus on Corporate Crime and Individual Accountability

Matters of corporate fraud enforcement and individual accountability pushed their way back onto the board of directors' agenda, with an October 28 policy announcement from the Department of Justice ("DOJ").

According to comments made by Deputy Attorney General Lisa O. Monaco, DOJ is taking a series of new actions intended to reinforce its commitment to combat corporate crime. These new actions are highly relevant to the board of directors' obligation to oversee corporate compliance with law and regulation, and are worthy of its close attention.

Most notable to boards in this regard is DOJ's 'unambiguous' prioritization of individual accountability in corporate criminal matters. To this end, DOJ is restoring prior guidance that premises receipt of corporate cooperation credit on a company's provision to the government of all non-privileged information about all individuals involved (not simply those "substantially involved") in the alleged misconduct, regardless of their position, status or seniority.

This disclosure expectation can sometimes lead to significant tension between governance and management in the course of risk evaluations, compliance initiatives, internal investigations and decisions on whether to seek cooperation credit. The board may wish to be pro-active in engaging with management in order to mitigate these tensions.

In gauging the seriousness of this new DOJ enforcement posture, the governing board should also be aware of DOJ's commitment to "surge resources" to its prosecutors, including embedding a squad of FBI agents in the department's Criminal Fraud Section.

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

In many respects, the new DOJ action reflects a return to Obama Administration-era enforcement policies; e.g. the so-called "Yates Memorandum" and other initiatives. At that time, responsible corporations were generally able to refine their oversight practices and business protocols to respond to the government's emphasis on individual accountability. As corporate fraud enforcement returns to these prior policies, it will be important for boards to direct management to re-invigorate their compliance and related protocols to ensure that they are adequate to respond to this new enforcement environment.

In particular, boards will want to assume direct responsibility for assuring a corporate culture that reflects a commitment to compliance and lawfulness, and to responsible corporate citizenship. Its failure to make good faith efforts to do so could place the board in fiduciary jeopardy. Boards should also encourage management to prioritize remediation, and promote cultural change, where even seemingly inconsequential (i.e., low dollar value) penalties are imposed on the company by a governmental entity. Tone at the top really counts.

The Chief Legal Officer, teaming closely with the Chief Compliance Officer, is the logical corporate officer to brief executive leadership and the board on the new DOJ actions. The CLO can combine the appropriate "The Sky Is Not Falling" message with a reminder of the seriousness with which the board of directors should treat these actions.

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