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## GOVERNING HEALTH UPDATE from Michael W. Peregrine For the Audit & Compliance Committee

### RE: DOJ PROVIDES SPECIFIC COMPLIANCE OVERSIGHT RECOMMENDATIONS TO CORPORATE BOARDS

Recent public comments from senior Department of Justice (“DOJ”) officials provide highly relevant guidance for the Audit & Compliance Committee in its exercise of oversight of the corporation’s compliance program and code of conduct.

In separate speeches made on March 3, both Attorney General Merrick Garland, and Assistant Attorney General Kenneth A. Polite, Jr. (Chief, Criminal Division) elaborated on DOJ’s commitment to corporate criminal enforcement and the priority it has placed on the prosecution of individuals responsible for corporate crimes. Assistant Attorney General Polite in particular emphasized DOJ’s specific requirements for a corporation to receive any credit for cooperation with the government. These include notifying DOJ of all relevant, non-privileged facts and evidence about the misconduct and [emphasis added] **all** of the individuals involved.

Notably for the Audit & Compliance Committee, the Assistant Attorney General identified several remedial factors relating to (i) corporate leadership and personnel; and (ii) the corporate compliance program, with which DOJ will likely consider as part of the cooperation credit analysis.

As to the first factor, DOJ urges a corporation upon the discovery of a crime to examine whether a change in the CEO position is necessary “even if there is no evidence that a CEO personally committed a crime”. DOJ suggests that in those situations a leadership change could be necessary because the CEO “modeled poor ethical behavior for the workforce, or fostered a climate in which subordinates committed wrongdoing to benefit the company, or permitted weak internal controls that allowed the crimes of the individuals to go undetected.” Significant, indeed.

As to the second factor, DOJ is likely to examine the scope of the compliance program, to make sure that it is “adequately creating, maintaining and supporting an ethical culture”. In particular, DOJ may focus particularly on the company’s investment in compliance, in order to determine whether the company is doing “everything [it] can to ensure that when that individual employee is facing a singular ethical challenge, he has been informed, trained and empowered to choose right over wrong.”

The Garland and Polite comments reflect the seriousness with which DOJ approaches its commitment to corporate fraud and individual accountability. It is important that the Audit & Compliance Committee be reminded of this commitment and, importantly, the types of remedial factors the DOJ will consider in making cooperation credit decisions. The Audit & Compliance Committee may wish to consider these remedial factors when making decisions with respect to the scope, funding, and organizational application of the compliance program. The Committee may also wish to evaluate initiatives to support demonstrate a “tone at the top” culture by the CEO and other executive leaders.

These recent comments by senior DOJ officials are highly informative to the Audit & Compliance Committee, for at least three reasons: First, they confirm DOJ’s commitment to individual accountability; second, they alert the committee to the potential need to address resulting executive level sensitivity; and third, they underscore the board’s responsibility for supporting an ethical culture within the organization.