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## At the DOJ, Change Is in the Air

Corporate boards need to focus on the department's initiatives on compliance.

### From the Experts

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Your board's audit committee will want to review new compliance guidance provided in a recent speech by assistant attorney general Leslie Caldwell, chief of the U.S. Department of Justice's Criminal Division. It coincided with the DOJ's announcement of the appointment of a "compliance counsel" to advise prosecutors as they consider whether a corporation maintained a good-faith compliance program at the time of any conduct giving rise to the prospect of charges. The guidance was presented as metrics that the new counsel will apply when evaluating programs for effectiveness.

Both the guidance and the appointment are consistent with the DOJ's renewed commitment to criminal and civil fraud enforcement, and its intent to be more transparent about how prosecution and related decisions are made. These are all matters with which the audit committee (or some other board committee charged with compliance oversight) should be concerned. They're all consistent with the board's obligations under the seminal *In re Caremark International Derivative Litigation* decision to create and maintain a corporate reporting/compliance program.

Of course, the DOJ's interest in compliance is not new. In particular,



its Principles of Federal Prosecution of Business Organizations (the DOJ Principles) make it clear that the existence and effectiveness of a corporation's pre-existing compliance program is a factor that the DOJ will take into consideration when making a prosecution decision. What appears new, however, is the agency's interest in applying a deeper analysis of compliance program quality and effectiveness. That's why it appointed a compliance counsel who has significant high-level experience across a variety of industries. According to

Caldwell, this new official will help DOJ Fraud Section prosecutors (a) test the validity of company claims about its program (e.g., that it is substantive in all respects, and is not merely "window dressing" or a "paper program"); and (b) develop realistic "compliance fixes" (i.e., those that are not unnecessary or unduly burdensome) when reaching a settlement with a company.

The DOJ Principles do not contain formulaic requirements, but rather focus on practical and fundamental themes. For example, they encourage questions such as: Is the corporation's

compliance program well designed? Is it being applied earnestly and in good faith? Does the compliance program work? Caldwell expands on these by identifying the following examples of metrics that the compliance counsel will apply when working with prosecutors to evaluate programs:

- Does the corporation ensure that its directors and managers offer strong support for compliance policies?
- Do compliance program staff have stature within the company? Are the compliance teams adequately funded and able to access needed resources?
- Are compliance policies clear and in writing? Are they easily understood by employees?
- Are the compliance guidelines effectively communicated to employees? Are they easy to find, and do employees get repeated training, including whom to contact with concerns?
- What compliance messages are conveyed to employees, and how are they conveyed (e.g., through in-person meetings, emails and telephone calls, and through their compensation)?
- Are the compliance policies subject to periodic review and updating as to evolving risks and circumstances?
- Do mechanisms exist to enforce the compliance policies? Is compliance incentivized, and are violators likely to be disciplined on an even-handed basis?
- Are third parties (vendors, agents, consultants) informed of—and held accountable for—compliance expectations?
- Has the company tolerated compliance failures in the past, and if so, why (e.g., the alternative would have

meant a reduction in revenues or profits)?

The approach outlined by Caldwell, together with the hiring of a compliance counsel, should be a signal to the audit committee of just how seriously the DOJ takes compliance program effectiveness. That is also demonstrated by the September announcement of a new DOJ enforcement policy (the Yates Memorandum) emphasizing the importance of holding culpable executives accountable for corporate wrongdoing. The audit committee should recognize that the hiring of the compliance counsel, and the release of the Yates Memorandum, reflect a governmental emphasis on fraud enforcement. This suggests a need for greater audit committee engagement on compliance matters.

There are three likely audit committee responses to these developments. A committee can examine whether it should increase the agenda time devoted to compliance; pursue internal education initiatives to enhance the committee's ability to evaluate the quality of the program; and compare the existing program to the DOJ's prescribed metrics (and the complementary compliance program provisions of the U.S. Federal Sentencing Guidelines). And, of course, it can consider whether to make changes. These should be coordinated with other company responses to the Yates Memorandum (e.g., revising its approach to internal investigations and ensuring appropriate indemnification of officers, directors and management).

Any action plan arising from these initiatives should probably be a joint effort of the general counsel and the chief compliance officer, rather than solely that of the compliance officer. This is because these developments



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extend beyond the four corners of the compliance program (since they require interpretation of the Yates Memorandum, the DOJ Principles and the Federal Sentencing Guidelines).

Indeed, an important tangible benefit of these initiatives is the opportunity they provide the audit committee to support and encourage increased collaboration and coordination between the general counsel and the compliance officer—which can only serve to improve an organization's legal compliance.

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