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New DOJ Actions Impact GC and Compliance Officer Roles—What Should the Board Do?

From the Experts

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Several new, highly publicized fraud enforcement initiatives of the U.S. Department of Justice are likely to impact the roles of the general counsel and chief compliance officer. In most organizations, there are elements of overlap in how these officers relate to the compliance program structure and the conduct of internal investigations. In the context of these new initiatives, however, absolute clarity on executive-level leadership is necessary in order to ensure an effective and coordinated organizational response. The governing board, with its obligations for legal compliance oversight, will in most instances conclude that the general counsel is best qualified to lead that response.

Two particular policy initiatives are at issue. First is the "Yates Memorandum" setting forth specific guidelines on corporate conduct. These guidelines incorporate a substantially increased government focus on individual accountability for corporate wrongdoing, and—of particular relevance—on corporate eligibility for "cooperation credit" in the context of government investigations. In so doing, the Yates Memorandum establishes a direct linkage between a corporation's ability to receive cooperation credit–certainly a desired fiduciary goal–and the extent of the corporation's efforts to provide the government with information on individuals responsible for the corporate wrongdoing.

Deputy Attorney General Sally Yates.

Diego M. Radzinschi/NLJ

Second is DOJ's decision to appoint a "compliance counsel" within its Fraud Division. The specific role of this new position will be to help determine whether corporations subject to DOJ investigation have maintained a good faith compliance program. The DOJ's Principles of Federal Prosecution of Business Organizations (a/k/a the "Filip Guidelines") make it clear that the existence and effectiveness of a corporation's pre-existing compliance program is a factor DOJ will take into consideration when making a prosecution decision.

These new initiatives directly implicate the board's Caremark obligations--the obligation to implement and maintain a corporate reporting and information system that works to confirm for the board that appropriate legal/compliance information will come to its attention in a timely manner. They also implicate the availability of business judgment rule protection for decisions made with respect to federal inquiries, to the structure and conduct of internal investigations and to decisions concerning cooperation with the government.

A key fiduciary interest is to ensure that the corporation's response to these two initiatives will be directed by the general counsel or the chief compliance officer, whichever is more qualified for the responsibility. Indeed, recent developments have caused the roles and responsibilities of the compliance officer and the general counsel to become increasingly blurred, leaving many corporate officers to question, "Is this for Legal or for Compliance?" Under these circumstances, the board should seek to establish clarity and reduce the potential for confusion. The failure to clearly delineate the respective duties of these key corporate officers can create administrative waste and inefficiency; increase internal confusion and tension; jeopardize application of the attorney-client privilege and "draw false distinctions between organizational and legal risk." These concerns are magnified in the context of the two new DOJ initiatives.

For the following reasons, the board is well advised to direct the general counsel to lead the organizational response to the new DOJ initiatives. The general counsel would then be expected to work collaboratively and cooperatively with the chief compliance officer, as a valued organizational partner.

As to the Yates Memorandum

Yates "raises the bar" in terms of the structure and conduct of internal corporate investigations. Going forward, the basis for any consideration of credit for corporate cooperation is the complete disclosure of all relevant facts about individual misconduct. This means that internal investigations must be focused in part on identifying all individuals allegedly involved in or responsible for the subject wrongdoing (regardless of position, status or seniority) and disclosing to the government all facts related to that alleged wrongdoing. The failure to provide the government with "complete factual information about individual wrongdoers" will jeopardize the corporation's ability to qualify for cooperation credit. Other, more traditional factors will also be considered in the assessment of cooperation credit (e.g., the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, the proactive nature of the cooperation, etc.).

The Yates linkage between cooperation credit and the focus of the corporation's internal investigation means that the general counsel, and not the chief compliance officer, should lead the corporation's internal investigation on matters involving actual or potential allegations of civil or criminal fraud. From an overarching perspective, the general counsel is better suited, by nature of her legal training and work with white collar counsel, to structure the investigation and evaluate its results, and to advise the board and management on negotiations with the government in general and pursuit of cooperation credit in particular.

For example, as part of the basic fact-gathering process, the general counsel is better suited to direct and determine that:

- the fact-collection process is staffed, and proceeds, at a level consistent with the expectations of DOJ (i.e. that the fact-gathering process proceeds with "the diligence, thoroughness and speed" that DOJ expects from the internal investigation);
- the fact-gathering process is focused on identifying and "providing all relevant facts with respect to individuals";
- specific facts identified are actually relevant to the question of individual culpability, based upon the legal issues in question and the applicable standards for determining liability;
- the fact-gathering process is designed to identify (and actually identifies) ALL individuals allegedly involved in or responsible for the misconduct at issue, regardless of their position, status or seniority; and
- the attorney-client privilege is protected, and the "right to counsel" protections available to individual employees will be recognized and honored, in the interview process.

This does not mean that the chief compliance officer and other compliance personnel should not be involved in the fact-gathering process. (Indeed, where members of the compliance staff have strong investigative skills, they should most definitely be involved). It does mean, however, that given the crucial legal issues, they should act under the direction and guidance of the general counsel. To do otherwise would be to invite organizational exposure to significant risk—that the internal investigation fails to qualify for cooperation credit, for instance, and/or that the availability of attorney-client privilege is jeopardized.

As to the Compliance Program

DOJ's appointment of an internal compliance counsel underscores the value of ensuring that the corporation's compliance program is "effective," consistent with DOJ/Filip and federal sentencing guidelines (FSG) standards. However, any review of the compliance program should be a shared effort between the general counsel and the chief compliance officer, rather than solely that of the compliance officer. That is because the new DOJ initiative has implications beyond the four corners of the compliance program, and which require legal analysis. These include:

- interpretation of the specific FSG and Filip criteria for program effectiveness;
- the relationship of program effectiveness to DOJ's Yates corporate prosecution standards; and
- the exercise by the board members of their Caremark compliance program oversight obligations.

For at least these reasons, the general counsel must play a leading role in any review of compliance program effectiveness, working closely together with the chief compliance officer.

Conclusion

Corporate board members are more likely to satisfy their legal compliance obligations by directing that the general counsel, and not the chief compliance officer, direct the organizational response to the two new Department of Justice corporate fraud initiatives.

Such an approach is not meant to denigrate the valuable contributions of the chief compliance officer. Similarly, it should not be viewed as an internecine turf battle, hierarchical jousting or an effort to limit the independence of the compliance officer. Role clarity in matters of internal fraud investigations is a critical board concern. The fiduciary goal is, therefore, to assure that the most qualified corporate officer is assigned to direct the organizational response to key governmental initiatives and, in most circumstances, that person is the general counsel.

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