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Effective Communication to Alleviate Company Risk

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Program Takeaways

With government agencies taking a stronger stance toward not only enforcement but also compliance and ethics programs in general, now is an opportune time to understand both the risk your company faces and how to discuss risk properly across departments and stakeholders. Compliance effectiveness is gauged not only by testing and audits, but by evaluating the nature and frequency of communication among key stakeholders. It is critical that open – and documented – communication occurs throughout the life cycle of the company's compliance program.

Viewed from the top down, the board, C-suite and management should each highlight compliance regularly, affirming its value at the company and the expectation that all employees act ethically. When actions are taken in response to a compliance investigation, consider reporting that out in a sanitized way to the reporting employee and/or all employees. This demonstrates that the company took the report seriously and communicates to employees that there are consequences for unethical behavior.

A company should track not only the formalized compliance (messaging, training, policies and procedures) but also internal discussions on compliance matters. Documenting each meeting and major decision is important. For example, regular evaluation of risk areas by subject matter experts is critical; compliance should document why the experts' recommended changes are accepted *or* rejected. If recommended changes are not accepted because there is already a compliance guardrail in place, that should be noted for the record. The government assumes nefarious intent, so the company should build its own record to demonstrate good faith effort to build an effective compliance program.

Legal is an important partner in compliance and there should be established communication between the two roles on a regular basis. Legal and compliance should look toward the fundamentals of developing and maintaining the company's compliance and ethics program. In doing so, the general counsel should seek to understand the role of the compliance and ethics professional and understand the potential points of conflicts with legal. Compliance must also understand the legal requirements in any given risk area, appreciating the fine line that may exist when issues of external disclosure arise. Intermixed with the external communication issues are concerns over attorney-client privilege – certain matters can and should be elevated to legal if compliance investigations are handled separately. Even where compliance is conducting the investigation, legal might want to weigh in on decisions so that it can consider the impact on privilege and external reporting obligations under law, regulation or contract.

From the ground up, it is important to ensure that all employees are aware of reporting avenues and that they feel comfortable using any available avenue. Employees should know that they can bring concerns to management, legal and/or compliance directly, and compliance should assess their comfort in doing so. Employees should also be aware of any confidential reporting mechanism, such as a website or hotline. Compliance should be testing whether these avenues are being used. Remember, an "*effective*" program is required – not simply "a" program. If there are no calls to the company's hotline, that is <u>not</u> a good thing; it could indicate a failing program unless there is a track record of open-door reporting and calls directly to management, legal and/or compliance.

Compliance and Enforcement Updates

October and November 2021 proved pivotal months for the Biden Administration defining how it will address corporate misconduct. Statements made by Chairman Gary Gensler of the U.S. Securities and Exchange Commission (SEC), Deputy Attorney General Lisa O. Monaco from the DOJ, and Gurbir Grewal, Director of the SEC's Division of Enforcement outlined an aggressive stance toward corporate compliance and wrongdoing. The pronouncements made clear that the administration intends to adopt a tough posture not only to punish those companies and individuals that break the law, but also to motivate companies to analyze and improve their current corporate compliance and ethics programs. Below are summaries of these recent statements from the government, which outline the current tenor toward promoting effective compliance programs to prevent misconduct and the need for additional focus on corporate compliance and ethics programs.

SEC Chair Gary Gensler Prepared Remarks at the Securities Enforcement Forum, Washington, D.C., Nov. 4, 2021

While delivering remarks at the Securities and Enforcement Forum, Chair Gary Gensler, emphasized that "Enforcement is one of the fundamental pillars in achieving the SEC's mission."

To highlight that mission, he spoke on five key areas 1) economic realities, 2) accountability, 3) high-impact cases, 4) process, and 5) positions of trust.

Economic Realities: In a push to look more at substance over forum, Gensler made clear that the SEC "will be looking at the economic realities of a given product or arrangement to determine whether it complies with the securities laws." As a warning to attorneys and other advisors, he noted that "going right up to the edge of a rule or searching for some ambiguity in the text or a footnote may not be consistent with the law or its purpose."

Accountability: The SEC will be using all of its "tools" to "investigate wrongdoing and hold bad actors accountable — including administrative bars, penalties, injunctions, or undertakings, where appropriate. We'll be prepared to litigate or seek a robust finding of facts if we settle." This statement again, signals a more aggressive enforcement posture from regulators.

High-Impact Cases: Gensler indicated that, while regular, every-day enforcement is critical, "high-impact cases" are important because they change behavior by sending a message.

Process: Gensler indicated that he intends the SEC to move swiftly in enforcement actions, streamlining meetings and moving cases expeditiously. In addition, the SEC reiterated its goal to continue working in parallel with other agencies both in enforcement actions and enforcement policy. Finally, he mentioned that the SEC will be not only looking to develop its own matters, but is also looking to benefit from sourcing cases from other agencies, self-reporting and a robust whistleblower program.

Positions of Trust: In addressing advisors such as attorneys and accountants, Gensler reemphasized the important role these gatekeepers and "positions of trust" have in upholding the law, working to enlist their help in protecting investors through the advice those advisors provide.

Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime, Washington, D.C., Oct. 28, 2021

While delivering an address at the American Bar Association's (ABA) National Institute on White Collar Crime, Deputy Attorney General Lisa Monaco outlined five key points: 1) companies need to review their compliance program to ensure it functions; 2) the DOJ will now consider a company's entire criminal, civil and regulatory record as part of any investigation; 3) companies must now identify *all* individuals involved in any misconduct to receive cooperation credit; 4) the DOJ is removing the presumption against requiring a monitor; and 5) these new policies are only a "start" to the administration's efforts to combat corporate crime, and she emphasized that "companies serve their shareholders when they proactively put in place compliance functions and spend resources anticipating problems."

Compliance and Accountability: Monaco explained the new policy statements intend to ensure the DOJ is clear in what it expects, so companies' C-suites and boardrooms have a proper understanding. With strong guidance, the department seeks to drive robust internal dialogue about compliance and measures designed to stop misconduct proactively. In short, corporate culture matters. "A corporate culture that fails to hold individuals accountable, or fails to invest in compliance — or worse, that thumbs its nose at compliance — leads to bad results." Further, the DOJ intends to focus on accountability for individuals responsible for misconduct. "Attorney General (Merrick) Garland has made clear it is unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance."

***All* Historical Misconduct:** Monaco also stressed that *all* prior misconduct must be evaluated when deciding how the DOJ will resolve any investigation with a company, "whether or not that misconduct is similar to the conduct at issue in a particular investigation." Thus, the DOJ will review any previous civil, criminal or regulatory lapses by a company as part of the total mix of any proposed resolution. Any previous "record of misconduct speaks directly to a company's overall commitment to compliance programs and the appropriate culture to discourage criminal activity."

***All* Individuals Involved:** Prior to her statement, for a company to receive cooperation credit, it was sufficient for companies to disclose only those individuals assessed to be "substantially involved" in the misconduct. No more. Monaco announced that she is directing the department to restore prior guidance that to be "eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue. To be clear, a company must identify all individuals involved in the misconduct, regardless of their position, status or seniority."

Corporate Monitors: The final change that Monaco announced related to corporate monitors. She highlighted that any resolution with the government requires "trust that a corporation will commit itself to improvement, change its corporate culture, and self-police its activities." When that trust becomes damaged, however, "monitors have long been a tool to encourage and verify compliance." To the extent that prior DOJ guidance included a presumption that monitors are disfavored, Monaco rescinded that guidance. Instead, she stated the DOJ "is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA."

Division of Enforcement Director Gurbir Grewal Remarks at SEC Speaks 2021, Washington, D.C., Oct. 13, 2021

While delivering remarks at SEC Speaks 2021, Gurbir Grewal, Director of Division of Enforcement, highlighted three key areas: 1) enhanced corporate compliance and responsibility, 2) accountability for gatekeepers, and 3) appropriate remedies to include requiring wrongdoers to admit they broke the law.

Corporate Responsibility: Grewal reiterated the legal and regulatory scheme that Congress and SEC have adopted to ensure that companies are responsible and play fair. "But too often, they ignore these rules and fail to implement sufficient controls or procedures to ensure compliance. In some cases, firms are practically inviting fraud or waiting for misconduct to occur; in others, they are actively covering it up or minimizing it." He emphasized that these "rules are not just 'check the box' exercises for compliance departments; they are important to ensure that the SEC and other law enforcement agencies can understand what happened and make appropriate prosecutorial decisions."

Gatekeeper Accountability: Grewal stressed that trust requires more than SEC enforcement, highlighting "the essential role" that gatekeepers play. Gatekeepers, outside advisors and internal compliance professionals, must live up to their obligations because "they serve as the first lines of defense against misconduct." Failure to do so will lead to accountability for such failures.

Crafting Appropriate Remedies, Prophylactic Measures and Admissions: Finally, Grewal discussed the dual prongs of punishing misconduct and deterring it from occurring. A key component of the SEC's approach will be requiring wrongdoers to admit that they broke the law. Thus, Grewal stated that "in an era of diminished trust, we will, in appropriate circumstances, be requiring admissions in cases where heightened accountability and acceptance of responsibility are in the public interest." This furthers the belief that "admissions, given their attention-getting nature, also serve as a clarion call to other market participants to stamp out and self-report the misconduct to the extent it is occurring in their firm." In addition to admissions, Grewal focused on officer and director bars, injunctions, undertakings and the hiring of independent compliance consultants as "a critical tools" to prevent future misconduct.

Conclusion

The October statements by Deputy Attorney General Monaco and Director Grewal continue the arc of government policies that will lead to enhanced enforcement and scrutiny of corporate compliance. Indeed, the prior publication of the DOJ's Criminal Division Evaluation of Corporate Compliance Programs (Updated June 2020) guidance outlined the importance of designing a compliance and ethics program to prevent misconduct. Many additions to that policy highlighted the need for compliance and ethics programs to be "adequately resourced and empowered to function effectively," with a focus on evaluating, testing, and incorporating "lessons learned" to develop the most robust program possible given a company's size, industry, geographic footprint and regulatory landscape.