Expert Opinion **Corporate Governance**

Boards Should Retain Their Corporate Fraud Vigilance

Now's not the best time for corporate boards to take their foot off the corporate compliance pedal.

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Fraud. Credit: MYKHAILO KUSHEI/ Adobe Stock

Now's not the best time for corporate boards to take their foot off the corporate compliance pedal. That, notwithstanding recent reporting in The Wall Street Journal that "The Justice Department Is Pulling Back on Prosecuting Corporate Crime."

The thrust of The Journal's article is that the DOJ elected against prosecuting companies in several recent instances, despite having evidence implicating senior employees in wrongdoing. The inference is that government investigation of corporate crime is not a priority in the Trump administration, with all of the potential implications for the effectiveness of internal corporate fraud prevention practices. And while the government may indeed have made decisions not to prosecute companies in certain instances, the larger view suggests a level of corporate fraud enforcement by the Trump DOJ that merits continued vigorous compliance oversight by boards of directors. Several different indicators speak to this view.

It is true that under the Trump Administration, a focus of the DOJ's Criminal Division has been investigating and prosecuting corporate crime in areas perceived as most significantly affecting the tax dollars of U.S. citizens and U.S. interests. DOJ cites those areas as including cartels and transnational criminal organizations, human trafficking, the flow of dangerous drugs, child predators, and violent criminals. But the Division has also identified ten specific high-impact areas of white-collar crimes as investigative and prosecution targets, beginning with waste, fraud, and abuse (e.g., health care fraud, federal program, and procurement fraud) that harm the public first. "Fraud" is a concept that can be broadly applied by prosecutors depending upon the applicable statute, and corporations can certainly be held to have perpetrated such activity. Boards can not comfortably turn their collective backs to the related risk implications.

Then there's the new Department-wide Corporate Enforcement Policy introduced earlier this year that is designed to encourage voluntary misconduct self-disclosure by companies. This, in itself, requires the presence of a vigorous internal compliance function if a company is to be able to identify signs of wrongdoing that could be the basis of self-reporting. The new "CEP" makes clear that well-intentioned businesses will be rewarded when they self-disclose wrongdoing, cooperate with government investigations, and remediate the misconduct. "But for those that do not, make no mistake – we will not hesitate to seek appropriate resolutions against companies and individuals alike that perpetrate white-collar offenses that harm American interests."

Also relevant is the formation of the National Fraud Enforcement Division, which consolidates and realigns into a single unit all existing DOJ fraud enforcement resources. The NFED is expected to be a heavily funded, significantly staffed, and "robust litigating division" of the DOJ with respect to fraud targeting Federal government programs, federally funded benefits, businesses, nonprofits, and private citizens nationwide. It operates in coordination with "President Trump's Task Force to Eliminate Fraud," which is a whole-of-government approach chaired by Vice President Vance. A scan of recent DOJ job postings shows an increase in hiring related to the NFED, highlighting further the dedication of resources to fraud enforcement.

Comments by senior DOJ officials reject public suggestions that white-collar enforcement is not a priority in the current administration. In a speech earlier this year, then-Deputy Attorney General Todd Blanche observed that "[I]t's remarkable how some members of the white-collar bar seem to have an endless stream of clients who are each coincidentally victims of supposed overreach or weaponization, but still publicly draft client alerts suggesting that the department is not prioritizing white-collar cases," Blanche said. "Such a statement is wrong. White-collar cases are a significant priority for President Trump, for the attorney general and for the department."

Media narratives notwithstanding, these government initiatives and comments describe a fraud-oriented enforcement landscape that very much targets corporations as well as individuals. From a compliance oversight perspective, the governing board's concern is that management and other employees might misinterpret reports, such as those in The Journal, as providing them with greater freedom to pursue business arrangements that "push the edge of the envelope" from a compliance risk perspective. That is not an unreasonable concern, especially in organizations where there is an intense culture of performance and executives operate within elastic risk guidelines.

In such a situation, the board is encouraged to use The Journal article, as well as similar media stories, as an opportunity to provide discreet (as opposed to "hammer on the head") compliance education. That could logically incorporate the following points:

- The DOJ remains extremely focused on white-collar criminal enforcement, especially where it involves fraud targeting Federal programs.
  - Fraud allegations can arise from conduct that misguided management interprets as ordinary "close the deal" business practices.
- That the DOJ's primary focus will be on individual accountability does not preclude investigations of corporations under similar allegations.
- Problematic corporate and individual conduct occurring now may form the basis for government investigation in the future, when perhaps a different (and more severe) enforcement policy is in place.
- The board and its audit committee should continue to support the General Counsel and the Chief Compliance Officer in their efforts to preserve the integrity of the company's legal control and compliance education systems within the context of current federal law enforcement priorities and their application to new compliance threats.

***Michael Peregrine** is a retired attorney and Fellow of both the American Health Law Association and the American College of Governance Counsel. **Ashley Hoff** is Counsel, McDermott, Will & Schulte and a former U.S. Attorney for the Western District of Texas.*