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NATIONAL DIRECTORS INSTITUTE

Webinar Housekeeping

- Questions can be entered via the Q&A widget open on the left-hand side of your screen. We will address questions at the end of the program, time permitting.
- The recorded version of this presentation will be available on [Foley.com](https://www.foley.com) in the next few days and you can get a copy of the slides in the Resource List widget on the right-hand side of your screen.

BREAKOUT SESSION

The Rapidly- Changing Landscape of the Board's Role in Overseeing Corporate Compliance



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Thanks to Olivia Singelmann, Senior Counsel,
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this presentation.

Flash Poll #1

- On a scale of 1-5 (1 – not confident, 5 – very confident), how confident are you in the strength of your enterprise risk assessment?
- On a scale of 1-5 (1 – not confident, 5 – very confident), how confident are you about your organization's internal compliance program?

DOJ Guidance on Corporate Compliance Programs



Compliance Overview

The Compliance Mission: Try to **prevent** bribery and corruption; but if **detected**, company must **respond** appropriately

PREVENT



- Commitment, Oversight & Resources
- Risk Assessments
- Policies & Procedures
- Contractual Provisions
- Training & Communications

DETECT



- Periodic Testing & Review
- Monitoring & Continuous Improvement
- Ethics Hotline
- Third-Party Due Diligence

RESPOND



- Internal Investigations
- Incentives & Discipline
- Remediation

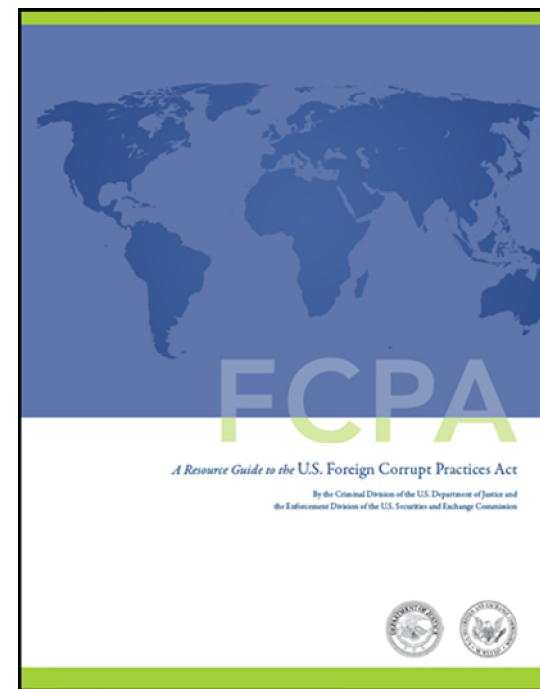


DOJ–Evolution of Compliance Expectations

- **DOJ/SEC’s *Resource Guide to the U.S. FCPA*** (July 2020, Second Edition)
 - Identifies the Hallmarks of Effective Compliance Programs

Ten Hallmarks of an Effective Compliance Program

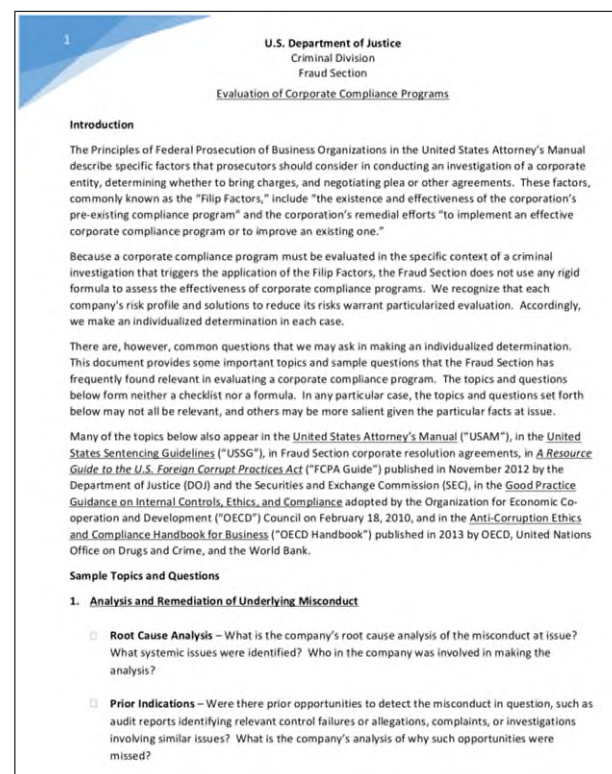
1. Commitment from Senior Management
2. Code of Conduct, Compliance Policies, & Procedures
3. Oversight, Autonomy, & Resources
4. Risk Assessment
5. Training & Continuing Advice
6. Incentives & Disciplinary Measures
7. Third Party Due Diligence and Payments
8. Confidential Reporting & Internal Investigation
9. On-going Improvement: Periodic Testing & Review
10. M&A Due Diligence & Integration



DOJ–Evolution of Compliance Expectations

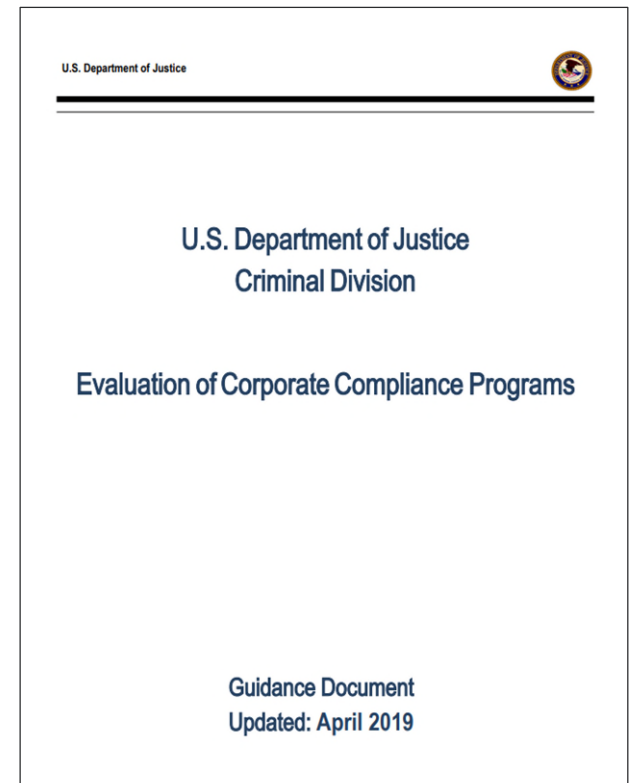
■ DOJ’s *Evaluation of Corporate Compliance Programs* (February 2017)

- Originally published by DOJ’s Fraud Section on its website
 - Intended to help inform prosecutorial decisions related to: (i) form of resolution or prosecution; (ii) monetary penalty, if any; and (iii) compliance obligations in corporate resolution (e.g., monitorship, reporting obligations)
- 119 separate questions, organized by the hallmarks, that address a wide range of specific, practical aspects of a company’s compliance program
 - The document provides “[s]ome important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program”



DOJ–Evolution of Compliance Expectations

- **DOJ’s *Evaluation of Corporate Compliance Programs*** (Revised April 2019)
 - Substantive and thoughtful revision that structures prior and additional hallmark-related questions/guidance around three “fundamental questions:”
 1. “Is the corporation’s compliance program well designed?”
 2. “Is the program being applied earnestly and in good faith?”
 3. “Does the corporation’s compliance program work in practice?”



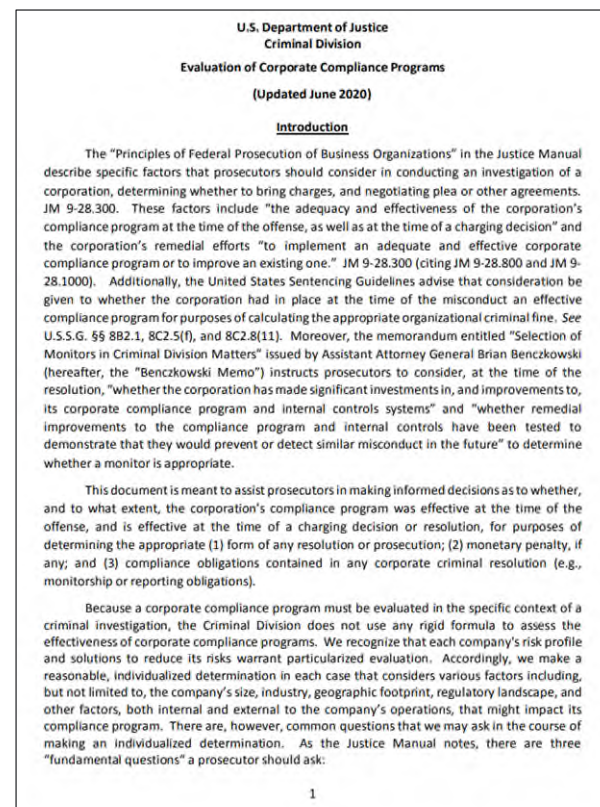
DOJ–Evolution of Compliance Expectations

Among the questions and topic areas identified in the 2017 DOJ Guidance

- **Senior and Middle Management**
 - *Conduct at the Top*
 - *Shared Commitment*
 - *Oversight*
- **Risk Assessment**
 - *Risk Management Process*
 - *Information Gathering and Analysis*
- **Incentives and Disciplinary Measures**
 - *Accountability*
 - *Consistent Application*
- **Compliance Autonomy and Resources**
 - *Compliance Role & Stature*
 - *Empowerment*
 - *Funding and Resources*
- **Training and Communications**
 - *Risk-based training*
 - *Effectiveness*
 - *Communications about Misconduct*
- **Continuous Improvement and Periodic Testing**
- **Third Party Management**
 - *Risk-based and Integrated Processes*
 - *Relationship Management*
 - *Actions and Consequences*
- **Policies and Procedures**
 - *Design and Accessibility*
 - *Operational Integration*
- **Confidential Reporting and Investigations**
 - *Effectiveness*
 - *Scope of Investigations*
 - *Response to Investigations*
- **M&A**
 - *Due Diligence*
 - *Integration*
 - *Implementation*

DOJ–Evolution of Compliance Expectations

- **DOJ’s *Evaluation of Corporate Compliance Programs*** (Revised June 2020)
 - Updates made “based on [DOJ’s] own experience and important feedback from the business and compliance communities”
 - June 2020 Update retains existing structure around the three fundamental questions
 - Evolution of several compliance themes
 - Consideration of individual company’s circumstances, risks, and business realities
 - Emphasis on data to test programs and track effectiveness
 - Focus on evolution of compliance programs
 - More critical analysis of alleged complications due to foreign laws



Flash Poll #2

- Of the following metrics, which are the most important for measuring improvement toward your internal compliance goals? Please select up to 3:
 - “Tone at the Top” by leadership
 - Compliance trainings and completion rates
 - Audits/risk assessments/monitoring practices in place
 - Compliance policy updates/revisions
 - Leadership team’s response to complaints and investigations
 - Employee surveys
 - Other (please specify)

June 2020 DOJ Compliance Updates

- **Greater consideration of individual company's circumstances and business realities**
 - Edits recognize that certain topics and questions may not be relevant, while other topics/questions may be more salient, based on the particular facts of a case; prosecutors expressly instructed to consider the unique circumstances of each company
 - Example: Rather than assume a company will complete ABC due diligence pre-acquisition, 2020 Update recognizes that is not often the business reality; additional questions regarding pre- and post-acquisition integration
- **Emphasis on data to test programs and to track effectiveness**
 - Continued focus on use of data to develop compliance programs; expectation that companies will collect operational data and monitor employee access to policies to improve compliance program
 - Additional questions related to (i) compliance department's and control personnel's access to relevant data for monitoring and testing internal controls and transactions, and (ii) plans to address any limitations such ability to obtain or access data

June 2020 Update – Specific Topics

- **Risk assessments – increased focus on unique risks**
 - In addition to traditional risks (e.g., geographic, regulatory landscape), risk assessments should identify both external and internal company-specific risks based on go-to-market strategies, operational history, prior concerns, and issues faced by industry competitors
 - Policies should be updated periodically to address emerging industry- and company-specific risks; explanations for why changes were made should be documented
- **Accessibility of policies**
 - Additional questions on employees' ability to easily access policies
 - Are policies published in a “searchable format for easy reference;” able to be located using internal website search terms?
 - Does the company “track access to various policies and procedures to understand what policies are attracting more attention from relevant employees”?

June 2020 Update – Specific Topics

▪ Targeted and interactive training

- Trainings should be “tailored to the audience’s size, sophistication, or subject matter expertise”
 - DOJ recommends companies offer “more targeted training sessions” designed “to enable employees to timely identify and raise issues to appropriate compliance, internal audit, or other risk management functions”
 - Online trainings, in particular, should be targeted and interactive (e.g., test employees’ understanding of material, ability to ask questions during training or afterwards)

▪ Increased emphasis on reporting channels/hotlines

- Companies must show that reporting channels are effective
 - Testing of reporting channels (e.g., sample tracking of cases from start to finish)
 - Testing of employees’ ability to locate information about reporting channels
 - Evidence of consistent and frequent communication about reporting channels

June 2020 Update – Specific Topics

- **Third-party due diligence; continuous monitoring**

- Single, but telling question: “Does the company engage in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?”

- **Mergers & Acquisitions**

- June 2020 Update adds question on “timely and orderly integration” of acquired entities
 - Prior version focused on pre-merger activities, as opposed to post-merger integration

June 2020 DOJ Compliance Updates (cont'd)

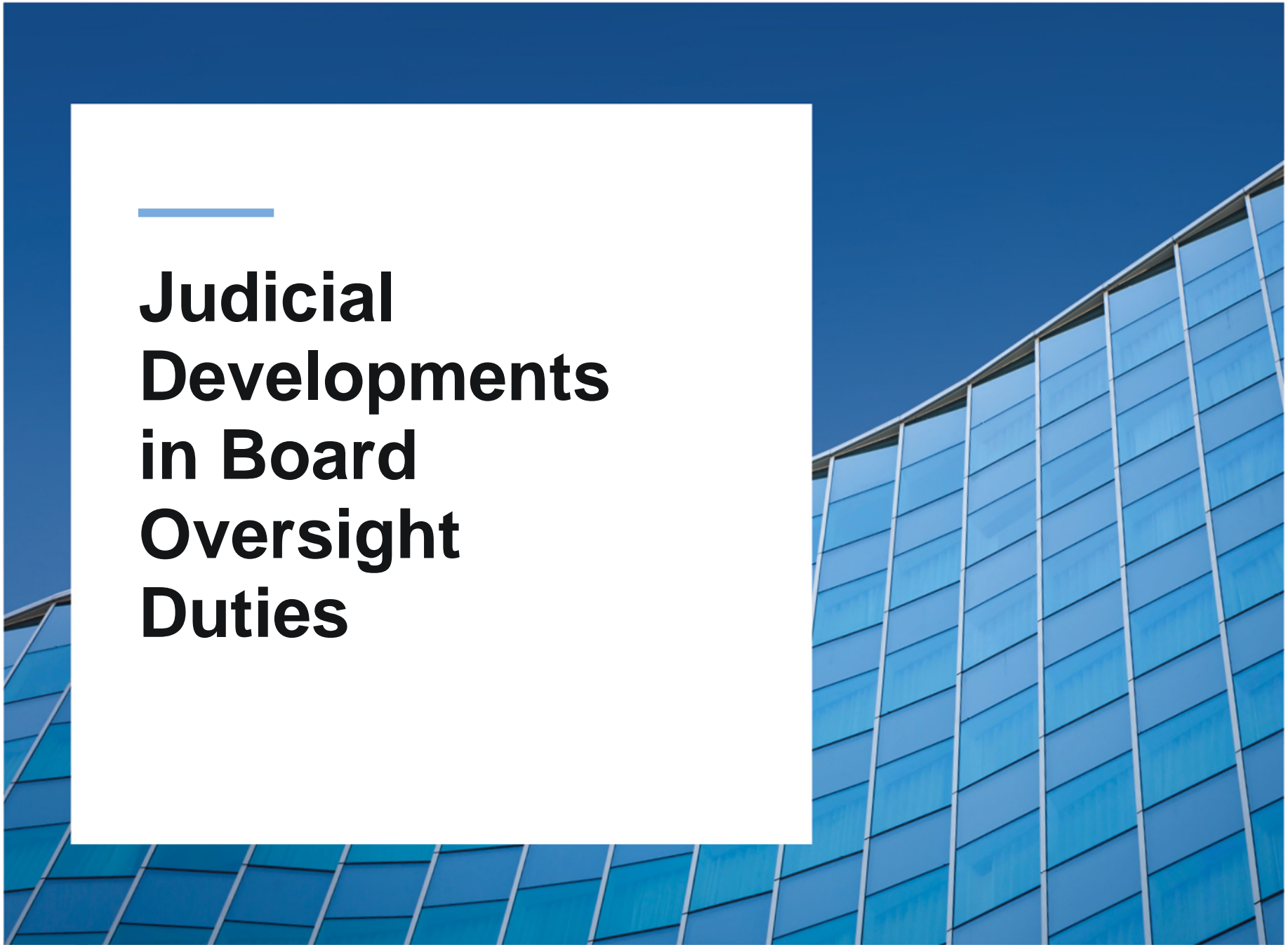
- **Focus on evolution of compliance programs**

- Additional consideration given to company's efforts to improve its compliance program over time
 - Compliance programs now evaluated "both at the time of the offense and at the time of the charging decision and resolution"
 - Questions related to how company has revised its program based on risk assessments, audits, internal allegations of misconduct, external factors, and/or industry-related concerns; focus on the "why" behind changes

- **More critical analysis of alleged complications due to foreign laws**

- Footnote to 2020 Update instructs prosecutors to question basis for alleged impediments to data transfer and/or inability to fully incorporate compliance procedures or processes due to foreign laws
 - If particular compliance structures or decisions are guided by foreign laws, company should address how it maintains the integrity and effectiveness of its compliance program while still abiding by foreign laws

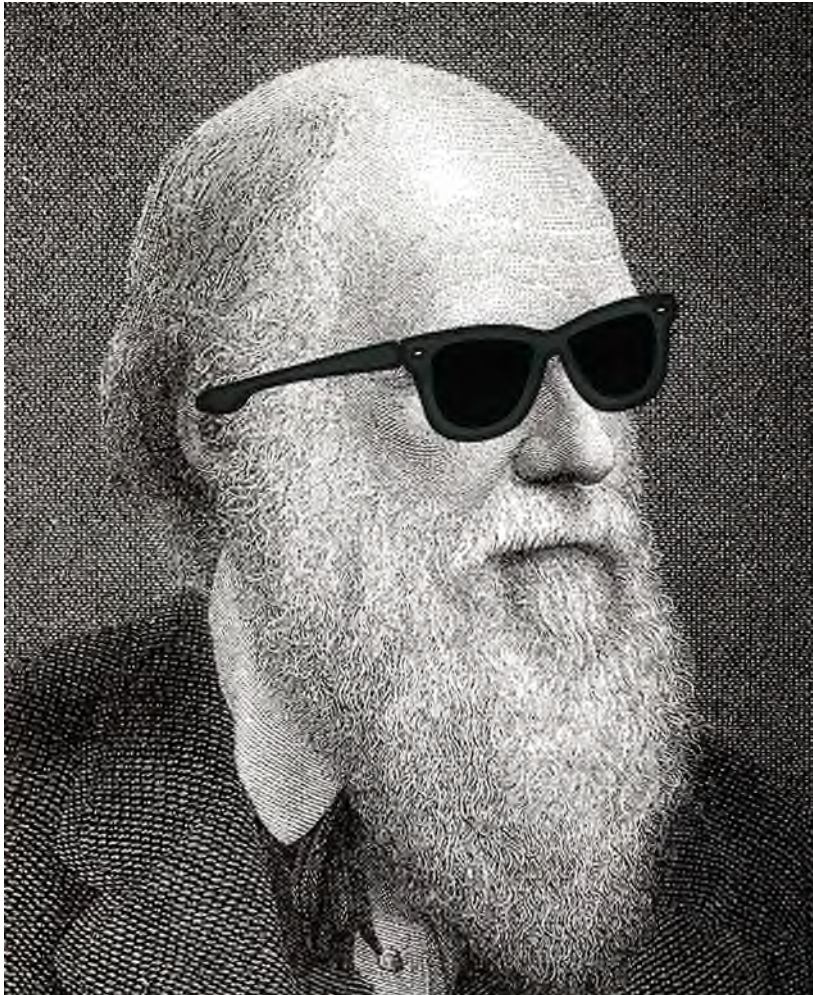
Judicial Developments in Board Oversight Duties



Shift in DE Board Oversight Duties

- **No more “business-as-usual” approach to Board oversight of compliance programs, even where DOJ not involved**
 - Shift of standard from “sustained or systematic failure of the board to exercise oversight” (*Caremark* (1996)) to proactive requirement that directors “must make a good faith effort to implement an oversight system and then monitor it” (*Marchand* (DE 2019), *Clovis* (DE Chancery 2019), *Hu* (DE Chancery 2020))
- **Proactive oversight involves similar criteria as DOJ:**
 - Consideration of individual company’s circumstances, risks, and business realities
 - Emphasis on data to test programs and track effectiveness
 - Focus on evolution of compliance programs
- **Failure to execute can result in:**
 - Shareholder derivative suits, for breach of fiduciary duty
 - Shareholder class action suits, for risk disclosure violations in SEC filings

Managing & Mitigating Risk



- **“Effectiveness” means constantly evolving**
 - Tailor your approach to where and how you actually conduct business
 - “Risk-based” approaches are always better than “fear-based” approaches
 - Monitor periodic changes in U.S. and foreign requirements
 - There is no “one and done” in our constantly changing world
- **“Effectiveness” is not the same as “Perfection”**
 - Key is whether a company can respond swiftly and effectively
 - Focus more on culture, oversight, and systems than on technicalities

Flash Poll #3

- To what extent is the board involved in defining your organization's risk assessment and monitoring processes?
 - To a large extent
 - To a moderate extent
 - To a small extent
 - Not at all

Ethical Lapses Are Top Reason for CEO Departures

- CEO departures increased nearly 13% over the prior year.
- Approx. 1,640 CEOs ousted in 2019.
- 2019 PwC Study found 39% of forced CEO exits in 2018 were the result of "ethical lapses rather than financial performance or board struggles."
- **First time in the study's history that ethical lapses accounted for more forced CEO departures than financial- or board-related shakeups.**

Ongoing issues – Payoffs for Ousted Execs; and Walkouts

- McDonalds - \$40 million payout to ousted CEO; post-ouster more allegations unearthed;
- Google - \$90 million to one ousted exec and \$45 million for another ousted exec. Settlement of shareholder lawsuit included a \$310 million commitment to create a diversity, equity and inclusion advisory council comprised of outside experts.
- Boeing - \$23 million payout to ousted CEO
- Wayfair – employee walkout after DHS contract
- Facebook – employee walkout over POTUS posts

Flash Poll #4

- On a scale of 1 (strongly disagree) to 5 (strongly agree) to what extent do you agree with the following statement: “Our board would act quickly and decisively if our CEO were accused of ethical improprieties.”

What Boards Should be Asking Management About #MeToo / Compliance Issues

- How does the company currently handle sexual/racial harassment claims?
 - When and how is the Board informed about such complaints?
- What is the company's diversity and inclusion training program?
 - Is it a “check-the-box” approach limited to an occasional online module? Or is it an organized, serious, thoughtful approach that permeates throughout the organization?
 - How does one test via objective metrics?

What Boards Should be Asking Management About #MeToo / Compliance Issues (cont'd)

- Does the Board have access to information about prior complaints and outcomes, especially involving CEO/senior management?
- Is the Board notified immediately if an accusation is made against the CEO or a member of the senior management team?
 - Consider whether to require *board* approval of any settlements, especially re C-Suite or senior managers

Other Practical Considerations

- Review employment contracts with current and future senior management
 - Review “for cause” provisions closely – do they include violation of anti-harassment policies? Can “failed” execs exit with a huge payout?
 - Consider whether to include a “morals clause”
 - Consider strengthening claw-back and indemnification provisions
 - Consider inclusion of restrictions on shareholder voting rights
- Review Employment Practices Liability Insurance
- M&A Implications for buyer’s due diligence review
 - Add review of harassment complaints against management to DD checklist
- Increased focus on succession planning
 - In case CEO or senior management forced to resign on short notice

Thank You



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