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Storming the Gatekeepers: When Compliance Officers and In-House Lawyers Are at Risk

Individual accountability is at the forefront of the government's enforcement strategy—and that includes gatekeepers.

BY ROBERT STERN AND SARAH COYNE

History shows that following periods of upheaval there is an increase in fraud-related investigations and enforcement. 2022 has certainly had its share of turmoil: global volatility compounded by the toll of the war in Ukraine and follow-on effects from the pandemic have given corporate compliance officers and in-house lawyers new challenges to confront.

And a rising tide of regulation is headed for them. Corporate accountability is a key priority for the Department of Justice and the Securities and Exchange Commission, and both agencies have renewed their focus on individual liability for gatekeepers, including lawyers, accountants, underwriters, and auditors. We discussed these topics at Practising Law Institute's full-day conference of the same name in September, but a cascade of developments have surged since.

Recent comments from senior officials in the DOJ and SEC are particularly revealing.

In testimony this summer before the U.S. House of Representatives Committee on Financial Services, Gurbir Grewal, the director of the Division of Enforcement at the SEC, said:

"Robust enforcement also includes a focus on gatekeeper accountability. Gatekeepers, such as



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Courtesy photos

accountants and attorneys, are often the first lines of defense against misconduct. When they fail to live up to their obligations, investors and the integrity of our markets suffer. The SEC has brought enforcement actions against gatekeepers who engaged in wrongdoing themselves or attempted to cover up wrongdoing, engaged in conduct that crossed a clear line, or failed meaningfully to implement compliance programs, policies and procedures for which the gatekeeper had direct responsibility ... We will continue to take a hard look at gatekeepers to ensure that they are fulfilling their own professional responsibilities and not giving cover

to corporations or executives engaged in possible misconduct.”

SEC Chairman Gary Gensler similarly stated at the Securities Enforcement Forum that the SEC was committed to using “all of the tools in our toolkit to investigate wrongdoing and hold bad actors accountable—including administrative bars, penalties, injunctions, or undertakings, where appropriate.”

And earlier this month, Paul Munter, the SEC chief accountant, issued a statement entitled “The Auditor’s Responsibility of Fraud Detection” in which he highlighted the important gatekeeping role that independent auditors play in our financial system, identified auditor’s responsibilities with respect to identifying potential fraud, discussed some examples of auditor shortcomings and provided reminders on good audit practices.

The message is the same from the Department of Justice. In March, Attorney General Merrick Garland told the ABA Institute on White Collar Crime that, “the Department’s first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasance ... because corporations only act through individuals.” He elaborated that the prospect of personal liability has “an uncanny ability to focus the mind” and that “that prospect is the best deterrent to corporate crime.”

In September, Deputy Attorney General Lisa Monaco issued a memo detailing revisions to the Department’s Corporate Enforcement Policy that confirmed the Attorney General’s priorities. Section II, which provides guidance on corporate accountability, makes clear that corporations that employ a robust compliance program, cooperate with investigations and self-disclose misconduct will be looked at more favorably by the Department.

Most salient to gatekeepers—and, in particular, Chief Compliance Officers (“CCOs”)—is the inclusion of certain “metrics” that the DOJ will use to evaluate compliance programs, including: (1) whether the program utilizes compensation structures that promote compliance (e.g., employing clawback provisions to penalize misconduct and using financial incentives to “align the interests of the C-suite with the interests of the compliance department”) and (2) whether the corporation has policies in place to ensure that business-related data and communications on personal devices and third-party messaging platforms are preserved.

And we see the increased focus on gatekeepers not only in the SEC’s and DOJ’s words, but in their deeds.

Perhaps the most relevant example is the DOJ’s new certification requirement. The policy, which appeared for the first time in the recent Glencore resolution, requires CCOs and CEOs to certify that a corporation’s post-enforcement compliance programs has been “reasonably designed to prevent anti-corruption violations.”

Monaco acknowledged that while some “might look at the new policy as a punitive measure,” the DOJ sees it as “an effort to empower the gatekeepers, to empower the compliance officers and those who report to him or her in the different business lines.”

Assistant Attorney General Kenneth Polite supported DAG Monaco’s view, noting that the policy is intended to “give CCOs a voice within the organization” and to ensure that CCOs “receive all relevant compliance-related information and can voice any concerns prior to certification.”

The SEC has likewise proposed a series of new policies designed to enhance corporate compliance programs. The one that is perhaps most overtly

aimed at gatekeepers is the SEC's issuance of proposed rules to Enhance Disclosure and Investor Protection Relating to Special Purpose Acquisition Companies ("SPACs"), which aims to provide the same protections to investors of SPACs as they would receive from traditional IPOs. The proposal seeks to, among other things, ensure that the SEC can employ the same gatekeeper and issuer obligations on SPAC transactions as they do IPOs.

Bringing Cases

Recent cases brought by the SEC and DOJ also highlight their focus on individual accountability and gatekeepers. Specifically, the SEC's 2021 Enforcement Results highlight the following cases:

- The DOJ indicted and the SEC charged two attorneys, Richard Rubin and Thomas Craft, for their roles in an alleged scheme to fraudulently facilitate the sale of millions of shares of microcap securities to retail investors. The agencies allege that Rubin, who was disbarred in 1995, continued to fraudulently practice law by submitting attorney opinion letters that allowed microcap stock issuers' securities to be purchased by and sold to the public. The complaint alleges that Rubin signed letters claiming to be an attorney and drafted other letters for Craft's signature, and that Craft signed or permitted the use of his name and signature on letters that falsely stated he had performed substantive work to formulate the opinions in those letters.
- The SEC suspended two former auditors for improper professional conduct during the audit of the College of New Rochelle. The two former Big Four audit partners approved and authorized the issuance of an unmodified audit opinion on the

college's financial statements, despite not having completed critical audit steps. When the former controller and the college's president informed the auditors that the college needed the audit report before the end of the day, the auditors issued the report, despite the existence of outstanding open items and unanswered questions. The SEC suspended both individuals from practicing, with the ability to apply for reinstatement after a year, and three years, respectively.

While time will tell how the DOJ and SEC will enforce their new policies, at least one theme is unmistakable from the current landscape: individual accountability is at the forefront of the government's enforcement strategy—and that includes gatekeepers. Pursuant to its most recent guidelines, the DOJ demands that corporations implement compliance programs that are "well designed, adequately resourced, empowered to function effectively, and working in practice." Accordingly, gatekeepers must ensure that their organizations are not only cooperating with the government in disclosing and investigating misconduct, but also designing compliance programs that adequately detect and prevent misconduct. Failure to do so could subject both their organization and themselves to liability.

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