AGENDA

OPINION

FCPA Settlement Exposes Directors to Criminal Risk

A recent resolution raises governance concerns

By Steven Fagell, Veronica Yepez, Adam Studner, Nathaniel Oppenheimer | April 8, 2024

Criminal investigations by the U.S. Department of Justice create a myriad of financial, strategic and reputational challenges for directors to help navigate on behalf of the companies they serve. A new resolution shows how directors could face criminal risk as part of their oversight role.

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Companies engulfed in FCPA inquiries already face protracted investigations, the possibility of ongoing compliance obligations or even the imposition of independent compliance monitors.

Now, the DOJ's recent plea agreement with Switzerland-based international commodities trading firm Gunvor S.A. raises another potential complication: a director being required to certify —under penalty of perjury and with exposure to criminal risk for making a false statement — a company's compliance with post-resolution disclosure and compliance program obligations.

The post-resolution disclosure obligation requires companies to notify the DOJ when they learn of conduct that may violate the FCPA. The compliance certification, in turn, requires making representations about the design and effectiveness of the company's compliance program and the accuracy of reports made to the DOJ about that program. In 2020, the DOJ began requiring that CEOs and CFOs provide a certification at the end of the resolution

agreement term as to the disclosure obligation, and, in 2022, the DOJ began requiring that CEOs and CCOs also provide certifications as to the compliance obligations.

When Gunvor pleaded guilty to conspiring to violate the FCPA, the plea agreement required the chairman of the board of directors — as opposed to a CEO — to certify, at the end of the plea agreement term, compliance with the disclosure and compliance obligations set forth in the agreement.

This is the first FCPA resolution requiring a director to sign the certifications. The key question is: Does this requirement represent a paradigm shift in the DOJ's certification regime? If so, a range of governance and practical issues may be implicated.

For instance, from a governance standpoint, how will an individual director — or the board as a whole, if the DOJ were to move in that direction — provide certifications that reflect activities under management's control, and where management has the insight and direct access to information that practically would provide a basis to sign a certification?

Requiring a director (or the board) to reach down into and potentially take on management responsibilities to gain comfort to make the certification also raises questions about whether the director takes on exposure to liability not traditionally attendant to board activities. And, as a general matter of corporate law, absent board action authorizing one or more directors to act, boards must act collectively, often by at least a majority.

As a matter of execution, companies in Gunvor's posture will need to develop practical solutions to enable their certifying director to make sweeping compliance and disclosure certifications under penalty of perjury.

A few options come to mind short of making the certifying director the de facto CEO. For instance, companies could adopt a system of management certifications and sub-certifications, similar to those developed to comply with the Sarbanes-Oxley Act's requirement that CEOs and CFOs certify as to the accuracy of financial statements and the design and effectiveness of internal controls.

Another option would be to retain compliance counsel (at the board level) or other compliance professionals acting under privilege to undertake diligence, monitoring or testing and provide advice supporting the certification. Yet another option is a hybrid approach where management takes steps to provide comfort to the certifying director — either through a certification and sub-certification process or the retention of company compliance counsel to make representations to the director — and board-level compliance counsel provides an additional layer of comfort assessing the company's efforts.

No matter what steps are taken, however, the DOJ should acknowledge that placing this onus on a director, as opposed to management, creates significant governance and practical challenges.

As to the key question — does the Gunvor requirement represent a paradigm shift in the DOJ's certification regime? — the answer is "likely no."

The Justice Department did not impose an outside compliance monitor on Gunvor, signaling confidence in the company's current compliance program and approval of the company's cooperation and remediation during the investigation.

Moreover, the Gunvor entity that pleaded guilty, Gunvor S.A., does not appear to have a publicly identified CEO, which suggests a potential peculiarity in Gunvor's governance structure that led the DOJ to the chairman of the board, rather than a desire by the department to ensure board-level accountability for post-resolution certifications.

But institutional memory can fade and, even if the Gunvor resolution may be a unicorn today, companies will need to be vigilant to ensure that post-resolution certifications remain the responsibility of management, and not directors.