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HOW DO CHIEF COMPLIANCE OFFICERS PREPARE FOR DOJ'S NEW COMPLIANCE CERTIFICATION POLICY?

The U.S. Department of Justice (“DOJ”) has long focused on ensuring that corporate compliance programs are given the resources and attention necessary to effectively prevent, detect, and mitigate corporate misconduct. In 2022, DOJ announced and then implemented a new tool to accomplish this goal: requiring a Chief Executive Officer (“CEO”) and a Chief Compliance Officer (“CCO”) to certify at the end of a DOJ resolution that their company has met the resolution’s compliance obligations and that their company’s compliance program is reasonably designed and implemented to prevent future misconduct. Although new, the compliance certification policy is similar to other certifications required in DOJ resolutions and in other areas of the law, and CEOs and CCOs can take several practical steps to ensure that they can knowledgeably sign the certifications without exposing themselves to individual liability.

By James M. Koukios, Ruti Smithline, and Heather Han *

Under a new policy introduced by the Criminal Division of DOJ in 2022, as part of the close-out of a resolution agreement with the government, CEOs and CCOs will be required to certify that: (1) their company has met its enhanced compliance obligations under the resolution agreement; (2) the compliance program has been implemented throughout the company’s operations; and (3) the compliance program is reasonably designed to detect and prevent violations of the relevant area of law that gave rise to the resolution. Moreover, if the company submitted annual self-reports during the term of the resolution, the CEO and CCO will be required to certify that such reports were true, accurate, and complete when they were submitted.

This new CEO and CCO compliance certification policy is widely recognized as a part of DOJ’s renewed

focus on corporate criminal enforcement and, in particular, the importance of the compliance function in reducing corporate crime. The intent of the certifications, according to DOJ leadership, is to “empower” the CCOs and their staff to obtain needed resources, elevate compliance’s stature within a company, and guarantee compliance a “seat at the table” with senior management. But as DOJ has also made clear, false certifications, when made knowingly and willfully, could give rise to individual criminal liability for the executives. Given their importance for successfully ending a DOJ resolution and the importance of avoiding criminal liability, the new policy puts a premium on the ability of a CCO to take appropriate steps to satisfy himself or herself that the company’s compliance obligations have in fact been met.

* JAMES M. KOUKIOS is a partner at Morrison & Foerster LLP’s Washington, DC office. RUTI SMITHLINE is a partner and HEATHER HAN is an associate at the same firm’s New York office. Their e-mail addresses are jkoukios@mofo.com, rsmithline@mofo.com, and hhan@mofo.com.