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SEC, DOJ Announce Policy Changes Affecting Corporate Compliance and Charging Decisions

This past month the Securities and Exchange Commission and the Department of Justice announced policy changes that might affect the way you handle corporate compliance.

More Flexibility for Internal Controls

The Securities and Exchange Commission (SEC) proposed a more flexible interpretation of the internal control provision in Section 404 of the Sarbanes-Oxley Act of 2002. The change will help small companies that are overburdened by Sarbanes-Oxley requirements. Under the proposal, executives need review only those internal controls that could have a material impact on financial statements, and management's evaluation of internal controls should focus on those areas that pose the greatest risks to reliable financial reporting. The SEC also adopted final rules pushing back compliance by non-accelerated filers with Sarbanes-Oxley's requirement for a management report on internal controls to fiscal years ending on or after December 15, 2007. An auditor attestation report on internal controls will first be required for non-accelerated filers for fiscal years ending on or after December 15, 2008.

Following SEC's actions, the Public Company Accounting Oversight Board (PCAOB) voted to propose a new auditing standard for the audits of registrants' internal control over financial reporting under Section 404.

SEC Chairman Christopher Cox praised the proposed change, stating, "The PCAOB's proposal to repeal the unduly expensive and inefficient auditing standard under Section 404 of Sarbanes-Oxley - and to replace that standard with one that strengthens investor protection by refocusing resources on what truly matters to the integrity of financial statements - is an exceptionally positive step for both investors and for America's capital markets.

McNulty Memorandum Signals Fairer DOJ Charging Decisions

The Department of Justice also initiated significant policy changes affecting corporate compliance issues recently. Deputy Attorney General Paul McNulty

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overhauled the guidelines Federal Prosecutors follow when deciding to bring criminal charges against a corporation. While cooperation remains a factor in deciding whether or not to charge, prosecutors must now use more restraint in the type of cooperation they seek from corporations. The new guidelines will hopefully end the practice of forcing cooperative companies to produce attorney-client-privileged material. Now, only in "rare circumstances" may prosecutors seek the approval of the Deputy Attorney General to ask corporations to produce attorney-client communications. Even when the Deputy Attorney General approves, a company's refusal to provide this type of information cannot be held against it in the charging decision. Deputy McNulty's stated intent is to encourage more attorney-client communication that will detect and prevent misconduct.

The McNulty memorandum also stressed that the pre-existence of a corporate compliance program can go a long way in shielding a corporation and the individuals accused of wrongdoing from charges, provided that the program is well designed. In evaluating these programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct.

Members of Reinhart's White Collar Litigation and Corporate Compliance Group are experienced in Sarbanes-Oxley compliance, and in creating and implementing general corporate compliance programs customized to suit the unique needs, resources, and operations of our business clients. If you have any questions regarding your company's compliance plan or this update please call Mark Cameli at 414-298-8155, Chris Ware at 414-298-8255 or Ben Lombard at 414-298-8225.