

Articles

"Corporate Governance Seen Through the Eyes of the Enforcers: An Unlikely Place to Find Meaningful Guidance"

Spencer C. Barasch

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Typically, when corporate executives and other securities professionals grapple with corporate governance issues, one of the last places they tend to look for meaningful, forward looking guidance is to the “securities enforcers” — such as the Securities and Exchange Commission’s Division of Enforcement (SEC or the Agency) or the Department of Justice (DOJ). Rather, securities professionals are conditioned to focus almost exclusively on the endless sea of SEC regulations, interpretive releases and other pronouncements, along with comparable literature issued by relevant self regulatory organizations (SROs) and professional accounting bodies, to make professional judgments in the governance area.

This mindset is not without good reason. Enforcement, traditionally, has been thought of as a reactive function, in which the enforcers, post-facto, jump on violations of the law and mete out appropriate sanctions. Thus, the notion of enforcement, in the minds of many securities professionals, summons images of SEC press releases announcing enormous penalties, news conferences by politicians such as Elliott Spitzer declaring war against segments of the industry, and media coverage of the likes of Andrew Fastow, John Rigas and Dennis Kozlowski being “escorted” by government agents into a courthouse or jail.

Pictures like these speak a thousand words, but primarily about the nature and consequences of egregious corporate misconduct. The fallout from Enron and the corporate scandals of the last decade, however, also has led to several helpful, proactive pronouncements from the securities enforcers about their views of model corporate conduct and key elements of an effective compliance program. Unlike most enforcement literature, which is intended primarily to “shock and awe,” these releases offer valuable guidance on a host of governance issues.

This article summarizes this enforcement literature, and highlights their salient governance features.