

The Pros And Cons Of DOJ Hiring A Compliance Expert

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The U.S. Department of Justice recently announced the hiring of “compliance counsel” to evaluate the compliance programs of companies under investigation. The Fraud Section of the DOJ, which is responsible for prosecuting violations of the Foreign Corrupt Practices Act, will use compliance counsel to help evaluate the extent to which a corporation should be held liable for failing to detect and prevent the corrupt activities of its employees.

The new compliance counsel — who is yet to be named — is described as a former prosecutor who has real-world, hands-on experience developing and executing anti-bribery and corruption (ABC) compliance programs. According to Andrew Weismann, chief of the Fraud Section, based on that experience, the compliance counsel will be able to determine whether a corporate ABC compliance program is “robust ... or mere window dressing.”

Hiring a prosecutor with experience developing and executing a compliance program, and even more specifically an ABC program (which differs substantively from other kinds of compliance programs) signals the importance the DOJ places on compliance as an important tool in preventing corporate corruption. This is not a new approach to prosecuting FCPA cases, but rather emphasizes the DOJ’s existing methodology. The DOJ and regulators such as the U.S. Securities and Exchange Commission and the Financial Industry Regulatory Authority have continually indicated in press releases and nonprosecution and deferred prosecution agreements the critical importance they place on corporate compliance programs that adequately prevent and detect bribery risk. If a company can demonstrate to prosecutors that it has developed and executed a risk-based compliance program that effectively mitigates the company’s bribery risk, but where nevertheless, a rogue employee purposefully flouted those controls to violate the FCPA, the DOJ will consider that a mitigating factor when weighing corporate culpability.

For example, in 2012, the DOJ credited the strength of Morgan Stanley’s ABC compliance program when declining to prosecute the company for FCPA violations. In that matter, a managing director in Morgan Stanley’s China office bribed an employee of a state-owned enterprise. Similarly, Ralph Lauren Corp. secured a nonprosecution agreement when in the wake of learning about potential FCPA violations in its Argentine subsidiary, the company engaged in extensive remediation, which included developing and



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implementing robust controls to enhance the company's ABC compliance program. And even where a company is not able to secure a declination or a nonprosecution agreement, the adequacy of a company's ABC compliance program is a factor prosecutors consider in deciding what type of penalty, if any, should be levied against the company.

Assessing the adequacy of a corporate compliance program to determine a company's liability for the actions of its employees is not a concept unique to the U.S. Under the United Kingdom's anti-corruption law, the U.K. Bribery Act, a company is held strictly liable for corrupt acts committed by its employees. However, the U.K. Bribery Act also provides an affirmative defense for entities that implement adequate procedures to mitigate bribery risk at the time the employee engaged in corruption. Although there is not a similar affirmative defense built into the FCPA, the DOJ (and the SEC, which is responsible for civil FCPA enforcement) has instituted a de facto defense for companies that have adequate compliance programs (such as Morgan Stanley).

The question to be addressed is whether the DOJ's hiring of compliance counsel is a positive development for companies that find themselves the target of an FCPA investigation. Below we examine the pros and cons of this development.

Pros

It Just Makes Sense

Given the importance the DOJ places on compliance controls in fashioning corporate criminal resolutions, it makes sense that the DOJ would consider the views of someone with hands-on experience building and evaluating compliance programs. As described above, the DOJ has increasingly considered the adequacy of ABC programs as a crucial factor in deciding corporate culpability. It is difficult for individuals with little or no hands-on experience to judge the adequacy of a compliance program. Evaluating whether an ABC program is appropriately "risk-based" requires a contextual analysis and understanding of business practices that is beyond the experience of most prosecutors. A meaningful compliance analysis examines the legal and policy aspects of a program, as well as its operational aspects, including but not limited to business, finance, audit, and information technology units.

From this perspective, it makes sense that prosecutors deciding whether to charge companies criminally for compliance failures should have access to an experienced compliance professional versed in operationalizing a compliance program. Having such an expert contribute to charging/penalty decisions will lend credibility and insight to the DOJ's evaluation of compliance programs that companies will be fairly.

Companies May Be More Likely to Receive Credit for Compliance Efforts

The DOJ has repeatedly stated that it will look beyond paper policies to ensure compliance programs are not just "window dressing." One hope is that compliance counsel will recognize and reward companies' efforts to operationalize their compliance programs, even if those efforts are still a work in progress. Compliance professionals know that it can take years to traverse the difficult road from "paper program" to "executed program." The compliance expert should provide this perspective for DOJ prosecutors to ensure that the DOJ examines not just the end result of a compliance program, but also the path forged to build that program. In this way, companies will be better positioned to "get credit" for their efforts.

On the other hand, the compliance expert will also be well positioned to identify companies that have not made real compliance efforts — despite having a perfect paper program.

It Provides an Opportunity to Establish Guidelines for Executing Compliance Programs

The compliance counsel's evaluations of corporate compliance programs could provide other companies with instructive guidance on how to operationalize their ABC compliance programs. While there is much guidance as to what an ABC compliance program should look like (including the November 2012 SEC/DOJ FCPA resource guide) that guidance focuses primarily on how to build an ABC program — not how to execute it. Implementation is arguably the hardest part of executing an enterprise-wide ABC compliance program. Thus, to the extent that the DOJ makes public the compliance counsel's evaluations, it will provide important information for companies and compliance professionals seeking to operationalize their compliance concepts.

Cons

Compliance Counsel Knows Which Rocks to Look Under

From the perspective of a company with numerous problems or inadequate programs, the involvement of DOJ compliance counsel will be to its detriment. Where prosecutors may focus on certain aspects of a program to determine its adequacy, compliance counsel, understanding all aspects of an ABC program, including problematic areas, may be more adept at detecting additional FCPA violations or control weaknesses that otherwise might not have been identified.

Risk that Compliance Failures Become Criminally Actionable

There is the risk that with compliance counsel's more nuanced eye, the DOJ will raise the bar as to what constitutes an "adequate" compliance program, making it more difficult for companies to obtain mitigation through compliance efforts. As a result, instead of acting as a mitigating factor, compliance "failures" could be used as aggravating factors in charging/penalty decisions, effectively criminalizing companies for failures to build a compliance program that passes DOJ muster. Such a path ultimately leads to a slippery slope where compliance weaknesses, traditionally addressed as regulatory infractions, come to constitute criminal liability.

Similarly, involving compliance counsel in charging and penalty decisions contributes to the perceived trend of over-regulation, because the DOJ's compliance counsel may be viewed as an additional regulator judging a company on its compliance controls. From a policy perspective, it is fair to question whether prosecutors should be involved in compliance evaluations, especially when a plethora of other regulators already fulfill that role (e.g., the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Bank, etc.). From this perspective, the DOJ's inclusion of compliance program evaluations continues a trend in which prosecutors become "super-regulators," expanding the prosecutorial scope and interweaving compliance matters with criminal matters.

Risk of Creating Unreasonable Expectations for ABC Compliance Programs

Finally, there is the risk that giving criminal authority to a compliance official will lead to ever-increasing expectations for compliance programs. In theory, criminal prosecutors should become involved when a

company or bank has violated the criminal law. In such circumstance, the corrective measures ordered by prosecutors may be extreme to rectify the underlying problems that led to the prosecution. However, if these corrective measures are viewed as the new norm, it could cause an escalation in compliance standards that could hurt companies and stifle innovation. Despite the fact that guidance issued by prosecutors and regulators consistently pays heed to a “risk-based” approach, elevated expectations created by DOJ corrective measures could lead to a rigid zero-tolerance reality.

Conclusion

Under current law, the interplay between compliance failures and criminal investigations is a reality. DOJ policy, carefully enunciated and disseminated to the industry, makes clear that the implementation of a risk-based compliance system will mitigate FCPA liability. We hope that the inclusion of knowledgeable compliance counsel in the DOJ’s decision-making processes will lead to more nuanced and well-thought-out charging decisions, and will provide meaningful guidance to companies seeking to create appropriate ABC compliance programs.

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