

Daily Journal

JULY 23, 2014

- White Collar -

White-collar enforcement's 'compliance effect'

By Michael M. Farhang

Recent white collar enforcement activity by the U.S. Department of Justice and other federal agencies has had a salutary effect on the U.S. business environment by helping to promote the growth of corporate compliance programs that aid companies in preventing and detecting internal misconduct. This development has profoundly affected how many companies are structured and how they do business, transforming compliance from an abstract concept into a fundamental aspect of their everyday operations.

The advent of sophisticated corporate compliance programs can be attributed, at least in part, to the DOJ's impressive track record of success in securing high-dollar settlements in significant corporate prosecutions, a trend that has been developing over the last decade and has drawn attention to the value of such programs. Billion-dollar corporate resolutions are no longer unprecedented, and the DOJ has made major gains in prosecuting companies in the financial and health care fraud, money laundering, export controls, environmental and anticorruption areas since the early 2000s. In the last month, for example, the DOJ announced two major settlements with large banks reaching into the multiple billions of dollars based on alleged violations. In 2013, the DOJ announced a number of significant resolutions in the environmental, health care, anticorruption and antitrust areas.

With increased federal white collar enforcement, an industry of "compliance" within the business and legal communities has also arisen, with internal company structures as well as legions of prosecutors, private lawyers, accountants and consultants tasked with ensuring that corporations remain law abiding. Whereas company legal or internal audit departments

previously functioned as the sole internal corporate watchdogs, many public companies now also have chief compliance officers, compliance departments, whistleblower reporting procedures, hotlines and websites, management compliance committees, training protocols and policies, and due diligence procedures, all to help ensure that business activity stays within the bounds of the law and potential misconduct can be detected and addressed.

This sea change is due, in no small part, to the creativity and vigor of federal white collar enforcement over the last decade. Beginning in 2003, the DOJ's pronouncements that it would consider corporate cooperation and the adequacy of internal compliance programs in deciding whether to prosecute companies for wrongdoing have incentivized proactive compliance efforts and reporting to the government. In addition, federal legislation and other regulations mandating or encouraging internal controls and compliance systems such as the Sarbanes-Oxley Act of 2002, the Federal Acquisition Regulations and the U.S. Sentencing Guidelines, have helped make the maintenance of such systems a major priority for many companies during the same period.

Perhaps the most prominent example of federal enforcement efforts leading to the growth of compliance programs is the DOJ's use of the Foreign Corrupt Practices Act (FCPA), a set of laws penalizing bribery of foreign government officials. Although the FCPA has existed since the 1970s, beginning in the early 2000s a group of federal prosecutors in the DOJ's Fraud Section who recognized its potentially broad application to various industries made it the focus of numerous enforcement actions, some resulting in settlements reaching into the hundreds of millions of dollars with well-known blue-chip companies. These results, augmented by similar FCPA enforcement efforts by

the Securities and Exchange Commission, renewed the U.S. government's efforts to deter corruption of foreign governments by U.S. and multinational companies and arguably helped spur similar legislation and expanded enforcement in other countries.

After more than a decade of such enforcement efforts, it is now increasingly common for companies with international operations to have well-developed FCPA compliance programs, with training for employees about bribery risks in the business setting and compliance officers, attorneys, and auditors advising on how to prevent and detect such activity. A recent Dow Jones anticorruption survey, for example, found that 82 percent of U.S. and overseas companies surveyed in various industries had implemented anticorruption compliance programs with internal policies, trainings, and other controls, with most of those having maintained such programs for more than two years. A 2013 survey by PricewaterhouseCoopers found that one of the top areas of compliance risk identified by company compliance officers was bribery and corruption.

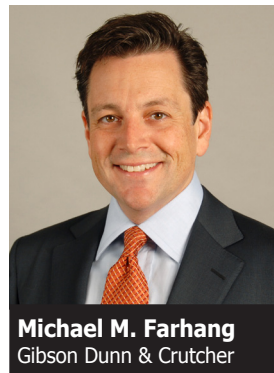
Other examples exist of enhanced federal enforcement leading to greater attention to the need for effective compliance programs, including in the areas of money laundering, export controls, insider trading, health care, government contracting and data privacy. The DOJ and other federal agencies also continue to show innovation in approaches to addressing thorny areas of enforcement need. A recent spike in federal lawsuits against major banks charging violations of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) reflects the DOJ's new use of a civil enforcement statute originally designed to address 1980s-era savings and loan abuses to address alleged misconduct in lending practices following the 2008 financial crisis. FIRREA en-

forcement actions, and the penalties and settlements some have yielded, have no doubt given the DOJ added leverage in the effort to encourage private sector compliance with federal laws.

By motivating companies to maintain effective compliance programs, the DOJ's strategy of targeted white collar prosecutions has arguably allowed it to externalize some aspects of its enforcement mandate. Vigorous enforcement has encouraged U.S. companies to equip themselves with the resources and tools to help ensure that they remain good corporate citizens, and thereby aid the DOJ's central mission of federal law enforcement.

The industry-wide investments in enhanced internal compliance systems that can be spurred by increased enforcement attention also redound to the benefit of individual companies themselves, whose management and shareholders will be better-positioned as to help them avoid the costly litigation, reputational hits, and negative market reaction a future enforcement action can bring. For these reasons, the "compliance effect" of federal law enforcement has meant significant progress in uniting government and the private sector in the pursuit of common goals that have benefited us all.

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