

**SESSION 505:  
LEVERAGING RECENT DEVELOPMENTS IN  
THE LAW TO ADVANCE YOUR PROGRAM**

**Society of Corporate Compliance and Ethics  
Compliance and Ethics Institute**

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**Overview: Lots to Cover!**

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- C&E-related government pronouncements
- Deferred prosecution agreements and declinations
- NLRB decisions and guidance
- EEOC and HR-related developments
- D&O compliance oversight responsibilities
- Strategies and advantages of using C&E legal developments to enhance your program

## Recent Comments of AAG Brian Benczkowski (10/12/18)

- Discontinue role of Fraud Section E&C Expert
- Instead, intent is to build compliance expertise throughout the various Sections of DOJ
- Prosecutors should consider compliance at the same time as other factors, such as remedial actions and self-disclosure
- “[E]very case will at some stage require a deep look into the sufficiency and proper functioning of the subject company’s compliance program. As companies continue to grow in size, scope and complexity, and as international business becomes the norm rather than the exception, compliance is of ever greater importance in ensuring that companies operate efficiently and within the bounds of the law.”
  - <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program>

## Benczkowski Memo re Selection of Monitors 10/11/18

- Factors DOJ will Consider in Determining Whether to Impose a Monitor
  - Did underlying misconduct involve manipulation of books and records or exploitation of inadequate compliance program or internal controls?
  - Was the misconduct pervasive or approved or facilitated by senior management?
  - Has the corporation made significant investments in, and improvements to, its compliance program and internal control systems?
  - Have remedial improvements to the compliance program and internal controls been tested to demonstrate that they would prevent or detect similar misconduct in the future?
  - Are changes in corporate culture or leadership adequate to safeguard against a recurrence of misconduct?
  - Have adequate remedial measures been taken to address problems?
    - Consider unique risks and compliance challenges, including region(s) and industry in which company operates and nature of company’s clientele.

## Enforcement, DPAs and NPAs

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- Extension of FCPA Pilot Program
  - <https://www.justice.gov/criminal-fraud/file/838416/download>
- Declinations
  - <https://www.justice.gov/criminal-fraud/pilot-program/declinations>
- DPAs and NPAs have continued
  - Monitor and compliance requirements

## Enforcement, DPAs and NPAs

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- DOJ policy re “piling on” and coordination
  - On May 9, 2018, Deputy AG Rod Rosenstein announced a new policy re coordination of corporate resolution penalties.
    - Government should “discourage disproportionate enforcement of laws by multiple authorities.
    - Included in U.S. Attorneys’ Manual.

## Enforcement, DPAs and NPAs

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- UK – Serious Fraud Office has entered into DPAs
  - “The New Normal”
- Australia – Legislation establishes system for DPAs
- France – Legislation to approve DPAs (and mandatory anti-corruption compliance programs)
  - <https://www.skadden.com/insights/publications/2016/12/new-french-anticorruption-legal-framework>
- Canada – Remediation Agreements

## Rolls Royce DPA

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- Agreements with DOJ, SFO and Brazilian enforcement authorities
- Both US and UK entered into DPAs with Rolls Royce, both of which include compliance program requirements
- DOJ DPA
  - Periodic risk assessment
  - High-level commitment
  - Compliance policies and procedures
  - Responsible executive with authority to report directly to independent monitoring bodies, adequate autonomy, sufficient resources and adequate authority
  - Training and certifications
  - System for providing guidance and advice
  - Effective systems for internal and confidential reporting
  - Process for responding to, investigating and documenting allegations of violations
  - Effective enforcement and discipline for violations
  - Monitoring and testing
  - Self-reporting re program
- <https://www.justice.gov/opa/press-release/file/927221/download>

## Fraud Section: Hui Chen – what impact and what learning?

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- Helped DOJ understand compliance
- The Fraud Section evaluation questions
- Little known fact: The Canadian Competition Bureau started this before DOJ

## DOJ Fraud Section: Evaluation of Corporate Compliance Programs

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- Posted on DOJ website in February 2017
  - <https://www.justice.gov/criminal-fraud/page/file/937501/download>
- Eleven categories of questions to facilitate program evaluation:
  - Analysis and Remediation of Underlying Misconduct
  - Senior and Middle Management
  - Autonomy and Resources
  - Policies and Procedures
  - Risk Assessment
  - Training and Communications
  - Confidential Reporting and Investigation
  - Incentives and Disciplinary Measures
  - Continuous Improvement, Periodic Testing and Review
  - Third Party Management
  - Mergers and Acquisitions

## Evaluation of Corporate Compliance Programs: Some Key Questions

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- Senior and Middle Management: Oversight
  - What compliance expertise has been available on the board of directors?
  - Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions?
- Autonomy and Resources: Stature
  - How has the compliance function compared with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers?
  - What has been the turnover rate for compliance and relevant control function personnel?
  - What role has compliance played in the company's strategic and operational decisions?

## Evaluation of Corporate Compliance Programs: Some Key Questions

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- Autonomy and Resources: Experience and Qualifications
  - Have the compliance and control personnel had the appropriate experience and qualifications for their roles and responsibilities?
- Autonomy and Resources:
  - Do the compliance and relevant control personnel in the field have reporting lines to headquarters?

## Evaluation of Corporate Compliance Programs: Some Key Questions

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- Incentives and Disciplinary Measures
  - Were managers held accountable for misconduct that occurred under their supervision?
  - Did the company's response consider disciplinary actions for supervisors' failure in oversight?
  - How has the company incentivized compliance and ethical behavior?
  - How has the company considered the potential negative compliance implications of its incentives and rewards?

## Antitrust Division

- A possible change favoring compliance & ethics programs?
- Past policy and practice
- Recent recognition of programs
- Has promised to consider whether to give credit for prior existing programs

## NLRB

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- NLRB reverses prior ruling regarding limiting employer facially neutral policies that could inhibit protected activity  
<https://www.nlr.gov/news-outreach/news-story/nlr-establishe-new-standard-governing-workplace-policies-and-upholds-no>
  - “The Board established a new test: when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.”

## NLRB

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- Internal Investigations
  - Banner Health System v. NLRB, 851 F.3d 35 (D.C. Cir. 2017)
  - Costco Wholesale Corp. (NLRB 2018)
- Confidentiality agreements
  - NLRB v. Long Island Ass’n for AIDS Care, Inc. (2d Cir. 2017)
- Confidentiality policies
  - Macy’s, Inc., [www.btlaborrelations.com/wp-content/uploads/2017/08/Macys.pdf](http://www.btlaborrelations.com/wp-content/uploads/2017/08/Macys.pdf)



## SEC

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- KBR enforcement action and confidentiality requirements
  - <https://www.sec.gov/litigation/admin/2015/34-74619.pdf>

## EEOC

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- Enforcement Guidance on Retaliation and Related Issues
  - <https://www.eeoc.gov/laws/guidance/upload/retaliation-guidance.pdf>
- Select Task Force on the Study of Harassment in the Workplace
  - [https://www.eeoc.gov/eeoc/task\\_force/harassment/report\\_summary.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm)

## #MeToo

- What does it mean for compliance programs?

## GDPR

- Does it pose a threat to effective compliance & ethics programs?
  - Background checks
  - Due diligence
- Enormous fines

## D&O Liability Cases

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- Directors owe shareholders a fiduciary duty of care, which includes “a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists.”
- Court endorses Corporate Sentencing Guidelines system of board oversight.
- Court recognizes that boards are not expected to manage C&E programs.
  - *Stone v. Ritter (2006)*, *In re Caremark International Derivative Litigation (1996)*
- The bar for liability is high.
  - *Horman v. Abney (Del. Ch. 2017)*

## The States

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- Compliance program requirements in some areas
  - Healthcare
  - EEO, e.g., California, Connecticut
  - Pharmaceuticals, e.g., California & Nevada
- Are states playing any role in recognizing and rewarding those with effective programs?
  - Does not seem to be an active area, but worth watching
  - Possibly picking up slack if Feds decrease enforcement activity

## Outside the U.S.

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- Mexico: Guidance on compliance programs in competition law area
- Mandatory programs, e.g., France for anticorruption and mandatory Company helplines!
- Germany: High court just held compliance programs need to be considered in determining penalties/fines
- More countries actively enforcing anticorruption laws
  - Brazil
  - South Korea
- EU's new privacy regime is driving the field globally

## ISOs

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- ISO 37001 & 19600
  - 19600 is for compliance management systems
    - Originated in the Australian standards
    - Has been adopted
    - Does not provide for certification
  - 37001 is anticorruption compliance
    - Provides for certification
    - Viewed as a major opportunity for consultants doing certification
- Will companies adopt the ISOs?
  - Business is used to ISOs for environmental management programs and quality
  - Easy for them to push the requirement down the supply chain
- Singapore example – endorsements by governments

## Using Developments to Advance Your Program – Example of Investigations

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- DOJ Evaluation Guidance
  - How has the company ensured that the investigations
    - have been properly scoped
    - were independent and objective
    - appropriately conducted
    - properly documented?
  - Has the company's investigation been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives?
  - What has been the process for responding to investigative findings?
  - How high up in the company do investigative findings go?
- Rolls Royce
  - Effective and reliable process
  - Sufficient resources
  - Respond to, investigate and document allegations of violations