

Session 705: Leverage Legal Developments to Advance Your Program

Society of Corporate Compliance and Ethics
Compliance and Ethics Institute

SEPTEMBER 17, 2019

Rebecca Walker
Kaplan & Walker LLP

Jeffrey M. Kaplan
Kaplan & Walker LLP

www.kaplanwalker.com

1

Agenda

-
- Review of recent developments in law related to compliance and ethics
 - DOJ Pronouncements
 - Global Developments
 - SEC, Case Law, Sexual Harassment
 - Examine the impact of recent legal developments on C&E program design and implementation
 - Consider strategies for using C&E legal developments to enhance your program

www.kaplanwalker.com

2

2

General Thoughts re Use of Legal Developments in C&E programs

- For significant compliance-related legal developments, consider implications for your
 - Risk assessment
 - Policies and procedures
 - Training and communications
 - Auditing, monitoring, program assessment
 - Accountability and program governance
 - Resources
- This may seem obvious, but it is often not done in a systematic way.

3

DOJ Pronouncements

4

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

- Discontinue role of Fraud Section E&C Expert
- Intent 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>

5

Benczkowski Memo re Selection of Monitors 10/11/18

Factors DOJ considers in determining whether to impose a monitor

- Did underlying misconduct involve manipulation of books and records or exploitation of inadequate compliance program?
- Was misconduct pervasive or approved or facilitated by senior management?
- Has company made significant investments in, and improvements to, its compliance program and internal control systems?
- Have remedial improvements to compliance program been tested to demonstrate that they would prevent or detect similar misconduct?
- Are changes in corporate culture or leadership adequate to safeguard against a recurrence of misconduct?
- Have adequate remedial measures been taken to address problems?
 - <https://www.justice.gov/opa/speech/file/1100531/download>

6

DOJ Criminal Division: Evaluation of Corporate Compliance Programs

- Traditional approach
 - Is the corporation's compliance program well designed?
 - Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?
 - Does the corporation's compliance program work in practice?
- With some modifications, e.g.
 - Enhanced focus on risk assessment, including
 - Risk-tailored allocation of C&E resources
 - Updates of risks assessment and use of results to update program
 - Enhanced focus on how investigations are conducted
 - How does the company determine who should conduct an investigation, and who makes that determination?
 - Does the company apply timing metrics to ensure responsiveness?
 - Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?
 - <https://www.justice.gov/criminal-fraud/page/file/937501/download>

7

DOJ Criminal Division: Evaluation of Corporate Compliance Programs

- CCO Positioning
 - Do those responsible for compliance have sufficient seniority and sufficient autonomy from management, such as direct access to the board of directors or the audit committee?
 - Where within the company is compliance housed (e.g., within legal or another function, or as an independent function reporting to the CEO and/or board)?
 - To whom does the compliance function report?
 - Is compliance run by a designated CCO or another executive, and does that person have other roles in the company?
 - What role has compliance played in the company's strategic and operational decisions?
- C&E Program Staffing: Prosecutors should also evaluate the resources the company has dedicated to compliance and the quality and experience of the personnel involved in compliance.
 - Has there been sufficient staffing for compliance personnel to effectively audit, document, analyze, and act on the results of the compliance efforts?
 - Has the company allocated sufficient funds for the same?
 - Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company?

8

DOJ Criminal Division: Evaluation of Corporate Compliance Programs

- Culture
 - How often and how does the company measure its culture of compliance?
 - Does the company seek input from all levels of employees to determine whether they perceive senior and middle management's commitment to compliance?
 - What steps has the company taken in response to its measurement of the compliance culture?
- Root Cause Analysis and Remediation
 - What is the company's root cause analysis of the misconduct at issue?
 - Were any systemic issues identified?
 - Who in the company was involved in making the analysis?
 - What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future?
 - What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

Antitrust/Competition Law

- In July 2019, AAG Makan Delrahim announced major changes in how the Antitrust Division of the DOJ will make charging decisions in criminal antitrust cases.
- For decades, the Division had utilized an all-or-nothing approach, bestowing corporate leniency on the first company to self-report a violation but giving no compliance program credit to others, even if they had exemplary programs.
- Under the new policy, companies with strong compliance programs may be eligible for deferred prosecution agreements even where they were not the first to self-report.
- This policy change creates a significant new incentive for companies to implement strong antitrust compliance programs.

Antitrust

- Under a newly published Guidance document, the Division will consider 9 factors in determining whether a compliance program is effective:
 1. Design and comprehensiveness of the program
 2. Culture of compliance within the company
 3. Responsibility for, and resources dedicated to, antitrust compliance
 4. Antitrust risk assessment techniques
 5. Compliance training and communication to employees
 6. Monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program
 7. Reporting mechanisms
 8. Compliance incentives and discipline
 9. Remediation methods
- Questions and considerations regarding each of these topics are set forth in the Guidance.

Antitrust

- For many years, members of the C&E community – led by Joe Murphy – had urged the Antitrust Division to adopt the approach to rewarding compliance programs utilized by the Criminal Division since the advent of the Sentencing Guidelines in 1991. The fact that it has finally agreed to do so is a landmark achievement.
- However, the achievement will endure only if companies rise to the occasion and implement strong antitrust compliance programs. For some companies, this will require no small degree of effort.
- Indeed, given the level of detail in the Guidance, the prospect of going “from zero to sixty” quickly may seem quite daunting. Where to begin?

Antitrust

Where to start?

- Risk assessment
- Policies and procedures
- Communications and training
- Auditing and monitoring

Practice pointers

- Combine antitrust compliance with other areas where appropriate to do so, such as auditing
- Report to the board on risk assessment and mitigation in this area

Global Developments

Global Antitrust/Competition Law

- Italian Competition Authority: Adoption of a specific compliance program is a possible mitigating circumstance that allows the company to obtain a reduced fine.
 - Published competition law compliance guidance
- Other countries that have done something similar include Canada, Mexico, Chile and Singapore.
- Consider doing an assessment of your antitrust program against relevant local standards.

15

Global Anti-Corruption

- Highlights include:
 - UK Court approves first-of-its-kind DPA
 - Some notable enforcement activity in Brazil, the Netherlands, Canada, Mexico
- But cup isn't nearly half full
- Need to follow local law where you do business
 - Use local law examples in training and communications
 - Use local law for policies (e.g., gifts policy)

16

GDPR and Hotlines

- Fast-moving area
- Anonymity now welcome in many jurisdictions where it was previously not
- Requirements for whistleblower reporting and protection

17

SEC D&O Case Law Sexual Harassment

18

SEC Whistleblower Program

- May 2019 SEC Awards \$4.5 Million to Whistleblower Whose Internal Reporting Led to Successful SEC Case and Related Action
 - “The whistleblower sent an anonymous tip to the company alleging significant wrongdoing and submitted the same information to the SEC within 120 days of reporting it to the company. This information prompted the company to review the whistleblower’s allegations of misconduct and led the company to report the allegations to the SEC and the other agency. As a result of the self-report by the company, the SEC opened its own investigation into the alleged misconduct. Ultimately, when the company completed its internal investigation, the results were reported to the SEC and the other agency. This is the first time a claimant is being awarded under this provision of the whistleblower rules, which was designed to incentivize internal reporting by whistleblowers who also report to the SEC within 120 days.”

Director Liability for Compliance Oversight

- Law poses a very high hurdle.
- *Marchand v. Barnhill* (2019) arose out of a serious food contamination incident at an ice cream manufacturer that resulted in widespread product recalls and three deaths.
- The Delaware Supreme Court, utilizing the ‘duty to monitor’ doctrine articulated in *In re Caremark International, Inc. Derivative Litigation*, ruled that the plaintiff had alleged the requisite bad faith by the members of the board by showing facts supporting their contention that the Company did not have in place “a reasonable board-level system of monitoring and reporting” with respect to food safety, which the Court deemed to be “a compliance issue intrinsically critical to the company’s business.”
- Board members should review
 - Policies on monitoring and escalation
 - How the board monitors high-risk areas
- Also consider expectations of boards in DOJ program evaluation guidance documents.

Sexual Harassment Training Requirements

- New York
 - Requires employers to adopt mandatory, interactive sexual harassment training program for all employees who work in NY
 - Effective October 9, 2019
 - On annual basis and within 30 days of hire for new hires
 - Articulates model standards to meet for anti-sexual harassment policy
- California
 - California employers with five or more employees must provide harassment prevention training to all employees no less than every two years.
 - Effective January 1, 2020
 - Requirement previously applied only to supervisors.