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GIVE CREDIT WHERE CREDIT IS DUE

The government should take compliance programs into account when things go awry. [BY BEN W. HEINEMAN JR.]

FEDERAL ENFORCEMENT AUTHORITIES should give much more systematic credit to effective corporate compliance programs when making decisions about criminal prosecutions, including nonprosecution or deferred prosecution agreements, and when deciding the scope of civil and administrative settlements.

That is the fundamental conclusion of a recent report from an advisory group constituted in November 2011 to assess the effectiveness of the Federal Sentencing Guidelines for Organizations (FSGO) 20 years after publication by the U.S. Sentencing Commission (sgo.ethics.org/FSGO). Organized by the Ethics Resource Center, the advisory group was composed of law enforcement officials, judges, prosecutors, academics, and compliance experts from companies and law firms. It focused on corporations, not other entities covered by the FSGO (such as unions or pension funds). (Disclosure: I was on the advisory group and approved the final report but was not involved in decisions about scope or in drafting.)

The advisory group faced a fundamental paradox at the outset. In response to the elements of a good compliance program outlined in the FSGO (and elements drawn from numerous other sources), many corporations have established strong compliance and ethics programs during the past 20 years. Yet few corporations received credit under the Sentencing Guidelines because there were so few corporate

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convictions as more and more corporate criminal investigations were settled outright or resolved with nonprosecution or deferred prosecution agreements (NPAs and DPAs).

The advisory group thus properly focused not on sentencing but on the question of whether federal enforcement officials, who have the authority to do so, gave credit to companies with good compliance programs in making enforcement decisions. It concluded that there was a major problem both at the U.S. Department of Justice and in other federal departments and agencies in this respect. Companies strive to have good compliance programs for many reasons besides "sentencing" considerations (for example, high integrity must be fused with high performance to prevent wrongdoing and to secure trust of all stakeholders), but having an effective program ignored by enforcers is certainly a disincentive to create one for nonvisionary business leaders.

The advisory group report is thus an important opening statement in a needed dialogue between federal enforcers and the corporate community about when and how to give credit for good compliance efforts. Every general counsel should read this report. And the corporate community should organize to make this important idea have real-world impact through systematic engagement with the executive branch and, perhaps, with Congress.

The advisory group identifies two major problems with the federal government enforcers.

1) The Justice Department is increasingly using nonprosecution or deferred prosecution agreements in criminal cases—and in other civil settlements—without following department policy (reflected in the U.S. Attorneys' Manual), which directs prosecutors to consider effective compliance programs. The number of NPAs/DPAs has increased from five in 2004 to 32 in 2010. As the report states:

"There is little hard evidence that organizations are receiving the promised consideration for their compliance programs, and prosecutors rarely point to compliance programs when discussing

needed case resolutions. A Conference Board study in 2009 found that after-the-offense compliance requirements are often mandated in settlements, but it found very few cases where DOJ acknowledged granting credit for—or even carefully assessing—a preexisting compliance/ethics program."

Moreover, if there is little record of effective compliance programs receiving credit in enforcement decisions, the Justice Department has virtually no guidance on how actually to assess such programs. The report says that there is no "common set of criteria, assessment framework, methodology, or work steps" to measure effectiveness. In addition, one part of the department, the antitrust division, takes the view that it is not bound by department policy and will give no credit for a company's compliance program.

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2) Beyond the issues at the Justice Department, the report describes a second set of problems: "There is lack of consistency in policies [toward effective compliance programs] across the various [federal] agencies that play a role in corporate law enforcement and regulation because there is neither a requirement that these policies be aligned nor a mechanism available for doing so." More than 20 federal departments and agencies have jurisdiction over corporate conduct, but each entity—and even units within the entity—has its own approach to crediting corporate compliance programs. Lack of consistency is compounded by lack of transparency. And, as with the Justice Department, the methods used for evaluating compliance program effectiveness are variable, obscure, or nonexistent.

For example, in addition to the major federal agencies (Treasury, Defense, HHS, etc.), most of the administrative agencies also regulate corporate conduct and have some policy about crediting effective compliance programs (e.g., CFTC, EPA, EEOC, OSHA, FDA, FTC, etc.). And these agencies have their own views of what constitutes a good compliance program drawing from sources beyond the FSGO (for example, New York Stock Exchange listing requirements, Sarbanes-Oxley, Federal Corrupt Practices Act program elements in recent DPAs under the FCPA and the Federal Acquisition Regulations).

The key recommendations for the federal government flow, of course, from the definition of the problems. Regarding the Justice Department, the report recommends that:

- The Justice Department should define the key elements of compliance programs, paying special attention to the FSGO.
- The Justice Department should define how to evaluate and assess those core elements.
- It should issue guidelines on how an "effective" compliance program can affect case outcomes (much as the agency is now about to issue more particular guidelines on the Foreign Corrupt Practices Act).
- The Justice Department should ensure greater consistency across its divisions in treatment of effective compliance programs when making prosecution decisions or settlement outcomes.
- The department should have more training so its personnel have better understanding of compliance programs—and perhaps use independent third parties in evaluating them.
- The Justice Department should present far more systematic communication about its approach to this critical issue in general and to the disposition of particular matters.

With respect to other departments and agencies, the report recommends:

- The president should order executive branch departments and agencies to adopt, publicize, and apply clear written policies about how to promote effective compliance programs and give them due consideration in enforcement decisions.
- The president and/or Congress should create a cross-government working group to create a core model for compliance programs, starting with the FSGO, so that there is consistency in approach.

Finally, the reports makes a controversial recommendation that judges reviewing NPAs/DPAs "should exercise judicial oversight . . . to ensure that such agreements indicate on their face the consideration" of compliance program elements and other relevant compliance factors promulgated by the relevant agency. In theory, this would be a "process check" on whether the governmental entity was doing what it said it would do (assuming some of the reforms noted above had been implemented) and would not raise separation of powers issues by engaging "substantive" review of matters delegated to the executive. Such a review function could, the report argues, be undertaken pursuant to "inherent judicial authority." It could also apply to other settlement agreements involving an agency commitment to take compliance effectiveness into account.

It goes without saying that these key reforms advocated by the advisory group are ambitious. They assume that government agencies are, in the name of incentivizing good corporate behavior, willing to give up some of their prosecutorial or other enforcement discretion. It also assumes that the government is capable of evaluating compliance programs fairly and then sensibly giving them appropriate weight.

To put it mildly, much is still to be done. In addition, the report did not have within its scope and thus did not address in any detail (if at all) certain important issues such as:

- What is the relevance of an effective compliance program if senior leaders are implicated in wrongdoing?
- Should government enforcers evaluate whether the "ethics" dimension of ethics and compliance programs is robust (although the report talks about "Effective Compliance Ethics Programs"—ECEP—it spends little time on the "ethical" dimension or its relevance to enforcement decisions)?
- How should voluntary disclosure—closely related to an effective compliance program—be treated by the government (e.g., no criminal prosecution of company)?
- Should there be, as in the United Kingdom's bribery statute, a complete defense for an effective compliance program in certain circumstances?

These are not failings of the report, just other, adjacent issues that, in my view, should be part of the discussion.

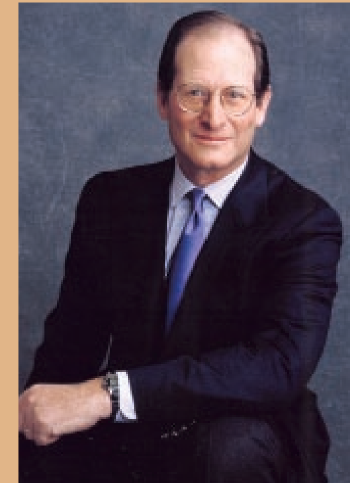
The advisory group effort is a notable achievement in identifying a question of critical importance to the corporate community: How should enforcement authorities systematically and consistently give credit to effective compliance programs in prosecutorial and settlement discussions? This fundamental issue has been obscured, both at the Justice Department and across the other departments and agencies.

It is up to the corporate community and its law firms to use the report as the starting point to engage with the enforcers/regulators on this critical issue. The conversation has now begun.

The advisory group also addresses issues in corporate compliance programs and urges that the Sentencing Commission consider appropriate alterations in the FSGO, which serves as one important model for compliance effectiveness. These issues include: compensating for integrity; the role of CEOs and top business leaders in making the mission of the company the fusion of high performance with high integrity; ensuring an important, respected role and reporting relationship for the chief ethics and compliance officer; establishing "employee voice" (i.e., an ombudsman system) as a critical element of a good program; and ensuring that the integrity infrastructure is as robust outside as inside the United States.

These are important issues, but they are already much discussed in the corporate world and in the compliance and ethics community. The companies that already have strong compliance programs have, generally, addressed these issues—and companies that are uncertain or that are laggards may not address them unless, among other things, the government recognizes their value in its actions.

Thus, the truly novel and important part of the report relates to the much needed dialogue between government enforcers and the corporate community about how dramatically to clarify and improve the government's approach to giving credit for effective compliance programs in enforcement decisions. ■



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