

# Daily Journal

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PERSPECTIVE

## Conflicting messages on business regulation

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Despite indications that President Donald J. Trump and Congress are seeking to roll back scores of regulations governing business activities, the Department of Justice vigorously continues to pursue criminal fraud. The March 10 guilty plea by Volkswagen, the announcement to continue the Foreign Corrupt Practices Act (FCPA) pilot program that encourages voluntary self-reporting by businesses also in March, and the use of the Travel Act to apply state bribery laws to overseas activities, all suggest that the DOJ is still focused on pursuing white collar crime committed by corporations.

The question then for businesses is how to interpret these conflicting messages. The recent guidance by the DOJ on how it will evaluate a company's compliance program provides a detailed roadmap that companies would be wise to review and incorporate into their thinking. While the DOJ has not initiated or announced any new FCPA enforcement actions since mid-January, that should not lead companies to become complacent. Similarly, because it has long been the DOJ's philosophy that corporations act through their people, the so-called Yates Memo (in which the DOJ stated it would prosecute individuals for corporate wrongdoing) should still be closely followed.

In its February pronouncement, the DOJ reminded companies that there are detailed factors that the government uses in evaluating a company's compliance program. The real rub is finding a way to comply without stifling creativity, flexibility, and the can-do spirit that leads to business success. Corporate resources devoted to compliance, the tone at the top, vigilance, responsiveness and self-reporting are all principles that the government looks for in evaluating its prosecutorial options.

The government's compliance review roadmap consists of:

### Analysis and Remediation of Underlying Misconduct

This first factor looks at three important, but related, criteria: what happened, whether there were signs that were missed that could have prevented the misconduct from occurring and what steps were taken

to remedy what occurred, such as making appropriate compliance program adjustments. A prompt, thorough investigation and timely internal response are key.

### Senior and Middle Management

The DOJ looks at the "conduct at the top," including management's words and actions. It then evaluates the internal coordination and structure to see if it is designed to foster communication of potential problems and remediation of those concerns. It also looks at the oversight by the company's board and outside auditors. What the government seeks is an active and robust oversight function by a board of directors with appropriate expertise. This concept is critical, especially when it comes to the reasonableness of the board's response to real and potential problems.

### Autonomy and Resources

This element focuses primarily on the personnel and practices of the compliance department. Compliance needs to be an independent and integral part of the company's business operations to be meaningful. There needs to be adequate funding, competent professionals and direct lines of communication to the board. The best programs empower compliance officers to act to stop problems as they are discovered. Possible red flags include the decision to outsource compliance functions to a third party that is otherwise not able to act with sufficient authority or autonomy to remediate problems.

### Policies and Procedures

Analyzing the process used to create the program and the substance of the mandated procedures, the DOJ also looks at the way gatekeepers are trained, the overall integration of policies and procedures and internal controls, with an emphasis on accountability. Policies may look good on paper, but the government will want to see how they were actually implemented.

### Risk Assessment

This factor is focused on determining how the company identified and addressed key risk factors to include the metrics used to reevaluate risk on an ongoing basis. Again, a static policy that is not adapting to changes in a company's business model will likely not be considered effective.



New York Times News Service

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### Training and Communications

The focus here is on determining whether the training provided is effective, focused on key areas and people, and whether there are reliable internal communications designed to educate the business enterprise about the present misconduct and steps that should be taken to prevent it in the future.

### Confidential Reporting and Investigation

To ensure that the company allows and encourages employees to reveal their compliance concerns, the government wants to see a process that makes it easy for employees to come forward and ensures that their tips will be taken seriously and that they are not harassed or otherwise discouraged from voicing concerns.

### Incentives and Disciplinary Measures

This factor is focused on making sure that a company responds appropriately through disciplinary actions when misconduct is discovered. Holding supervisors accountable is of high importance from the government's perspective. Incentives, both positive and punitive, for compliance-related issues are another important element that will be considered.

### Continuous Improvement and Testing

Here, the idea is to make sure that even a well thought out policy is continually reviewed and refreshed. Proactive reviews of a compliance system are also encouraged.

### Third-Party Management

The onus is on the company to make

sure it is vetting the third parties it may be using to mitigate compliance concerns. Significant company oversight of any third-party manager is expected. Recognizing and addressing red flags are key.

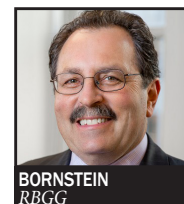
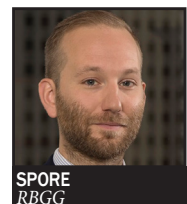
### Mergers and Acquisitions

If a company acquires a problem-ridden entity, the government will want to focus on the due diligence that was performed prior to the acquisition and the steps taken to remediate concerns and problems that were identified.

One can see from the guidance provided that the best offense is a good defense. A corporation needs to put a premium on compliance and fully integrate those precepts into its business model. Caveat emptor may soon be the law of the land in how businesses are regulated by other government entities but strong criminal enforcement remains a substantial business risk that will need to be managed.

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