

# Uncertainty over agency enforcement in second term

Companies can still take internal and external action to help shape the future white-collar enforcement landscape.

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That elections have consequences is a notion very much on the mind of American business leaders and their legal advisers in the wake of the presidential election. Both the U.S. and global economies continue to be sluggish and labor to recover from the financial crisis. Individual companies are rightfully cautious in addressing expansion, growth and spending generally. What U.S. authorities do going forward in business-crime enforcement will have consequences as well, as will how businesses address both current and new enforcement policies and initiatives. Consideration of what might reasonably be expected from President Obama's second term and how to best address enforcement challenges merit attention.

Both the U.S. Department of Justice and the U.S. Securities and Exchange Commission's Enforcement Division have aspects of business-crime enforcement high on their list of priorities. Both have focused on Foreign Corrupt Practices Act (FCPA) enforcement and accountability for fraud in connection with the financial crisis. For DOJ, fraud in the health care industry remains a priority, especially federal health program violations, and the SEC continues its traditional focus on challenges to market integrity.

There are no indications that these priorities will be de-emphasized in the new term, but they could be affected by a number of factors. Not the least of

those is how the political leadership addresses sequestration of funds if the government goes over the "fiscal cliff." It has been reported that DOJ is likely to lose \$2.1 billion in funding and that up to 86 percent of its work force could be furloughed for an average of five weeks if the January 2013 mandatory spending cuts take hold.

Because DOJ maintains a critical national security role, it is reasonable to expect that those responsibilities would be the first priority of its reduced resources. While this could well portend a decrease in white-collar enforcement cases over the long term, in the short term it is likely to create delay in the resolution of current investigations and enforcement proceedings. That would, in turn, generally result in further uncertainty for companies seeking to resolve existing matters, put the past behind them and move ahead with business initiatives that can stimulate economic growth and create jobs.

Uncertainty has also resulted from the lack of clear definition of DOJ and SEC intentions for FCPA enforcement. It is an irrefutable fact that many of the locales in the world where the best opportunity for economic growth can be found are also places where the challenges to doing business in compliance with anti-corruption laws and corporate ethics policies



are the greatest. The FCPA itself carries too many ambiguous or poorly defined terms, the government's enforcement policies and practices are too opaque to provide meaningful guidance as to where the enforcement lines are drawn, and benefits to companies that self-police their operations and/or disclose compliance issues are too uncertain to incentivize and independently justify corporate-compliance expenditures.

In the health care industry, many enforcement matters involve interpretation of broadly drawn and complex health care regulations. Increasingly, the uncertainty inherent in regulatory ambiguity is furthered by the phenomena of prosecutors, qui tam plaintiffs and judges drawing regulatory lines in the context of enforcement-related cases. This occurs in other industries and regulatory enforcement

spheres as well, including those affecting the financial and energy industries.

Such uncertainties can produce corporate caution in pursuing opportunities, consume business resources to address them, prolong internal consideration of issues affecting business decisions and be subjects of dispute with government enforcement authorities.

The energy industry may face particularly acute uncertainties in legal compliance and enforcement matters. It is obvious that the United States stands on the brink of what could be a remarkable change in the domestic energy picture. New technologies are already delivering additional supplies of gas and oil, so much so that markets are just now adapting to very changed circumstances. But these changes in the upstream energy business are already attracting renewed attention from environmental interest groups that are sure to be heard by government environmental enforcement authorities. In addition, the expanded Commodities Futures Trading Commission authority under the Dodd-Frank Act presents a new enforcement factor for energy companies and their partners to consider.

#### WHAT COMPANIES CAN DO

Businesses face decisions about how best to address these and related uncertainties in the enforcement environment. A few distinct but related business practices and/or initiatives can help companies address and cope with these uncertainties. First, businesses need to continue, if not expand, both their individual and collective group efforts to affect federal enforcement policy. Second, even when companies cannot risk the tribulations of adversary court proceedings in enforcement cases, they can nonetheless aggressively defend their interests in enforcement matters with the gov-

ernment. Third, companies can assess enforcement risk in their own operations and prioritize the mitigation of those risks by management.

It is obvious that there is a close divide in political power in the government. Indeed, both parties have claimed somewhat of a mandate from the November election results. While the nature and extent of any mandate is debatable, it is clear that both parties will be vying for credit for solutions to the issues the nation faces and looking for opportunity to further gain popular support from the other side's bad policy choices. The need to produce economic growth and job creation will not abate.

Businesses can do much to advance their interests by focusing lawmakers with oversight authority on agencies' enforcement policies, practices and decisions that affect broad economic policy and specific opportunities for growth and job creation. Businesses joined together in coalitions of interests and in general groups to work to address relevant policy issues can be very effective in steering the federal enforcement apparatus in directions that support economic opportunity and growth.

In individual enforcement matters, the fact that most companies cannot risk the vagaries of formal charges and contested court proceedings need not mean that they cannot aggressively defend themselves in a given matter. Undoubtedly, in any enforcement case, the government begins with huge advantages on its side. But well-developed factual and legal positions, sometimes coupled with significant policy arguments, can help to better position a company to address a strong government adversary. Reasoned resistance to enforcement overreaching and appeals on substantive issues to higher authorities can help counter expansive enforce-

ment, especially when the issues arise in the regulation of legitimate commerce.

Last but decidedly not least, companies can look inward as part of an effort to avoid entanglement with outside enforcement authorities. Many enforcement matters can be shown to have been avoidable had they been identified and addressed as internal matters in the first instance. Nearly all legitimate companies today engage in self-policing through internal compliance programs, but not all evince using compliance operations as the risk-management tool they should be.

Compliance for the sake of checking the compliance box is largely a waste of money. Compliance to identify and manage real risks is, however, not only a solid investment, but a productive one. The cost of addressing government investigations can be huge, in both economic charge and damage to reputation. Even when the substantive matters in question in a given case may not carry catastrophic risk to a company, the cost of addressing government inquiries can nonetheless be very significant. Money spent to avoid these circumstances is money well spent. To make compliance a good investment, companies need to assess their compliance risks, put controls in place to mitigate those risks and test to determine if those controls and related practices are effective.

While it is apparent that current economic conditions and lack of a clear government policies produce uncertainty, it is equally apparent that individual businesses and the corporate community are not without the means to help reduce it. In the sphere of business crime and regulatory enforcement, there is ample opportunity for internal and external action that can help shape the future enforcement landscape.



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