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Meet John DeLong

Director of Compliance for the National Security Agency 2009-2014

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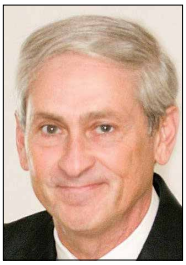
by Jeffrey M. Kaplan

Ten years after

The Federal Sentencing Guidelines for Organizations ("the Guidelines") have been in effect since 1991, but in many ways the modern era of the compliance began on November 1, 2004—when they were amended to, among other things, establish important expectations regarding risk assessment, program assessment, compliance incentives, program management/governance, organizational culture, and ethics. More than any other legal development before or since, these revisions gave shape and energy to the field of corporate compliance. Indeed, perhaps the greatest impact of the revised Guidelines has been outside of the U.S.—as they have provided a model for various other countries to promote compliance programs. But—particularly for compliance and ethics (C&E) professionals, who are often inclined to focus on the empty part of whatever glass they are examining—the 10-year anniversary of the Guidelines revisions is also an occasion to take stock of where this law has not yet fully lived up to its promise.



Kaplan

Perhaps most notably, federal prosecutors still do little to publicly identify cases in which companies receive credit in enforcement actions for having had an effective C&E program at the time of the offense—an information shortfall which undercuts the work of C&E professionals. There is one shining exception to this: The part of U.S. Department of Justice (DOJ) that enforces the Foreign Corrupt Practices Act has, on several occasions, publicly identified companies that have received compliance credit, most notably in a case where an executive of Morgan Stanley was prosecuted but the company was not.[1] But coming up short in this respect are other parts of DOJ – both in "Main Justice" and the US Attorneys around the country, the Securities and Exchange Commission, and state and local prosecutors.

Indeed, perhaps the greatest impact of the revised Guidelines has been outside of the U.S.—as they have provided a model for various other countries to promote compliance programs.

The other way that the cup is still partly empty concerns what could be called "under-reading" of the Guidelines. Most significantly, many companies do not fully grasp the breadth of the risk assessment provision of the revisions, and particularly the expectation that *all* aspects of a program (and not just auditing and board oversight) need to be based (at least in part) on the results of such an assessment. Indeed, 23 years later, some aspects of the *original* Guidelines continue to be "under-read"—such as the expectation that discipline be meted out not only for engaging in criminal conduct and for "failing to take reasonable steps to prevent or detect criminal conduct." ✳

1. The resolution of this matter is described is this DOJ press release: http://1.usa.gov/131c4jJ

Jeffrey M. Kaplan *(jkaplan@kaplanwalker.com) is a Partner with Kaplan & Walker LLP in Princeton, NJ.*