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Compliance certifications and the law

Certifications play various, and quite different, roles in C&E programs. In many companies, individual employees execute certifications regarding compliance with Sarbanes-Oxley requirements, code of conduct standards, and C&E policies—such as anti-corruption or antitrust. In my view, certifications of

this kind can be invaluable as a way of focusing the minds of employees on the need not only to be personally compliant, but also to be alert to problems that may exist around them.

Such certifications can also help a company defend against an enforcement action. In an important

and well-known investigation in 2012, part of the reason the government declined to prosecute Morgan Stanley for an employee's FCPA violations is that the individual wrongdoer had executed compliance certifications which deceived the firm.¹

But it needs to be emphasized that part of the reason that this type of certification can be helpful to a company as a matter of law is because a false certification can be hurtful to the individual involved as a matter of law. That is, it has “teeth”—the prospect of regulatory/securities or criminal liability—and so it is fair for a company to rely on it.

A quite different type of certification is when third parties self-certify compliance to their customer. These sorts of certifications can be beneficial as well—particularly in the FCPA realm.

Note, however, that since they generally do not have a securities (or other regulatory) law enforcement mechanism behind them (unlike Sarbanes-Oxley certifications), they are unlikely to be seen as providing as much of a defense to a company as do employee certifications. However, such a certification could give rise to contractual liability, and so should be entitled to some weight as a legal matter (i.e., they do have “teeth”—just not strong ones).

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Finally, some companies have their own programs' efficacy certified by third-party organizations that specialize in C&E matters. As best I can tell, there is no prospect of any legal accountability arising from certifications of this sort (i.e., no “teeth” of any kind) and the view of one former prosecutor about their utility in an investigation may be instructive here: “The Department of Justice and any regulatory agency would quickly brush that fact aside and put in the trash heap of irrelevant comments and ‘facts.’”² *

1. This aspect of the case was described in a speech in 2014 by Marshall Miller, a senior Justice official, which is available at <http://bit.ly/marshall-miller>
2. Michael Volkov: “You Cannot Buy an Ethical Corporate Culture, Corruption, Crime and Compliance.” August 16, 2015. Available at <http://bit.ly/volkov-blog-culture>

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



Kaplan