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Growing the SCCE: A 10-year perspective from SCCE Co-Chairs

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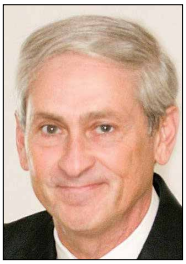
by Jeffrey M. Kaplan

A threat to compliance programs – from the Securities and Exchange Commission

Over the past two years, a repeated theme of this column has been that the legal system plays an invaluable role in promoting the development, implementation, and continuous improvement of compliance and ethics (C&E) programs. But, unfortunately, the legal system can have the opposite effect too.



Kaplan

One example of the latter phenomenon is that, as a general matter, the legal system does not afford communications involving a C&E program the same sort of protection that it does attorney-client communications. The absence of such protection presumably chills some companies' C&E efforts—particularly around risk assessment—and for years practitioners such as Joe Murphy have called for the situation to be remedied. But, for whatever reasons, it has not been, with the result likely being at least some degree of C&E "shortfall."

Another example concerns the doctrine of "piercing the corporate veil," under which a "parent" company can be sued for the wrongdoing of its subsidiary. For years, the possibility that a parent company's involvement in developing, implementing, or overseeing its subsidiaries' C&E efforts could serve as a basis for holding the parent company liable for the subsidiary's offense has existed as a mild deterrent to such involvement. I say mild because—at least to my knowledge—it was, until recently, only a theoretical possibility. Indeed, as far back as 1999, a federal prosecutor said at a conference co-sponsored by the U.S. Sentencing Commission: "I can't imagine a situation where the fact that a parent imposed its compliance program on subsidiaries would be used as a fact justifying directing the action at the parent."[1]

Unfortunately, earlier this year, in the Alcoa Foreign Corrupt Practices Act (FCPA) prosecution, the SEC did just this, basing its decision to proceed against the parent company in part on the parent's setting "the business and financial goals for [the sub] *and coordinat[ing] the* [sub's] legal, audit, and *compliance functions…*"[2] This aspect of the Alcoa case is indeed regrettable, and it seems inevitable to me that some companies will use it to justify a "don't ask, don't tell" approach when it comes to promoting compliance by their subsidiaries. In my view, this would be an overreaction and, on balance, a "hands-off" approach poses the greater danger. But, C&E professionals need to know about this change in the legal landscape. ✳

1. Mark Pearlstein, quoted in Kaplan & Murphy, *Compliance Programs and the Co Corporate Sentencing Guidelines*, Thomson Reuters (2013 ed.) at section 9:14.
2. Securities and Exchange Commission, *In the Matter of ALCOA INC.*, January 9, 2014 (emphasis added). Available at http://1.usa.gov/Ptlzbg

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