Practice Tip: Beware Individual Criminal Liability for CEOs and CCOs as DOJ Begins Requiring Compliance Certifications[1]

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Corporate executives and the attorneys who advise them are certainly not strangers to being required to make certifications under oath by various provisions of federal law. Certifications under the Sarbanes-Oxley Act ("SOX") and the Volcker Rule have been mandatory for years. But companies may be surprised (and not pleasantly) to learn that additional certification requirements may be on the way. Speaking at a white collar conference this past June, the Assistant Chief of DOJ's Fraud Section, Lauren Kootman, signaled the likely expansion of DOJ's previous efforts to require Chief Compliance Officers and potentially even Chief Executive Officers to certify that compliance programs required by DOJ resolution agreements have been "reasonably designed" to prevent future violations of law. As discussed in greater detail below, at roughly the same time, DOJ followed through with its warnings by requiring the CEO and CCO of a pleading company to sign compliance certifications.

Under such a new requirement, C-Suite executives who sign the certification could face individual criminal liability for knowingly and willfully certifying the reasonable design of what DOJ may view as a deficient compliance program. Assuming DOJ begins imposing this requirement more broadly, CCOs and other C-Suite management will want to fastidiously document their companies' efforts to institute compliance measures that are well designed to reduce the likelihood of future violations. And the attorneys who advise management will in turn wish to consider how executives can confidently certify without exposing themselves to individual criminal liability on the one hand or wasting corporate resources to create a "reasonable design" paper trail on the other.

Background – The Origin of DOJ's New Compliance Certifications

DOJ's anticipated certification requirement stems from a recent enforcement action where Glencore International A.G. (Glencore) and Glencore Ltd. each entered guilty pleas and agreed to pay more than $1.1 billion combined to resolve the government's investigations into violations of the Foreign Corrupt Practices Act ("FCPA") and a commodity price manipulation scheme.[2] Under the plea agreement, Glencore agreed to "implement a compliance and ethics program that meets, at a minimum, the elements of a regularly-used resolution document that outlines the minimum requirement for an acceptable ethics and compliance program. Specifically, the plea agreement requires minimum compliance directives involving: (1) commitment to compliance; (2) policies, procedures, and systems; (3) periodic risk-based review; (4) proper oversight and independence; (5) training and guidance; (6) internal reporting and investigation; (7) enforcement and discipline; (8) third-party relationships; (9) mergers and acquisitions; and (10) monitoring, testing and remediation.[3]

The Specifics of the New DOJ Compliance Certifications

Additionally—and significantly— the plea agreement also required both the CEO and CCO to make various certifications under penalty of perjury (18 U.S.C. § 1001) as well as a criminal obstruction statute (18 U.S.C. § 1519), namely, that

- "the undersigned are aware of the Company's compliance obligations under . . . the Agreement;"
- "based on the undersigned's review and understanding of the Company's compliance program, the Company ***has implemented*** a compliance program that meets the requirements set forth the Agreement; and
- "such compliance program is ***reasonably designed*** to detect and prevent violations of the [applicable law] (as defined in the Agreement) throughout the company's operations."[4]

A Page from SOX's Section 302 and 906 Certifications

Many of our readers will notice parallels between the new DOJ certifications and the certifications governing public companies under Sections 302 and 906 of the Sarbanes-Oxley Act ("SOX"). Section 906 of SOX, for example, requires the CEO and Chief Financial Officer to certify that the periodic report containing the financial statements fully complies with the applicable requirements of the Securities Exchange Act of 1934 and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.[5] SOX's Section 302 contains additional certifications to periodic reports. For example, § 302(a)(4)(B) requires the CEO and CFO to certify that they "have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared."[6]

But, unlike Sections 302 and 906, which apply to all public companies and require regular periodic certifications, DOJ's new compliance certifications apply only to those companies that resolve DOJ enforcement actions through corporate plea agreements or pre-trial diversion agreements, such as deferred prosecution agreements or non-prosecution agreements. Even then, DOJ's certifications only speak to a company's compliance program as opposed to its financial reports and various other disclosure obligations.

The Purpose and Impact of DOJ's Certification Requirements

DOJ has stated that its new certifications ought to empower CCOs to be involved in critical compliance-related decision-making and to make them more than just a cost-center. As AAG Kootman explained, the "intention is not to put a target on the back of a chief compliance officer," and it is not meant "as a punitive measure." Instead, DOJ envisions that its certifications requirements will help ensure that CCOs are "reporting to the board directly about 'what has or has not gone on in the course of fulfilling the company's obligations.'"[7]

Understandable Corporate Concerns

Despite DOJ's framing of the issue, some CCOs have raised concerns that although seemingly well-intentioned, DOJ's new certifications actually may be counterproductive. For example, some have expressed concern that the policy might result in the undercutting of a CCO's authority by subjecting them to senior management pressure to certify the compliance programs despite some concerns of insufficient compliance. Even more, the certifications are being made under penalty of perjury and pursuant to a powerful criminal obstruction statute. Those stark realities put the CCO (and CEO) in the crosshairs of a DOJ dispute with the company over the sufficiency of the company's compliance program.

Also, DOJ's certifications create the potential for the CCO (or even CEO) becoming the "fall person" if a dispute emerges between the company and DOJ over the sufficiency of a compliance program. It potentially—and some might say, unnecessarily—exposes the CCO and CEO to personal liability in the event of a future corporate violation, especially when such violations are viewed through the prism of DOJ hindsight bias.

Also, the certifications have a burden-shifting nature to them: They seem to require the certifier to prove his/her innocence as opposed to DOJ proving the CCO's or CEO's guilt. Furthermore, the certifications create a trap for the development of a potential conflict of interest between (or among) the company and the certifier(s) in the event of dispute about the efficacy of a compliance program. As the DOJ's certification are made pursuant to criminal laws and as part of a resolution of a criminal matter, CEOs and CFOs might well feel that they need to retain their own individual counsel to advise them on the certifications before executing them. In addition, the certification requirements also incentivize the CEO or CCO to spend outsized time, energy, and limited resources creating a paper trail of their efforts and the basis for the certification as opposed to actually working to best design and improve an organization's compliance program and internal controls. All this is to say that there may well be many unintended consequences that are counterproductive to DOJ's stated purpose of "empowering" CCOs in their compliance role.

DOJ's Response

To assuage some of these concerns, DOJ has stated that although it maintains its full panoply of prosecutorial discretion, its focus is on serious misconduct or intentional CCO (or CEO) malfeasance as opposed to good faith mistakes. For example, AAG Kootman identified specific steps DOJ deems useful in ensuring that compliance programs are sufficiently "resourced and empowered," including: (1) asking whether the CCO has a meaningful role in the evaluation of compliance; (2) implementing surveys of employees and follow-up analyses; (3) connecting compensation to compliance incentives; and (4) ensuring proper reporting and preservation of employee communications on company and personal devices.

Compliance Certification Tips

Regardless of the wisdom or necessity of DOJ's new compliance certifications, all indications are they appear here to stay, at least for the time being. As such, CEOs, CCOs, and others involved in the certification process would do well to take these new certifications seriously and to take steps to ensure that the certifications are complied with to the best extent possible, using the "reasonably designed" standard. In preparing to certify a compliance program, corporate officers might consider the following practices, among others:

- **Engaging in Robust Certification Discussions with DOJ.** Given that DOJ's new compliance certifications are anticipated to result from negotiated resolutions of criminal investigations, white collar counsel should ensure discussions of any such resolution with DOJ include an exploration of what a required certification will entail. This could help provide better benchmarks for what the DOJ will consider a "reasonable design."
- **Creating Sub-Certification Processes.** Controls are owned by various entities and stakeholders within a company, such as internal audit, legal, finance, human resources, procurement, and sales. Accordingly, companies may wish to have a quarterly sub-certification process (or "subcertification waterfall") whereby individuals within the areas

where different controls are housed certify effectiveness, thereby establishing clear accountability and providing appropriate assurances to certifying CEOs and CCOs. Indeed, instituting such processes and accompanying paperwork, brings to bear the old adage of "trust but verify" and also makes sub-certifiers acutely (and personally) aware of the important role they play in the compliance certification process.

- **Selecting an Appropriate Framework for Certification.** There are a number of publicly-available frameworks for effective compliance programs, including the DOJ's own *Evaluation of Corporate Compliance Programs* and the Committee of Sponsoring Organizations of the Treadway Commission risk management frameworks. Keying a certification to a widely-accepted framework should permit executives to certify more confidently and should also allow the company and its certifiers to effectively push back on DOJ should DOJ claim that the compliance program was somehow deficient.
- **Testing Operating Effectiveness.** In addition to design effectiveness, CCOs and CEOs should consider operating effectiveness of a compliance program before certifying. This can be done by, for instance, conducting field reviews at randomly-selected locations, including interviews, review of key documents, test transactions, and walk-throughs of processes and controls.
- **Documenting Efforts and Results.** Of course, creating effective documentation of the efforts and results of a company's compliance experience and outcomes should further allow the company and its certifying executives to "show their work," and demonstrate with concrete and specific examples the basis for their respective certifications.

The business environment in which companies do business is getting more—not less—complicated. DOJ's new compliance certifications are yet another example of this reality. When the stakes are high and when the "power to prosecute is the power to destroy," counsel and company management would do well to heed the old advice of "measure twice, cut once."

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[1] This article is adapted from Andrew Boutros, David Kelley & Jay Schleppenbach, *Measure Twice, Cut Once: New DOJ Compliance Certifications Put CEOs and CCOs at Risk of Individual Criminal Liability* (June 30, 2022), available at https://www.dechert.com/knowledge/onpoint/2022/6/measure-twice--cut-once---new-doj-compliance-certifications-puts.html?utm_source=vuture&utm_medium=email&utm_campaign=onpoint.

[2] Press Release, Dep't of Justice, U.S. Atty's Office, S.D.N.Y., *Glencore Entered Guilty Pleas To Foreign Bribery And Market Manipulation Conspiracies* (May 24, 2022), https://www.justice.gov/usao-sdny/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-conspiracies.

[3] Plea Agreement, *United States v. Glencore Ltd.*, No. 3:22-cr-71, at Dkt. 18, Attachment C (May 24, 2022), available at https://www.justice.gov/criminal-fraud/file/1508931/download.

[4] *Id.* at Attachment F (emphases added).

[5] 18 U.S.C. § 1350.

[6] 15 U.S.C. § 7241.

[7] Al Barbarino, *DOJ Defends New CCO Certifications Amid Industry Worry*, LAW360 (June 22, 2022, 4:54 PM EDT), https://www.law360.com/articles/1496108/doj-defends-new-cco-certifications-amid-industry-worry.