feature focus

A review of the McNulty Memorandum

Editor's note: The following articles review the U.S. Department of Justice revision of its corporate charging guidelines for federal prosecutors throughout the country. This guidance was outlined during a speech before the Lawyers for Civil Justice in New York on December 12, 2006, by U.S. Deputy Attorney General Paul J. McNulty. It revises the Thompson Memorandum, which was issued in January 2003 by then-Deputy Attorney General Larry D. Thompson and title the "Principles of Federal Prosecution of Business Organizations." The memo provides useful guidance to prosecutors in the field through nine factors to use when deciding whether to charge a corporation with criminal offenses.

This series focuses on:
1) The McNulty Memorandum's discussion of corporate compliance programs at Section VIII. It is reviewed by Cheryl Wagonhurst and Richard K. Rifenbark. Ms. Wagonhurst is a partner with Foley & Lardner LLP. She is a Certified Compliance and Ethics Professional (CCEP) and a member of the Health Care Compliance Association's Board of Directors. She may be reached by telephone at 310/975-7839. Mr. Rifenbark is a senior associate with Foley & Lardner LLP and may be reached by telephone at 310/97-7793.

2) The discussion of attorney-client and work product privileges, which is reviewed by Gabriel L. Imperato. Mr. Imperato is the Managing Partner of the Fort Lauderdale office of Broad and Cassel and chairman of the firm's White Collar Criminal and Civil Defense Fraud Group. He is Certified in Healthcare Compliance (CHC) and he is a member of the board of the Health Care Compliance Association. He can be reached by telephone at 954/745-5223.

3) The discussion about paying for counsel for individual subjects, which is reviewed by R. Christopher Cook. Mr. Cook is a partner in the Washington, D.C. office of Jones Day. He may be reached by telephone at 202/879-3734.

DOJ's McNulty Memorandum emphasizes that "paper" compliance programs may not be worth the paper on which they're written

By Cheryl Wagonhurst, CCEP and Rick Rifenbark

In the Department of Justice's recently issued memorandum entitled "Principles of Federal Prosecution of Business Organizations," Deputy Attorney General Paul McNulty describes, among other things, the importance of an effective compliance program in a prosecutor's evaluation of whether to criminally charge a corporation. Although it should come as no surprise to those in the compliance community that compliance programs must be "living" programs that have the support of management and the board of directors and continuously evolve to meet identified risks, the "McNulty Memorandum" serves as an important reminder that compliance programs are of little value if they are simply "paper programs." This also gives an organization an opportunity to assess and/or reevaluate the effectiveness of its compliance program.

The McNulty Memorandum

Like the "Thompson Memorandum" before it, the McNulty Memorandum provides guidance to prosecutors who are investigating whether to bring criminal charges against corporations. Prosecutors are required to consider nine factors, one of which is "the existence and adequacy of the corporation's pre-existing compliance program."[1] However, in order for a compliance program to positively influence a prosecutor's decision whether to criminally prosecute a corporation, the McNulty Memorandum emphasizes that compliance programs must be active programs with dedicated resources that detect and deter violations of law. The McNulty Memorandum cites several cases that emphasize that corporations may not avoid criminal liability for the actions of their employees simply because a compliance program is in place that prohibits violations of law. Moreover, a key consideration

is whether management and the board of directors support a corporation's compliance program.

Although the McNulty Memorandum acknowledges that the Department of Justice has no formal guidelines for corporate compliance programs,[2] it does provide certain questions that prosecutors should ask when assessing a corporation's compliance program. These questions include "[i]s the corporation's compliance program well designed" and "[d]oes the corporation's compliance program work?"[3] To help answer these questions, the McNulty Memorandum states that prosecutors should consider:

- The comprehensiveness of the compliance program;
- The extent and pervasiveness of the criminal conduct at issue;
- The number and level of corporate employees involved in the criminal conduct;
- The seriousness, duration, and frequency of the misconduct;
- Any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs;
- The promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation;
- Whether the corporation has established governance mechanisms that can effectively deter and prevent misconduct;
- Whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts; and
- Whether the corporation's employees are adequately informed about the compliance program and of the corporation's commitment to it.[4]

All of these questions are intended to determine whether the corporation's compliance program is simply a "paper program" and whether management may actually be encouraging illegal behavior notwithstanding the existence of a compliance program. Obviously, compliance programs that are determined to be paper programs will not be given positive consideration in prosecutors' determination of whether to criminally charge the corporation.

Practical implications for compliance officers and compliance programs

Corporations and compliance officers should use the McNulty Memorandum as a reminder that compliance programs are only effective if they are actually used and become fully integrated into the corporation's culture. To that end, a corporation should carefully review its compliance program and procedures to assess how they match up with the various items discussed in the McNulty Memorandum.

The McNulty Memorandum prompts prosecutors to consider whether (i) boards of directors exercise independent judgment over corporate management's actions, (ii) internal audit functions are conducted at a sufficiently high level as to ensure independence and accuracy, and (iii) boards of directors receive sufficient information to exercise independent judgment and stay informed regarding compliance activities.[5] Simply stated, a corporation's board of directors should be involved in assessing the corporation's compliance with the law and not simply rubber stamp management's actions. Compliance officers are well advised to evaluate the role of the corporation's board of directors in their compliance programs with an eye towards the points raised in the McNulty Memorandum.

A corporation should evaluate the existing structure and authority for its compliance program and consider whether the program only exists on paper in the form of a compliance manual or handbook or whether it is a program that is appropriately staffed, funded, and fully supported from the top of the organization. This involves looking at the current job description of the compliance officer and making a decision as to whether the position should be a full time employee rather than one combined with another role or job duties in the organization. In addition, the corporation should consider how the various departments and individuals within the corporation could serve to support the overall compliance program. Once the corporation has determined the type of structure that it requires to implement its program, then it should be prepared to devote the necessary funding to support that

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structure. A corporation should also consider developing a charter for the compliance program which is approved by the board of directors and senior management of the corporation to ensure that the program has full support and authority. The corporation should develop an annual compliance work plan which serves to identify the top risk areas for the corporation and articulates how each risk will be appropriately addressed through policy and procedure development and enforcement, training, monitoring, and auditing. Finally, the corporation should do an annual assessment of its compliance program to ensure that it is a living, breathing, functional program worthy of the paper it's written on.

One way to ensure that a compliance program is not a "paper program" is to consider what measures are in place to test a compliance program's effectiveness. Examples of such measures include questionnaires to employees regarding their knowledge of the compliance program's features, periodic audits of billing and collections or other identified high-risk areas, and use of outside consultants to assess the strengths and weaknesses of the compliance program. Compliance officers should also carefully document other items that demonstrate that their compliance program is publicized and effective, such as documenting attendance of training presentations, hotline complaints and appropriate follow-up, any governmental disclosures, instances where employees are disciplined for compliance violations, and, where appropriate, the results of any internal investigations.

Conclusion

Although the discussion of the corporate compliance programs in the McNulty Memorandum essentially reiterates the guidance set forth in the Thompson Memorandum, it is still worthwhile for compliance officers to reevaluate their compliance programs with the McNulty Memorandum in mind. If such an evaluation reveals only a "paper program," it is time to dust it off and make it a priority.