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Scott Schools
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On Thursday, March 20, 2014, Acting Assistant Attorney General Mythili Raman confirmed an inescapable truth regarding both corporate governance and white collar defense—compliance plans matter. In a speech to a Global Anti-corruption Compliance Conference, Ms. Raman, who was on her last day as head of the Criminal Division of the Department of Justice (DOJ), told the audience, "[W]hen companies fail to implement or enforce robust compliance programs, and they then violate the law, we will not hesitate to hold them – and their executives – to account." http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-140320.html .

Ms. Raman's remark reflects an emerging reality about the DOJ's view of when to seek corporate criminal responsibility for corporations whose employees engage in criminal conduct. That reality was reflected in a response that Paul Fishman, the United States Attorney for the District of New Jersey, provided on a panel at the 28th Annual National Institute on White Collar Crime in mid-March. When asked how his office evaluated the appropriate treatment for health care providers who have violated the law, he narrowed the evaluation down to two essential considerations—what did the corporation do to prevent the violation and what did the corporation do to respond to it? Mr. Fishman was not purporting to re-write Section 9-28.300 of the United States Attorney's Manual (USAM) that sets forth nine elements that prosecutors are to consider in determining when to hold a corporation criminally responsible for the acts of its employees. He merely cut to the chase confirming what many prosecutors are thinking: in the event of a violation, companies with robust compliance programs deserve (and should expect to receive) credit for their prior preventative actions.

Despite the seeming contradiction of obtaining "credit" for a compliance plan that has, by definition, failed, DOJ policy and the federal sentencing guidelines specifically allow for such credit. *See* USAM §§ 9-28.300. A.5 and 9-28.800 and USSG § 8B2.1. In order to obtain credit for pre-violation compliance efforts, compliance plans must be in place, current, and followed. Indeed, the government seems to expect compliance programs to be not just current but *prescient* because DOJ prosecutors—and other agency regulators for that matter–often identify conduct as "bad" before the industry has, *see e.g.* the stock options backdating investigations and prosecutions in the late 2000s. In short, the best compliance officials are always on the lookout for "the next big thing." Of course, having a plan in place is only the beginning. DOJ's central theme in reviewing a compliance plan will always be sincerity, that is "whether corporate management is

enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives." USAM § 9-28.800.B.

Whether or not a corporation can tout its pre-violation compliance effort, it will have a chance with DOJ or regulators to demonstrate its commitment to compliance through its post-violation response. Among the factors DOJ will consider is whether the corporation has sanctioned violators, enhanced compliance efforts, paid restitution, and cooperated with investigators. USAM § 9-28.300. Because DOJ expects full cooperation and has clear visibility of those efforts, the extent and tone of the cooperation will often color DOJ's perception of the sincerity of the corporation's post-violation response. However, all of the cited factors will be important, and the presence or absence of them will weigh in DOJ's determination of whether to seek a sanction against the corporation in the form of prosecution or a deferred or non-prosecution agreement that may include monetary payments and possible future oversight by a corporate monitor.

Ultimately, the government's most frequently cited metric of success for holding corporations accountable is the amount of dollars it brings in the door from the exercise of its prosecutorial or regulatory powers. In 2013, the DOJ reported over $3.8 billion in settlements and judgments from civil cases involving fraud against the government. And the beat goes on. Just since March 11, 2014, DOJ has announced settlements of $8.5 million, $27.6 million, $85 million, $1.2 million, and $1.2 *billion*. DOJ's emphasis on the relevance of pre-violation compliance plans together with its pursuit of high dollar resolutions are intended to send a clear message that the government will hold companies to account for failing to enforce robust compliance programs. In short, compliance is here to stay, and those corporations that fail to maintain robust compliance plans will face greater likelihood of violations, stiffer monetary settlements, and uphill battles when seeking to avoid criminal liability for the conduct of their employees.