

The Baseball Playoffs Are About to Begin as the Markets Begin to Drive Compliance

Can you name the three teams who started out the baseball season 0-6? It was the Boston Red Sox, the Tampa Bay Rays and the Houston Astros. Now for extra credit can you name the two of three still playing today for a playoff berth? (Spoiler Alert: It is not the Astros). As baseball ends its 162 game season and with the playoffs just around the corner I thought this would be a good lead in to what may be one of the most significant changes in the calculus for compliance that has occurred over the past several years.

Representatives of the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have been speaking now for several years on why companies should implement or enhance their compliance programs in order to follow the requirements of the Foreign Corrupt Practices Act (FCPA) to avoid prosecution. For at least the past year this tone has changed into something similar to what Greg Andres said at the House Judiciary Committee hearing in June, that companies should not engage in bribery at all. (Just say no?)

Up until now, there is always one business person at a conference who says something along the lines of “Why should I spend \$200,000 to \$500,000 to implement a FCPA compliance solution when the chances of getting caught and sanctioned are quite low?” My immediate response is “Remember the Ford Pinto?” Recognizing there will always be the Neanderthal approach to compliance the usual compliance discussion is “what do I have to do to follow the law?” However, that discussion may well become “what do I have to continue to operate my company and transact business” all within the compliance context. I have recently seen this change in three areas: the integration of compliance into overall risk management and business financing.

Banks

Banks which provide traditional financing are now requesting and reviewing company compliance programs before providing financing. I was recently involved in a project where a company was completing a “straight forward” purchase of another entity. All members of the consortium of lenders requested and reviewed the purchasing entity’s compliance program as part of their due diligence before lending the money. However, this requirement by financing institutions is not simply limited to the financing of purchases, take-overs or other means of acquisitions. It also includes regular re-financing of entities. The existence and maintenance of robust compliance programs, whether FCPA; UK Bribery Act compliant or based upon some other jurisdiction’s legal requirements, is now being written into the covenants required in financing or re-financing.

Insurance

Many have written about insurance for FCPA claims. For instance, the D&O E&O Monitor wrote about a product by the insurer Chartis which will provide insurance to a company to cover FCPA claims. This is certainly a type of insurance that companies should consider for their risk

management portfolio, even if such coverage is limited to investigative costs only. One of the keys to obtaining such coverage is that the insurer must review a company's compliance program. No compliance program (or substandard program) and the insurer will not provide the coverage. Additionally standard Directors and Officers insurance coverage may not apply if the Directors have not followed their responsibilities under the US Sentencing Guidelines or the various Deferred Prosecution Agreements which, over the past year, have set the standards for FCPA compliance *best practices*.

What does all of this mean? It means that FCPA compliance may have now moved from enforcement driven to market driven. This means that your company may not be able to access its value, through capital or financial markets, if it does not have a minimum *best practices* compliance program in place. How do you think that Chief Executive Officer (CEO), who will not allocate resources for a *best practices* compliance program, is going to feel when he cannot get financing to do a transaction; cannot refinance; or offload some risk via insurance? He may feel like a soon-to-be ex-CEO.

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