

The Justice Department's Slippery Slope — Enforcement Versus Regulation

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The Department of Justice is proud of its record on FCPA enforcement. They take credit whenever and wherever they can. They trumpet every settlement. They proudly proclaim that over half of last year's criminal fines were collected for FCPA violations. They are entitled to claim success.

It is hard to argue against prosecutions of private companies and individuals who engage in foreign bribery. Such conduct skews competition in the global marketplace, undermines the integrity of foreign governments and threatens to destabilize governments. These harms are more than evident – they are inescapable and persuasive. Our national

interest supports reducing foreign bribery to protect the integrity of the global economy and foreign governments.

But there is something wrong here with the Department's approach. Maybe it is because many FCPA practitioners operate inside the Beltway. Something is amiss. Maybe it comes with age. Certainly not with wisdom. We have seen this picture before.

An enforcement agency which operates with hubris and insensitivity to the business community is sure to fall eventually in the political world. Companies and practitioners are frustrated because they have to read tea leaves of Justice Department expectations from criminal settlements and official speeches to decipher what is expected of them in the compliance world.

Hon. Harold H. Greene



Most business want to comply in good faith but want more specific guidance on what they have to do to comply with the law. Legal interpretations of terms are made by DOJ lawyers with little judicial supervision. These are issues which should be addressed by some type of overall regulatory framework or even like the Ministry of Justice tried to do in releasing guidance for the UK Bribery Act. In the UK there was sensitivity to the needs of business to have clear rules for compliance, safe havens for conduct and some assurance on the risk of prosecution. The Justice Department will not go that far.

So lets go back to a period in my career in the aftermath of the breakup of AT&T. My hero, District Court Judge Harold H. Greene, watched over the implementation of the antitrust decree in the case, and Justice Department lawyers (some of the brightest and most dedicated lawyers) played a critical role in setting telecommunications policy. The industry accused the judge, and the Justice Department of slowing the telecommunications industry, and eventually the

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judge and the Justice Department were removed from the issue when Congress enacted the Telecommunications Act of 1996.

In the AT&T case, the Bell Operating companies argued that they needed to be regulated by the FCC, not the Justice Department and a federal judge. Similarly, companies in the FCPA world want to know what compliance policies will satisfy the Justice Department. Businesses are now complaining, and they have a good argument — they just want to know what the rules of the game are. If they discover a violation through an internal audit, what are the benefits to the company of coming in and disclosing to the Justice Department the conduct. Out of frustration, businesses are now looking to the Chamber of Commerce to lobby Congress and put pressure on the Justice Department to provide some guidance on its enforcement policies, to provide specific guidance.. The Justice Department better lose its hubris and respond in some way, or they may lose the issue all together.

The analogy is not exactly right on point but I am reminding everyone that blind enforcement without responding to legitimate business concerns will result in some type of push back – be it threats of legislation resulting in changes in policy, or even changes in the law itself. My advice to the Justice Department is simple – respond to the business community, adopt some prosecutorial policies and make them public, so that companies can implement meaningful and effective compliance programs without fear of unfair prosecutions.

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