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Corporate Investigations

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Data Analytics: The New Frontier of DOJ Investigations

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With the continued advancement of technology – particularly in a post-COVID-19 world, where remote work and communications applications have become more prevalent than ever – the Department of Justice (“DOJ”) has been changing the way it views the use of technology and data analytics in corporate compliance programmes. As the DOJ gears up and increases its focus on data analytics when evaluating such programmes, companies should reassess and update their programmes to remain eligible for favourable consideration in the event of an investigation.

A Recent Developments and Guidance From the DOJ Indicate an Increased Focus on Data Analytics in Evaluating the Adequacy of Corporate Compliance Programmes

Recent personnel hirings, pronouncements, and guidance have indicated that the DOJ views data analytics as vital components to adequate compliance programmes. In June 2022, Glenn Leon, the former chief compliance executive at Hewlett Packard Enterprise, joined the DOJ as the chief of its criminal fraud section.¹ Since joining the DOJ, Leon has stated that “compliance is a very big area of focus” for the agency, and that federal prosecutors’ ability to craft effective compliance policies and evaluate corporate compliance programmes is being directed by former compliance professionals.² In fact, the Department’s Corporate Enforcement, Compliance, and Policy Unit within the Fraud Section includes five former compliance officers. Further, in September 2022, Matt Galvin, the former global compliance chief at Anheuser-Busch InBev SA who championed the use of machine learning to help companies detect and prevent compliance violations, joined the DOJ’s fraud section in a newly created position as the section’s compliance and data expert.³

Also in September 2022, Deputy Attorney General Lisa Monaco released a memorandum that revised the DOJ’s existing corporate criminal enforcement policies and practices to, among other things, place a greater emphasis on corporate data practices and data governance as indications of strong compliance programmes.⁴ This memorandum addressed the rise in the use of personal devices and third-party messaging platforms, including the use of ephemeral and encrypted messaging applications, and called for corporations to implement effective policies and procedures governing the use of such devices and platforms to ensure the preservation of business-related electronic data.

Such increased focus on data analytics culminated in the DOJ’s March 2023 updates to its “Evaluation of Corporate Compliance Program” (“ECCP”) memo, which provides guidance and factors for DOJ attorneys to consider when conducting investigations, determining whether to bring charges, and negotiating plea or other agreements with corporate defendants.⁵ Updates to the ECCP included specific guidance for corporations on how DOJ attorneys will evaluate a corporation’s policies and procedures governing the use of personal devices, communications platforms, and messaging applications. The new guidance also directed prosecutors to examine whether business-related electronic data and communications were accessible and amenable to preservation by the company. Therefore, these updates demonstrate the DOJ’s increasing emphasis that corporations use of their data and employee communications for compliance purposes.

B The DOJ’s Framework for Evaluating Corporate Compliance Programmes

The ECCP guides federal prosecutors to consider various factors when making individualised assessments of compliance programmes. Specifically, the ECCP notes three “fundamental questions” a prosecutor should ask: whether the corporation’s compliance programme is well designed; whether the programme is adequately resourced and empowered to function effectively; and whether the corporation’s compliance programme works in practice.

In determining whether a corporate compliance programme is well designed, prosecutors look for whether the corporation has tailored its programme to detect the types of misconduct that are most likely to occur, and whether the programme has evolved to adapt to changes over time. Prosecutors will examine the methodology through which the company identified, analysed, and addressed its risks, and what information or metrics that company collected in order to detect misconduct. Prosecutors will also analyse whether, after identifying high-risk areas, the company has allocated appropriate resources to address these concerns. DOJ attorneys are directed to examine whether the company’s risk assessment is subject to periodic review and has led to updates in policies, procedures, and controls.

When examining whether a company’s compliance programme is adequately resourced and empowered to function effectively, prosecutors probe whether a compliance programme is a “paper programme” or one implemented, resourced, reviewed,

and revised, as appropriate, in an effective manner. That is, prosecutors look for signs of high-level commitment by company leadership to implement a culture of compliance, and scrutinize whether compliance personnel have sufficient resources to undertake the requisite auditing, documentation, and analysis. Prosecutors also examine whether compliance personnel have sufficient access to data to allow for timely and effective monitoring and/or testing of policies, controls, and transactions.

Finally, when determining whether a compliance programme works in practice, prosecutors assess the adequacy and effectiveness of the programme at the time of the offence, as well as at the time of the charging decision. In assessing whether a corporate compliance programme was effective at the time of the misconduct, prosecutors consider how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company's remedial efforts. In determining whether a company's compliance programme was working effectively at the time of a charging decision or resolution, prosecutors examine whether the programme evolved over time to address existing and changing compliance risks.

C Corporations Can Utilise Data Analytics to Develop Comprehensive and Proactive Compliance Programmes That Meet the DOJ's Expectations

Utilising data analytics as part of an effective compliance programme can address all three fundamental questions in the DOJ's inquiry.

First, the implementation of data analytics can help demonstrate a well-designed compliance programme. Data analytics can help a company identify and then direct resources to mitigate high-risk areas of the business. By employing advanced algorithms and data analytics, companies can collect vital information, such as financial records, public records, and transactional information, in order to conduct effective due diligence on vendors, business partners, and potential acquisitions. Data analytics permit companies to monitor information over time so that they can identify additional risks, anomalies, and patterns. For example, a company can analyse transactions, employee expense reports, and other relevant data to identify suspicious communications, inflated invoices, excessive entertainment expenses, or suspicious payments to vendors or foreign officials. Data analysis can also help a company determine the training it should provide to its employees. Further, by monitoring changes in data over time, companies can continuously update and revise their compliance programmes to address these trends.

Second, using data analytics could show that a corporate compliance programme is adequately resourced and empowered to function effectively. The incorporation of robust data analytics to a compliance programme may demonstrate the management's commitment to compliance. The use of data analytics could provide resources to a company's compliance team to effectively undertake the necessary auditing, documentation, and analysis to implement

an effective compliance programme. For example, data analytics may streamline otherwise-unwieldy amounts of information and increase accuracy during audits by making such information more easily understandable for compliance personnel. By facilitating the audit and monitoring processes, data analytics may also help the company identify violations and enforce compliance policies through appropriate disciplinary measures.

Finally, data analytics can help a company show that its compliance programme works in practice by efficiently identifying areas of risk and potential adjustment. Data analytics can help a company identify misconduct, investigate violations, impose appropriate disciplinary measures, and update its risk assessment and policies to keep up with additional or changing risks. By using available data, companies can allocate and re-direct resources based on information learned from compliance analytics. By continuously monitoring information, a company can update its programme to prevent "staleness", and narrowly tailor its policies and procedures to address its unique risks.

D Takeaways

Utilising data analytics can help companies implement comprehensive and proactive compliance programmes that address the DOJ's recent emphasis on data-driven solutions. Investing in data analytics can not only demonstrate management's commitment to compliance, but also help the company identify and mitigate risks, as well as prevent, detect and remediate issues of non-compliance.

Endnotes

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5. U.S. DEPT. OF JUSTICE CRIM. DIV., EVALUATIONS OF CORPORATE COMPLIANCE PROGRAMS (updated Mar. 2023) (available at <chrome-extension://efaidnbmnnnibpcajpcglclefndmkaj/https://www.justice.gov/criminal-fraud/page/file/937501/download>).



Matthew Biben focuses his practice on complex negotiation and litigation of disputes, including regulatory and enforcement matters on behalf of both individuals and organisations. His diverse litigation practice includes representing financial institutions and FinTech companies in civil disputes, securities and bankruptcy litigation, and complex matters involving the government. As former general counsel of a large bank and federal prosecutor, Matthew routinely acts as counsel in litigated disputes and internal investigations of both domestic and international matters involving, among others, the Department of Justice ("DOJ"), Securities Exchange Commission ("SEC"), Federal Reserve Board ("FRB"), Office of Comptroller of the Currency ("OCC"), Consumer Financial Protection Bureau ("CFPB"), New York Department of Financial Services ("NYDFS"), state attorneys general and foreign regulators. Prior to joining private practice, Matthew served for three-and-a-half years at JPMorgan Chase, where he was Executive Vice President and General Counsel for Chase Consumer & Community Banking.

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As the United States Attorney for the District of New Jersey, Craig directed all federal criminal and civil matters in the state of New Jersey. Craig made significant organisational changes, including creating the nation's first standalone opioid enforcement unit and the District's first cybercrimes unit. Prior to his service as U.S. Attorney, Craig was co-chair of an Amlaw 50 firm's litigation and trial practice group and also led its white-collar, government and internal investigations team.

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