

DOJ and Compliance

The Department of Justice and the Securities and Exchange Commission have repeatedly focused on corporate compliance in recent years as a way to mitigate liability. Neither the DOJ nor the SEC is about to recognize a compliance defense. At the same time, each has decried “paper systems” which are little more than a book on a shelf at the company detailing the key elements of a system which has yet to be implemented. While it is true as each regulator admits that no system can prevent every malfeasance and misdeed, it is equally true that if the system is not implemented it does nothing. Indeed, the corporate officials who permit such an event do a huge disservice to their firm – the failure to implement will undoubtedly be a key point in the charging decision against the firm and its officers.

Equally problematic is confusing proper compliance, and the difficult decisions implementing a system can generate, with arguments and debates about the issue of deference to regulators by courts and the proper rules of construction for statutes – issues which can create the kind of difficulties that a paper compliance system might yield. Yet that seems to be the upshot of recent remarks by a senior Department official discussing what some might call a political point of view under the guise of compliance. Remarks by Claire McCusker Murray, Principal Deputy Associate Attorney General, at the Compliance Week Annual Conference on May 20, 2019 ([here](#)) reviewed the matter.

Ms. McCusker’s remarks began with a discussion of recent efforts to step-up the training for DOJ attorneys on corporate compliance. That trend will have positive benefits for a Department and corporations as Ms. McCusker notes. The discussion quickly shifted, however, to the question of what Ms. McCusker called “agency guidance documents. These documents are agency rules that come in the form of ‘Dear Colleague’ letter, ‘Frequently Asked Question,’ bulletins, and other informal guidance that exists on websites, manuals, and everywhere in between.” Critics of these documents have various less than kind descriptions, according to the Principal Deputy AG.

The difficulty with these documents begins with the notion that “Congress writes the law,

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not the Executive Branch or administrative agencies within that Branch.” Congress does, in some instances however, delegate its authority to agencies, Ms. McCusker allowed. “But the proper way for a regulatory agency to impose obligations that are binding on the public is governed by the Administrative Procedure Act – and generally (for your purposes) requires notice-and-comment rulemaking.”

It is the difference between APA Rule making and the “Frequently Asked Question” type of guidance that presents the dilemma, according to Ms. McCusker. The text of the rule is law while the text of Frequently Asked Question is “just paper,” she declared. To be sure, the DOJ and SEC have for years decried compliance systems which are little more than a book on the shelf or, “paper” to borrow the Principal Deputy AG’s term. That criticism has nothing to do with different types of guidance offered by the Department or regulatory agencies. The criticism of compliance systems that are just “paper” does have much to do with the proper implementation of a compliance system.

The question of how agencies write rules when directed by Congress, or if the Department and agencies make available other types of guidance, seems untethered from the nuts and bolts of building a compliance system or even how the DOJ, SEC and others law enforcement agencies evaluate a system when considering possible liability during an investigation. Yet Ms. McCusker continued undeterred, stating that the “key is to distinguish between the categories of guidance. . . One category is “what the law requires.” The other is items such as “the agency’s interpretation of an ambiguity . . . [or] best practices.” For the former the company will want to ensure compliance. For the latter the firm must make a “good faith risk calculation – really, a business decision. . .” about whether to comply she told the audience. Under this approach maybe the firm follows the agency guidance, or not.

Here Ms. McCusker is not discussing compliance, but rather her view of how statutes and rules should be interpreted and followed. This is clear from the end of her speech where she states the current use of “paper” by the government causing the need for a “business decision” may change if the “Supreme Court charts a new course with respect to *Auer* deference in *Kisor v. Wilkie* this term. *Auer v. Robbins*, 519 U.S. 452 (1997) is a unanimous decision of the Court written by Justice Scalia discussing deference to an agency position under select circumstances. *Kisor v. Secretary of Veterans Affairs*, No. 18-15 is a case in which the Solicitor General is arguing in favor of a limited form of *Auer* deference.

What Ms. McCusker appears to be discussing – or perhaps advocating — is a strict, literal language version of statutory and rule construction which eliminates all deference to agencies and their interpretations that are not the literal text of a statute or rule. Regardless of one’s position on whether there should be some, little or no deference to the interpretations offered by the Department or by agencies, the Supreme Court has consistently refused to negate all deference as Ms. McCusker admits in her comments on *Kisor*.

In the end, Ms. McCusker’s “business decision” approach is not about compliance and does not reflect existing law as evidenced by the Solicitor General’s brief in *Kisor*. Her

position does appear to be consistent with comments by the Attorney General denouncing recent court rulings for what he called interfering with administration policy. See, e.g., William Barr, Attorney General, Remarks to the American Law Institute on Nationwide Injunctions, Washington, D.C. (May 21, 2019) (“ We have seen over time an expansion of judicial willingness to review executive action . . . [and issue] nationwide injunctions . . . [that] have frustrated presidential policy . . .”). All of this presents a critical question: Is the Department of Justice enforcing the law or trying to rewrite it?