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General Chapters:

Country Question and Answer Chapters:

Why President Trump's Deregulation Agenda Does Not Mean Firms Should Cut Compliance Budgets

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I. Introduction

The Trump administration has been lauded by some for ushering in a new era of deregulation. Executives with long-term vision, however, recognise that regulations can "snap back" just as quickly as they are weakened, leaving companies that have slashed compliance budgets and personnel at a disadvantage in the current climate of continuing regulatory enforcement. In short, the financial and reputational costs of addressing regulatory snapback – ramping up the compliance programme, hiring more personnel, and restarting the hard task of creating a "culture of compliance" – far outweigh any feel-good initial cost savings that might be gained from scaling back compliance programmes.

II. The Current Administration's Regulatory and Enforcement Agenda

President Trump crystallised his administration's stance on regulation in June 2017, stating "[w]e will get rid of the redundancy and duplication that wastes your time and your money".[1] Indeed, Executive Order 13,771's two-for-one policy,[2] which requires federal agencies to identify two regulations to eliminate for each new regulation issued, solidified a new era of deregulation. The Trump administration has begun curtailing rules in several major economic sectors, including the financial, energy, telecom, and healthcare sectors. In the financial sector, recent changes include revisions to the Sarbanes-Oxley Act and the Dodd-Frank Act, while the Consumer Financial Protection Bureau (CFPB) is uncertain of its future and mission.[3] The repeal of net neutrality and internet privacy rules heralds a less-regulated telecom sector, and changes to defined standards of essential health benefits[4] and qualified health plans[5] reflect an easing of healthcare sector regulations. These changes, along with a multitude of changes to lesser-known regulations, show deregulation spanning a clear majority of the entire economy.

At the same time the Executive Branch is curtailing regulations and beating the very familiar drum of deregulation, it is also issuing executive orders that call for greater enforcement of certain laws, including those relating to money laundering, consumer fraud, and violent crime. For example, just 10 days after the issuance of Executive Order 13,771's two-for-one policy, President Trump issued Executive Order 13,773, which aims to "strengthen enforcement of Federal law", to combat corruption, cybercrime, financial crimes, and money laundering.[6] Similarly, on July 11, 2018, more than 18 months after the issuance of Executive Order 13,773, the administration issued Executive Order 13,844, which orders the creation of a task force to guard against consumer fraud and to protect market integrity.[7] Executive Order 13,844 is, however, written so broadly that it impacts every major industry and business sector in the United States, and only time will tell if it ends up having any impact.

III. Congressional Attitudes Toward Deregulation

Traditional stereotypes that Republicans propose and Democrats oppose deregulation do not always hold true. For instance, Sen. Elizabeth Warren, D-Mass., signalled a willingness to ease capital restraints on small regional and community banks[8] and Democratic Senators Mark Warner, Tim Kaine, and Heidi Heitkamp,[9] and 13 others, voted in favour of legislation that scales back federal oversight under the Dodd-Frank Act. Likewise, Republican Senators Richard Shelby and Bob Corker called for better CFPB oversight of financial institutions in the wake of recent bank scandals.[10] Republican Senators Chuck Grassley, John Cornyn and Orrin Hatch broadly support anti-money laundering (AML) laws, and put forth a bipartisan bill to modernise and close loopholes in the existing AML regulations.[11] In addition, Republican Representatives Scott Taylor and Carlos Curbelo, among others, oppose EPA cuts favouring the energy industry[12] and Republican Representatives Mike Coffman and Susan Collins opposed the Federal Communications Commission's repeal of net neutrality.[13] As these examples show, support for regulatory pause does not fall cleanly along party lines, which makes future regulatory and law enforcement priorities all the more difficult for corporate compliance departments to predict.

IV. Thinking Critically About Compliance Cutbacks

Following through on the lure of deep cuts in compliance spending when no one is looking is short-sighted and costlier in the long run, especially when there is so much uncertainty in current regulatory, law enforcement, and legislative priorities. Moreover, the U.S. is no longer the only country that is aggressively investigating and penalising companies that maintain poor compliance programmes. Organisations that "stay the course" and keep their compliance function robust are better able to weather non-U.S. regulatory inquiries and the potential for regulatory snapback. To that end, smart managers understand that the following considerations should guide their ongoing compliance decisions.

A. **Multinational firms must consider regulators in multiple jurisdictions**. Multinational businesses should know that

changes to U.S. regulations will not always result in changes to nondomestic regulations. A strong, domestic compliance programme that aligns with global standards helps ensure that U.S.-based operations do not run afoul of foreign regulations, breach the trust of regulatory stakeholders, or subject the firm to penalties and legal fees in other markets.

B. **Updating a compliance programme to address deregulation may cost more than programme maintenance**. Although deregulation could result in fewer regulatory obligations for businesses, fewer obligations does not necessarily result in fewer compliance costs. Slashing the budget and removing compliance resources can result in numerous other tangible costs, such as increases in legal and consulting spend, development of new training materials, retraining compliance staff, and execution of staff evaluations, to name a few. In addition, there are other, well-known intangible costs that may result, including alienated high performers, reduced workforce morale, and diminished productivity. Finally, where there is uncertainty in the government's approach to enforcement, smart organisations double down on their compliance efforts to avoid unpredictable outcomes.

C. **Regulatory cycles**. Over the past 300 years, the financial sector exhibited a cycle of deregulation and regulation that ultimately correlated with respective market booms and busts.[14] If past is prologue, a period of increased financial sector regulation is not far off. In addition, a sample of post-9/11, "significant regulations",[15] as defined in Executive Order 12,866, shows a pattern of regulatory wax and wane, seemingly uncorrelated with traditional notions of political preference for regulations.[16] Accordingly, firms should avoid betting on sustained deregulation because Executive Branch rhetoric may not bear out in practice – firms should instead focus on building sustainable, resilient compliance programmes.

D. **Trends in regulatory enforcement actions and fines in the financial sector**. Despite widespread deregulation, managers should be careful not to correlate fewer regulations with a decrease in enforcement. Particularly in the context of the Foreign Corrupt Practices Act (FCPA), the Bank Secrecy Act (BSA) and AML fines in the financial sector, the current deregulation trend had little effect on the enforcement of highly regulated aspects of the business. Data indicates that BSA/AML enforcement actions in all of 2017 and the first quarter of 2018 alone each surpassed $1 billion in total fines from U.S. enforcement agencies.[17] In addition, the Office of the Comptroller of the Currency recently levied a $100 million fine against a large U.S. financial institution. Furthermore, BSA enforcement agencies, like the FinCEN, increase the civil penalty adjustment tables year over year,[18] with an emphasis on the responsibility of institutions, increasingly large monetary penalties, and a greater focus on individual liability.[19] Similarly, FCPA civil monetary penalties levied by the SEC were more than $2 billion in 2016 and just under $2 billion in 2017.[20] The aggregate number of enforcement actions and dollars of fines for violations of both BSA/AML and FCPA regimes show distinct upward trends over the past decade.

E. **Compliance programmes affirm corporations' commitment to cooperating with the government**. At the International Association of Defense Counsel's "Corporate Compliance College", Deputy Attorney General Rod Rosenstein urged companies to work with the Department of Justice (DOJ). "When you work with us, you help us uphold the rule of law and ultimately help create the kind of legal environment where your companies can thrive."[21] Rosenstein noted that corporations can be held liable for certain bad acts by their employees, and that if a corporation wants the DOJ to treat the corporate entity as a victim, "it should act like a victim and help ensure that the perpetrators are held accountable".[22] Rosenstein also said, "[s]trong compliance programs are a company's first line of defense",[23] and, "[w]hen something does go wrong, law enforcement should give the greatest consideration to companies that have effective compliance programs in place and timely report the conduct to law enforcement. … An investment in a strong compliance program can pay dividends if you find your company named as a subject or target".[24]

F. **Risk of legal damage and reputational harm**. Compliance consists not only of adherence to laws and regulations, but also strong governance and sound risk management practices, which generate a culture of compliance and accountability, and allow a business to identify and remediate internal issues. When considering cuts to compliance budgets, one of the most relevant considerations is whether the business is willing to expose itself to the risks of significant legal damages and reputational harm. Legal damages are costly and create unnecessary distractions for the business and its stakeholders. More than ever, reputation serves as an indicator of an organisation's health to outsiders, and reputational harm can have a real and lasting impact on public perception of a business.

G. **Compliance as a means of accessing new markets**. By fostering a strong compliance programme, companies with an international footprint have an opportunity to not only improve credibility in the public eye but also to allow the company to safely enter markets it previously could not. As an example, maintaining a robust sanctions programme could allow for the safe, secure, and compliant sale of more products and services in emerging markets due to a strengthened ability to manage the additional risks.

H. **Now is the time for investments in RegTech**. Regardless of deregulation, current technological advances present an opportunity to bolster and even invest more in a compliance programme. Forward-looking managers will invest in the implementation of cutting-edge regulatory technology, such as automation, robotics, machine learning, and artificial intelligence, to improve the strength and efficiency of their compliance programmes. Such investments now will yield future cost savings and the benefit of a more effective programme.

V. Conclusion

The diminution of a compliance department based on a presidential administration's perceived deregulation agenda may in the long run cause damage to a company that far outweighs any short-term cost savings. A company with a strong compliance framework, robust governance, and a sound risk management programme is poised to weather regulatory change and uncertainty, but also withstand the inevitable regulatory snapback when administrations change – as they always do.

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