

Multiple Challenges in a Difficult Environment

By Ty E. Howard

Businesses operating in today's difficult environment face multiple challenges, few of which fall neatly into a single enforcement category.

What Is Government Enforcement?

What does “government enforcement” mean? It’s an apt question and one worth addressing in depth in this issue of *For The Defense*, which focuses on articles written by the DRI Government Enforcement

and Corporate Compliance (GECC) Committee.

Lawyers whose practices bring them into regular contact with law enforcement, prosecutors, and regulators are labeled in different ways, as reflected in practice group names and professional classifications such as “white-collar criminal defense,” “government investigations,” “government litigation,” “internal investigations,” and many others. Regardless of the name, however, many construe the practice area with work related to, in some way, criminal or quasi-criminal law.

While criminal law is certainly a key part of the practice area, I believe that that construction is too narrow and does not reflect the breadth of the practice area or the day-to-day work of the lawyers who work in it. At DRI, we use the term “government enforcement” to capture this broader view, which is reflected in the GECC Committee’s content and focus, and the diverse

practices of its membership. Indeed, that broader view is what made the DRI GECC Committee particularly attractive to me, and why I believe it can be so attractive to other lawyers, including both existing and potential new DRI members.

So how do we define “government enforcement”? Broadly speaking, it comprises legal issues arising from the government affirmatively enforcing laws against a person or an organization and those persons’ and organizations’ efforts to avoid such enforcement. Using this base definition, I view government enforcement as having five core elements: (1) compliance; (2) internal investigations; (3) regulatory enforcement; (4) civil enforcement; and (5) criminal enforcement. Most importantly, these five elements are not just related, but in many cases, they overlap—a result that, I argue, becomes the defining characteristic of government enforcement as a practice area.

Five Core Elements

Let’s look a little closer at the five elements.

The term **compliance** suggests a regimen or process to comply with something. In this case, that something will be the law and the regulations that apply, specifically or generally, to a given indus-



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try. Companies now expend enormous sums on compliance efforts: compliance plans, compliance officers, compliance departments, compliance hotlines, cultures of compliance, and so on. The reason is clear: with mounting government scrutiny across industries, record-setting government judgments and settlements, and increased focus on corporate wrongdoing, an ounce of protection really is worth a pound of cure.

Internal investigations are just that: investigations internal to a company. But they take myriad forms and harbor different levels of urgency. The need for an investigation may arise from a routine human-resources issue or from discovering potential malfeasance through internal controls. Equally often, an investigation is prompted by an external inquiry, such as a government subpoena or request for information. The scope and the urgency of an investigation will turn on multiple factors such as the seriousness of the potential misconduct, the financial and other resources at stake, the risk to a company and its risk tolerance, the structure of a company, and the need for immediate information. Finally, investigations often raise a host of vexing collateral issues, including protecting the attorney-client privilege, determining when to get employees separate counsel, ensuring confidentiality, and avoiding allegations of obstruction of justice.

Regulatory enforcement relates to some process through which a company or an individual is exposed to a penalty imposed on the government agency level without resort to the civil or the criminal courts. While regulatory enforcement can be less formal and less serious than other types of enforcement, such is not always the case. The regulatory and administrative regime varies greatly from industry to industry and agency to agency, but the penalties can be severe. For example, in health care, one of the most heavily regulated industries, potential administrative exclusion from Medicare and Medicaid billing is often as threatening as any civil or even criminal penalty.

Civil enforcement in its various forms is well known to the DRI membership. Such enforcement refers to potential liability and the associated penalties owed

to the government and extracted through the civil courts. While broadly speaking civil enforcement captures any type of government-initiated litigation, it focuses on litigation arising from prosecutorial and quasi-prosecutorial offices. The most common example is the False Claims Act (FCA), which continues to be the federal government's chief enforcement tool. But many other examples exist, including the Stark law and the Civil Monetary Penalties Law (health care), portions of 1934 Securities Exchange Act (securities), and many other industry-specific laws. Further, while not government initiated, civil litigation involving private rights of action such as civil fraud, conspiracy, non-intervened *qui tam* cases, and many others often implicate similar enforcement issues.

Criminal enforcement involves perhaps the most familiar component of government enforcement. While criminal enforcement includes traditional criminal defense work, it is most strongly associated with fraud and "white-collar" crime. It involves a prosecutorial agency—a United States Attorney's Office, a state attorney general's office, or a local district attorney's office—bringing criminal charges, and a company's or individual's attempt to avoid or defend against those charges.

Listing these core elements is straightforward enough. But the key to government enforcement as a practice area is

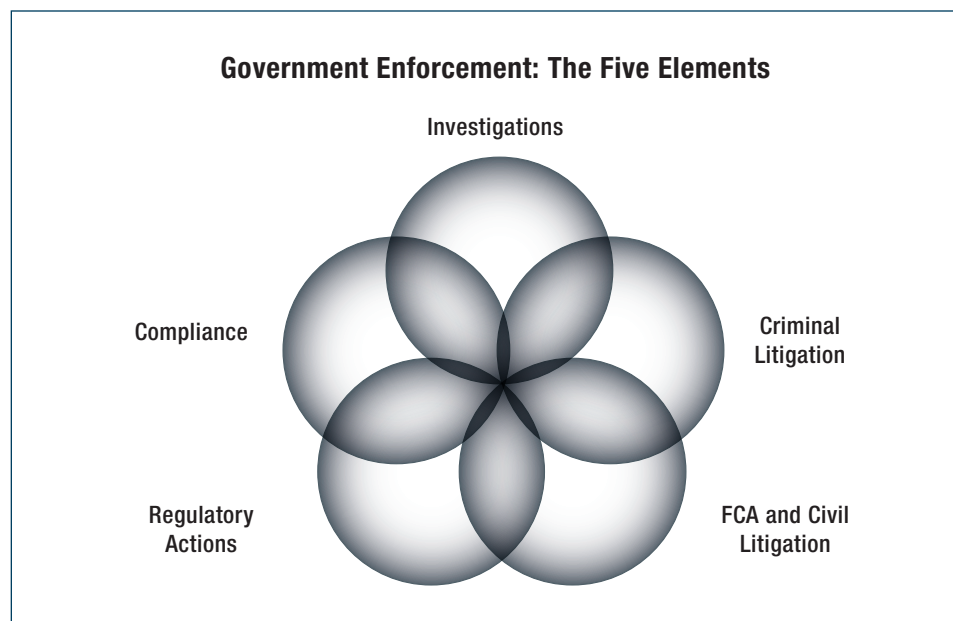
not viewing the elements *individually* but rather *collectively*. That's because the elements are connected and overlap, as illustrated in Figure 1.

As a pragmatic lawyering issue, the overlapping of these elements comes as no surprise. An attorney drafting a compliance plan for a client does so, at least in part, to help the client avoid a potential

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regulatory action (or worse) in the future. Likewise, any lawyer who negotiates regularly with the U.S. Department of Justice (DOJ) is familiar with the DOJ's approach to parallel civil-criminal proceedings and the landmines it creates. Nonetheless, it is worth pausing to consider what drives this overlap. The answer, I suggest, comes from the nature of "white-collar" issues and

Figure 1



the government's ability to take different enforcement approaches to the same facts.

One Case, Many Approaches to Enforcement

Let's begin with the government's approach to a couple of hypothetical cases.

In a typical non-white-collar case, the approach is simple. Joe shoots Steve dur-

ing a bar fight. The police investigate and arrest Joe, who is charged with a crime. The government's criminal case against Joe is later resolved through trial, plea bargain, or occasionally, a separate legal ruling such as a motion to dismiss. While there could be private civil litigation (e.g., a lawsuit for wrongful death), or some attendant civil forfeiture proceeding, the government's approach to the non-white-collar case is entirely one of criminal enforcement, and there are few, if any, alternative approaches for the government to take or for defense counsel to defend.

As the case progresses, the investigative tools chosen could change. Plus, while some tools such as search warrants and grand jury subpoenas are limited to only criminal matters, others like AIDs and IG subpoenas can produce evidence that could later be used in a civil or a criminal case. Once the evidence is gathered, further enforcement options exist, and not all of them are mutually exclusive. The case could be prosecuted criminally as a health-care fraud matter; it could be brought as a civil FCA case; or it could be handled by the Department of Health and Human Services Office of Inspector General (HHS-OIG) administratively through various regulatory penalties. Indeed, one of the greatest challenges for defense counsel is that many factually similar cases could be and often are handled in different ways. The difference in the enforcement approach could rest on the individual agency or the individual prosecutor, whether the client's industry is currently a priority, or many other factors.

This variability has important implications. Returning to the five core elements of government enforcement, the connectedness and the overlap of those elements *reflect* the multiple approaches that the government could take to a given issue or case, as illustrated in Figure 2.

Naturally, not every issue crosses over into different categories. Our bar-fight example above represents an obvious case that would be plotted solely in the green (criminal) sphere of our graph. Other examples exist for those that would be exclusively in the regulatory or the civil spheres. But as government involvement in the economy and various industry sectors grows, the natural trend will be for the spheres to be pushed even closer together, resulting in even more overlap—and more challenges for defense counsel and their clients.

Some of my prosecutor and government lawyer friends may object to the above formulation, arguing that it wrongly implies that the government considers arbitrary or even improper factors in determining how to handle a case. But this formulation has nothing to do with prosecutorial miscon-

duct, real or perceived. To the contrary, the formulation reflects that these approaches can be *legitimately* mutually inclusive, and it is that legitimate variability for similarly situated issues that characterizes the practice area.

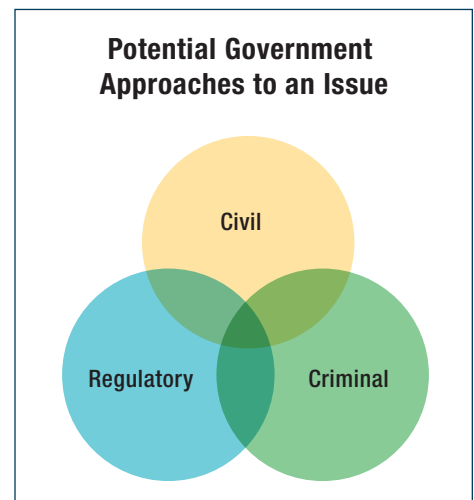
How does such legitimate variability arise? While fully answering that question is beyond the scope of this article, some culprits are easy to spot. First, the line between regulatory, civil, and criminal enforcement is often merely one of intent, which is inherently subjective and proved through circumstantial rather than direct evidence. Second, a significant number of criminal statutes, particularly those affecting regulated industries, have explicitly reduced or unstated *mens rea* requirements, further blurring the lines between crimes and non-criminal misconduct. Third, the proliferation of federal criminal laws—the exact number has defied counting but is estimated at over 23,000—and regulation generally allows government enforcement into more areas of life. A separate statutory and regulatory regime on the state, the city, or the international level adds still further complexity and variability.

Test for Defense Lawyers and Their Clients

The above landscape has a significant effect on defense lawyers and their clients. From a client standpoint, it alters risk assessment. For example, most companies in regulated industries are well aware of the need to have a good compliance program. The enterprise-wide risk analysis, however, changes when

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Figure2



uncertainty and variability increase, such as when a breach of contract can be construed as a false claim with fines, penalties, and treble damages, or when technical violation of a regulation can result in criminal penalties. The prospect of criminal sanctions will obviously alter what might otherwise be a strictly financial analysis. Regardless of the particular situation or industry, businesses must constantly calibrate and recalibrate their risk tolerance and their exposure within their industry.

Lawyers share the challenges that their clients face and therefore must engage in similar risk analysis. The government-enforcement landscape also provides new opportunities for lawyers. The value that defense lawyers offer is not just how to handle a problem, but also how to frame the problem, much as lawyers do when framing issues for a jury, a trial judge, or an appellate court. Put another way, a lawyer can serve his or her client by successfully framing a case as a civil or an administrative case instead of as a criminal one. This is, of course, difficult work and not possible in every case. Often prosecutors and regulators have already investigated and developed a narrative of a case before the defense lawyers and their clients are even aware of it. And the work necessarily takes place on the other side's turf before any court, judge, or other neutral third party is involved. But, as the saying goes, this is the business that we've chosen.

DRI's Role

Government enforcement is not a traditional practice area for DRI, and the DRI GECC Committee is one of DRI's newer committees. The growing GECC Committee reflects DRI's commitment to this area and the changing nature of litigation generally. While some historically active areas of litigation have slowed due to alternative dispute resolution, tort reform, escalating litigation cost, and many other factors, government enforcement has grown significantly in the last decade. Many firms have added "white-collar criminal defense" or similarly named practice areas to their services, and few truly full-service firms exist without such capability.

DRI is well positioned to take advantage of these changes. The DRI GECC Committee encompasses the full array of government enforcement areas and practitioners,

including in-house counsel dealing with compliance issues, civil litigators handling FCA litigation, white-collar defense lawyers negotiating with the DOJ, and lawyers who handle regulatory matters in fields such as health care, government contracting, securities, and the life sciences. Equally important, the committee is geared for attorneys whose entire practice is in government enforcement as well as attorneys whose primary practice may be elsewhere but who increasingly encounter such issues.

Conclusion

Government enforcement continues to grow, and the government has an array of options when making enforcement choices. Businesses operating in this difficult environment face multiple challenges, few of which fall neatly into a single enforcement category. The resulting challenge for us, as defense lawyers, is to see and to understand this full environment so that we can help clients navigate it—through prospective planning, quick investigation and remediation, and if necessary, vigorous litigation defense. The DRI GECC Committee looks forward to continuing to be a resource for lawyers of all kinds as they help their clients through this evolving enforcement environment. 