

## ***Boeing Fraud Enforcement Action***

One of the top corporate scandals over the past few years entered its next phase with the settlement by the Department of Justice (DOJ) with The Boeing Company (Boeing) around its fraud in the certification of its 737 MAX aircraft. The resolution was via a [Deferred Prosecution Agreement](#) (DPA). Under the DPA, Boeing agreed to pay a total amount of \$2.5 billion. According to a DOJ [Press Release](#), this total amount consisted of “a criminal monetary penalty of \$243.6 million, compensation payments to Boeing’s 737 MAX airline customers of \$1.77 billion, and the establishment of a \$500 million crash-victim beneficiaries fund to compensate the heirs, relatives, and legal beneficiaries of the 346 passengers who died in the Boeing 737 MAX crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302.” It was basically for Boeing’s fraud on the US government.

### ***I. Background***

This scandal engulfed the company and showed at the time, Boeing to be one of the most morally bankrupt companies in the US. The flaws in the 737 MAX led to two plane crashes yet Boeing initially blamed the pilots of those flights all the while knowing there were flaws in the planes. After government oversight groups across the globe banned the 737 MAX from flying and the Federal Aviation Administration (FAA) was considering a similar ban, the then Chief Executive Officer (CEO) of Boeing called President Trump and asked him to intercede to prevent the US from banning the 737 MAX from the air. Once again, all the while knowing about the defects in the 737 MAX. Clearly the safety of the US flying public was not on the forefront of Boeing at that time.

Acting Assistant Attorney General David P. Burns of the Justice Department’s Criminal Division said, “The tragic crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302 exposed fraudulent and deceptive conduct by employees of one of the world’s leading commercial airplane manufacturers. “Boeing’s employees chose the path of profit over candor by concealing material information from the FAA concerning the operation of its 737 Max airplane and engaging in an effort to cover up their deception. This resolution holds Boeing accountable for its employees’ criminal misconduct, addresses the financial impact to Boeing’s airline customers, and hopefully provides some measure of compensation to the crash-victims’ families and beneficiaries.”

Then US Attorney Erin Nealy Cox for the Northern District of Texas said, “The misleading statements, half-truths, and omissions communicated by Boeing employees to the FAA impeded the government’s ability to ensure the safety of the flying public. This case sends a clear message: The Department of Justice will hold manufacturers like Boeing accountable for defrauding regulators – especially in industries where the stakes are this high.” Special Agent in Charge Emmerson Buie Jr. of the FBI’s Chicago Field Office said, “The substantial penalties and compensation Boeing will pay, demonstrate the consequences of failing to be fully transparent with government regulators. The public should be confident that government regulators are effectively doing their job, and those they regulate are being truthful and transparent.”

However, the settlement and DPA demonstrate that Boeing did make a comeback from its cultural miasma. There is much to be learned by the anti-bribery compliance practitioner from this Boeing DPA. Over the next few blog posts, I will be exploring the DPA and mining it for lessons learned. It was interesting to see how the DOJ evaluated a Fraud Section case that was not a Foreign Corrupt Practices Act (FCPA) enforcement action. The DOJ applied the same formula found in the Corporate Enforcement Policy to the DPA involving Boeing.

According to the DPA, Boeing did not receive any credit for self-disclosure as “it did not timely and voluntarily disclose to the Fraud Section the offense conduct described in the Statement of Facts”. However, Boeing did receive partial credit for its cooperation with the DOJ’s investigation into the Company’s deception of the FAA; the cooperation “ultimately included voluntarily and proactively identifying to the Fraud Section potentially significant documents and Company witnesses and voluntarily organizing voluminous evidence that the Company was obligated to produce”. Going forward, “Boeing has agreed, among other things, to continue to cooperate with the Fraud Section in any ongoing or future investigations and prosecutions. As part of its cooperation, Boeing is required to report any evidence or allegation of a violation of U.S. fraud laws committed by Boeing’s employees or agents upon any domestic or foreign government agency (including the FAA), regulator, or any of Boeing’s airline customers.”

In the area of remediation, Boeing eventually turned itself around as well. The Press Release laid out some of the key remediation steps: (i) creating a permanent aerospace safety committee of the Board of Directors to oversee Boeing’s governing safety and its interactions with the FAA; (ii) creating a Product and Services Safety organization to strengthen and centralize the safety-related functions; (iii) reorganizing Boeing’s engineering function to have all Boeing engineers report through Boeing’s chief engineer rather than to the business units; (iv) structural changes to Boeing’s Flight Technical Team, including moving Boeing’s Flight Technical Team under the same organizational umbrella as Boeing’s Flight Test Team; (v) adopting new policies and procedures and conducting training to clarify expectations; and (vi) requirements governing communications between Boeing’s Flight Technical Pilots and regulatory authorities. Somewhat more dryly is also noted, “Boeing also made significant changes to its top leadership since the offense occurred.”

## ***II. Facts of the Fraud***

The flaws in Boeing’s 737 MAX led to two plane crashes involving Lion Air Flight 610 and Ethiopian Airlines Flight 302 and causing the deaths of some 346 people. Boeing initially blamed both disasters on ‘pilot error’. However it turned out that the culprit was the plane’s “Maneuvering Characteristics Augmentation System (MCAS) that impacted the flight control system of the Boeing 737 MAX”. This had been originally approved by the FAA back in 2011.

According to the DPA, Before any U.S.-based airline could operate a new commercial airplane, U.S. regulations required FAA, to evaluate and approve the airplane for commercial use. Without this approval, a U.S.-based airline would not be permitted to operate the airplane. As part of this

evaluation and approval process, the FAA had to make two distinct determinations: (i) whether the airplane met U.S. federal airworthiness standards; and (ii) what minimum level of pilot training would be required for a pilot to fly the airplane for a U.S.-based airline. These two determinations were made by entirely different groups within the FAA that were composed of different personnel with different organizational structures and different reporting lines.

The FAA Aircraft Evaluation Group was headed up the determination of the minimum level of pilot training required for a pilot to fly the airplane for a U.S.-based airline. To make that determination, the FAA AEG compared the new version of the airplane to a similar, prior version of the airplane. After evaluating the differences between the new and prior versions of the airplane, the FAA AEG mandated the minimum level of pilot training, known as “differences training,” for the new version.

At the conclusion of this evaluation, the FAA AEG published the 737 MAX Flight Standardization Board Report, which contained relevant information about certain aircraft parts and systems that Boeing was required to incorporate into airplane manuals and pilot-training materials for all U.S.-based airlines. This Report also contained the FAA AEG’s differences-training determination. After the 737 MAX FSB Report was published, Boeing’s airline customers were permitted to fly the 737 MAX.

Within Boeing, the 737 MAX Flight Technical Team, which was composed of 737 MAX Flight Technical Pilots, was principally responsible for identifying and providing to the FAA AEG all information that was relevant to the FAA AEG in connection with the FAA AEG’s Report. Because flight controls are vital, differences between the flight controls of the prior model and the 737 MAX were especially important to the FAA AEG for purposes of its publication of the Report and the FAA AEG’s differences-training determination.

In November 2016, two of Boeing’s 737 MAX Flight Technical Pilots (Boeing Employee-1), one who was then the 737 MAX Chief Technical Pilot and another who would later become the 737 MAX Chief Technical Pilot (Boeing Employee-2), discovered information about an important change to MCAS. Unfortunately, these two Boeing employees did not inform the FAA on about this change. Moreover, the DPA noted “these two 737 MAX Flight Technical Pilots, concealed this information and deceived the FAA AEG about MCAS. Because of this deceit, the FAA AEG deleted all information about MCAS from the final version of the 737 MAX FSB Report published in July 2017.” The practical impact was that the “airplane manuals and pilot training materials for U.S.-based airlines lacked information about MCAS, and pilots flying the 737 MAX for Boeing’s airline customers were not provided any information about MCAS in their manuals and training materials.”

The reason for this fraud and deception was cost around training pilots on the new MCAS system. If the FAA had been aware of the true nature of the change, it would have every pilot certified on the system to have “training only by appearing in person wherever the pilot’s airline operated a full-flight simulator. Apart from the cost of acquiring one or more multimillion-dollar simulators and other related expenses, airlines that were required by the FAA AEG to train pilots on a full-

flight simulator could also lose revenue that the pilot might otherwise have generated from flying airline passengers during that time.”

With the lower level of training mandated, this meant that the “737 MAX would be a more attractive option for Boeing’s airline customers already flying the 737 NG than switching to an entirely new airplane, such as the new version of Company-1’s airplane, as such customers would save significant money in pilot-training costs by transitioning to the 737 MAX.”

In addition to this training issue, Boeing engineers recognized that the MCAS system had operating deficiencies when operating at lower speeds and lower speed. Boeing Employee-1 further recognized that this lower-speed operation was different from what Boeing had briefed and described to the FAA. Boeing Employee-1 and Boeing Employee-2 had the following conversation in an internal chat function.

*Boeing Employee-2: Oh great, that means we have to update the speed trim description in vol 2  
Boeing Employee-1: so I basically lied to the regulators (unknowingly)*

Both Boeing employees understood that it was their responsibility to update the FAA about any relevant changes to the 737 MAX’s flight controls—such as MCAS’s operational scope. However, despite knowing that the FAA had issued its lower training level required without any awareness that MCAS’s operational scope they did not correct the FAA understanding of MCAS’s operational scope or otherwise ensure that the FAA educational determination requirement “was based on an accurate understanding of MCAS’s operation. Instead, Boeing—through Boeing Employee-1 and Boeing Employee-2—intentionally withheld and concealed from the FAA AEG their knowledge of MCAS’s expanded operational scope.” These failure directly led to the two airline disasters.

What type of company who makes a product that requires regulatory approval, provides both insufficient and incorrect information to the regulators? What was the culture of Boeing that allowed this type of behavior from senior engineers? After the disasters occurred what type of company would have a CEO who blamed ‘pilot error’ for the crashes all while claiming the Boeing 737 MAX planes were still reliable and more importantly safe to fly? One with a vary broken culture.

## ***II. Remediation and Going Forward***

The criminal penalty could have been much higher. Boeing did receive some credit for cooperation, the DPA somewhat dryly noted “such cooperation, however, was delayed and only began after the first six months of the Fraud Section’s investigation, during which time the Company’s response frustrated the Fraud Section’s investigation.” The company did better with its remediation and also received credit under the Corporate Enforcement Policy for its extensive remediation, which included:

- (i) creating a permanent aerospace safety committee of the Board of Directors to oversee the Company's policies and procedures governing safety and its interactions with the FAA and other government agencies and regulators;
- (ii) creating a Product and Services Safety organization to strengthen and centralize the safety-related functions that were previously located across the Company;
- (iii) reorganizing the Company's engineering function to have all Boeing engineers, as well as the Company's Flight Technical Team, report through the Company's chief engineer rather than to the business units; and
- (iv) making structural changes to the Company's Flight Technical Team to increase the supervision, effectiveness, and professionalism of the Company's Flight Technical Pilots, including moving the Company's Flight Technical Team under the same organizational umbrella as the Company's Flight Test Team, and adopting new policies and procedures and conducting training to clarify expectations and requirements governing communications between the Company's Flight Technical Pilots and regulatory authorities, including specifically the FAA.

Boeing also made significant changes to its top leadership since the fraud including the former Chief Executive Officer (CEO) resigning after his rather pathetic performance during the crisis.

There are several points for every compliance professional. Boeing put a "permanent aerospace safety committee" on the Board. It is somewhat amazing that it did not do so before but it points to the increasingly important role of the Board in risk management. The Delaware Supreme Court in the [Marchand](#) decision (Blue Bell) made clear that companies must make certain that its highest risk is managed at the Board level. For any airline manufacturer one of its key risks is safety. This new Board committee will "oversee the Company's policies and procedures governing safety and its interactions with the FAA and other government agencies and regulators."

Boeing centralized product safety by pulling it from the business units and centralizing product safety into a separate corporate function. This is also a best practice for a corporate compliance function. It must be independent from reporting to or even being influenced by the business unit in performing its job. Simply put, if the business unit has authority over compliance, compliance will not be able to do its job. This same reorganization was made for Boeing's engineering function.

As with every DPA involving violations of the Foreign Corrupt Practices Act (FCPA), there is a best practice compliance program laid out in Attachment C, which Boeing agreed to implement and continue using going forward. While the compliance program laid out in the Boeing DPA is somewhat different than the standard FCPA-violation DPA, it certainly merits study by all compliance practitioners. For instance, under Attachment C Boeing is required to "ensure that its directors and senior management provide strong, explicit, and visible support and commitment to its corporate policy against violations of U.S. fraud laws and its compliance codes, and demonstrate rigorous adherence by example. The Company will also ensure that middle management, in turn, reinforces those standards and encourages employees to abide by them.

The Company will create and foster a culture of ethics and compliance with the law in its day-to-day operations.” This means senior management must provide *visible and demonstrable* support to creating a culture of ethics within the organization.

Under policies and procedures, the company must base its policies on periodic fraud risk assessments and should update both policies and procedures no less than annually. One or more senior executive will be in charge of fraud prevention, detection and remediation and will report directly to “independent monitoring bodies, including internal audit, the Company’s Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of stature and autonomy from management as well as sufficient resources and authority to maintain such autonomy.”

Regarding training, Boeing will “ensure that its compliance code, policies, and procedures regarding U.S. fraud laws are **effectively** communicated to all directors, officers, employees, and, where necessary and appropriate, agents and business partners.” Moreover, this training should be “**tailored** to the audience’s size, sophistication, or subject matter expertise and, where appropriate, will discuss prior compliance incidents.” [emphasis supplied]

In the area of internal reporting and investigations, Boeing will “handle the investigations of such complaints in an effective manner, including routing the complaints to proper personnel, conducting timely and thorough investigations, and following up with appropriate discipline”. Discipline should be “designed to effectively enforce its compliance code, policies, and procedures” and should be “applied consistently and fairly, and in a manner consistent with the violation, **regardless of the position held by, or perceived importance** of, the director, officer, or employee.” But more than simply discipline, the company should be “appropriately incentivizing compliance”. [emphasis supplied]

Boeing must remedy the “harm resulting from such misconduct, and to ensure that appropriate steps are taken to prevent further similar misconduct” by performing a root cause analysis which would assess “the internal controls, compliance code, policies, and procedures and making modifications necessary to ensure the overall compliance program regarding U.S. fraud laws is effective.” Under Mergers and Acquisitions (M&A), Boeing must engage in pre-acquisition due diligence by conducting “appropriate risk-based due diligence on potential new business entities, including appropriate due diligence regarding U.S. fraud laws by legal, accounting, and **compliance personnel**.” [emphasis supplied]

Finally, under monitoring and testing, Boeing agreed to “ensure that its compliance program does not become **stale**”. It will do so by conducting periodic reviews and testing of its compliance code, policies, and procedures to evaluate and improve the effectiveness in “preventing and detecting violations of U.S. fraud laws and the Company’s code, policies, and procedures regarding U.S. fraud laws, taking into account relevant developments in the field and evolving industry standards.” If misconduct is found, “the Company will conduct a **thoughtful** root cause analysis and timely and appropriately remediate to address the root causes.” [emphasis supplied] It is important to note that Boeing was not required to have a corporate monitor.

### ***III. Lessons Learned***

Although the matter was based upon fraud against the US government, largely around Boeing employees misrepresenting facts to the FAA, there are some valuable lessons for every compliance professional. First, about fraud risk management. Never forget that corruption is a subset of fraud. Indeed, the ACFE 2020 Report to the Nations reported that corruption was the most common fraud scheme in every region across the globe. Having a strong fraud risk management program is not simply a “nice to have” but is a must in today’s world.

Snežana Gebauer, Executive Managing Director and head of Investigations and Risk Advisory for the Americas, K2 Integrity, has noted that fraud around COVID relief is the investigation and prosecution priorities for the DOJ in 2021. You should also remember that there will be many willing whistleblowers for False Claims Act litigation in the hospital and medical care space concerning government distributions from the Pandemic and related issues. Finally, Gebauer also believes that there will an increased focus on financial and corporate fraud by the Securities and Exchange Commission (SEC) as a by-product of the economic downturn caused by the pandemic.

Another key lesson learned is about the structures within your organization. For Boeing it was having engineers report to the business unit they worked in. At Boeing this had the effect of putting product safety far down the list below generating profits. Boeing centralized product safety by pulling it from the business units and centralizing it into a separate corporate function. This is also a best practice for a corporate compliance function. It must be independent from reporting to or even being influenced by the business unit in performing its job. Simply put, if the business unit has authority over compliance, compliance will not be able to do its job. This same reorganization was made for Boeing’s engineering function.

Once again Boeing reminds all compliance practitioners about the need for the critical risks of the company to have Board of Director oversight and participation in that risk management function. For the compliance function, this means having a Board of Director’s committee, dedicated to compliance. Just as Blue Bell ice cream learned, you have to actually manage risk at the Board level. The days of compliance being shunted to some small part of the Audit Committee’s remit are far behind us. Companies must commit to managing their compliance risk and that means at the Board level.

Another lesson learned was, once again, no matter how egregious the conduct which led to the violation, either fraud or corruption, if a company turns it around, cooperates and extensively remediates it will (not can) receive a reduction in the overall fine and penalty under the DOJ Corporate Enforcement Policy. Recall that the then Chief Executive Officer (CEO) of Boeing personally called President Trump and asked him to intercede with the FAA to prevent the federal agency from grounding the 737 MAX planes. This was after EU regulators had grounded the planes and well after the CEO had known about the failures in the 737 MAX and the system

failures which led to the two airplane crashes. As the DPA somewhat dryly noted, “Boeing also made significant changes to its top leadership since the offense occurred.”

For almost one year after the two airline crashes, Boeing continued a non-cooperation stance with the FAA. However sometime in late 2019 or early 2020 Boeing finally saw the light and began to cooperate with the FAA and the DOJ. Boeing also moved towards a very robust remediation from an obviously broken culture and non-existent fraud risk management system. The changes made by Boeing in its fraud risk management system are worth reiterating; they included:

- (i) creating a permanent aerospace safety committee of the Board of Directors to oversee Boeing’s governing safety and its interactions with the FAA;
- (ii) creating a Product and Services Safety organization to strengthen and centralize the safety-related functions;
- (iii) reorganizing Boeing’s engineering function to have all Boeing engineers report through Boeing’s chief engineer rather than to the business units;
- (iv) structural changes to Boeing’s Flight Technical Team, including moving Boeing’s Flight Technical Team under the same organizational umbrella as Boeing’s Flight Test Team;
- (v) adopting new policies and procedures and conducting training to clarify expectations; and
- (vi) requirements governing communications between Boeing’s Flight Technical Pilots and regulatory authorities.

Finally, Boeing agreed to “ensure that its compliance program does not become *stale*”. It will do so by conducting periodic reviews and testing of its compliance code, policies, and procedures to evaluate and improve the effectiveness in “preventing and detecting violations of U.S. fraud laws and the Company’s code, policies, and procedures regarding U.S. fraud laws, taking into account relevant developments in the field and evolving industry standards.” This final point demonstrates the importance of continuous monitoring and continuous improvement in any compliance program; whether it be fraud management or anti-corruption.