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THE WHY & HOW OF COMPLIANCE PROGRAMS

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**SOCIETY OF CORPORATE
COMPLIANCE AND ETHICS**



WHY HAVE A COMPLIANCE PROGRAM

- THE DECISION TO PROSECUTE
- CONTESTING LIABILITY
- AVOIDING PUNITIVES
- SENTENCING?
- A STRATEGIC ADVANTAGE!
- IT'S THE RIGHT THING TO DO
- VOLUNTARY BECOMES MANDATORY

WHY HAVE A COMPLIANCE PROGRAM

- Caremark decision
- DOJ Principles for Prosecution of Corporations
- EPA Voluntary Disclosure
- SEC

WHY HAVE A COMPLIANCE PROGRAM

- EEO Guidance/*Kolstad* and *Ellerth*
- Sarbanes-Oxley
- NYSE Listing Requirements
- FAR

HOW THEY FIND OUT

- **“THANKS FOR NOT WEARING A WIRE!”**
 - THE ADM CASE
- **UNHAPPY SPOUSES**
 - THE PURCHASING MANAGER’S SPOUSE
- **QUI TAM**
 - A LITTLE INCENTIVE
- **UNHAPPY COMPETITORS**
- **UNHAPPY EX-EMPLOYEES**
- **YOU NEVER KNOW WHAT YOU’LL HEAR**
 - “LET’S MEET IN THE BAR ACROSS THE STREET”
- **WHAT WILL THEY WRITE DOWN NEXT?**
 - THE TAXI-CAB RECEIPT
 - “LET’S BE PREDATORY ABOUT IT!”
 - “COMPETE – BUT NOT ON PRICE”

WHAT IS A COMPLIANCE PROGRAM

- MANAGEMENT COMMITMENT TO DO THE RIGHT THING

- MANAGEMENT STEPS TO MAKE IT HAPPEN

THE TWO TESTS OF A COMPLIANCE PROGRAM

- THE SKEPTICAL US ATTORNEY TEST
- THE TWO-MINUTE TEMPTATION TEST

STARTING PRINCIPLES

- DILIGENCE IN PREVENTING & DETECTING MISCONDUCT

- A CULTURE THAT ENCOURAGES ETHICS & COMPLIANCE

RISK ASSESSMENT

- NEED TO DETERMINE YOUR RISKS
- BEST PRACTICE: NOT JUST CRIMINAL, BUT ALL LEGAL, ETHICS AND REPUTATION RISKS
- PRIORITIZE BASED ON LIKELIHOOD & IMPACT
- NEEDS TO BE ONGOING
- SURPRISE! THEY ACTUALLY TELL YOU WHEN & WHERE THEY WILL ATTACK!

RISK ASSESSMENT - WHAT IS THE SCOPE?

- ETHICS
- CIVIL & CRIMINAL
- *NOT* ERM – WEATHER, ECONOMY, FIRE, ETC
- INCLUDES:
 - *ANTITRUST, PRIVACY, GOVERNMENT CONTRACTING, ENVIRONMENT, SAFETY, ACCOUNTING FRAUD, CONFLICTS OF INTEREST, EEO, WAGE & HOUR, TRADE SECRETS, BRIBERY, LOBBYING, ETC*
 - *ANY LAW YOU CAN BREAK, ANY SCANDAL YOU CAN FALL INTO*

USSG's item 1 - Standards and Procedures

- STANDARDS – A CODE OF CONDUCT & OTHER STANDARDS

- EXACTLY WHAT DOES A CODE OF CONDUCT DO?

- PROCEDURES – INTERNAL CONTROL SYSTEMS

- DO YOU HAVE CHECKS ON THE MISUSE OF POWER ANYWHERE IN THE COMPANY?

USSG's item 2 - Compliance infrastructure

- HIGH-LEVEL EXECUTIVE OR GROUP TO RUN THE PROGRAM
 - **CHIEF ETHICS & COMPLIANCE OFFICER**
 - **AUTHORITY & RESOURCES TO GET THE JOB DONE**

- *MANAGEMENT* MUST ENSURE THE PROGRAM WORKS

- THE BOARD MUST KNOW WHAT IS GOING ON & OVERSEE THE PROGRAM
 - **REPORTS BY THE COMPLIANCE OFFICER**

USSG's item 2 - Compliance infrastructure

- **COMPLIANCE COMMITTEES – ONE IMPORTANT TOOL**
- **IS SOMEONE(S) RESPONSIBLE FOR KEY RISK AREAS?**
- **IS THIS JUST A HQ PROGRAM DU JOUR, OR IS THERE A COMPLIANCE PRESENCE IN EVERY BUSINESS UNIT WITH SIGNIFICANT COMPLIANCE RISK?**

USSG's item 2 - Compliance infrastructure

- COMPLIANCE AND ETHICS – MOVING THIS FROM THEORY TO REALITY
- THE COMPLIANCE & ETHICS PROFESSIONAL
 - CCEP CERTIFICATION FROM SCCE
- A NEW PROFESSION:
 - PEOPLE IN COMPANIES WHO WORK TO PREVENT & DETECT MISCONDUCT
 - DIFFERENT FROM LAWYERS, AUDITORS, HR, RISK MANAGEMENT
 - 150,000-200,000 & GROWING
- BUILDING A CAREER IN COMPLIANCE AND ETHICS (SCCE; 2007)

USSG's item 3 - Delegating responsibility

- DON'T GIVE RESPONSIBILITY TO THOSE YOU SHOULD HAVE KNOWN WERE CRIMINALS
- DOES THE COMPANY'S ASSESSMENT & PROMOTION SYSTEM SCREEN OUT THOSE LIKELY TO BREAK THE LAW?
- COULD YOU HAVE A BOARD MEMBER OR EXECUTIVE WHO HAD SERVED TIME FOR ARMED BANK ROBBERY (E.G., SMITH & WESSON) WITHOUT YOUR KNOWING ABOUT IT?

USSG's item 4 - Communicating effectively

- TRAINING AND COMMUNICATION ON THE RISKS & THE PROGRAM
- NEEDS TO COVER BOARD MEMBERS, OFFICERS, EMPLOYEES & “AGENTS, AS APPROPRIATE”
- PRACTICAL & EFFECTIVE
- WILL YOUR EMPLOYEES REMEMBER THE TRAINING?

USSG's item 5 - Steps to prevent violations

- MONITORING AND AUDITING *TO DETECT CRIMINAL CONDUCT*
 - WHAT'S GOING ON OUT THERE?
 - MORE THAN PROCESS REVIEWS
 - CAN YOU FIND CRIME WITH ANNOUNCED REVIEWS?

- EVALUATE EFFECTIVENESS PERIODICALLY
 - SURVEYS
 - FOCUS GROUPS
 - TESTING
 - SELF-ASSESSMENTS
 - EXIT INTERVIEWS
 - DEEP DIVES – “The Measurement Challenge (Part I):
Introducing the Deep Dive,” 17 ETHIKOS 7 (May/June 2004).

USSG's item 5 - Steps to prevent violations

- EMPLOYEES AND AGENTS CAN SEEK ADVICE/REPORT CRIMINAL CONDUCT
 - DOES “JUST CALL KEN LAY” WORK?

- PUBLICIZE
 - DO EMPLOYEES KNOW IT'S THERE?

- WITHOUT FEAR OF RETALIATION
 - WILL ANYONE BELIEVE “TRUST US, WE WON'T RETALIATE”?

USSG's item 6 - Discipline

- ENFORCE CONSISTENTLY THROUGH APPROPRIATE DISCIPLINARY MEASURES
 - “CONSISTENT”? – MEANS *TOUGHER* ON THE LEADERS
- FAILURE TO TAKE REASONABLE STEPS TO PREVENT/DETECT CRIMINAL CONDUCT
 - “ON YOUR WATCH” RESPONSIBILITY
- INCENTIVES TO PERFORM IN ACCORDANCE WITH THE COMPLIANCE PROGRAM
 - WHAT IS THE MESSAGE OF YOUR REWARD SYSTEM?
 - http://www.corporatecompliance.org/Content/NavigationMenu/Resources/IssuesAnswers/DRAFTwhitepaper-BuildingIncentivesCompliance_WOappdx.pdf

USSG's item 7 - Responding effectively

- RESPOND APPROPRIATELY TO VIOLATIONS
- INVESTIGATE PROMPTLY, THOROUGHLY, PROFESSIONALLY
- FIX THE PROBLEM – AND THE CAUSE OF THE PROBLEM

USSG's item 7 - Responding effectively

○ HOW YOU RESPOND CAN MEAN MORE THAN WHAT YOU INITIALLY DID WRONG

○ VOLUNTARY DISCLOSURE

○ **“LET’S MAKE A DEAL”**

○ MANDATORY DISCLOSURE?

Industry practice

- FAILURE TO FOLLOW INDUSTRY PRACTICE WEIGHS AGAINST FINDING EFFECTIVENESS
- KNOW WHAT IS GOING ON IN THE COMPLIANCE FIELD

Industry practice - Useful resources

- SOCIETY OF CORPORATE COMPLIANCE & ETHICS
- WWW.CORPORATECOMPLIANCE.ORG
- ETHIKOS
- <http://www.ethikosjournal.com/>
- KAPLAN & MURPHY, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES (THOMSON/WEST; 1993 & ANN'L SUPP)
- CONSTRUCTION INDUSTRY COMPLIANCE PRACTICES FORUM

Third parties/agents

- YOU MAY BE RESPONSIBLE FOR SOME ACTS OF THIRD PARTIES
 - **E.G., ENVIRONMENTAL, SAFETY, OVERSEAS BRIBES, EXPORTS**

- CASES AGAINST THE THIRD PARTY “HELPERS”

- IF YOU ARE AT RISK FOR THIRD PARTIES, NEED TO ADDRESS THAT RISK
 - **DUE DILIGENCE IN RETENTION**
 - **TRAINING**
 - **AUDITS/MONITORING**
 - **CONTRACT PROVISIONS**
 - **CODES, COMPLIANCE PROGRAMS**

Documentation

- IF YOU ARE DOING THESE THINGS, CAN YOU PROVE IT?
 - “IF IT’S NOT IN WRITING IT DIDN’T HAPPEN”
- THE IMPORTANCE OF AN INVENTORY
 - “OH, WE DON’T HAVE ANYTHING HERE”
- DOES YOUR COMPLIANCE PROGRAM TELL A COMPELLING STORY?

QUESTIONS?