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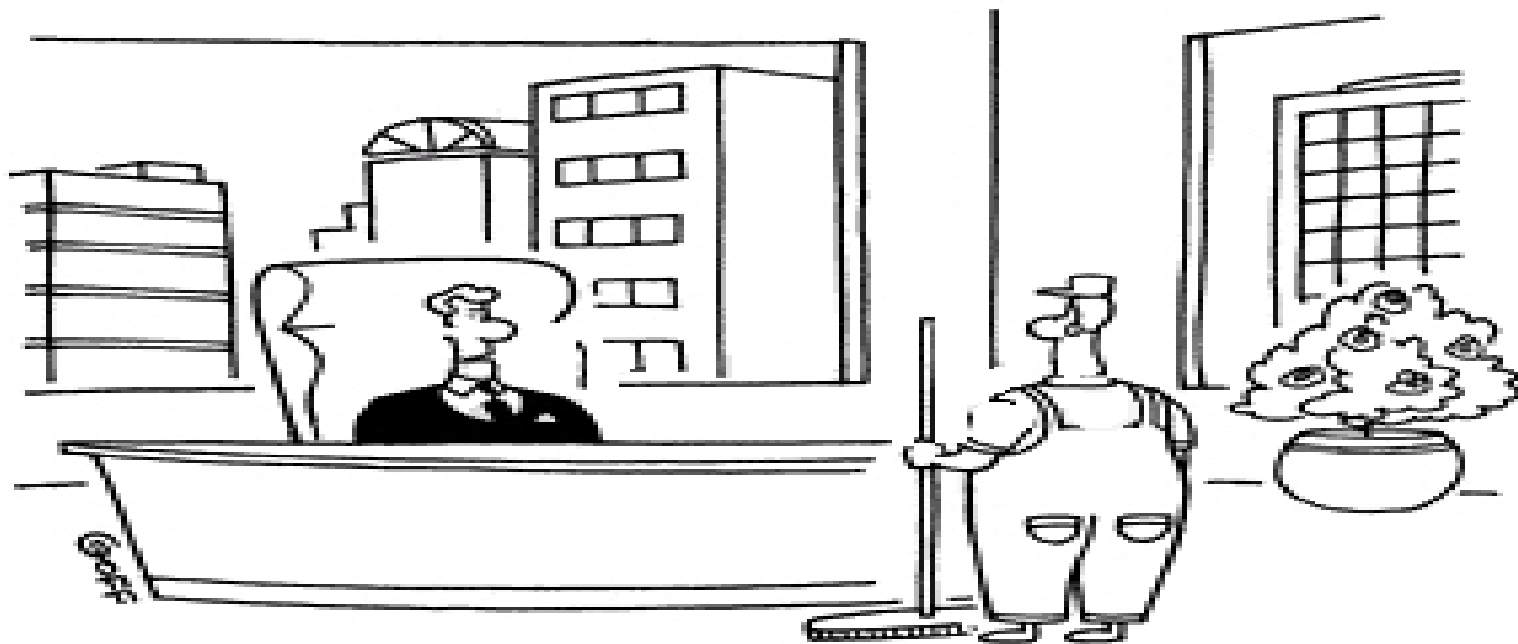
“Cutting Edge Issues in Compliance and Business Conduct” – BECA Forum at Santa Clara University

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Cutting Edge Enforcement and Compliance Issues

- Sentencing Guidelines remain the benchmark
- Role of corporate gatekeepers
- Board responsibility for oversight of compliance programs
- Deferred prosecutions and federal monitors
- Anti-corruption laws and the Foreign Corrupt Practices Act

The Problem



"I've decided to blame you for this company's inability to accept responsibility for anything."

Federal Sentencing Guidelines: A Corporate “Carrot and Stick” Approach

- **1991 and 2004 Organizational Sentencing Guidelines**
- **The Stick – Fine increases for:**
 - **Managerial involvement, tolerance or condoning of behavior**
 - **Prior history**
 - **Obstruction**
- **The Carrot – Fine decreases for:**
 - **Effective compliance programs**
 - **Cooperation, self-reporting**

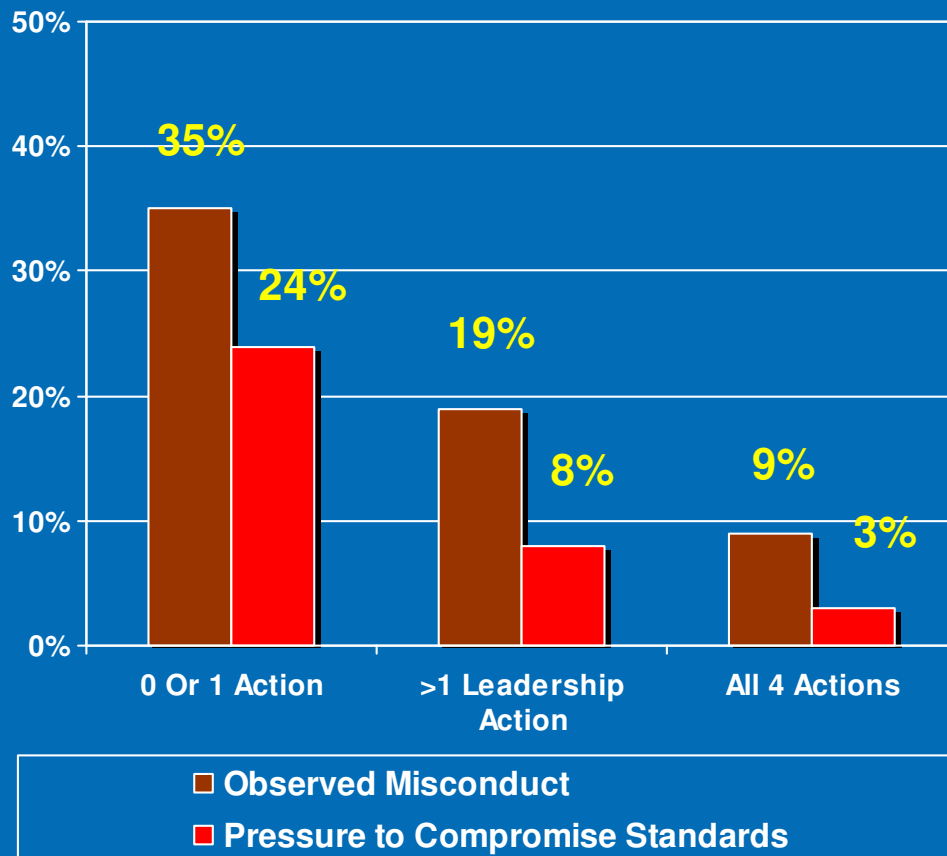
What's an Effective Program? Seven Minimum Steps

- 1. Establish standards and procedures**
- 2. Governing authority knowledgeable, high-level oversight, and specific individual responsible**
- 3. Do not delegate to person who has engaged in conduct inconsistent with program**
- 4. Communicate standards and procedures by training and disseminating information**
- 5. Monitoring, auditing and reporting systems**
- 6. Enforce standards through incentives and discipline**
- 7. Respond appropriately to offense and take steps to prevent further offenses**

Compliance Expectations Have Changed

- No longer enough to just have a compliance and ethics program – it must be effective
- Focus on corporate culture
 - Sentencing Guidelines: Requires promotion of culture that “encourages ethical conduct and commitment to compliance with the law”
 - DOJ: Corporation must be “unequivocally committed” to “highest standards of legal and ethical behavior” (Thompson/McNulty memo)
 - SEC: “Integrity, ethics and compliance [should be] part of the promotion, compensation and evaluation processes” (Cutler speech)

DII Study on the Importance of Leadership



Leadership actions:

- Talk about importance of ethics
- Keep promises and commitments
- Model ethical behavior
- Hold employees accountable

When senior management engages in all four actions, employees are:

- 4x less likely to observe misconduct
- 8x less likely to feel pressure to compromise standards

Expectations on the Gatekeepers

- DOJ and SEC are closely scrutinizing the conduct of accountants, auditors, lawyers, directors
- Compliance responsibilities and expectations have increased substantially
- Sentencing Guidelines:
 - Directors must be knowledgeable about program and exercise reasonable oversight
 - High-level personnel are responsible effectiveness
 - Person with operational responsibility must report periodically to high-level personnel and governing authority, have adequate resources, appropriate authority, and direct access to governing authority

DOJ Thompson/McNulty Memo – Leadership Responsibility

- **Are directors provided with information sufficient to enable the exercise of independent judgment?**
- **Are internal audit functions conducted at a level sufficient to ensure their independence and accuracy?**
- **Have directors established information and reporting system reasonably designed to provide management and board with timely and accurate information sufficient to allow them to reach informed decision regarding organization's compliance with the law?**

The Prosecution of Robert Riley – Compliance Gone Awry

- **“Compliance officers are . . . today’s corporate fire personnel. They are often the company’s first responders and must focus on both proactive and reactive efforts to be effective.” Judge Castillo at sentencing**
- **Compliance officer at AbTox, medical device manufacturer**
- **CEO knew he could manipulate and dominate Riley**
- **Riley had no compliance officer training/background**
- **Participated in misleading FDA filings, and failed to report adverse information and improper marketing to FDA**
- **Sentenced to 6 years imprisonment**

Deferred Prosecution Agreements and Monitors

- DOJ has used frequently in last 6 years
- Examples: AIG, AmSouth, AOL, Banco Popular, Bristol Myers, Computer Associates, GE/InVision Technologies, KPMG, Merrill Lynch, Micrus, Monsanto, PNC Bank
- Allows company to avoid criminal guilty plea, but often involves penalty, admissions, monitor
- No standard form agreement
- DOJ only occasionally discloses publicly the factors that went into decision to forego indictment
- Controversy recently – is this corporate leniency?
- More controversy – how are monitors selected?

International Anti-Bribery Laws

- **Every country has an anti-bribery statute**
- **US passes FCPA in 1977**
- **Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)**
- **United Nations Convention Against Corruption**
- **Organization of American States Inter-American Convention Against Corruption**
- **Council of Europe Criminal Law Convention on Corruption**

What is the FCPA?

- **Criminalizes the bribery of foreign officials anywhere in the world for the purpose of corruptly influencing an official decision in order to obtain a business benefit.**
- **Requires companies with stock traded on a U.S. exchange to meet certain standards regarding their accounting practices, books and records, and internal controls.**

Multi-Jurisdictional Law Enforcement Coordination

- Statoil - \$5 million in bribes to an Iranian GO
 - Norwegian law enforcement begins inquiry
 - DOJ and SEC opened investigations
- Siemens – Over \$2 billion in suspicious payments around the world
 - German law enforcement begins inquiry
 - Siemens announces SEC and DOJ investigations
 - At least 10 other countries investigating
- Bristol-Myers Squibb – Potential bribe payments by German subsidiary
 - German law enforcement begins inquiry
 - BMS announces SEC investigation

FCPA – It’s All About The Controls: Invision Technologies

- **Manufacturer of explosive detection systems for airports**
 - **Allowed agents/distributors to act on its behalf despite “high probability” they bribed foreign officials**
 - **Settle with DOJ and SEC for \$1.9 million in disgorgement and civil and criminal penalties, and monitor**
- **SEC settled with former SVP for sales and director; alleges he**
 - **indirectly caused falsification of company’s books;**
 - **aided and abetted violation of FCPA internal controls provision by failing to devise and maintain internal controls adequate to detect and prevent misconduct**
- **SEC focuses on lack of background checks on third parties, failure to train employees/agents/distributors, lack of oversight**

FCPA – M&A-Related Cases

- **Syncor International Corporation**
(Acquired by Cardinal Health Inc.)
- **ABB Vetco Gray**
(Acquired by JP Morgan Partners, Candover Partners Limited and 3i Group)
- **InVision Technologies, Inc.**
(Acquired by General Electric)
- **Titan Corporation**
(Proposed acquisition by Lockheed Martin)

Global Compliance Issues and Internal Investigations

- DOJ expects companies to self-disclose and cooperate – for DOJ, this is hallmark of good corporate citizenship and good culture
- SEC McAfee decision (2006) -- “it is incumbent upon management to report [violations] to SEC”
- First 24 to 72 hours after potentially serious allegation are often critical
- Have plan/protocol ready if needed to address key issues (ie, document preservation, privacy)

International Compliance Investigation Issues

- **Program must be practical and workable**
- **Consider local cultural issues**
- **Program should be translated into local language**
- **Not all violations involve US laws – remember there are local laws as well**
- **Use web-based training as necessary**
- **Visit your offices around the globe**
- **Evaluate privacy issues – hotlines, document retention, expatriating documents to US, etc.**
- **Understand impact of local work council rules**