



**Wednesday, May 2**  
**10:45 am – 12:15 pm**

## **Hot Topics in Compliance**

**Nancy Cohen**

*Vice President & Sr. Division Counsel*  
The Estee Lauder Companies, Inc.

**Keith Henderson**

*Compliance Officer & VP Ethics & Compliance*  
Capital Access Network, Inc.

**Larry Parsons**

*Vice President, Business Conduct/Ethics*  
Freescale Semiconductor, Inc.

## Faculty Biographies

### **Nancy Cohen**

Nancy Cohen is vice president and senior ethics counsel for The Estee Lauder companies. She is a member of the company's Ethics and Compliance Committee, and also serves as the dedicated lawyer for the Americas and Travel Retail - worldwide.

Prior to working for The Estee Lauder Companies, Ms. Cohen was vice president - legal for Cunard Line Limited and in-house counsel for Pan Am.

Ms. Cohen has been a member of ACC since 1987. She is the immediate past president of ACC's Greater New York Chapter and a current board member of that chapter.

### **Keith L. Henderson**

Keith Henderson is compliance officer and vice president, ethics and compliance for Capital Access Network, Inc. Mr. Henderson manages the day-to-day operations of the compliance program. He conducts and oversees investigations into violations of company policy such as fraud, theft, conflicts of interest, privacy, and misappropriation of company property or assets. He also manages the corporate-wide training and education on compliance and business ethics matters. Mr. Henderson's practice covers a broad spectrum of compliance related law involving Sarbanes Oxley, FCPA and various domestic and international privacy laws.

Prior to joining Capital Access Network, Mr. Henderson managed the compliance program for Turner Broadcasting System, Inc., including its CNN, TBS, TNT, TruTV and Cartoon Network business divisions. He also practiced as senior counsel at Hewlett Packard in Atlanta, Washington, D.C. and Colorado. At HP, Mr. Henderson handled the sale, licensing, and procurement of information technology products and services and represented the consulting, customer support, and managed services business units.

Mr. Henderson is the author of "*The Tax Treatment of Corporate Sponsorship Payments and the Aftermath of the Cotton Bowl Ruling*" (Exempt Organization Tax Review, May 1996). He serves on the board of directors of the ACC Georgia Chapter; ACC Compliance and Ethics Committee, secretary; and a board of director of the Atlanta Compliance and Ethics Roundtable.

Mr. Henderson holds a BA from Howard University, a JD from Texas Southern University School of Law, and a Masters of Laws in Taxation from Georgetown University Law Center.

**Larry Parsons**

Larry Parsons currently holds the position of vice president, legal and chief ethics and compliance officer for Freescale Semiconductor, Inc. In this role he has responsibility for ethics, compliance, labor and employment law, employment and trade secret litigation, immigration, corporate social responsibility and investigation matters worldwide for Freescale. Freescale is a public company headquartered in Austin, Texas with over 20,000 employees in 26 countries.

Prior to assuming this role for Freescale, Mr. Parsons was senior director, labor and employment law for Motorola, Inc. Before joining Motorola, he practiced labor and employment law in the Austin office of Fulbright & Jaworski, L.L.P. and in the Dallas office of Jones, Day, Reavis & Pogue, L.L.P.

Mr. Parsons received his BS from Texas Christian University (cum laude, University Honors and Departmental Honors) and his JD from Vanderbilt University School of Law (Order of the Coif, Law Review). Following law school he clerked for the Hon. Jerre S. Williams, Circuit Judge, United States Court of Appeals for the Fifth Circuit.

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## Hot Topics – The Top 10 List

1. "Grease Payments and other Slippery Things"
2. "Whistle While you Work"
3. "Watch Your Back"
4. "Your Brother's Keeper"
5. "Together, We Can Rule the World"
6. "Big Brother is Watching You"
7. "ICE, ICE Baby"
8. "Working for Two Masters"
9. "A Rose by any Other Name"
10. "Get out of Jail (Sort of) Free Card"

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## No. 1 - **“Grease Payments and other Slippery Things”** **The FCPA, UK Bribery Act and Other Anti-Bribery Laws**

- U.S. Foreign Corrupt Practices Act (“FCPA”)
- The U.K. bribery Act
- Organization for Economic Co-operation and Development and Guidelines (“OECD Guidelines”)

## **Recent Trends in Compliance**

- 2011 - Record number of investigations
- July 1, 2011 - UK Anti-Bribery Act went into effect
- May, 2010 - US Sentencing Guidelines were revised addressing issues of self reporting and the elements of an effective ethics and compliance program
- March, 2010 - OECD published new guidelines regarding an effective corporate anti bribery compliance program

- **The FCPA Applies to:**

- U.S. companies, their affiliates, and their respective officers, directors, employees and agents, *wherever conduct occurs*
- U.S. citizens, *wherever located*
- Any acts in the US, *by whomever committed*

## **FCPA**

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- Prohibits bribery – making or offering to make payments, gifts, or anything of value to foreign officials for the purpose of influencing the official; and
- Requires accurate reporting and accounting of all books and records



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## It is also Unlawful to:

Indirectly offer to make or make a payment or gift:

- through an intermediary, agent, or “consultant” *knowing* that the payment or gift will be passed on to government officials for unlawful purposes

Knowledge includes:

- “conscious avoidance”
- “deliberate ignorance”

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## Unlawful Purposes:

- To obtain business;
- To retain business;
- To direct business; or
- To “secure an improper advantage”

Bottom line: Avoid making payments or providing gifts that may have the appearance of impropriety.

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## Who is a Government Official?

- Persons acting officially on behalf of a government entity
- Employees of government owned or controlled entities
- Private persons who are “advisors” or “consultants” to foreign officials
- Relatives of government officials
- Employees of 75+ international organizations, including EU entities, UN entities, World Bank, Asian and African Development Banks, similar institutions
- Very broadly defined

## Payments Not Prohibited by FCPA

- Facilitating Payments:
  - Payments for “routine governmental action” to which the company is *otherwise entitled*
  - For example, grease payments for permits, visas, licenses
  - Note:* May be prohibited under local law
- Payment must also be lawful under written local laws:
  - Rarely applies
  - Get written opinion from local counsel
  - Even if permitted by local law, need to book payment properly



## Payments Not Prohibited by FCPA





- Reasonable and bona fide expenditures directly related to products/services:
  - Modest travel expenses
  - Modest meals and entertainment in connection with business discussions
  - No cash gifts
  - No sight-seeing, lavish meals/hotels, entertainment or payment for official's family members or friends

## Books & Records Requirement


- US Companies and their foreign affiliates must:
  - make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; and
  - devise and maintain a system of internal accounting controls sufficient to ensure compliance with US GAAP

## Special Concerns:

How to identify “Red Flags”:

-  • Entertainment
-  • Internal Controls
-  • Intermediaries
-  • Charitable Contributions

## Special Concerns: ENTERTAINMENT

-  • Entertainment
  - Lavish meals, lodging, transportation and entertainment
  - Repeated instances of meals and entertainment, even of a lesser value
  - Expenses for family members
  - Leisure or hospitality activities with no legitimate connection to business

## Special Concerns: INTERNAL CONTROLS



- Internal Controls of Foreign Affiliates
  - Fictitious contracts
  - Improper booking of expenses
  - Manipulations of controls (i.e. series of payments below the approval level)
  - Other irregularities in the books and records

## Special Concerns: INTERMEDIARIES



- Intermediaries (e.g. distributors, consultants)
  - Holds a governmental position or is related to someone who does
  - Was recommended by a government official
  - Charges a fee in excess of the fair market value of the services
  - Requests payment in cash, offshore, or other unusual method

## Special Concerns: CHARITABLE CONTRIBUTIONS

- Was recommended by a government official
- Headed by government officials

## UK Bribery Act

- Effective as of July 1, 2011
- Bribing, or being bribed is a criminal offense
- Prohibits all bribery, in any amount, whether made to a government official or a private person
- The law imposes a new corporate offense: strict liability (does not require corrupt intent) to the corporation for offenses committed by persons associated with and acting on behalf of the corporation
- Affirmative defense: “Adequate Procedures”

## Fines and Penalties

### FCPA

A company may be fined up to \$2 million for violating the anti-bribery provisions

For books and records violations, a company may be fined up to \$20 million

Individuals found to have violated the anti-bribery provisions of the law may be liable for fines up to \$250,000 and 5 years in prison

For books and records violations, up to \$5 million and 20 years prison

### UK Bribery Act

A company violating the law may be liable for an unlimited fine, and disgorgement of property obtained by the unlawful conduct

Senior officers of the company who have consented to or connived in the illegal conduct may be found to have violated the law and may be sentenced to a prison term of up to 10 years, unlimited fines, or both

## Six Guiding Principles Under the UK Bribery Act: Adequate Procedures

- Proportionate Procedures
- Top Level Commitment
- Risk Assessment
- Due Diligence
- Communication and Training
- Monitoring and Review

The six guiding principles were issued by the Ministry of Justice, and while they provide a great deal of insight into what is expected, they are, of course, only guidelines

## OECD

- Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions
- Annex II, adopted in 2010, *Good Practice Guidance on Internal Controls, Ethics and Compliance* provides guidance for companies

## Additional Information:

- FCPA Checklist and List of Red Flags: [www.justice.gov](http://www.justice.gov)
- UK Bribery Act: Transparency International UK Anti Bribery Guidelines: [www.transparency.org.uk](http://www.transparency.org.uk)
- Transparency International's Corruption Perceptions Index: [www.transparency.org](http://www.transparency.org)
- OECD Guidelines: [www.oecd.org](http://www.oecd.org)

## No. 2 – “Whistle While You Work”

### The Dodd-Frank Whistleblower Provisions

- Dodd- Frank Wall Street Reform and Consumer Protection Act – Whistleblower provision § 922 (July 21, 2010)
  - Provides that whistleblowers who provide original information leading to a successful enforcement action by the SEC under the securities laws will be able to receive 10% to 30% of a total recovery that’s greater than \$1 million.
  - Applies to SEC enforcement of books and records provisions of the FCPA
  - Remedies for retaliation - including reinstatement, two times base pay, and recovery of attorney’s fees and costs
  
- SEC Developments
  - Following extensive comment period, Final Whistleblower Regulations issued June 22, 2011 – with an effective date of August 12, 2011
  - SEC created a Whistleblower Office and hired a Whistleblower Coordinator

## The Dodd-Frank Whistleblower Provisions

- Some key issues addressed in the Final Regulations:
  - Failure to use company’s internal complaint procedure prior to bringing an issue to the SEC will not disqualify a whistleblower from receiving a bounty – but, it may impact the amount awarded by the SEC;
  - SEC created a “grace period” of 120 days following an internal complaint allowing a whistleblower to keep his or her “place in line” to receive a bounty;
  - Provides guidance on what constitutes “original information”;
  - Disqualifies certain individuals from eligibility for awards in most cases (e.g., attorneys, compliance officers and auditors); and,
  - Outlines protections against whistleblower retaliation.
  
- Criticism of the Whistleblower Regulations
  - Employees will bypass existing hotlines/reporting mechanisms
  - Employees will wait to report so that value of claim reaches minimum/increases

## The Dodd-Frank Whistleblower Provisions

### ➤ Current Data on Whistleblower Claims:

➤ Office of the Whistleblower – Sean McKessy, Chief: <http://www.sec.gov/whistleblower>

➤ Annual Report of Whistleblower Office:  
<http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf>

➤ From August 12, 2011 to September 30, 2011 the Office of the Whistleblower received 334 tips

➤ The most common complaint categories were market manipulation (16.2%), corporate disclosures and financial statements (15.3%), and offering fraud (15.6%)

➤ The Commission did not pay any whistleblower awards during fiscal year 2011, but did post Notices of Covered Actions for 170 applicable enforcement judgments and orders issued from July 21, 2010 through July 31, 2011 that included the imposition of sanctions exceeding the statutory threshold of \$1 million. Some of these might be eligible for awards. In process of determining if there are any eligible applicants/claimants for an award.

## The Dodd-Frank Whistleblower Provisions

### ➤ Finding ways to encourage employees to report internally

- Communicate hotline
- Demonstrate that actions occur when reports made
- Incentives???

### ➤ The Whistleblower Improvement Act of 2011 (H.R. 2483)

- Introduced by Rep. Michael Grimm (R-NY) on July 12, 2011
- Bill would deny any award granted under the whistleblower protection program to employees who fail to first report information constituting possible securities fraud to their employers before reporting such information to the SEC
- Legislation also would eliminate the minimum award requirement, and instead give the SEC discretion in granting any award up to 30% of the sanctions imposed
- Finally, the bill would insert a new requirement that the SEC notify the employer of the whistleblower's allegations prior to commencing any enforcement action against the employer in order to give it time to investigate the alleged misconduct and take remedial action.
- The bill has been referred committee



## **No. 3 - "Watch Your Back"**

### **Compliance Officers in the Crosshairs**

- Compliance Officers may be subject to personal liability by virtue of their position to prevent and promptly correct a violation of law or company policy.
- Department of Justice (DOJ), Securities Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), Health and Human Services (HHS) enforcement actions and cases against Compliance Officers are very active

## **Key Targets**

Financial Services and Healthcare Industries serve as barometers of the scope of Compliance Officer liability

## SEC and FINRA Jan 2010 - Dec 2011

### Range of Disciplinary Actions against Compliance Officers

- Failure to Supervise
- Failure to Investigate Misconduct
- Failure to Take Action to prevent misconduct
- Failure to stop wrongdoing
- Permitting unregistered individuals to trade in securities
- Failure to preserve emails
- Failure to monitor money laundering activities
- Participation in wrongful conduct
- Failure to revise and update compliance Manual to conform to business requirements
- Failure to report customer complaints

## Key Areas of Exposure

- Failure to Supervise
- Failure to Report
- Participation in Wrongful Conduct

## Failure to Supervise

Compliance Officers who have delegated supervisory responsibilities over personnel or the implementation, maintenance, monitoring or tracking of compliance for their company's could be held personally liable for failure to adequately supervise

## Failure to Supervise

Supervisory Responsibility began to expand to Compliance Officers in the early 90's with the Enron, Adelphia, WorldCom scandals and the roll out of Sarbanes-Oxley

Compliance Officer must have sufficient "responsibility, ability, or authority to affect the conduct of employees whose behavior is at issue."

"Line of Supervisory Authority" Huff – CEO – GlobeTel Communications (1991) and Kolar – Manager for Dean Witter Reynolds (1999) Enforcement Actions – Both argued that their line of supervisory authority was either sufficient and/or not within their responsibility. SEC – "[You] cannot rely on unverified representations of subordinates"

"A Tangled Web: Compliance Director Liability under Securities Laws" Fordham Journal of Financial and Corporate Law (Vol. VIII) (2003)

## Failure to Supervise

### Enforcement Actions and Cases

- Urban – Ferris Baker Watts (Royal Bank of Canada) – Liability for acts of employees not in his supervisory line if the CCO has sufficient responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue. SEC divided on the issues of liability (2012)
- Sulzbach – Tenet Healthcare – CCO certified that company was in compliance with federal healthcare statutes (Medicaid and Medicare) – even though she had knowledge of wrongdoing (2000)
- Udell – Purdue Pharma – GC and three other corporate officers were held personally liable for failure to stop wrongful conduct (Oxycontin misbranding as non-addictive) Barred from healthcare industry for 12 years and fined \$8 Mil CCO not charged (2011)
- Campanella – vFinance Investments – CCO failure to stop use of non-company email. Warned three times and took not action. \$100K company, Campanella \$30K Recklessness is sufficient (Year)
- Miller – Leeb Brokerage Services – CCO failed to supervise registered brokers who where selling unregistered securities \$130K (2011)
- Arceci – Valmark Securities – CCO failure to supervise private placements with known liquidity problems \$10K (2011)
- Strong – Jessup and Lamont Securities – CCO failure to supervise personal trades of analyst or to monitor daily transactions to report to NASD to misconduct. \$10K (2011)

## Failure to Supervise

### ➤ Enforcement Actions and Cases - Cont'd

- Pyramid Financial Corp – CCO failure to preserve emails in accordance with securities laws that require a 3 year retention period. Emails were also sent to personal email accounts. Suspended for 30 days and \$35K (2011)
- Consulting Services Group – CCO used pre-packaged compliance manual that did not reflect business compliance requirements (2009)
- Morgan – Westpark Capital – CCO failure to conduct due diligence to have effective written supervisory procedures. \$10K (2011)
- Thacker – Company – CCO failure to supervise establishing, maintaining and enforcing supervisory system and written procedures. \$10K (2010)
- Karp – Buckingham Capital Mgt – CCO failure to establish, maintain, and enforce written policies and procedures reasonably designed to prevent misuse of material nonpublic information \$35K (2010)
- Beynon- Omni Investment Advisors – CCO failure to adopt and implement compliance policies and procedures. \$50K (2010)

## Failure to Supervise

Liability can be mitigated for Compliance Officer even if a bad actor is found under its supervisory line of authority where the company has adequate policies and procedures in place

## Failure to Supervise

### Mitigating Factors for Compliance Officer

- CCO adopted procedures reasonably designed to prevent and detect violations of law and company policy
- CCO had system in place for applying the procedures
- CCO reasonably discharged his/her supervisory responsibilities in accordance with the written procedures and had no reason to believe the supervised person was not complying with the procedures.

## Lessons Learned

- Maintain a clear demarcation between supervisory responsibilities and compliance monitoring responsibilities
- Regularly monitor, test and evaluate the adequacy and effective implementation of your companies policies and procedures
- Know your company's supervisory compliance procedures and policies and related responsibilities delegated to you under those procedures and policies
- Take steps necessary to correct deficiencies in policies and procedures and to correct those deficiencies
- Investigate any questions of concern, red flags and follow through on that investigation
- Fulfill delegated responsibilities, and when appropriate, necessary or unclear, involve business line supervisors with direct or ultimate supervisory responsibility over the matter

Brod – Aeltus Investment Mgt- Portfolio Mgr, failed to supervise fraudulent trades. CCO not charged because mitigating compliance policies in place. (2007)

## Failure to Report

- Pagliarini- CCO failure to follow up on red flags and to file Suspicious Activity Reports . Suspended for 12 months and \$20K (2011)
- Visram – CCO failing to conduct a review of any AML-related trading activity or to timely file SARs – Suspended for 6 mos. and \$20K (2011)
- Poulus – Olympia Asset Management – CCO failure to report customer complaints to INRA \$10K (2010)

## Wrongful Conduct

- Zwick - Suncoast Capital Group – CCO participating in a scheme with a salesperson he supervised to provide kickbacks Approx \$400K in fine and penalties. (2012)
- Ellis – CCO aiding and abetting for failing to take action to correct known problems with the company's supervisory procedures even after being informed in two audits. \$15K (2011)
- Wunderlich Securities – CCO aiding and abetting company's failure to have written policies and procedures designed to comply with the Advisors Act. \$50K (2011)
- Aletheia Research Mgt – CCO aiding and abetting is submitting responses to RFP's that misrepresented or failed to disclose information related to prior SEC examinations. \$100K (2011)
- Dragel – NDX Trading - CCO permitting an unregistered agent to trade on the company's proprietary account. Two months suspension from NASD registration (2011)
- Meals - Consulting Services Group – Meals – Backdating acknowledgement forms that Code of Conduct had been received. \$10K in penalties (2011)
- Freedman – TriCapital Advisors – CCO charged with wire fraud and money laundering through stock trades to a separate company owned by the CCO. \$1.2 Mil (2008)

## In the Crosshairs

Compliance Officers title and position alone does not impute liability, but his/her acts, omissions, or failure to act based on their job duties may cause liability.

## Best Practice

- Establish, maintain and enforce policies and procedures reasonably designed to prevent violations of law and company policy.
- Define Compliance Officer's supervisory responsibilities and scope.
- Know your industry and follow that industry's standards, requirements, laws, rules, and regulations that affect your business.

## No. 4 – “Your Brother’s Keeper” Supply Chain Compliance

### Apple supplier audit finds major wage and overtime violations

By [Julianne Pepitone @CNNMoneyTech](#) March 29, 2012: 8:54 PM ET

(CNNMoney) -- A heavily anticipated report on working conditions at Apple supplier Foxconn documents dozens of major labor-rights violations, including excessive overtime, unpaid wages and salaries that aren't enough to cover basic living expenses.

A team from the FLA, an independent labor-rights organization, [arrived last month](#) at the vast Foxconn plant in Shenzhen, China, known as Foxconn City, to conduct a voluntary audit commissioned by Apple ([AAPL](#), [Fortune 500](#)). Thursday's report, which the FLA said is the first of many, covered three factories in Guanlan, Longhua and Chengdu.

The FLA's audit comes in the wake of [growing public concern](#) about labor conditions in the overseas factories that many U.S. gadget makers rely on to make their devices. Apple is one of many companies that outsources its manufacturing, but as the industry's most popular and profitable company, it's under the most intense spotlight.



## Supply Chain Compliance

### ➤ Industry Organizations focused on Supply Chain Compliance:

- The Fair Labor Association (Apple and Foxconn)
- The Electronic Industry Code of Conduct - establishes standards to ensure that working conditions in the electronics industry supply chain are safe, that workers are treated with respect and dignity, and that business operations are environmentally responsible.

### ➤ Company Policy, Supplier Codes and Audit Programs

- "Freescale's Code of Business Conduct and Ethics, Environment, Health & Safety Policy and Eco-Design Substance Management System reflect our commitment to our employees and to the communities in which we live and work. Freescale expects our suppliers to have similar programs in place, and to operate in a manner consistent with the standards reflected in these documents. To help our suppliers understand our expectations, we are providing this Supplier Code of Conduct. Freescale may end its relationship with any supplier that fails to meet these expectations."

## Supply Chain Compliance

### ➤ Surveys, Certifications, Representations and Warranties, Audits

#### ➤ Examples of audit subjects

- Child Labor
- Wage and hours of work
- Disciplinary
- Benefits and allowances
- Health and Safety
- Environment
- Training

#### ➤ Managing the Audits

- Requires Quality, HR, Factory Management, EHS, Legal and Others
- Requires Preparation – collection of documents and completion of preliminary requests
- Requires Time – for preparation and during the actual audit (2-4 days for audit)

## No. 5 - "Together, We Can Rule the World" Antitrust and Price Fixing

i. **THE IMPORTANCE OF COMPLIANCE:** See DOJ Antitrust Update in its 3.28.12 Spring 2012 Newsletter

- A. Criminal enforcement of antitrust violations will continue to be a top priority**
- FY 2011: DOJ filed 90 cases, the most in 25 years, and recovered > \$500M in fines  
The average prison sentence was 17 months compared to 8 months, a decade ago
  - FY 2012: DOJ has already obtained \$567 M fine, the second largest criminal fine in its history
- B. Increased cross border cooperation and enforcement**
- Increase in global regulatory environment which includes competition laws
  - Enforcement authorities see large ROI

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## Antitrust and Price Fixing

- C. Focus on markets critical to the nation's economic recovery:**
- Real estate foreclosure auctions
  - Financial services
  - Freight forwarding
  - Price fixing in auto parts
  - Health care fraud
- D. Examples of recent settlements:**
- Muni Bonds investigation: Almost \$750 Million against 18 former executives and JP Morgan Chase, UBS, Wachovia Bank, GE Funding Capital and Bank of America.
  - Auto parts price fixing and bid rigging: \$470 Million against Yazaki, Denso, Eletech, Furukawa Electric and others
  - Freight forwarding: Almost \$100 Million against 13 companies for price fixing

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## Antitrust and Price Fixing

### II. KEY U.S. LAWS

- Sherman Antitrust Act – Sections 1 and 2 (15 U.S.C. sections 1 and 2)
- Robinson Patman Act – (15 U.S.C. section 13)

### III. PROHIBITED ACTIVITY

- A. **Per se violation or the rule of reason:** Agreements that on their face clearly have an anticompetitive effect are deemed to be *per se* violations of the law. No further analysis is needed nor proof of intent. All other agreements are evaluated, by using the rule of reason, considering any mitigating effects, to determine their anticompetitive effect. The agreement may be oral, written, or even in the form of body language.

## Antitrust and Price Fixing

- B. **Horizontal and vertical agreements:** A horizontal restraint on trade is an agreement among competitors to fix prices, rig bids or participate in other anticompetitive activity such as market allocation. Agreements between a manufacturer and a distributor or other reseller to fix resale or retail prices are considered vertical agreements.

Examples include:

- Price fixing
- Price increases, reductions or no change in prices
- Maintain margins
- Elimination or reduction of discounts
- Credit terms
- Production Limits
- Bid rigging, rotation, price fixing in bidding
- Allocation of sales territories or markets

## Antitrust and Price Fixing

**C. Price Discrimination:** Discrimination by sellers in the price offered to different buyers, buyers knowingly inducing or receiving discriminatory pricing from sellers, and buyers and sellers using allowances and services to accomplish indirectly what the law prohibits.

Examples include:

- Tying arrangements, conditioning the offer of one product or service on the purchase of another.
- Discounts for purchasing a greater percentage of purchasing requirements from the supplier. The discount is not tied to volume, but rather to a percentage of their requirements.

**IV. ENFORCEMENT / FINES AND PENALTIES:** Action may be brought by a private individual seeking treble damages, or by DOJ seeking injunctive relief in a civil suit, or criminal damages against both the organization and individuals working for it as well as prison sentences.

## Antitrust and Price Fixing

**V. CHECKLIST:**

- A. Risk assessment:** What is the exposure within your organization and who is most likely to engage in the prohibited activity
- B. Code of Conduct:** Every organization should have a code of conduct and it should include a section on price fixing and other prohibited conduct
- C. Train, train and train:** There is no substitute for training, both new hires and those newly promoted to positions in high risk areas

## Antitrust and Price Fixing

### D. Training do's and don't's:

1. Do educate your client on the existence of an agreement – (it can be a handshake, nod of the head, exchange of emails, text messages and other signals to indicate a meeting of the minds) It is not just a formal document with the word “agreement” on top.
2. Do recommend that a lawyer attend meetings of trade associations.
3. Do not discuss pricing, the rate of price increases, costs or profit margins with competitors.
4. Do not discuss market allocation and territories with competitors. Extra care is needed at trade shows and other similar social events attended by competitors.
5. Do object and/or exclude yourself from industry discussions on prohibited topics.
6. Do discuss changes in the law, and general information at industry events.
7. When bidding on contracts, or purchasing materials, do not discuss pricing or any other terms of your proposal with competitors.

## Antitrust and Price Fixing

### D. Training do's and don't's (continued):

8. If you are a manufacturer, do not require that your distributors and/or resellers sell at a certain price.
9. Do treat your suppliers, purchasers and resellers fairly. Do not discriminate in pricing.
10. Don't be fooled by what appears to be a common practice. Just because everyone is doing something, doesn't make it legal.

For more information:

Competition Laws in foreign countries: [www.justice.gov/atr/contract/otheratr.html](http://www.justice.gov/atr/contract/otheratr.html)

## No. 6 - "Big Brother is Watching You" Privacy Issues

Best Practice - Develop a Global Data Privacy and Data Protection Framework

- Develop Privacy Policy - Offline and Online
- Designate a Privacy Officer/Manager – Oversight
- Evaluate and Audit Data Security Integrity

## US Privacy Framework

Understand the Federal Laws that impact your Privacy Governance Framework

- Health Insurance Portability and Accountability Act - HIPAA
- Health Information Technology for Economic and Clinical Health - HITECH
- USA Patriot Act
- Gram-Leach-Bliley act
- Right to Financial Privacy Act
- CAN-SPAM – Controlling the Assault of Non-Solicited Pornography & Marketing Act
- Fair and Accurate Credit Transactions Act and Red Flag Rules
- Fair Credit Reporting Act - FCRA
- Telephone Consumer Protection Act – Do Not Call – Junk Fax
- Family Educational Rights and Privacy Act - FERPA
- Children's Online Privacy Protection Act
- Electronic Communications Privacy Act
- Stored Communications Act
- Privacy Act
- National Security Act of 1947

## State Privacy and Data Security Laws

- Massachusetts (Information Security requirements)
- California
- Nevada
- Texas

## Information Security

- ISO -27002 – International Information Security Standards and Procedures - Great foundational best practice for establishing an information security program
- PCI-DSS – Payment Card Industry Data Security Standards

## Federal Trade Commission “Privacy by Design”

FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change*, March 2012

Promote consumer privacy throughout  
the organization and at every stage of  
the development of products and  
services

## “Privacy by Design”

### The Substantive Principles:

Integrate substantive privacy  
protections into your company  
practices, such as data security,  
reasonable collection limits, sound  
retention practices, and data accuracy.



## **“Privacy by Design”**

### **Adopt Procedural Protections to implement Substantive Principles**

Maintain comprehensive data management procedures throughout the life cycle of the products and services (i.e., designated personnel for privacy, training, risk assessments)

## **“Privacy by Design”**

### **Simplified Consumer Choice – “Do Not Track”**

Provide a mechanism at the time of collection and in a context relevant to the consumer to allow consumers to control whether their data is collected and how it is used.

## “Privacy by Design”

### Transparency

- Improve and Increase the transparency of company data practices.
  
- Privacy statements, clearer, shorter improve consumer reasonable access to data and help consumers to understand how companies collect, use, and share their data.

## Consumer Privacy Bill of Rights

White House advocating a multi-stakeholder process for:

- Developing enforceable codes of conduct for consumer privacy
- Strengthening FTC enforcement capability
- Improving global interoperability of data protection

*“Consumer Data Privacy in a Networked World: A framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy”* Obama Administration (Feb 2012)

## International Data Security

- EU Directive 95/46 – Art 29 Working Party Data Protection
- APEC – Asia-Pacific Economic Cooperation
- Canada – PIPEDA – Personal Information Protection and Electronic Documents Act

## Global Privacy Framework

- Identify the Types of Data – Sensitive vs. Non-Sensitive
  - Sensitive Data
    - What is it? How is it defined?
    - Any special handling procedures or safeguards
  - Access to Data
    - Who has access? What are the controls? Are there written access procedures and processes?
    - How is it secured, stored and transferred?
    - Who administers access?
  - Consent to Collection and Use of Data
  - Opt-In vs. Opt-out

## Global Privacy Framework

- Post-consent use
  - Does subsequent use by company comply with the original purpose and intended use of the data?
  - Consent required prior to sharing data with third parties –Is this clear in original Consent ?
  
- Notice to collect sensitive data, identify the data controller and purpose for which data will be processed.
  - Purpose of data processing and intended use of PII must be clearly stated and followed
  
- Is database registration required?
  
- Allow access to data and correction of data by the Data Subject
  
- Maintain a compliant handling process

## EU Data Protection Directive 95/46

### Key Principles

- Notice must be given to the data subjects when data is to be collected
- Data must be used for the purpose it was intended
- Consent must be obtained prior to disclosure
- Data must be stored and transmitted securely
- Data Subjects must be informed of who is collecting data
- Data Subjects must be allowed access to their data and a mechanism to make corrections
- Complaint management mechanism must be available.

## Best Practice

Understand the privacy issues that impact your business and develop mechanisms to manage compliance across multiple lines of business

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## No. 7 – “ICE, ICE Baby” Independent Contractors – Or Not

### News Release

WHD News Release: [09/19/2011]

Release Number: 11-1373-NAT

### **Labor secretary, IRS commissioner sign memorandum of understanding to improve agencies' coordination on employee misclassification compliance and education**

#### ***11 state agency leaders also sign, agree to memorandums of understanding***

**WASHINGTON** — Secretary of Labor Hilda L. Solis today hosted a ceremony at U.S. Department of Labor headquarters in Washington to sign a memorandum of understanding with the Internal Revenue Service that will improve departmental efforts to end the business practice of misclassifying employees in order to avoid providing employment protections.

"We're here today to sign a series of agreements that together send a coordinated message: We're standing united to end the practice of misclassifying employees," said Secretary Solis. "We are taking important steps toward making sure that the American dream is still available for all employees and responsible employers alike."

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## Independent Contractors – Or Not

### Independent Contractor

- One who is retained to perform certain work and controls the manner and means by which the work is accomplished.
- ICs have their own business
- ICs do not depend on an employer to earn a living

### Employee vs. Independent Contractor

- Categories of Evidence:
  - Behavioral control
  - Financial control
  - Type of relationship of the parties

## Independent Contractors – Or Not

### The DOL Misclassification Initiative

<http://www.dol.gov/whd/workers/Misclassification/index.htm>

### Liability Issues

- Employment Law Issues
- Liability for Unpaid Payroll Taxes
- ICs argue Eligibility for Benefits
- FLSA/Wage & Hour – Minimum Wage and Overtime
- Ripe for Class Action



## Labor Law Issues – Unpaid Interns

### Interns, Unpaid by a Studio, File Suit

By STEVEN GREENHOUSE

Published: September 28, 2011

The New York Times

Two men who worked on the hit movie “Black Swan” have mounted an unusual challenge to the film industry’s widely accepted practice of unpaid internships by filing a lawsuit on Wednesday asserting that the production company had violated minimum wage and overtime laws by hiring dozens of such interns.

Fox Searchlight acted illegally, the lawsuit asserts, because the company did not meet the federal labor department’s criteria for unpaid internships. Those criteria require that the position benefit the intern, that the intern not displace regular employees, that the training received be similar to what would be given in an educational institution and that the employer derive no immediate advantage from the intern’s activities.

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## Labor Law Issues – Unpaid Interns

DOL Wage and Hour Division relies on the following six criteria to determine if an internship can be unpaid (see <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>):

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

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## Labor Law Issues – Unpaid Interns

### Compliance Keys:

- Exercise caution in hiring especially if the internship is going to be unpaid;
- If you question whether the internship meets the criteria set forth by the Department of Labor that probably means the intern should be paid;
- If your managers say “we could sure use an intern this summer to get us caught up on all the little ministerial things we haven’t be able to get to,” the intern needs to be paid; and,
- Paying an intern even minimum wage will certainly be cheaper than defending your business in a lawsuit.

## I-9 Compliance

### ICE auditing 1,000 more companies' hiring records

Associated Press February 17, 2011, 3:41PM ET

By SUZANNE GAMBOA (WASHINGTON)

The Obama administration is launching a new round of worksite investigations, maintaining the pressure on businesses to make sure they are hiring only people who can legally work in the U.S.

Immigration and Customs Enforcement said Thursday it has notified 1,000 companies of upcoming audits of their I-9s, forms that new employees complete, and of the identification documents those employees provided to show they are eligible to work in the U.S.

"The inspections will touch on employers of all sizes and in every state in the nation -- no one industry is being targeted nor is any one industry immune from scrutiny," ICE said in a statement. The agency declined to name the businesses to be inspected.



## I-9 Compliance Background

In 1986, in an effort to control illegal immigration, Congress passed the **Immigration Reform and Control Act (IRCA)**. **IRCA forbids employers from knowingly hiring individuals who do not have work authorization in the United States.**

The employment eligibility verification provisions of **IRCA are found in Section 274A of the Immigration and Nationality Act (INA)**. To comply with the employment eligibility verification provisions of the INA an employer must:

Verify the identity and employment authorization documents of employees hired after November 6, 1986

Complete and retain a **Form I-9 for each employee hired after November 6, 1986**

Refrain from discriminating against individuals on the basis of actual or perceived national origin, citizenship or immigration status

## I-9 Compliance

### Compliance Tips

- 1. Make a specific person or persons responsible for obtaining and maintaining I-9s – see <http://www.ice.gov/doclib/image/pdf/form-i-9-presentation.pdf>**
- 2. Develop and follow a document retention practice for I-9 information**
- 3. Conduct an internal audit**
- 4. Plan for an audit by ICE – who, what and how**

## No. 8 - "Working for Two Masters" Conflicts of Interest

Compliance Officer can wear multiple hats depending on the organizational structure of the company and regulatory requirements

- **General Counsel**
- **Corporate Counsel**
- **Chief Financial Officer**
- **Business Unit Manager/Officer**

## Working for Two Masters

Conflicts can emerge when the Compliance Officer is also the General Counsel

As a consequence the roles must be clearly defined and understood in the organizational structure

## Working for Two Masters

The Chief Compliance Officer and General Counsel have dual roles that are often intertwined

- The legal roles basic mission is to protect and promote the company's legal interest
- The compliance roles basic mission is to create standards and procedures that will enable it to prevent and detect violations of law and ethics

## Working for Two Masters

A prudent corporate governance program should call upon lawyers – notably the corporations maintenance of the corporations procedures for promoting legal compliance

ABA Task Force on Corporate Responsibility 2007

## Role of the Lawyer

### ABA Model of Professional Conduct Rule 1.7

- As advisor, a lawyer provides a client's legal rights and obligations and explains their practical implications.
- As advocate, a lawyer zealously asserts the client's position under the rules of the adversary
- As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.
- As evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

## Role of Compliance Officer

Implement and administer a Compliance Program that serves to:

1. Develop and implement policies and procedures
2. Oversee monitoring and tracking of compliance issues
3. Training and educational development
4. Coordinating internal risk assessments and audits
5. Responding to and investigating reports of non-compliance and misconduct
6. Reporting directly to the Board of Directors and senior management on compliance matters

Must have broad knowledge of organization and operational matters and awareness of applicable laws and regulations. The Chief Compliance Officer role is the "go-to" for monitoring legal and ethical compliance

SEC and HHS - Compliance Program Rules

## Federal Sentencing Guidelines

Sect. 8B2.1 (b)(2)(C)

### Effective Compliance and Ethics Program

*Specific Individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.*

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## Working for Two Masters

### General Counsel

Advocate for the company with general supervisory responsibility for legal affairs of the corporation and limiting legal risks

### Chief Compliance Officer

Preventing misconduct as well as identifying any legal or ethical misconduct that may have occurred

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## The Intersection

“The Lawyers tell you whether you can do something and compliance tells you whether you should. We think upper management should hear both arguments”

Quote from Lewis Morris, Chief Counsel for the Office of Inspector General HHS, Pfizer Settlement (2009)

## Natural Overlapping Responsibilities

- Compliance with law and regulatory requirements
- Responding to government investigations
- Establishing organizational ethics, culture and integrity

## Increased Conflicts Awareness

Increased enforcement in the Financial and Healthcare industries has enhanced the importance of clearly defining the scope of responsibilities of the Compliance Officer across the compliance landscape

## Compliance Regulatory Influences

- Health and Human Services Office of Inspector General Compliance Program Guidelines
- Financial Industry Regulatory Authority Rules and Guidelines
- Investment Advisors Act and Investment company Act
- Sarbanes-Oxley Act
- NYSE and NASDAQ

## Organizational Size may impact who handles conflicts

- **Large Organizations** – Must have formal operations and greater resources in meeting FSG than a small organization. Designated compliance personnel who's sole responsibility is compliance.
- **Small Organizations**– Must demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. Less formality and fewer resources than a large corporation is expected, but reliance on existing resources and systems for compliance is acceptable. Compliance personnel may wear multiple hats.

### *Example of informality for small organizations*

1. Governing authority responsibility for oversight of compliance by directly managing compliance and ethics efforts
2. Training employees through informal staff meetings
3. Use available personnel, rather than employing separate staff to carry out the compliance and ethics program
4. Modeling its own compliance and ethics program on existing, well regarded compliance and ethics programs and best practices of similar organizations

U.S. Sentencing Commission Staff Commentary 2008

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## Are Conflicts inherent when the Chief Compliance Officer reports to the General Counsel?

Inherent conflicts when Compliance Officers report to a lawyer?

Lawyer is charged with defending the company while the Compliance Officer is charged with preventing and detecting violations.

Is this really a conflict?

What happens when compliance detects violations of law that could subject the Company to substantial fines and penalties and the lawyer with supervisory responsibility over compliance has to juggle his duty to manage compliance while at the same time protecting the interest of his/her client the company?

Can the two coexist?

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## Scope of Supervisory Authority

Scope of supervisory responsibility over compliance?

A General Counsel could be found within the supervisory authority of employees who engage in misconduct even if those employees do not directly report to him. (Non-line Supervisory Authority)

Theodore Urban – General Counsel, Purdue Pharma, the determination of whether the General Counsel can be deemed to have supervisory authority will depend on whether he has the requisite *degree of responsibility, ability or authority to affect the conduct of the employee whose behavior is at issue*. SEC Enforcement Action (2011)

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## Structural Considerations

- Whether the CCO and GC should be combined or separate
- Specific define each job description
- Define reporting relationship to senior management and to the Board of Directors
- Preservation of the Attorney-Client Privilege
- Rules of Professional Responsibility
- Lines of Communication between the two positions

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## Combining the Roles

- Overlap in responsibilities
- Economic efficiencies associated with limited headcount
- Streamlined lines of communication with the Board of Directors
- Maintenance of Attorney-Client Privilege

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## Separating the Roles

Apparently neither Tenet nor its General Counsel saw any conflict of interest in wearing two hats – General Counsel and Compliance Officer. As General Counsel the General Counsel zealously defended Tenet against claims of ethical and legal non-compliance... while as Chief Compliance Officer, she supposedly ensured compliance by the company's officers, directors and employees.

"It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement"

2003 Letter from U.S. Senator Charles Grassley (Iowa) to the Senate Finance Committee

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## Separating the Roles

### Government Regulators Approach:

Separating the compliance function from the key management positions such as General Counsel or Chief Financial Officer establishes a system of checks and balances is established to more effectively achieve the goals of the Compliance Program.

HHS Office of Inspector General Compliance Program Guidance for Hospitals 1998

## Separating the Roles

### Large health sector company enforcement examples

**Tenet Healthcare** – GC/Chief Compliance Officer signed a Corporate Integrity Agmt on behalf of company that was proven to not be followed and misconduct continued. – OIG asserted the combined roles created an inherent conflict (2000)

**WellCare Health Plans** – WellCare asserted that combining the roles ensured that compliance is always represented at the senior management level – Post investigation General Counsel ousted and roles separated (2007)

**Pfizer** - Roles separated to “eliminate conflicts of interest” and to prevent Pfizer in-house counsel from reviewing or editing reports under the Corporate Integrity Agmt (2009)

## Best Practice

Maintain independence of the Compliance Officer role in order to manage and avoid conflicts.

- Provide direct access to the Board of Directors and Senior management
- Develop mechanisms that ensure a clear separation of responsibilities and roles – (i.e. Written policies and procedures that define the roles)
- Maintain independent and open lines of communications throughout the business

## No. 9 – “A Rose by any Other Name” Trade Compliance Issues



- **Export Administration Regulations**
  - Found in the C.F.R., Title 15 ([http://www.access.gpo.gov/bis/ear/ear\\_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html))
  - Key concepts include:
    - Controlled Technology (e.g., controlled for National Security or Anti-Terrorism reasons)
    - Country Chart (countries where specific controls are applicable)
    - Can only export controlled technology to a country on the chart by identifying a license exception or obtaining an export license (if a license is even allowed)
- **International Traffic in Arms Regulations**
  - Found in the C.F.R., Title 22 ([http://www.pmddtc.state.gov/regulations\\_laws/itar\\_official.html](http://www.pmddtc.state.gov/regulations_laws/itar_official.html))
  - Similar concepts as in the EAR applied to Munitions (“items made primarily for military use”) and technical data about munitions: controlled items and limitations on exports to specific countries



## Trade Compliance – Deemed Exports

- **Deemed Export Rule**
  - Access to controlled technology/technical data by a foreign national anywhere is deemed export to the foreign national's home country
  - Example – Chinese national working in your U.S. facility on an H1-B visa
    - Cannot permit access to controlled technology to this employee without an export license (or license exception)
    - Issue – having processes in place to prevent the inadvertent disclosure of controlled technology
- **New Form I-129 (U.S. Citizenship and Immigration Services)**
  - Form I-129 “Petition for a Non-Immigrant Worker” has been used for many years
  - Form is used when an employer in the U.S. applies to have a foreign national work in the U.S. on an H1-B or L-1 (and some other) visas
  - USCIS issued a new version of Form I-129 effective February 20, 2011
  - Section 6 of the new form requires a certification regarding the foreign national's access to controlled technology/technical data

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## Trade Compliance – Deemed Exports (cont.)

### ➤ New Form I-129 (Section 6 certification)

*With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:*

1. A license is not required from either the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or,
2. A license is required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

### ➤ What this means for Employers

- Must understand export control and ITAR requirements
- Must understand the technology necessary for the foreign national to do his or her job
- Must have controls in place to segregate and limit access to controlled technology/technical data (i.e., to avoid inadvertent disclosure or access)
- Person certifying the I-129 form must have appropriate level of information to make an accurate certification (generally completed by Human Resources)

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## No. 10 - "Get out of Jail (Sort of) Free Card"

### U. S. Sentencing Guidelines

Promulgated by the U.S. Sentencing Commission, an independent agency of the judicial branch of the government

While not mandatory, the Guidelines provide guidance to:

- federal judges during sentencing
- the parties during settlement negotiations
- in a more proactive manner, to organizations in establishing an effective ethics and compliance program

## Chapter 8 of the Guidelines: Organizations

The Elements of an Effective Ethics and Compliance Program for Organizations

- Exercise due diligence to prevent and detect criminal conduct
- Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law



*By in-house counsel, for in-house counsel.®*

### **Requirements for an organization to have an effective ethics and compliance program**

- Standards and procedures to prevent and detect criminal conduct
- Reasonable oversight by the Board
- Due diligence in the hiring and retention of high level personnel
- Communication and training – tone at the top
- Evaluate the effectiveness of the program through periodic monitoring and auditing, and mechanisms for confidential reporting of noncompliance
- Consistent enforcement throughout the organization
- Respond appropriately to the detection of criminal conduct by disciplining the wrongdoers, remediate the wrongdoing and implement controls to prevent future violations

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### **The Guidelines provide Federal Judges with a specific range within which an organization will likely be sentenced.**

- The base fine is the larger of the financial gain to the defendant, the financial harm caused, or the standard fine set by the Guidelines.
- The base fine is multiplied by a culpability score which is determined, with aggravating factors increasing the factor, and mitigating factors decreasing it.

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### **Aggravating Factors:**

- Organization's tolerance of criminal activity
- Prior history of the organization
- Obstruction of Justice
- Violation of an order

### **Mitigating Factors:**

- The existence of an effective compliance and ethics program
- Self reporting before discovery of the criminal conduct outside of the organization or before such discovery was reasonably likely
- Cooperation, and acceptance of responsibility
- No person with operational responsibility for the program participate in, condones, or was willfully ignorant of the crime

**Bottom Line: The best defense is an effective ethics and compliance program!**





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## **“Other” Hot Topics**

**Insider Trading Issues**

**Wage and Hour Issues**

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