



**Monday, October 19**  
**4:30 pm–6:00 pm**

## **104 Don't Prosecute the General Counsel**

**Peter Anderson**

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*Vice President, General Counsel & Secretary*

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*Managing Director and General Counsel*

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# Program Outline

Introductions

Case Study Scenarios

1. Foreign Corrupt Practices Act (FCPA)
2. Short-Sale Campaign
3. Fraud and Accounting Improprieties

Conclusions



This program will cover the following:

- Sarbanes-Oxley Act (Sections 302, 404, 806, 906)
  - Internal Control Over Financial Reporting, Disclosure Controls and Procedures, Whistleblower Claims
- Foreign Corrupt Practices Act (15 U.S.C. §§ 78dd-1, et seq )
- Rules of the National Securities Exchanges
  - NYSE Listed Company Manual (Section 303A), Nasdaq Listing Rules (Rules 5601-5640)
- Securities Exchange Act of 1934
  - False Books and Records and Internal Controls [§13(b)(5) and Rule 13b2-1]
  - Reporting of False and Misleading Information [§13(a), Rules 12b-20 and 13a]
  - Failure to Keep Accurate Books and Records [§ 13(b)(2)(A)]
  - Failure to Maintain Internal Controls [§ 13(b)(2)(B)]
- Delaware General Corporation Law
  - Case law regarding fiduciary duties of corporate directors



## Scenario #1 - FCPA

- German prosecutors advise you they are conducting an investigation into payments to a government official ostensibly for attendance at and promotion of conferences in Germany at which the company's products will be marketed.
- Government official was in a position to authorize the purchase of the company's products. The payments are not substantial but were routed through Swiss bank accounts.
- CEO authorized the payments.
- Payment was described in the company's books and records as "consulting" services related to the marketing of a product in Geneva.
- Your auditing firm has made an inquiry.
- Media beginning to report rumors of payments and reports have caught the attention of the DOJ.



## Scenario #2 – Short-Sale Campaign

- Prominent short seller takes large (20%) short position in your company and launches campaign to drive down stock price.
- Campaign includes public speeches, letters to Board alleging fraud and accounting improprieties, slandering executive officers and demanding action on behalf of company's stockholders.
- Media attention is attracted by newspaper and magazine articles, blogs, and other message boards
- Stock price plummets.
- Plaintiffs attorneys notice; lawsuits filed
- SEC launches informal investigation focusing on issues of fraud and accounting improprieties alleged by short seller.
- DOJ similarly announces investigations.



## Scenario #3 – Fraud & Accounting Improprieties

- SEC announces investigation of your company related to allegations of improper accounting practices.
- SEC uncovers a series of loans made to several executive officers without receiving approval from the appropriate committee of the board of directors.
- The loans (total \$150+ million) have not been appropriately reflected in the company's financial statements nor disclosed to shareholders.
- Board of Directors forms special committee to review and hires independent legal counsel to assist.
- Special committee discovers that loans to the executive officers were made with low to no interest; board of directors nor shareholders were aware of the existence of the loans as required by appropriate procedures and disclosure obligations under federal securities laws.
- Special committee also discovers that the same group of executive officers sold shares of your company's common stock for more than \$500 million and failed to disclose such sales.



## Action Items in Response to Scenarios

- Evaluate your corporate governance framework
- Develop a strong “tone at the top”
- Review/modify your code of ethics, corporate governance guidelines and other corporate governance policies
- Review/modify your disclosure controls and procedures
- Review/modify your internal controls over financial reporting
- Develop/ enhance and test your whistleblower procedures
- Implement a corporate governance education program for officers and directors

## ACC Extras

Supplemental resources available on [www.acc.com](http://www.acc.com)

Attacks on In-house Counsels' Ethics.

Program Material. October 2008

<http://www.acc.com/legalresources/resource.cfm?show=164609>

Personal Liability Risks Facing In-house Counsel.

Program Material. October 2008

<http://www.acc.com/legalresources/resource.cfm?show=161879>

U.S. Department of Justice Memorandum.

Quick Reference. May 2009

<http://www.acc.com/legalresources/resource.cfm?show=275108>

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.