



# ***THE WHY & HOW OF COMPLIANCE PROGRAMS***

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# WHY HAVE A COMPLIANCE PROGRAM

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- **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

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



# WHY HAVE A COMPLIANCE PROGRAM

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



# HOW THEY FIND OUT

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- **“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

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- **MANAGEMENT  
COMMITMENT TO DO THE  
RIGHT THING**
  
- **MANAGEMENT STEPS TO  
MAKE IT HAPPEN**



## THE TWO TESTS OF A COMPLIANCE PROGRAM

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



## STARTING PRINCIPLES

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- **DILIGENCE IN PREVENTING & DETECTING MISCONDUCT**
  
- **A CULTURE THAT ENCOURAGES ETHICS & COMPLIANCE**



# RISK ASSESSMENT

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- **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?

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- **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

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- **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

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- **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

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- **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

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- **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

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- **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

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- **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

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- **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



## USSG's item 5 - Steps to prevent violations

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- **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

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- **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](http://www.corporatecompliance.org/Content/NavigationMenu/Resources/IssuesAnswers/DRAFTwhitepaper-BuildingIncentivesCompliance_WOappdx.pdf)



## USSG's item 7 - Responding effectively

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



## USSG's item 7 - Responding effectively

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- **HOW YOU RESPOND CAN MEAN MORE THAN WHAT YOU INITIALLY DID WRONG**
  
- **VOLUNTARY DISCLOSURE**
  - **“LET’S MAKE A DEAL”**
  
- **MANDATORY DISCLOSURE?**



## Industry practice

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



# Industry practice - Useful resources

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



# Third parties/agents

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- **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

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- **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?**



# *THE WHY & HOW OF COMPLIANCE PROGRAMS*

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# QUESTIONS?