Be Prepared When the Government Comes Calling: Tailor an Effective Compliance Program for Your Portfolio Companies

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As a corporate officer or director you know whereof I speak: you're on the front lines, you're leading your corporation into daily battle with your competitors, and when you look behind you, what do you see? Nothing. Absolutely nothing. Now I exaggerate, because of course you have your corporate team behind you, but, if you really think about it, post Enron/ World-Com/ Sarbanes-Oxley/ it's you, the general, out front, with sole responsibility for an entire company. After all, does your vice president now sign off on the company's financial statements? No, alas it is you, and only you.

So, here you are, seemingly alone, unprotected, and without a defense. Right?

Wrong...Why? Because, by dint of your capacity for hard work, detail, and thoroughness, you can beat the government and create value for your company. Thus, while it may seem the worst of times for you and your company; you who have been asked to maintain profit levels while struggling with the mammoth costs of governmental compliance; you who have been asked to certify, under pain of criminal indictment, that company results are accurate; and who are often asked to waive the privileges that have been in place for generations in order to prove to government investigators that you are complying with the law; you can nevertheless deal with these governmental excesses and win.

Obviously, the excesses of the booming 90's are being exaggerated by both the markets, and the Government. The problem, however, is, as with many well-meaning Government investigations and regulations, they begin with good intentions, and end by hurting business, especially small to mid-market businesses. However, don't despair; you can beat them, if you keep three things in mind:

1. Develop and implement a compliance and ethics program, to detect and prevent violations of law.

2. Be ready to respond when the Government comes calling.

3. Consider these steps as creating "value insurance".

Now, I know what you're thinking, this is just another lawyer boondoggle. And to some extent, that may be true. But believe me - it's the Government lawyers who helped write the Sarbanes-Oxley Act and the Federal Sentencing Guidelines. We defense attorneys have never endorsed the Sarbanes-Oxley bill, or, God forbid, the Sentencing Guidelines. (Notwithstanding the Supreme Court's recent ruling in the Booker case (*United States v. Booker* 543 U.S.__ (2005)) the Federal Sentencing Guidelines will continue to have a major impact on corporate sentencing.

So, first order of business, develop a Compliance Plan. The Sarbanes-Oxley Act mandates:

• Section 406: Requires public companies to institute a Code of Ethics to promote Compliance with applicable Governmental rules and regulations.

• Section 301: Requires procedures for treatment of complaints regarding accounting and auditing matters.

• Section 806: Requires companies to institute whistleblower procedures and protections.

In addition, the Federal Sentencing Guidelines require cooperation on the part of a business organization to avoid the severe impact of the guidelines, and give business organizations credit if, "the offense occurred despite an effective program to prevent and detect violations of law".

Where to start?

First Point.

The key - create a Compliance Program.

It's a pain in the pocket, but it's prudent. Let's face it; we all know an ounce of prevention is worth a pound of cure. Establish a compliance program that meets your company's needs. Critical personnel should work together and tailor a compliance plan specifically for your business and that is consistent with your existing programs and corporate culture.

Second Point.

Be ready to respond when the Government comes calling. And, the critical point is - get started. You can talk to us about what is called a "Special Counsel", which counsel works to mount a defense and attempts to uncover wrongdoing within the business organization. It is imperative that you get to the bottom of things quickly. Usually, now, the Special Counsel is hired by say, a public company's independent directors, and then commences his investigation. Immediately.

There is a problem to watch for, however. Often times the prosecutor will insist that "Special Counsel" waive the company's attorney-client privilege at the start of the government's probe. In other words, the prosecutor seeks to co-opt the "Special Counsel" and enlist him as a member of the prosecutor's team; to, in effect, deputize the "Special Counsel" so as to assist the Government's own investigation.

This cannot happen. And we don't know what other firms do, but we've litigated against the Government - lots - and we don't do the Government's bidding.

In addition, you cannot allow multiple groups of lawyers and/or investigators, or even supervisors, to repeatedly question employees. No one can tell the same story twice. If I ask you tomorrow what you did today you'll say one thing, a week from now something different, and two weeks from now something quite a bit different. It's just human nature. The process of having different factions within a company do successive interviews can destroy morale, not to mention create damaging inconsistent statements. They may be minor inconsistencies, but the Government will exploit them.

Special Counsel can root out impropriety, protect the company, and cooperate with certain investigators, so as to protect the company against the scourge of the Government. But, you can't be a patsy. The great abolitionist, Frederick Douglass once said, "He who is whupped easily, will be whopped often". You can't let that happen. You cannot let the government walk all over you. If the government attorneys and agents view you as a patsy, you're finished.

Finally, the Third Point.

What does this kind of Special Counsel add to your business?

Answer: "Value insurance." Let me explain what I mean.

Repeated Government investigations of Tyco reportedly cost that company $100 Million. The Government can destroy you even if you've done nothing wrong. The IRS can put you out of business inside of a year, by sending out "circ" letters (circular letters) to all your vendors and customers. Simple IRS inquiries to vendors and customers about your business and any documents or information they may have in their possession will cause the vendors and customers to respond with wariness or fear, and the result will be: they quit doing business with you. After all, they reason, they don't want to get involved, they don't want to get caught in the Government's gross hairs, and then next thing you know, you're out of business.

You can't afford to lose money. You can't afford to lose your company. You need to protect yourselves, your companies, your employees. And a compliance audit, setting up a compliance program, ethics program, ethics procedures, and whistleblower procedures, will provide you with the value insurance you need to protect the business and people you care about and provide you with the protection you need when the Government comes calling.

As I often say to juries in mitigation, what good is it for a company to have been a good corporate citizen all of its existence, if it means nothing when the chips are down.

So, make your good citizenship count when and if you need it - set up a Compliance Program - a program that will insure the value of your company.

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