

The FCPA and Tone at the Top

Both the US Sentencing Guidelines and the Organization for Economic Co-operation and Development (OECD) *Good Practice Guidance on Internal Controls, Ethics, and Compliance* consider one of the key items for a best practices compliance program to be the appropriate “Tone at the Top.”

The US Sentencing Guidelines reads:

High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program ... and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

The OECD Good Practices reads

1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery;

The Foreign Corrupt Practices Act (FCPA) world is riddled with cases where the abject failure of any ethical “Tone at the Top” led to enforcement actions and large monetary settlements. In the two largest monetary settlements of enforcement actions to date, Siemens and Halliburton, for the actions of its former subsidiary KBR, the government specifically noted the companies' pervasive tolerance for bribery. In the Siemens case, for example, the Securities and Exchange Commission (SEC) noted that the company's culture "had long been at odds with the FCPA" and was one in which bribery "was tolerated and even rewarded at the highest levels". Likewise, in the KBR case, the government noted that "tolerance of the offense by substantial authority personnel was pervasive" throughout the organization.

In addition to the two cases set out above, in a 2003 report, the Commission on Public Trust and Private Enterprise cited a KPMG survey covering selected US industries; found that 37 percent of employees had, in the previous year, observed misconduct that they believed could result in a significant loss of public trust if it were to become known. This same KPMG survey found that employees reported a variety of types of misconduct and that the employees believed this misconduct is caused most often by factors such as indifference and cynicism; pressure to meet schedules; pressure to hit unrealistic earnings goals; a desire to succeed or advance careers; and a lack of knowledge of standards.

So how can a company overcome these employee attitudes and replace the types of corporate cultures which pervaded at Siemens and KBR and re-set its “Tone at the Top”? In a 2008 speech to the State Bar of Texas Annual Meeting, published in *Ethicsphere*, Larry Thompson, PepsiCo Senior Vice President of Governmental Affairs, General

Counsel and Secretary, discussed the work of Professor Lynn Sharp at Harvard. From Professor Sharp's writings, Mr. Thompson cited five factors which are critical establishing an effective integrity program and to set the right "Tone at the Top".

- 1) The guiding values of a company must make sense and be clearly communicated.
- 2) The company's leader must be personally committed and willing to take action on the values.
- 3) A company's systems and structures must support its guiding principles.
- 4) A company's values must be integrated into normal channels of management decision making and reflected in the company's critical decisions.
- 5) Managers must be empowered to make ethically sound decisions on a day-to-day basis.

The subject of management making significant changes in the manner in which a business is run has long been the topic of the business press. Most recently, the current issue of the Harvard Business Review was entitled, "*Managing Change: How to do it and When to do it*". In an article entitled, "The Decision-Driven Organization", it cited the example of Ford Motor Company and its recent business turn around, in explicitly setting out a company's decision to change a company's business tone. When Allan Mulally became Chief Executive Officer (CEO) in 2006, he found the company in dire need of a change in business direction. Rather than change the company's structure and then consider the change which would come thereafter, he made the decision to change the direction of the company and then put the structure in place to facilitate that change.

In large part the change led by Mulally was based upon the five steps noted above with Mulally substituting 'a different way of business' for ethics, however the message is clear. Just like the change at Ford Motor Company being led by the CEO, the transformation in ethics and compliance must be led by the CEO. Employees take their lead from the very top management of a company. If the CEO takes the opportunity to discuss ethics and compliance at every town hall meeting, in newsletters, posters and other types of communications this message is constantly reinforced.

It is clear from the Harvard Business Review article that management change can occur. If your company does not have the correct "Tone at the Top" it can make the change. The five points set out by Thompson give a clear path to achieving the right tone to move forward with a FCPA compliance policy. Both the US Sentencing Guidelines and the OECD Good Practices are looking to top management to set a company's tone for the values of ethics and compliance. But more importantly your employees are too.

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