

Will No One Rid Me of this Meddlesome Priest?

Tone at the Top has become a phrase inculcated in the compliance world. The reason it is so important to any compliance program is because it does actually matter. Any compliance program starts at the top and flows down throughout the company. The concept of appropriate tone at the top is in the US Sentencing Guidelines for organizations accused of violating the Foreign Corrupt Practices Act (FCPA); the Department of Justice's (DOJ) *best practices* for effective compliance programs which have been released with each Deferred Prosecution Agreement (DPA) over the past year; the UK Bribery Act's Six Principles of *Adequate Procedures*; and the OECD Good Practices. The reason all of these guidelines incorporate it into their respective practices is that all employees look to the top of the company to see what is important. Or to quote my colleague Mike Volkov, who quoted Bob Dylan, in opining "*You don't need to be a weatherman to know which way the wind blows*".

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 UK Bribery Act Guidance for the Six Principles of Adequate Procedures reads:

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Attachment C, to each DPA released in the past year, has the following

2. [The Company] will ensure that its senior management provides strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code.

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 apparently pervaded at News Corp and re-set its "Tone at the Top"? In a 2008 speech to the State Bar of Texas Annual Meeting, reprinted in Ethisphere, 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 in 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.

So whether with malicious intent or simply said out of frustration, when Henry II uttered the words which are the title of today's posting, it set the tone for the four knights which overheard him. They set off and murdered Thomas Becket. Perhaps less starkly into today's world, if the tone from the top is that you must meet your quarterly numbers or the company will find someone else to do the job; that is the message that will come across to company employees. But whether you are the King of England, the CEO of a Fortune 500 company or simply in a leadership position in your company; the tone does matter.

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