Institute for Enterprise Ethics

Peer-to-Peer Roundtable on the Dodd-Frank Whistleblowing Provisions

Daniels College of Business

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UNIVERSITY OF DENVER
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On September 8, 2011 a group of over 30 business leaders, practitioners, service providers and academics gathered to discuss the challenges in implementing the recently released SEC regulations for the whistleblowing provisions of the Dodd Frank legislation. The diversity of the group, including Ethics and Compliance Officers and General Counsels and Independent Directors of public and private companies, together with outside counsels, consultants and advisors to such companies and several members of the Business Ethics and Legal Studies Department of the Daniels College of Business provided a robust discussion and a rich variety of points of view.

The Institute's introductory view was that this implementation would be a significant challenge to companies as they had worked hard and successfully over the past decade to integrate the Sarbanes-Oxley provisions for internal whistleblowing into their business culture and operations. The Dodd-Frank legislation challenges this work by offering significant financial incentives ("bounties") for employees to report perceived violations directly to the SEC. Presumably these new regulations could nullify the efforts of these companies to build strong cultural loyalty and effective internal whistleblowing processes and practices within their organizations. This change could also deter companies from being able to deal effectively and quickly with violations as employees are attracted to the prospect of a rich payday from the SEC rather than a pat on the back from their company.

The roundtable participants put these concerns into a couple of very practical, insightful and valuable perspectives. Opening the discussion, Professor James O'Toole made two key points regarding the propensity for whistleblowing in an organization: first, whistleblowing is less likely to occur in organizations that have an open, transparent culture where employees have an ownership mentality and exert a peer pressure for right behavior. Second, reportable violations usually reflect poor management practices and companies that are well managed are less likely to have whistleblowing opportunities.

The companies represented around the table reflected sufficient confidence in the strength of their companies' culture, the prowess of their companies' management and the effectiveness of their internal whistleblowing process to feel that their employees would continue to report perceived violations internally and not be immediately tempted to go directly to the SEC. The sense around the table was that their companies were well managed and reportable violations of SEC regulations were unlikely; if violations were to occur that "culture would trump greed" and the violation would be reported internally; and the employees had sufficient trust in the company's process that the report would be followed up effectively and the reporting employed would be protected.

Consequently, especially the Ethics and Compliance Officers and the Internal Counsels viewed these new SEC regulations as "just one more thing they have to deal with" in their jobs and were confident that they would be able to do so effectively. However, it was also clear that not all companies enjoy such a position; i.e. not all companies are well managed with a strong positive culture and effective compliance processes. The roundtable discussion turned to these companies' challenges in implementing the new regulations and they appear to be four: culture, process, communication and tone at the top.

Culture. As professor O'Toole noted in the opening discussion, a culture of candor, transparency and openness will go far in encouraging employees to utilize internal reporting procedures. Employees who feel their views will be respected and their positions protected are more likely to talk to their bosses about perceived violations or utilize the companies' internal reporting systems rather than blow the whistle directly to outside parties such as the press or the SEC.

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Process. Similarly, if employees have faith in the effectiveness, fairness, seriousness and timeliness of the companies' internal reporting process, they are more likely to utilize them. These processes should be both proactive and reactive. Proactive process include a robust compliance audit process that effectively reviews key compliance activity, reports results to accountable people and assures timely and comprehensive follow-up. Reactive processes designed to deal with reported violations should make the reporting employee feel comfortable, safe and protected in their reporting; encourage the employee to feel that the company is taking their report seriously and will follow-up expeditiously; communicate back to the reporting employee regarding the result of the investigation in a timely manner. Companies should deal with even perceived minor reporting instances in a consistently protective and thorough manner to assure that employees will trust the processes in the event of more substantial issues. The question of exactly how the new whistleblowing regulations will be integrated into existing company internal reporting processes appears to not be fully determined yet.

Communication. As is the case with almost any management activity, a key to effective implementation is full and frequent communication. Certainly, the cultivation of a culture of candor, transparency and openness requires constant communication to emphasize and reinforce its principles and its application. Examples and stories demonstrating adherence to important cultural values often become company legends oft-told and revered. On a less ephemeral level, policy communication regarding specific processes must be clear, comprehensive, frequent and written in understandable non-legalese language.

Tone at the top. The roundtable participants were in pretty consistent agreement that the single most important factor in assuring good management practice, powerful cultural values and robust process execution is a positive and responsible tone set by the top executives of the organization. These officers and managers must not only "walk the talk," that is behave as they say everyone should, but also "talk the walk," that is communicate enthusiastically when others in the organization do things that represent the highest values and principles of the organization's culture. Thus, talking the walk illustrates and reinforces the messages embodied in the company's culture.

Summary

The roundtable discussion once more reinforced certain basic principles for leading and managing ethical enterprises. Whether viewed from the Chief Ethics and Compliance office, the General Counsel office, the Independent Director's seat or the C-suite, a strong positive culture, excellent management practices, robust process mechanisms and a powerful and consistent tone at the top will take any organization very far along the path to avoiding compliance violations and dealing with them effectively should they occur. This truly reflects the character of the ethical enterprise.