

CADWALADER

Cadwalader, Wickersham & Taft LLP
New York London Charlotte Washington Beijing

SCCE's 7th Conference for Effective Compliance Systems in Higher Education

Michael E. Horowitz

**Former Commissioner, U.S. Sentencing
Commission**

**Partner, Cadwalader, Wickersham & Taft LLP
(202) 862-2407; Michael.Horowitz@cwt.com**

The Problem We Face



"Make sure everything's done ethically.
Within reason, of course."

Compliance Expectations Have Changed

- Regulators focusing on ensuring compliance program are effective – not just whether organization has one
 - High level responsibility for compliance program
 - Governing Authority must exercise oversight
 - Focus on corporate culture – “tone at the top”
 - Programs must be individualized – risk assessments
 - Expectation of self-policing and self-disclosure
- Compliance issues/problems for higher education similar to those for corporations

Some Key Regulatory Events

- **USSC: Amends Organizational Guidelines (Nov. 1, 2004) and amends economic crimes guidelines for individuals (Nov. 1, 2002)**
- **DOJ: Holder memo (1999), Thompson memo (2003), McNulty memo (2006) and new USAM provision (2008) (“Principles of Federal Prosecution of Business Organizations”)**
- **SEC: Seaboard Decision (2001) and McAfee Decision (2006)**

Program Must Be Effective

- **USSC amendments to Organizational Guidelines:**
 - Must be “reasonably designed, implemented, and enforced”
 - Compliance officer must be provided “adequate resources, appropriate authority, and direct access to governing authority”
- **DOJ corporate charging principles: Two “fundamental” questions:**
 - Is program well designed?
 - Does program work?
- **SEC Seaboard Decision**
 - What compliance procedures were in place to prevent misconduct?
 - Why did procedures fail?

Leadership Responsibility

- **USSC amendments:**
 - **Governing Authority must be knowledgeable about program and exercise reasonable oversight**
- **DOJ corporate charging principles:**
 - **Are directors provided with information sufficient to enable the exercise of independent judgment?**
 - **Are internal audit functions conducted at a level sufficient to ensure independence and accuracy?**
 - **Have directors established information and reporting system reasonably designed to provide management and board with timely and accurate information sufficient to allow them to reach informed decision regarding organization's compliance with the law?**
- **SEC Seaboard: Was Audit Committee fully informed?**

Culture and Tone at the Top

- **USSC amendments:** Organization must promote “an organizational culture that encourages ethical conduct and a commitment to compliance with the law”
- **DOJ ex-AAG (ABA Speech):** “The question we are going to be looking at fundamentally is, is this a corporation whose culture and structure in some way facilitated or allowed this to happen?”
- **SEC ex-Enforcement Chief (GC Roundtable Speech):** Companies must set “tone at the top” – managers must comply with letter and spirit of rules; make character a key hiring criteria; make ethics and compliance a part of promotion, compensation and evaluation process; zero tolerance for compliance risk even if lose business; remedy and fix ethics violation ASAP; and hold managers accountable for setting right tone

Individualized Programs

- **USSG §8B2.1(c) (risk assessments):**
 - “Periodically assess risk of criminal conduct” and “design, implement, or modify” seven requirements to reduce risks identified
 - Risk assessment must include nature and seriousness of such criminal conduct; likelihood of violation given nature of business; and prior history of organization
- **DOJ corporate charging principles: Is program merely a “paper program” or is it designed and implemented in an effective manner?**

The Prosecution of Robert Riley – Compliance Gone Awry

- **“Compliance officers are . . . today’s corporate fire personnel. They are often the company’s first responders and must focus on both proactive and reactive efforts to be effective.” Judge Castillo at sentencing**
- **Compliance officer at AbTox, medical device manufacturer**
- **CEO knew he could manipulate and dominate Riley**
- **Riley had no compliance officer training/background**
- **Participated in misleading FDA filings, and failed to report adverse information and improper marketing to FDA**
- **Sentenced to 6 years imprisonment**

Self-policing and Self-disclosure

- DOJ expects companies to self-disclose and cooperate with prosecutors. For DOJ, this is the hallmark of good corporate citizenship and a good culture
- SEC McAfee decision (2006) -- “it is incumbent upon management to report [violations] to SEC”
- But what matters do you need to disclose? And when?

Does the *Booker* decision have an impact on compliance rules?

- Easy practical answer – NO!
- Sentencing Guidelines are now advisory, but Court must still consider them
- Most importantly – Prosecutors and regulators still look to Guidelines as the benchmark for compliance programs

Convergence of Regulatory Issues for Higher Education and Private Business

- **Expectations of prosecutors/regulators for internal investigations**
- **Conflicts of Interest**
- **Compensation**
- **Impact of government involvement in private business**
- **International operations**
- **Third party interactions and due diligence**
- **Data privacy**