ETHICS AND COMPLIANCE PROGRAMS

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Agenda

- What is a Compliance Program? Why is it necessary
- Is there a difference between ethics and compliance?
- How does it apply to our industry?
- Practical Application
What is an Ethics & Compliance Program? Why Is it necessary?
Why Does a Company Need One?

I am ethical

- Because knowing what is right and standing up for those principles may be harder than you think.

- It takes courage.
Why?

“The Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.”

In re Caremark International Derivative Litigation (1996)
An Effective Ethics and Compliance Program, USSG Section 8b2.1(a)

An organization must:

■ Exercise due diligence to prevent and detect criminal conduct.

■ Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

■ Program must be reasonably designed, implemented and enforced so that the program is generally effective in preventing and detecting criminal conduct.
Is Your Reputation Important to You? Your Company?
Compliance v. Ethics: Is there a difference?
How Often Do You Exceed the Posted Speed Limit?

A. Never
B. Every Week or So
C. Almost Every Time I Drive
Would you misrepresent your child’s age by one year at a movie theater, Disney, ski resort?

A. Yes
B. Yes, but only by one year
C. Only if they weren’t nearby to catch me
D. Only if I could save more than $20
E. No, never
Ethics

A system of moral principles, by which human actions and proposal may be judged well or bad, or right or wrong.

The rules of conduct recognized in respect of a particular class of human actions.

Moral principles, as of an individual

(Delbridge et. al., 2000).
What is Compliance?

- Laws, rules, and regulations
- Organizational policies
- Sound management practices
Compliance Failures

Mistake → Inefficiency → Bending the Rules → Fraud

- ERROR
- WASTE
- ABUSE
- FRAUD
The Fraud Triangle

- **Rationalization**: Justification of dishonest actions.
- **Opportunity**: Ability to carry out misappropriation of cash or organizational assets.
- **Pressure**: Motivation or incentive to commit fraud.
How Does the Construction Industry Compare?

When compared to the US national average, more construction employees indicated that they feel pressure to compromise standards; they see more misconduct; and when they report wrongdoing to management, they are far more likely to experience retaliation for having done so. At the same time, however, the construction industry set a new standard for Corporate America with regard to employee reporting.

Culture
Who Has the Most Impact on the Daily Behavior of Your Employees?

A. Senior Management
B. Middle Management
C. Supervisor or Manager
D. Human Resources
E. Ethics/Compliance
What Prevails?

When a rule or a policy or a code conflict with an organization’s culture, which wins?
Main Ethics Laws

• Fraud (Title 18 U.S. Code)
• Conflict of Interest
• Bribery and Gratuities Statutes
• Civil or Criminal False Claims Act
• False Statements Act
• Anti-Kickback Act
• Forfeiture Statute
• Anti-Trust Acts
• Mail and Wire Fraud
• Truth in Negotiations Act
• Procurement Integrity Act
• Buy America Act
• Socio Economic Acts
• EEO/AA
• Credible Evidence of Potential Criminal Violations
What is Fraud?

- No one definition
- A deliberate deception to secure an unfair gain.
- Monetary, contractual or other type of advantage
- Unlawful

Common Types of Fraud

- Bid Rigging
- Bribery
- Conflicts of Interest
- Minority Business Enterprise / Disadvantaged Business Enterprise / Women-Owned Business Enterprise
- Kickbacks or Unlawful “pay to play”
- Time Overcharging
Blatant and Brazen: Bid Rigging
Bid Rigging

Bid rigging is an illegal practice in which competing parties collude to choose the winner of a bidding process while others submit uncompetitive bids. Bid rigging stifles free-market competition, as the rigged price will be higher than what might have resulted from a competitive bidding process.

- Bid Suppression
- Bid Rotation
- Price Fixing
- Dividing Markets
False Statements and False Claims

Submitting a statement or claim for payment knowing it contains a falsehood.

Examples:
- Misrepresentation of cost or quality.
- Less work progress than reported.

False statement may be written or oral, sworn or unsworn, signed or unsigned.
Knowledge of False Claim

■ ACTUAL
■ “DELIBERATE IGNORANCE”
■ ”RECKLESS DISREGARD”
Certifications

- Signed by officers or other senior personnel.
- Signers may rely on factual matters within your control.
- Improper cert may be a legal violation.

NEVER TREAT A CERTIFICATION AS “JUST ANOTHER FORM.”
EXAMPLES OF CERTIFICATIONS

- Use of XBE firms
  - Authentic?
  - Dollars CORRECT?
- EEO/Affirmative Action
- Wage reporting
- Buy America Act
- No Lobbying
Progress Payments

- Common source of false claims
- Each requisition a separate “claim”
- Often broad language:
  - Invoiced work completed per the contract
  - Subcontractors timely paid
  - No intent to hold $ from sub
  - Prompt Payment law
AJAX/Dan’s PM strikes agreement with Borbolla on pass-through % fee
COMMON CONFLICT OF INTEREST SITUATIONS

- Moonlighting (employment and future jobs)
- Nepotism (Family and Romantic Relationships)
- Vendor Relationships-Kickbacks and Rebates
- Gifts from vendors, customers or others
- Improper use of company assets
BRIBERY AND KICKBACKS

Giving or receiving anything of value to influence an official act
Government or Commercial
Giving or receiving
Kickbacks

Examples:
- Prime employee selects sub and is paid a percentage of subcontract value in return
- Purchasing agent has work done on home by at below market price
- Sub gives prime employee Super Bowl tickets in exchange for favorable T&M change order
GIFTS, GRATUITIES AND ENTERTAINMENT

1. A purchasing agent receives concert tickets from a subcontractor who was awarded a job.

2. A Project Manager provides gift cards and luncheon for outstanding safety on the job site.

3. Several times a year, office and job site personnel are sent baskets from vendors.
GIFTS, GRATUTITES AND ENTERTAINMENT

- Do not give or accept business courtesies that may create a perception of favorable treatment or would violate laws or regulations
- Never give or accept to government employees
- Ask yourself:
  1. *Is this too much?*
  2. *How will this be perceived?*
What were they thinking?

“I’ll get a bigger bonus”
“It’s only a little”
“I deserve this”
“It will be good for my career”
“It’s not a very important rule”
“It’s not really against the rules”

“Everyone/the competition is doing it”
“This is how business is done”
“It was legally defensible”
“This is a must win deal”
“We need to make this quarter”
“Following the rules makes us non-competitive”
Practical Applications
Ethics Scenario

Your former college roommate and friend is an excellent consultant with a proven track record of success. He really wants ACME’s business, and asks for your help.

WHAT DO YOU DO?

A. Introduce him to the appropriate executive and provide an excellent endorsement.
B. Introduce him to the executive, with a demurral indicating no pressure and no expectation.
C. Let the CEO know that you have recommended him to the executive
D. “Strongly recommend” that the executive use the consultant.
E. Nothing.
Ethics Scenario

An employee of ACME has violated the company’s Code of Conduct on entertainment issues on four separate occasions. His supervisor defends him each time by pointing to his excellent sales record, his importance to the company’s bottom line, minimizing his conduct. His violations are relatively minor, but repetitive, and colleagues know that he fails to follow the code.

WHAT DO YOU THINK?

Is this a case where the employee should be fired?

What about the bottom line?

If he is retained and punished, how should he be punished?

Will this lead to an environment that will breed more serious violations, especially by those who are perceived as significant producers and important to the company’s bottom line?
ACME solicits bids for a business service. Its current vendor, with whom the company is very pleased, understands that it is required to obtain bids from three qualified vendors. A current vendor suggests that it will undercut the lowest bid by 20% if it agrees to pay him 5% in cash, so his effective discount is only 15% off the lowest bid.

Is this in the best economic interests of the company?

Do/not do the deal?

Values at stake?

Ethical dilemma presented by the facts?
Ethics Scenario

You are on a business trip in another country doing site visits as part of your role as an officer at ACME. The head of one of ACME’s joint venture partners invites you to his lodge in the country for the weekend. He explains that he has invited a couple of senior governmental officials, so the weekend will be very good for building business relationships.

WHAT DO YOU DO?

A. Decline the invitation

B. Accept, but refrain from discussing anything related to any industry issue, including ACME

C. Accept, but discuss the trip before and after with ACME’s Government Relations team

D. Consult with ACME’s General Counsel before accepting.
Ethics Scenario

The purchasing manager for a large company agrees to give you an order (their first), expecting you agree to make a $200 donation to his favorite charity, a local youth sports team.

How do you respond?
A large, prospective client calls you and asks about a competitor's reputation. One of your long time customers had a very bad experience with this competitor.

What information do you share with the prospect?

How might you respond to the call?
There is Never a Right Way to Do the Wrong Thing

- I don't know if it's right or wrong
- Depends on the situation
- It's an individual choice, so what's the big deal
- As long as I don't get caught
Can We Do Better?

- Pressure to stray is always present
- Can’t have too much vigilance
- Policies and training
- Honest & thorough discussion
- Follow through on consequences
EMPLOYEE RESPONSIBILITIES

Stay alert to issues or concerns
Ask questions when concerns arise
Report any issue or concerns of wrongful conduct
Duty to participate in internal investigations
"I've been here so long I don't remember what I did, but it had something to do with non-compliance."

It's No Joke

TAKE IT SERIOUSLY!
Ethics is the Measurable Differentiator
Performance of 2016 Honorees as Compared to the S&P 500 Over the 2015 Calendar Year

Ethics Premium: 3.3% Excess Return
Questions?

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