



***REASONS FOR A
STRONG
COMPLIANCE &
ETHICS PROGRAM:
AVOIDING THE BIG
LEGAL STICK***



WHY HAVE A COMPLIANCE & ETHICS PROGRAM

THERE ARE MANY BENEFITS, BUT . . .

- **AVOIDING/MINIMIZING THE DISASTER OF A LEGAL VIOLATION IS ENOUGH IN ITSELF**



AVOIDING THE BIG LEGAL STICK

**US CORPORATE FINES ARE UP
DRAMATICALLY -**

- **\$340M DAIWA BANK**
- **\$500M HOFFMAN LAROCHE**
- **\$745M COLUMBIA/HCA**



AVOIDING THE BIG LEGAL STICK

CORPORATE FINES GLOBALLY ARE ALSO A REAL THREAT:

- **EU 10% OF WORLD TURNOVER
IN COMPETITION CASES**
- **CANADA, AUSTRALIA, ETC.,
FOLLOWING US LEAD**



AVOIDING THE BIG LEGAL STICK

PILING ON:

**US, STATES & GOVERNMENTS
GLOBALLY ALL JOIN IN**



AVOIDING THE BIG LEGAL STICK

PILING ON:

- **PRIVATE CASES FOLLOW THE GOVERNMENT**
- **TREBLE DAMAGES (ANTITRUST & RICO)**
- **FED WIN ESTABLISHES A PRIMA FACIE CASE IN ANTITRUST**



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PILING ON:

- **ROLLING UP COUNTS IN AN INDICTMENT - IN AN ANTITRUST CASE FEDS CAN ADD COUNTS FOR MAIL FRAUD, WIRE FRAUD, CONSPIRACY, OBSTRUCTION, ETC.**
- **ONE COUNT FOR EACH INSTANCE**



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INDIVIDUAL FINES:

- **NO REIMBURSEMENT**
- **\$10M AGAINST ONE OFFICER
IN UCAR ANTITRUST CASE**



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INDIVIDUAL PRISON TIME:

- **ADM's MICHAEL ANDREAS GIVEN 2 YEAR SENTENCE (NO FEDERAL PAROLE) BY TRIAL JUDGE**
- **INCREASED TO 3 YEARS AFTER APPEAL**
- **CONGRESS RAISED LIMIT TO *10* YEARS NOW**
- **EVEN FOREIGN NATIONALS ARE SERVING TIME IN US PRISONS**



AVOIDING THE BIG LEGAL STICK

CORPORATE PROBATION/MONITORS:

- **OUTSIDE MONITOR IMPOSED ON CON ED**
- **HERE ARE QUOTES FROM HIS PUBLIC REPORTS, ABOUT SPECIFIC CON ED MANAGERS/DEPARTMENTS -**



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PUBLIC QUOTES BY THE CON ED MONITOR ABOUT COMPANY PEOPLE/DEPARTMENTS:

- **“SHOWED AN INABILITY OR UNWILLINGNESS TO HANDLE THE MATTER PROPERLY”**
- **“RELUCTANCE TO ASSERT ITSELF”**
- **“HIS SUPERVISOR TOLD HIM HE WAS A SACRIFICIAL LAMB”**



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PUBLIC QUOTES BY CON ED MONITOR ABOUT COMPANY PEOPLE/DEPARTMENTS:

- **“THE VICE PRESIDENT ALSO FAILED TO GET INVOLVED”**
- **“ENVIRONMENTAL AFFAIRS GAVE FUZZY ADVICE”**
- **“LAW DEPARTMENT APPEARS TO HAVE ACQUIESCED”**



AVOIDING THE BIG LEGAL STICK

SENTENCING GUIDELINES:

**IF A COMPANY DOESN'T ALREADY
HAVE A PROGRAM, THE COURT
MUST IMPOSE ONE.**

**TYPICALLY INCLUDE REPORTING
TO THE COURT & THE
GOVERNMENT**



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Remarks of Jamie S. Gorelick, then Deputy Attorney General of the United States

“[T]he Guidelines also require courts to impose compliance programs where they do not exist. A judge’s compliance program may be far more stringent and costly than the program a company would have developed of its own initiative, and may involve substantial government or court monitoring.”



AVOIDING THE BIG LEGAL STICK

- **TERRIBLE PUBLICITY CAN KNOCK OFF ENORMOUS VALUE FROM A COMPANY'S STOCK & HAVE LINGERING EFFECTS**
- **E.G., ENRON**



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COLLATERAL DAMAGE:

- **LOSS OF KEY PERSONNEL**
- **WASTE OF OFFICERS' TIME**



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OTHER HARMS:

- **DISMEMBERMENT**
- **LOSS OF CONTROL**
- **LOSS OF INDEPENDENCE**
- **EG., EF HUTTON, DAIWA BANK**



AVOIDING THE BIG LEGAL STICK

**LIMITS ON FUTURE
BUSINESS FREEDOM –
DEFERRED
PROSECUTION
AGREEMENTS**



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CAREMARK: DIRECTORS INDIVIDUAL LIABILITY

- **“Any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions that it offers.”**



AVOIDING THE BIG LEGAL STICK

CAREMARK:

- **“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.”**



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CAREMARK:

- **“a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”**



AVOIDING THE BIG LEGAL STICK

CIVIL LIABILITY:

- **LOSS OF BUSINESS**
- **CLASS ACTIONS**
- **DAMAGES PAID TO
CUSTOMERS &
COMPETITORS**



AVOIDING THE BIG LEGAL STICK

PUNITIVE DAMAGES:

- **CASE BY CASE, STATE BY STATE**
- **TEXACO HIT WITH PUNITIVE DAMAGES OVER \$10 BILLION IN PENNZOIL CASE**
- **A COMPLIANCE PROGRAM MAY SERVE AS A DEFENSE**



AVOIDING THE BIG LEGAL STICK

IF YOU DO BUSINESS WITH THE FEDS:

- **“QUI TAM” OR BOUNTY HUNTER SUITS**
- **DOUBLE OR TREBLE DAMAGES**
- **20-30% TAKE FOR THE WHISTLEBLOWER**



AVOIDING THE BIG LEGAL STICK

IF YOU DO BUSINESS WITH THE FEDS:

- **DEBARMENT, SUSPENSION - GOVERNMENT CAN DROP YOU AS A SUPPLIER WITHOUT TRIAL**
- **YOU COULD BE BLACKLISTED - YOUR CUSTOMERS THEN WON'T USE YOU ON THEIR GOVERNMENT WORK**



AVOIDING THE BIG LEGAL STICK

FREEZING YOUR ASSETS “WHILE WE TALK”

- **KAYE SCHOLER CASE**
- **GOVERNMENT FROZE FIRM’S ASSETS, FORCING IT TO SETTLE**
- **(NO TRIAL, HEARING, OR ANYTHING ELSE)**



AVOIDING THE BIG LEGAL STICK

- **COUNSEL FEES - YOURS AND THEIRS**

\$
\$
\$
\$
\$



AVOIDING THE BIG LEGAL STICK

ENDLESS DISCOVERY

- **OLD DOCUMENTS**
- **E-MAIL**
- **INSTANT MESSAGES**
- **“C” DRIVES**
- **BACKUP TAPES**
- **& DIARIES TOO (REMEMBER SENATOR PACKWOOD)**



AVOIDING THE BIG LEGAL STICK

**SPENDING DAYS AND
WEEKS WITH LAWYERS –**

**EXPLAINING EVERYTHING
YOU DID, OVER & OVER
AGAIN**



AVOIDING THE BIG LEGAL STICK

BEING INDICTED & PROSECUTED:

- **GRAND JURIES - JUST YOU, A PROSECUTOR & A JURY**
- **YOU LOSE, BEGINNING WITH THE FIRST SEARCH WARRANT. YOU DON'T RECOVER YOUR COSTS OR COUNSEL FEES, OR YOUR REPUTATION**



AVOIDING THE BIG LEGAL STICK

LOSS OF EXPORT PRIVILEGES:

- **SOFTWARE, TECHNICAL INFORMATION**
- **LOCKHEED “AGREED” TO A \$24M FINE, AFTER THE GOVERNMENT SUSPENDED ITS EXPORT LICENSE**
- **(NO TRAIL OR HEARING REQUIRED TO DO THIS)**



AVOIDING THE BIG LEGAL STICK

GET OUT!

- **DAIWA, A JAPANESE BANK, GETS KICKED OUT OF THE US FOR BANKING VIOLATIONS**



AVOIDING THE BIG LEGAL STICK

LOSS OF CUSTOMERS:

- **DENNY'S AND CUSTOMER BOYCOTTS**
- **GOVERNMENT BLACKLISTING**
- **BLUE CHIP CUSTOMERS WITH THEIR OWN COMPLIANCE PROGRAMS MUST BE CAREFUL WHOM THEY DO BUSINESS WITH**



AVOIDING THE BIG LEGAL STICK

POLITICAL IMPACT:

- **CONGRESSIONAL HEARINGS & LEGISLATION**
- **PUNISHING AN INDUSTRY**
- **SOX**



AVOIDING THE BIG LEGAL STICK

THE GOOD NEWS:

An effective and diligent ethics & compliance program can help prevent these disasters