ENHANCED ENFORCEMENT: COMPLIANCE PROGRAMS, INTERNAL ACCOUNTING CONTROLS, AND DISCLOSURE OBLIGATIONS

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MAXIMIZING RESOURCES

- LIMITED GOVERNMENTAL RESOURCES
- SHIFTING THE BURDEN TO PRIVATE SECTOR
- MUST BE SEVERE COSTS FOR FAILURE OF SELF-ENFORCEMENT
  - Classic Example: Debarment or Blacklisting
- MULTIPLIER EFFECT
EFFECTIVE MEANS OF ENHANCING ENFORCEMENT

- DEBARTMENT/BLACKLISTING
- COMPLIANCE PROGRAMS
- INTERNAL ACCOUNTING CONTROLS
- DISCLOSURE OBLIGATIONS
DEBARMENT/BLACKLISTING

- THE BROADER THE APPLICATION = MORE EFFECTIVE DETERANCE
- ELIGIBILITY REQUIREMENTS
- WORLD BANK AND MULTILATERAL LENDING INSTITUTIONS
- U.S. EXPERIENCE
COMPLIANCE PROGRAMS

- GLOBAL TREND
- WORLD BANK
- UNITED KINGDOM
- U.S. EXPERIENCE
WORLD BANK: COMPLIANCE PROGRAMS

- ELIGIBILITY REQUIREMENTS
- VOLUNTARY DISCLOSURE PROGRAM
- LINKAGE WITH OTHER MULTILATERAL LENDING INSTITUTIONS
UK BRIBERY ACT: COMPLIANCE PROGRAMS

- CORPORATE LIABILITY FOR ACTS OF EMPLOYEES IN PAYING FOREIGN BRIBES

- EFFECTIVE COMPLIANCE PROGRAM CONSTITUTES AN AFFIRMATIVE DEFENSE
UNITED STATES: COMPLIANCE PROGRAMS

- U.S. SENTENCING GUIDELINES
- DOCTRINE OF RESPONDEAT SUPERIOR
- PERSONAL LIABILITY FOR MEMBERS OF BOARD OF DIRECTORS
- ESSENTIAL TO EFFECTIVE INTERNAL ACCOUNTING CONTROLS
  - DISCLOSURE OBLIGATIONS
  - CERTIFICATION REQUIREMENTS
- MONITORS
UNITED STATES: COMPLIANCE PROGRAMS - MONITORS

- DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS
- INTERNAL INVESTIGATIONS
- ADVANTAGES TO COMPANIES
- ADVANTAGES TO ENFORCEMENT OFFICIALS
COMPLIANCE PROGRAMS

- ATTITUDE AT THE TOP IS THE KEY
- WRITTEN POLICIES AND PROCEDURES
  - MUST BE MORE THAN WRITTEN PROCEDURES
  - MUST BE APPLIED AT ALL LEVELS
- EDUCATION AND TRAINING
  - MUST INCLUDE PROTECTIONS FOR WHISTLEBLOWERS
  - PROVIDE MEANS OF SEEKING GUIDANCE
- REQUIRES ADEQUATE DUE DILIGENCE
COMPLIANCE PROGRAMS: DUE DILIGENCE

- KEY FACTOR: EVERYTHING REASONABLE WAS DONE UNDER THE CIRCUMSTANCES
- WRITTEN RECORD
- MUST BE AVAILABLE FOR REVIEW
SECURITIES AND EXCHANGE COMMISSION (SEC): INTERNAL ACCOUNTING CONTROLS

- BASIC CRITERIA
  - Controlling Environment
    - COMPLIANCE PROGRAMS
  - Reviewing Internal Controls
  - Monitoring Compliance
  - Reasonable Assurance

- STRICT LIABILITY FOR CIVIL VIOLATIONS
  - Applies Only to Publicly-Held Companies
  - No Intent Required
INTERNAL ACCOUNTING CONTROLS: SEC’S CATCH-ALL PROVISION

- ALMOST ALWAYS CIVIL IN NATURE

- PROVIDES ALMOST UNLIMITED JURISDICTION FOR SEC TO ADDRESS PROBLEMS AFTER-THE-FACT

- NO INTENT REQUIRED FOR CIVIL ENFORCEMENT
INTERNAL ACCOUNTING CONTROLS: RELATED KEY COMPONENTS

- ACCURATE RECORD-KEEPING
- ACCURATE DISCLOSURES TO AUDITORS
RECORD-KEEPING PROVISIONS

- NO MATERIALITY REQUIREMENT
  - Small Amounts of Money Can Have Serious Consequences
  - Not Limited to Bribery

- 20-YEAR TERM OF IMPRISONMENT

- EXTREMELY EFFECTIVE ENFORCEMENT TOOL
LYING TO AUDITORS

- LIMITED TO OFFICERS AND DIRECTORS

- EXTENDS TO INTERNAL AND EXTERNAL AUDITORS

- RELATES TO MATERIAL OMISSIONS AND MATERIAL MISREPRESENTATIONS

- CIVIL ENFORCEMENT – NO INTENT REQUIRED
DISCLOSURE OBLIGATIONS: PUBLIC COMPANIES

- QUANTITATIVE
  - CONTINGENT LIABILITIES
  - MATERIAL AMOUNT

- QUALITATIVE
  - MATERIAL
  - EXAMPLE – KEY OFFICIAL

- SARBANES-OXLEY – CERTIFICATIONS
  - CEOs and CFOs
  - Attest Function of Auditors
AUDITORS - HEIGHTENED RESPONSIBILITIES

- SECURITIES REFORM ACT OF 1995
  - REPORTING TO SEC
  - PROVIDES SAFE HARBOR

- SAS No. 99
  - REPORTING TO SENIOR OFFICIALS FOR NON-PUBLIC COMPANIES
DISCLOSURE OBLIGATIONS: CRIMINAL AND CIVIL LIABILITIES

- CRIMINAL AND CIVIL LIABILITY FOR SENIOR OFFICIALS
- CIVIL LIABILITY TO SHAREHOLDERS