

Keep Your Pinstripes Vertical

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COMPANIES CAN
AVOID DEALING
WITH WHISTLE-
BLOWERS BY
PREVENTING
FRAUD IN THE
FIRST PLACE.

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The federal government's enforcement juggernaut rolls on—and the pharmaceutical industry is squarely within its sights. In recent years, the industry has paid close to a billion dollars in fines, civil settlements, and penalties. Many of those charges were brought to the government's attention by pharmaceutical company employees turned whistleblowers. Who else would have the ability to know about an alleged fraudulent manipulation of, say, the complex rules governing the pricing of pharmaceuticals to federal government agencies and to deconstruct them for prosecutors as well as provide a documentary record?

The whistleblower profile has changed profoundly since the 1960s, when the archetypal crusading line worker took on the corporate Goliath. Today, corporate executives turn informer on their own companies.

The Motivation

So what makes a whistleblower? For one thing, money. The *qui tam*, or whistleblower, provisions of the federal False

Claims Act permit private citizens with knowledge of a fraud on the government to bring a civil lawsuit and to receive up to 30 percent of the proceeds. With individual settlements in the hundreds of millions, the rewards to *qui tam* plaintiffs can be—and have been—handsome indeed.

In 2001, for example, TAP agreed to pay the federal government \$875 million in the largest healthcare fraud settlement ever reached. The fine arose from two *qui tam* cases, one filed by TAP's former vice-president of sales, who alleged that the company gave kickbacks to doctors and encouraged them to defraud Medicare by billing for free samples. The vice-president reportedly received \$79 million for his whistleblowing efforts.

Of course, whistleblowers often are motivated by factors other than money, such as the desire to redress a personal wrong, a perceived need to do the right thing, or as a last resort after efforts to get the company to address the problem have failed. In most cases, the whistleblower's motives are mixed. More recently, a new motivation has crept into the mix: self-protection. And those most often so motivated are corporate executives.

Department of Justice policies encourage corporations confronted with allegations of fraud to offer up high-level wrongdoers. Consider the department's 1999 guidance to prosecutors on bringing criminal charges against corporations—the so-called “Holder Memorandum”:

“In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporations' willingness to identify the culprits within the corporation, including senior executives.” (page 6)

“The prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.” (page 8)

As evidenced by the parade of Enron, Worldcom, and ImClone ex-executives lining up to plead guilty before various courts last year, DOJ is serious.

The pharma industry is rife with opportunities for the government to accuse companies of ignoring, circumventing, artfully avoiding, manipulating, or just plain vio-

lating some part of the intricate web that is the industry's legal and regulatory scheme. Conduct that many companies view as merely entrepreneurial can, and has been, viewed by the government as beyond the pale. Companies unwilling to risk their market share may well feel driven to adopt certain "borderline" practices that other companies have initiated to gain a competitive advantage. But DOJ has no tolerance for the "everyone does it" defense.

The Options

So what can executives do if they are aware of, or were involved in, conduct that prosecutors may view as fraudulent? Consider this hypothetical. An executive learns that the company has adopted a particular "interpretation" of a Veterans Administration pricing rule that has the effect of increasing government reimbursement. The executive may suspect that the government, if asked, might not agree with the company's interpretation, and might even believe that it is fraudulent. That same executive may be a senior decision maker in the department that administers VA pricing. He or she may well ask: "If the government ever questions this, will the finger be pointed at me?" The executive's options may be as follows:

Report the conduct internally. The HHS Inspector General's recently released Draft Compliance Program Guidance for the industry states that an effective compliance program must have "a process [such as a hotline or other reporting system] to receive complaints or questions, and the adoption of procedures to protect the anonymity of complainants and to protect whistleblowers from retaliation." How many pharma companies can claim to have a process that honors that description both on paper and in the behavior of employees and management alike? The hypothetical executive may have some or all of the following concerns:

- Will I be punished if I draw attention to a practice that is making the company a lot of money?
- Will I be shunned by my colleagues?
- What use is an internal report if management is part of the problem?

In the absence of a reporting process that truly fits the HHS model, those concerns are likely to be all too real.

Do nothing. And hope that the government doesn't find out about it. That certainly does nothing for peace of mind. What happens if someone else reports it first? Some executives might be tempted to hope that when and if the conduct is exposed, the corporation will protect and defend them.

But a perusal of the front pages of major business dailies in the past year makes it all too clear that executives shouldn't expect support from the company if they are involved in potentially fraudulent conduct. Nor should they expect to fly below the radar if they knew about the conduct but did nothing to stop it.

Resign. The prospect of unemployment is rarely appealing, and the financial impact of an abrupt resignation can be devastating. Resigning may not even be an option if the executive is contractually bound to stay for a period of time. In any event, leaving may resolve an immediate ethical conflict, but it does not extinguish any liability the executive may have for past conduct.

Faced with those equally unattractive options and seeking a better solution, executives may well ask: "How can I protect myself against becoming a jobless statistic or winding up at the wrong end of a grand jury investigation?"

Many aggrieved executives already have used the *qui tam* law to protect themselves or to right what they saw as a wrong. When the vice-president of sales in the TAP case—who was already troubled by what he saw as TAP's "cowboy" culture—heard about an alleged kick-back plan involving sales of Lupron (leuprolide), he reportedly realized the extent of his personal exposure. "The sales force was my responsibility," he told *People* magazine. "I could have been the one to get hung out to dry."

The Choice

What is the lesson to be learned? It is this: the importance of fostering an ethical corporate culture is not merely tired, self-evident rhetoric. To retain

the confidence and loyalty of employees, corporate management must be ever-vigilant to ensure that the corporation's ethical underpinnings—the way it does business—are solid to begin with and are not allowed to slip.

Contrary to some widely held beliefs, corporate crime rarely is the product of a single rogue employee or a plot concocted by evil conspirators in a smoke-filled room. It is more likely to be cultural, to grow out of conduct that initially was perceived as entrepreneurial and later diversified into risky, then to borderline or gray, then to illegal. Such conduct thrives in a culture that condones ethical corner-cutting in the interests of revenue maximization. And corporations that regularly engage in "gray area" activity eventually become desensitized to the very grayness of it.

Ultimately, it's a collective understanding of "how we do things around here" that determines the ethical decisions that employees and management make every day. A corporate code of ethics that represents a commitment to doing the right thing—that senior management honors and communicates effectively and often to employees—will go a long way towards curtailing "entrepreneurial" conduct that might slide down the slippery slope into fraudulent.

Every pharma CEO should read the HHS Inspector General's industry guidance and make a personal commitment to implementing its mandates. A corporate culture in which employees at every level feel safe from retaliatory acts if they report questionable conduct requires that those employees believe in the honesty, integrity, and fairness of senior management. It also requires that senior executives commit to making the tough decisions that might, at times, elevate ethics over short-term gain.

If there is any question about on which side of the line those decisions should fall, senior management should remind themselves of this: preventing fraud, in the long run, is a lot easier—and less painful—than dealing with whistleblowers. ■