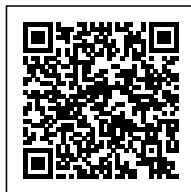


COMPANIES MUST ACT “WHITER THAN WHITE”

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Companies need to do more than have a corporate compliance programme they need to demonstrate it exists and that it works in practice, says Tyco Ombudsman María Hernández

Para las empresas, no basta con tener un programa de cumplimiento normativo: hay que saber comunicarlo a los trabajadores, explica María Hernández, Ombudsman en Tyco. Por otro lado, la entrada en vigor de la ley Dodd-Frank puede suponer un nuevo desafío para las empresas en los Estados Unidos, que deberán redefinir sus estructuras de gobierno corporativo.

The anniversary of the enactment in the US of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the approval of the final "Whistleblower Rules" under it have again brought into focus the demand for publicly-listed companies to implement and operate practical internal governance programmes, including whistleblower mechanisms, to discourage improper management or corporate misbehaviour.

Dodd-Frank was enacted in response to the financial downturn to encourage greater accountability and transparency of corporate decision-making. It is tremendous in its scope but a key element is the expansion of the whistleblower protection provisions intended to uncover wrongful actions. The new Rules provide substantial financial incentives for individuals who voluntarily provide original information to the US Securities and Exchange Commission (SEC) regarding possible violations of Federal securities laws. Should a prosecution result, leading to a successful enforcement action in which the SEC obtains more than \$1m, the whistleblower will be entitled to receive between 10 percent and 30 percent of any amounts recovered.

The ability of individuals to benefit financially from uncovering corporate wrongdoings will be a powerful investigatory tool, the SEC hopes. The challenge for multinational companies is however ongoing: how to maintain the requisite degree of oversight control, and, where needed, prompt action in commercial, operational and employee activities wherever they do business.

This is a major task and one that requires the fostering of a "compliance" culture that encourages employees or managers to speak up and come forward with legitimate complaints. Responsible companies want employees to come forward with concerns, so they can be addressed promptly. Dodd-Frank contains provisions that attempt to encourage this, but may have missed the mark based on the comments submitted by many companies. Notably omitted from the final rules are requirements that were suggested and designed to preserve the effectiveness of corporate internal reporting systems, such as a requirement that a whistleblower report internally before going to the SEC in order to recover an award under the Rules.

The new rules do contain provisions encouraging – but not requiring – employees to raise concerns internally first, and this could be a factor increasing the amount of the potential award the whistleblower will be entitled to receive. It will inevitably take much time for all of the nuances of the Dodd-Frank Act to be assessed. The legislation is clearly important, but it provides only one way of encouraging companies, even more, to manage their own internal and corporate behaviour.

For Tyco, the goal is to have not only robust corporate governance guidelines but also to act within them. We are seeking to encourage compliance at all levels, reinforce codes of conduct and training – including "on time" training as employees enter new business situations – and require employees to report all possible violations.

One of our strengths is the "Tone at the Top" we have in the Company, with executives being compliance advocates and zero tolerance with wrongdoings anywhere in the business. Compliance needs to be a business-driven activity.

Fundamental to this has also been the strengthening of our internal reporting procedures, making them more accessible and easier to use. In part this requires better communication, not only to highlight the dangers of wrongful behaviour, but also to demonstrate in practical terms the positive results internal reporting has produced. We support and recognise employees who show exceptional commitment to compliance, even where this means highlighting possible company violations.

More and more we see major market players insisting on the highest levels of compliance in the companies they do business with. Compliance in that sense can also be a factor for competitive advantage.

Dodd-Frank, though potentially onerous, may yet set the benchmark for compliance by international companies of all types. After all, the most important point to keep in mind is to establish a culture of compliance throughout the organisation, which is not only a task for the compliance and the legal department but also a commitment that management should take ownership – to be receptive to employee concerns.

María Hernández is the Ombudsman of Tyco International based in Princeton, New Jersey. A Spanish lawyer she was previously General Counsel for Tyco International in Southern Europe and Middle East.

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