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For small business, procrastination is a risky option

BY NANCY G. BROWN

Executives running small or midsize companies have their hands full thinking about all the daily issues required to run a successful business. It's tempting to think that corporate compliance is something that can be addressed down the road when the company is bigger and has more employees. In truth, ignoring legal compliance is a risky business whatever the size of the company.

You may or may not be aware that the Federal Sentencing Guidelines specifically apply to all businesses. If federal prosecutors come knocking on your door, unless you have an effective corporate compliance program, it is much more likely that they will choose to prosecute; it will be more difficult to negotiate a reasonable resolution; and should there be a conviction, the imposition of a larger fine or sanctions can be anticipated.

The sentencing guidelines establish seven specific criteria as the minimum for an effective program. These include the requirement that the board of directors or other governing body be knowledgeable and exercise oversight, and that high level personnel take responsibility.

The company must conduct appropriate training focusing on key areas where the particular company may be vulnerable to wrong do-

ing. There must be monitoring and auditing of the program and a mechanism to enable reporting of possible criminal conduct without fear of retaliation. Finally, wrongdoing must be punished.

And then there is Sarbanes-Oxley. Admittedly, most provisions of Sarbanes-Oxley apply only to public companies. However, even private companies are subject to Sarbanes-Oxley's penalties for knowingly destroying, altering, concealing or falsifying records or documents with the intent to impede, obstruct or interfere with an investigation.

Penalties include significant fines and as many as 20 years in prison. In addition, Sarbanes-Oxley provides for enhanced penalties including up to 10 years imprisonment for anyone who knowingly retaliates against any employee for providing information to the government about the possible commission of any federal offense. Retaliation against a whistle-blower by a private company could result in significant fines or imprisonment.

It is becoming increasingly obvious that Sarbanes-Oxley and the new rules adopted by the New York Stock Exchange and Nasdaq usher in a new era of corporate governance — and companies ignore them at their own peril.

The first step for most private companies is adopting a corporate code of ethics and a process to facilitate report-

ing of wrong doing without fear of retaliation.

It is also important to have a records retention program that includes a process to stop the destruction of documents in the event of litigation.

In addition, as companies grow, they are likely to consider instituting an enhanced audit function, with independent members who possess strong financial backgrounds and boards that include independent directors.

The private company that does not take the time to understand and respond to the growing emphasis on corporate governance is likely to have diminished value in the event of a sale. It may encounter difficulties obtaining financing or become a less desirable partner for sophisticated customers or suppliers.

And the risk exists that its officers and directors may incur legal liability that could have been avoided. If legal compliance sounds burdensome, keep in mind that an effective corporate compliance program's real value is in preventing illegal conduct and creating an ethical culture that will benefit the company over the long term.

NANCY G. BROWN is an attorney in the Columbus, Ohio, office of Taft Stettinius & Hollister LLP.

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Email: sales@twostep.com
Web: www.twostep.com