

FOURTEENTH ANNUAL
TAXPAYERS AGAINST FRAUD EDUCATION FUND
AWARDS DINNER

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KEYNOTE ADDRESS

**Neil V. Getnick
Getnick & Getnick, LLP**

I will speak to you this evening on three related topics: business driven integrity; the new paradigm of whistleblower cases; and reforming markets.

Business Driven Integrity

At the end of July, the House Judiciary Committee held a hearing on the Federal False Claims Act. The U.S. Chamber of Commerce representative called for a weakening of FCA enforcement mechanisms, emphasizing instead “gold standard” compliance programs to be the primary focus for fighting fraud. But, we have seen time and time again that major company legal compliance programs have met with spectacular failures.

An underlying problem is that companies typically rely on “law-driven” compliance rather than “business-driven” integrity programs. Law-driven programs seek to avoid punishment by meeting the letter of the law without developing a deeply rooted culture of integrity. In many cases, law-driven programs are only grudgingly tolerated by executives and employees, and they often fail as a result.

By contrast, a business-driven integrity program is much more likely to prove effective because business people from the top down (not just the legal department) embrace and promote it as essential to the long-term success of the enterprise. A business-driven program is viewed throughout the company as a profit center and a competitive advantage, rather than a cost center or an obstacle.

This approach makes a fundamental difference when employees confront real-life issues such as kickback arrangements, price fixing, or insider trading. Their responses become less a matter of consulting a legal guidance memo than fulfilling the company’s basic mission and business model. The core principle is that good ethics is good business. Integrity and honest dealing lead to an enhanced business reputation and long-term success, for individuals and corporations alike.

One of the best tests of a corporate compliance program is how the company responds to internal whistleblowers who report misconduct. If the company is serious about business integrity, it will welcome the report, investigate it vigorously, and shield the whistleblower against retaliation. Here, again, good ethics is good business. When whistleblowers are ignored and penalized, often their next stop is a prosecutor’s office.

In the end, the overriding goal should be the reform of corrupt industries and markets, not just individual companies. That goal can be achieved only by combining powerful business-driven integrity programs with effective law enforcement.

New paradigm of whistleblower cases

What is that new paradigm? What defines it? One of the most important characteristics is the reliance on a public-private partnership. When I speak on this topic, I always stop and say: With all the criticism that we find about government in the United States, it is very interesting to understand that we all take it for granted that whistleblower laws can provide for a public-private partnership. But I can tell you, as many of you know yourselves, from your international work, we in the United States are unique in that we can take certain things for granted, because a public-private partnership implies at least two things: First, honest government. A citizen can go to the Justice Department and turn over such information, and a Justice Department official is not going to corruptly take advantage of that information for his or her own agenda, reporting back to that whistleblower's company for some private deal. It's almost shocking to us to even think about such things, but as we know full well, they do go on elsewhere. Not here. And the second is an active and engaged citizenry. With all the criticism about apathy in our society, the fact of the matter is that our citizenry is sufficiently engaged to come forward and bring these cases, knowing that there is a structure to do so, and that there is a track record of these cases going forward and being successful with rewards being paid to the individuals who bring them.

This captures the genius of America at its best: bipartisan support; simultaneously recognizing the potential and the limits of government; and a synergy of governmental resources, coupled with engaged citizens and their counsel.

Reforming Markets

What I am about to describe to you, I submit, is the New Era. Beyond reforming companies and industries, we will now aim to reform whole markets. Why must we do that? Because corruption distorts the free market, rewarding dishonesty, opaqueness, inefficiency, and ineffectiveness.

We all know that anti-corruption laws seek to remedy that. But, to the extent they come up short, and so often they do, honest businesses are at a competitive disadvantage. So we should ask ourselves: Why do they come up short? Here is why in my view: lack of information; lack of resources; and lack of will. That is particularly true when you get outside the borders of the United States and are relying on international enforcement mechanisms. Whistleblower laws can be the great equalizer, developing reliable information, matching it up with public resources, and incentivizing integrity. That is exactly what is needed to make economic sense out of our international anti-bribery laws. That will help honest companies throughout the world to compete effectively in the global marketplace. It will help U.S. companies, in particular, that adhere to the U.S. Foreign Corrupt Practices Act.

To date, the U.S. Chamber of Commerce has spent its capital opposing whistleblower laws, including the SEC whistleblower law. But I predict that that narrow and shortsighted view is about to be overtaken by events. First, these laws are here to

stay. Second, applied effectively, these laws will prove to be the great friend of U.S. business. We have seen this before.

We have seen this with the antitrust laws. When the antitrust laws first appeared, business was askance and opposed, but they learned that it can be a very helpful law in the face of unfair competition. By now, business has come to rely on private anti-trust lawsuits as an important remedial tool. We have seen it in the case of civil RICO. When civil RICO, the civil anti-racketeering law appeared, it too was looked upon askance and opposed by the business community. But consider what the insurance industry has done since, and how it has used civil RICO effectively when dealing with complex fraud in the insurance industry, involving arson for profit rings, no-fault rings, and the like. That industry has used that statute to expose those enterprises. I believe we are about to see it again with whistleblower laws. As I say, that fight will go beyond simply reforming companies or even industries; it will settle for no less than reforming whole markets.

Conclusion

In conclusion, let me borrow from the words of Bobby Kennedy, when in 1962, as U.S. Attorney General, he addressed the fight against business crime:

... It is our national faith that the system of competitive enterprise offers the best hope for individual freedom, social development and economic growth. Thus, every businessman who cheats on his taxes, fixes prices or underpays his labor damages the free enterprise system in the eyes of the world and so does a disservice to the millions of honest Americans in all walks of life.

Business crime is a problem for all America, not just the Federal Bureau of Investigation or the Department of Justice. The ordinary citizen, the businessman, the union official, and the public authority must stand up to be counted and refuse to be corrupted.

Who are these brave and intrepid individuals that Bobby Kennedy spoke about – those who stand up for integrity and refuse to give into the fraud and corruption which is the enemy of free enterprise? They are the people in this room and in particular those who we honor this evening.