

HCCA 2007 Compliance Institute: Government Panel

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Key Criminal Enforcement Issues

- **Sentencing Commission Update**
- **Waiver of Attorney/Client Privilege**
- **Deferred Prosecution Agreements**
- **Expectations around internal investigations**
- **International Compliance Issues**

Sentencing Commission Update

- Commission functioning same post-Booker as pre-Booker
- Organizational Guidelines still in effect – no plans to review for possible amendment
- Just adopted annual guideline amendments (terrorism, cargo theft, IP crimes, drug trafficking, sex crimes, criminal history, compassionate release)
- Awaiting Rita and Claiborne decisions

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Waiver of Attorney/Client Privilege

- DOJ: McNulty Memorandum (Dec. 206) revises Thompson Memo
- SEC: Still waiting possible change to Seaboard
- CFTC: Revised waiver policy following McNulty Memo

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Deferred Prosecution Agreements

- **Health Care: UMD of NJ, BMS, Pharmacia, United Memorial Hospital, Intermune, Roger Williams Medical Center; and AIG, AmSouth, AOL, Banco Popular, Computer Associates, GE/InVision Technologies, KPMG, Merrill Lynch, Micrus, Monsanto, NYRA, PNC Bank**
- **DOJ leadership encouraging use**
- **Allows company to avoid criminal guilty plea, but often involves penalty, admissions, monitor**
- **No standard form agreement**
- **DOJ only occasionally discloses publicly the factors that went into decision to forego indictment**

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Expectations Around Internal Investigations

- **DOJ expects companies to self-disclose and cooperate – for DOJ, this is hallmark of good corporate citizenship and good culture**
- **SEC McAfee decision (2006) -- “it is incumbent upon management to report [violations] to SEC”**
- **First 24 to 72 hours after potentially serious allegation are often critical**
- **Have plan/protocol ready if needed to address key issues (ie, document preservation)**

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International Compliance Issues

- **Foreign prosecutors focusing on health care fraud**
- **Interactions with foreign health care professionals often implicates US anti-bribery law – FCPA**
 - **Applies to all US issuers**
 - **All US persons, no matter where act occurs**
 - **Corporate subs, foreign controlled subs, agents and consultants of U.S. companies**
 - **Almost everyone who, while in US, commits act in furtherance of bribe to official outside U.S**

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FCPA Cases Involving Health Care

- **Recent resolutions:**
 - **Syncor (2002), Schering Plough (2004), Micrus (2005), Diagnostics Products Corp. (2005)**
- **Recent public disclosures:**
 - **AstraZeneca, Bristol Myers Squibb, GlaxoSmithKline, Immucor, Johnson & Johnson, Pfizer**

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