# POLICIES IN CONFLICT: UNDERMINING CORPORATE SELF-POLICING

EXTENSION OF REMARKS

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TABLE OF CONTENTS



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1. References to "corporate," "companies," and "corporation" are for convenience only.

## INTRODUCTION

This Article addresses one of the foremost, yet mostly unrecognized, barriers to the development of effective compliance and ethics programs in organizations: the existing legal system. While much has been made of government efforts to promote and recognize compliance and ethics programs, almost no attention has been given to an undercurrent in the legal system that has thwarted organizational self-policing and that threatens to undermine the policy basis for promoting effective compliance and ethics programs. This Article begins with a brief overview of the history of the field of compliance and ethics and the policy reasons for its development. It then reviews the policy conflicts between the existing legal system and the application of compliance and ethics. It surveys weaknesses in current approaches to implementing compliance and ethics programs that undercut the effectiveness of such programs. In the Conclusion, it discusses how to balance the conflicting policies, ending with proposed legislation to resolve the conflict.

## I. A BRIEF HISTORY OF COMPLIANCE & ETHICS

One of the most striking developments in corporate[1] governance and law enforcement in the past four decades is the emergence of

1. References to "corporate," "companies," and "corporation" are for convenience only. The scope of this Article includes all organizations as defined in 18 U.S.C. § 18 (2009). Interestingly, much of the analysis in the literature tends to be confined to discussions of for-profit companies, generally omitting other large organizations such as labor unions, other non-governmental organizations, religious organizations, governmental bodies, and universities, all of which have considerable capacity for law-breaking activity which can produce harm to society. *See, e.g.*, Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016) (focusing exclusively on U.S. corporations and corporate governance); Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 770–75 (2014) (corporate crime and corporate compliance); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 411–17 (2007) (corporate criminal liability); Wouter

corporate self-policing, or compliance and ethics programs. It is now routinely accepted that companies should have these programs to prevent and detect various forms of misconduct.[2] Recently, for example, the U.S. Department of Justice, in its 2016 Foreign Corrupt Practices Act Enforcement Plan and Guidance, reiterated that companies must take remediation steps in order to receive more lenient treatment, including "[i]mplementation of an effective compliance and ethics program."[3] Nor is the United States unusual in this.[4] Governments and enforcement agencies have recognized compliance programs in their regulatory and enforcement actions. In the competition law area, for example, authorities in France,[5] Chile,[6] Brazil,[7] the United Kingdom,[8] India,[9] Canada,[10] and Italy[11] have issued guidance documents and

P.J. Wils, *Antitrust Compliance Programmes and Optimal Antitrust Enforcement*, 1 J. ANTITRUST ENFORCEMENT 52, 52–53 (2013) (focusing on companies).

2. *See, e.g.*, SALLY BERNSTEIN & ANDREA FALCIONE, PWC, MOVING BEYOND THE BASELINE: LEVERAGING THE COMPLIANCE FUNCTION TO GAIN A COMPETITIVE EDGE 2 (2015), https://www.pwc.com/us/en/risk-management/state-of-compliance-survey/assets/pwc-2015-state-of-compliance-survey-final.pdf.

3. ANDREW WEISSMAN, CHIEF, FRAUD SECTION, U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 7 (April 5, 2016), https://www.justice .gov/opa/file/838386/download.

4. Amber C. Kelleher, Lori T. Martens & Joseph E. Murphy, *Globalizing the Compliance Program: Why and How*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES §§ 21:1–21:40, Westlaw (updated Oct. 2016).

5. AUTORITÉ DE LA CONCURRENCE, FRAMEWORK-DOCUMENT OF 10 FEBRUARY 2012 ON ANTITRUST COMPLIANCE PROGRAMMES 1 (2012) (Fr.), www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf.

6. FISCALÍA NACIONAL ECONÓMICA, PROGRAMAS DE CUMPLIMIENTO DE LA NORMATIVA DE LIBRE COMPETENCIA 20 (2012) (Chile), www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf (an unofficial English translation is available at www.compliance-network.com/wp-content/uploads/2012/10/Chiles-Compliance-Program.pdf ).

7. VINICIUS MARQUES DE CARVALHO ET AL., MINISTRY OF JUSTICE ADMIN. COUNCIL FOR ECON. DEF., GUIDELINES FOR COMPETITION COMPLIANCE PROGRAMS 39 (Braz.), http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf.

8. OFFICE OF FAIR TRADING, HOW YOUR BUSINESS CAN ACHIEVE COMPLIANCE WITH COMPETITION LAW 31 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf.

9. COMPETITION COMM'N OF INDIA, COMPETITION COMPLIANCE PROGRAMME FOR ENTERPRISES 14–15 (2008), http://www.competitioncommission.gov.in/advocacy/CCP0707 2008.pdf.

10. COMPETITION BUREAU, BULLETIN CORPORATE COMPLIANCE PROGRAMS 4–5 (2015) (Can.), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf.

indicated that compliance programs are taken into account in how companies are treated. In Singapore[12] and Malaysia,[13] the Competition Commissions have stated that compliance programs are taken into account in determining penalties. In the fight against corruption, the United Kingdom has enacted legislation that includes the existence of a compliance program as a substantive defense.[14] Italy has previously enacted such legislation.[15] Examples of countries that have mandated compliance programs include Russia,[16] Ukraine,[17] and Spain.[18]

What is meant by "compliance and ethics" throughout this discussion? At its most basic, the concept consists of two elements:

1) Management commitment to do the right thing; and

2) Management steps in order to make this happen.

The concept is that management controls what the organization does. If management actually wants the company to do the right thing, this commitment is the first essential element. The second part acknowledges the nature of organizations. The use of management tools

11. George A. LoBiondo, *Italian Competition Authority Issues Guidelines, Will Consider the Existence of a Compliance Program When Imposing Fines*, ANTITRUST UPDATE BLOG (Nov. 5, 2014), http://www.antitrustupdateblog.com/blog/italian-competition-authority-issues-guidelines-considers-existence-compliance-program-when-imposing-fines/.

12. COMPETITION COMM'N OF SINGAPORE, CCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY § 2.13 (2007), https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/ccs%20guidelines/ccsguidelinepenalty20071033.ashx.

13. MALAYSIA COMPETITION COMM'N, GUIDELINES ON FINANCIAL PENALTIES § 3.5.d (2014), http://www.mycc.gov.my/sites/default/files/handbook/Guildline-on-Financial-Penalties.pdf.

14. Bribery Act 2010, ch. 23, § 7 (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

15. Francesca C. Bevilacqua, *Corporate Compliance Programs Under Italian Law*, ETHIKOS & CORP. CONDUCT Q. (Nov.–Dec. 2006), http://www.singerpubs.com/ethikos/html/italy.html.

16. *Russian Federal Anti-Corruption Law*, GAN BUS. ANTI-CORRUPTION PORTAL, http://www.business-anti-corruption.com/anti-corruption-legislation/russia (last visited Jan. 4, 2017).

17. Yuliya Kuchma & Thomas Firestone, *Compliance Officers Required Under New Ukraine Anti-Corruption Law*, THE FCPA BLOG (Apr. 22, 2015), http://www.fcpablog.com/blog/2015/4/22/compliance-officers-required-under-new-ukraine-anti-corrupti.html (last visited Jan. 4, 2017).

18. Ley Orgánica 1/2015, de 30 de marzo, del Código Penal [Organic Law 1/2015 of March 30, 2015 of the Penal Code] (BOLETÍN OFICIAL DEL ESTADO [B.O.E.] 2015, 3439) (Spain).

is how organizations get things done. If a compliance and ethics program is to work, it needs to use all the management tools that organizations use to achieve their other important objectives.[19]

This Article uses the words "compliance *and ethics*." What is the reason for including "ethics"? There has been ongoing debate over the years pitting the concept of law- and rules-based compliance efforts versus ethics- and values-based approaches.[20] Lawyers are sometimes seen as taking a one-dimensional, "follow the details of the law or go to prison" course, while values-based methodologies alone may tend to discount laws as formalities and to appeal to employees' idiosyncratic sense of ethics.[21] The concept of "compliance and ethics" synthesizes the two; recognizing that law and threats without values may have little appeal to employees in companies,[22] but values without law can be subjective and vague, and even lead to rationalizing serious legal violations.[23] The focus instead is on moving employees to do the right thing through utilizing management techniques.[24] This confluence of the two concepts can be seen in some of the world's most important compliance and ethics standards.[25]

In defining the field, it is also useful to stake out what it is not, particularly since there has tended to be significant confusion on this score.[26] One of the earliest and most persistent misunderstandings was

19. As noted by Brian Sharpe, one of the leading lights of compliance in Australia, "[l]egal compliance is the *management discipline* of designing and implementing effective steps to ensure that an organisation actually complies with the laws, regulations and codes of practice relating to its operations." BRIAN SHARPE, MAKING LEGAL COMPLIANCE WORK 1 (1996).

20. *See, e.g.*, Lynn S. Paine, *Managing for Organizational Integrity*, 72 HARV. BUS. REV. 106, 107 (1994) (comparing "ethics management" and "compliance management," but retaining an emphasis on using management steps).

21. *See, e.g.*, *id.* at 111.

22. *Id.* at 110–12.

23. Advocates of the ethics and values approach tend to overlook the point that values can frequently conflict, and that law plays an important role in prioritizing values. For example, "loyalty" is certainly a value, but when it means covering up criminal conduct by a colleague, it can result in law-breaking. Being considerate of others also reflects a value, but calling a competitor to agree to end a price war would violate the Sherman Act and conflict with the value of free and open markets.

24. *See supra* note 19 and accompanying text.

25. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2015); *see also* ORGANISATION FOR ECON. CO-OPERATION AND DEV., GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE, annex II (Feb. 18, 2010), http://www.oecd.org/daf/anti-bribery/44884389.pdf.

26. *See infra* notes 27–31 and accompanying text.

that a code of conduct or code of ethics was an actual compliance and ethics program.[27] Of course, any realist will explain that a little booklet, no matter what it contains, is nothing more than a little booklet.[28] It is one, and only one, tool, and a passive one at that; on its own, it does nothing.[29]

Similarly, training is another tool sometimes mistaken for a compliance and ethics program.[30] However, training also is only one tool. While it is more dynamic than a little book, it is also not a program. Training can be useful or a waste of time, depending on how it is done. Boring lectures by lawyers speaking in monotones have little impact, except perhaps as punishment for employees too passive to escape.[31]

The same conclusion also applies to various forms of value statements, mission statements, and oaths and pledges by senior managers.[32] They are at best tools, but can also have a negative impact when they contrast with on-the-ground reality in the business.[33]

27. For example, there are those who rely on studies indicating that codes of conduct do not prevent misconduct for their own assertions that compliance programs do not prevent misconduct. *See infra* note 76 and accompanying text.

28. M. CASH MATHEWS, STRATEGIC INTERVENTION IN ORGANIZATIONS: RESOLVING ETHICAL DILEMMAS 63–82 (1988) (drawing on empirical work indicating that codes of conduct do not result in fewer violations); Lynn Paine et al., *Up to Code: Does Your Company's Conduct Meet World-Class Standards?*, HARV. BUS. REV., Dec. 2005, at 2 ("A code is only a tool, and like any tool, it can be used well or poorly—or left on the shelf to be admired or to rust.").

29. MATHEWS, *supra* note 28, at 63–82; Paine et al., *supra* note 28, at 2.

30. *See, e.g.*, L.V. Anderson**,** *Ethics Trainings Are Even Dumber Than You Think*, SLATE (May 19, 2016), http://www.slate.com/articles/business/the_ladder/2016/05/ethics_compliance_training_is_a_waste_of_time_here_s_why_you_have_to_do.html (equating training with compliance programs).

31. *See* Graham Gibbs, *Lectures Don't Work, But We Keep Using Them*, WORLD U. RANKINGS (Nov. 21, 2013), https://www.timeshighereducation.com/news/lectures-dont-work-but-we-keep-using-them/2009141.article.

32. Enron, in its annual report to shareholders, listed these core values:

> [1.] *Communication* [–] We have an obligation to communicate. . . .
>
> [2.] *Respect* [–] We treat others as we would like to be treated . . . .
>
> [3.] *Integrity* [–] We work with customers and prospects openly, honestly, and sincerely. . . .
>
> [4.] *Excellence* [–] We are satisfied with nothing less than the very best in everything we do. . . .

ENRON, ANNUAL REPORT 53 (2000), http://picker.uchicago.edu/Enron/EnronAnnualReport2000.pdf. Enron subsequently became synonymous with corporate misconduct.

33. *See, e.g.*, Jeffrey L. Seglin, *The Right Thing; The Values Statement vs. Corporate Reality*, N.Y. TIMES (Sept. 17, 2000), http://www.nytimes.com/2000/09/17/business/the-

When a company seeks to increase sales, decrease costs, or increase production, it would not rely on booklets, lectures, or mere slogans. So, too, in preventing crime and misconduct, there is no replacement for effective management tools.

Where is this field of compliance and ethics from? In 1988, Rutgers Professor Jay Sigler and I reported on the various related strains that we thought constituted this subject area and laid out the path for bringing this together as one field.[34] At the time, compliance efforts were generally confined to single risk areas such as antitrust or employment discrimination with little or no sense that efforts in any one area were related to efforts in other areas.[35] There were company codes of conduct,[36] but there was no field of compliance and ethics and no understanding that work in an area like antitrust compliance had anything to do with efforts to prevent employment discrimination or foreign bribery.[37]

In the past, each compliance effort was confined to its own silo.[38] There were efforts in and some literature on key areas of compliance focus: antitrust, dating to the 1950s;[39] employment discrimination and environmental compliance from the 1960s, workplace safety efforts, in the 1970s foreign bribery;[40] and in the 1980s insider trading and defense industry government contract fraud.[41] Separately, there were efforts in business ethics, such as the notable formation of the Center for Business Ethics at Bentley College in 1976.[42]

right-thing-the-values-statement-vs-corporate-reality.html ("Values statements that do not reflect reality can do more harm than good, by fostering cynicism and anger.").

34. JAY A. SIGLER & JOSEPH E. MURPHY, INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION, at vii–x (1988).

35. *Id.* at 19–30.

36. Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1601–02 (1990).

37. JOSEPH E. MURPHY & JOSHUA H. LEET, BUILDING A CAREER IN COMPLIANCE AND ETHICS: FIND YOUR PLACE IN THE BUSINESS WORLD'S HOTTEST NEW FIELD 2 (2007).

38. *Id.*

39. Pitt & Groskaufmanis, *supra* note 36, at 1578–82.

40. *Id.* at 1582–88.

41. *Id.* at 1588–97.

42. The Center for Business Ethics was founded in 1976 at what was then Bentley College and played a leading role in such developments as the creation of the Ethics Officer Association. *W. Michael Hoffman Center for Business Ethics*, BENTLEY U., http://www.bentley.edu/centers/center-for-business-ethics (last visited Jan. 4, 2017).

There was also a small amount of case law including one reported case involving World War II production controls,[43] the possible use of antitrust compliance programs as a defense in criminal actions,[44] and a nascent trend to consider preventative efforts as a defense in punitive damages cases.[45] Cases were also emerging that considered whether to provide special treatment to protect from abuse in discovery compliance efforts in employment discrimination[46] and patient safety efforts in healthcare.[47] There were emerging, innovative discussions about codes of conduct,[48] but there was no overarching sense of policy, and there was no recognition that compliance and ethics was actually a discrete field worthy of its own place.[49]

What we observed in *Interactive Corporate Compliance* was the commonality of purpose and of methodologies across the different risk areas.[50] In looking at complex organizations, the question was how best to internalize an approach that protected the public. By stepping back from each individual risk area, we could see several important points:

1. Large organizations had enormous potential for causing harm, yet the typical enforcement model depended on catching misconduct ex-post and imposing penalties.[51]

2. It was not practical for government to reach into all large organizations and control misconduct.[52] There were too many risk areas and too many organizations. A government

43. *See* Holland Furnace Co. v. United States, 158 F.2d 2, 5 (6th Cir. 1946).

44. AM. BAR ASS'N, SAMPLE JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 52–53 (James P. Kennedy et al. eds., 1984); Pitt & Groskaufmanis, *supra* note 36, at 1611–13.

45. *In re* P&E Boat Rentals, Inc., 872 F.2d 642, 652–53 (5th Cir. 1989).

46. *See, e.g.*, Flynn v. Goldman, Sachs & Co., 836 F. Supp. 152 (S.D.N.Y. 1993); Nash v. City of Oakwood, 90 F.R.D. 633 (S.D. Ohio 1981); Stevenson v. Gen. Elec. Co., 26 Fed. R. Serv. 2d 574 (S.D. Ohio 1978); Johnson v. S. Ry. Co., No. C77-175A, 1977 WL 91 (N.D. Ga. Dec. 27, 1977); Sanday v. Carnegie-Mellon U., 22 Fed. R. Serv. 2d 1424 (W.D. Pa. 1975); Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971); Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355, 361 (1987).

47. Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

48. Pitt & Groskaufmanis, *supra* note 36, at 1159–60.

49. SIGLER & MURPHY, *supra* note 34, at 104–06; MURPHY & LEET, *supra* note 37, at 2.

50. *See generally* SIGLER & MURPHY, *supra* note 34.

51. *Id.* at 119–22.

52. MURPHY & LEET, *supra* note 37, at 3.

powerful enough to do this would be too powerful on many unacceptable levels.

3. The tools that companies used to achieve their business ends were the same tools that would be needed to achieve the purpose of compliance and ethics.[53] Thus, for example, from the beginning, we knew that incentives and senior management support were essential.[54]

4. Compliance and ethics needed sufficient independence, position, and empowerment to achieve the desired ends.[55] It could not be just an attractive bauble; it needed to be a core part of the business.

5. If each risk area was isolated and broken out, they would lack the elements needed to be effective and would compete with each other. Separate, uncoordinated training, audit schedules, board reports, etc., for each risk area would create friction, waste, and pushback. Compliance and ethics needed to be recognized as a key power base in the organization, with each risk area tied into this function.

6. Within each organization, there were different constituencies. We championed a compliance constituency that would be an in-house advocate for doing the right thing.[56] We had seen this in operation in organizations and believed this model had enormous potential.[57]

Building on this framework, we also deduced that the development of strong compliance programs would depend on the government playing a key role.[58] Merely imposing tough punishment had not and

53. SIGLER & MURPHY, *supra* note 34, at 80–83.

54. *Id.*

55. *Id.* at 83.

56. *Id.* at 73.

57. *Id.* at 73, 147–48; *see also* D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 220 (2012) ("Both theoretical and empirical work in a number of different fields, including economics, accounting, finance, organizational theory, and sociology, provide important insights indicating that a firm is not merely a single entity in its actions. Rather, a firm has a number of various components, each of which has its own incentives that shape behavior.").

58. SIGLER & MURPHY, *supra* note 34, at 126–33, 143–65.

would not lead companies to move in the right direction; corporate insularity would not be overcome by these outside, ex-post efforts.[59] But, the use of a carrot and stick approach would open the path for this change.

This was the framework of our work as set out in *Interactive Corporate Compliance* and as subsequently developed. First, that compliance program efforts could not be unidirectional, with headquarters merely issuing codes and proclamations; rather, the program had to interact with all parts of the business.[60] And second, government also could not take a unidirectional approach, simply imposing fines after serious harm was committed; government needed to interact with companies to bring about diligent compliance efforts in the private sector.[61]

At approximately the same time *Interactive Corporate Compliance* was being written, the U.S. Sentencing Commission ("Commission") began examining the treatment of corporate crime in the federal courts, with the conclusion that the level of inconsistency was unacceptable.[62] At first, the Commission strove to achieve the economists' concept of "optimal deterrence,"[63] but realized the serious flaws in this concept.[64] Instead, it opted for a carrot and stick approach, providing for reduced sentences for companies that met certain standards, such as voluntarily disclosing violations and cooperating in investigations.[65] Most remarkably, the Commission also included having a compliance program as a mitigating factor.[66] The standard it applied for such a program was not the unidirectional approach of mere codes and

59. See CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975) for an excellent, in-depth analysis of this phenomenon.

60. SIGLER & MURPHY, *supra* note 34, at 79–107.

61. *Id.* at 126–33; 143–65.

62. Nolan E. Clark, *Corporate Sentencing Guidelines: Drafting History*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, §§ 2:1–2:34.

63. *Id.* §§ 2:7–2:8; Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 210 n.30 (1993) (providing sources on the "optimal penalties" theory).

64. Nagel & Swenson, *supra* note 63, at 219–22.

65. *Id.* at 237.

66. *Id.* at 227–28.

legalistic lectures; rather, the Commission called for programs that were truly interactive.[67]

The Commission's work has played a defining role in shaping the field of compliance and ethics.[68]

## II. THE RATIONALE AND POLICIES

What was the driving force behind *Interactive Corporate Compliance* and the Commission's approach? One hallmark of the past century has been the development of huge corporations and other large organizations.[69] Accompanying this development has come the realization that great organizations can cause great harm.[70] The impact of such harm can be too great for society merely to await a disaster and then react.

Two industry examples illustrate this point. In the nuclear power industry, society and governments do not rely merely on punishment to deter transgressions; the stakes are too great.[71] Instead, regulation and control is integrated into the industry.[72] Similarly, in airline safety,

67. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6)(B) (U.S. SENTENCING COMM'N 2004) (requiring such interactive steps as auditing, monitoring, systems for employees to report problems and raise questions, and evaluations of program).

68. Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, *in* CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2015, at 87, 97 (2015) (stating the Guidelines' standard "continues to be the most important definition of what constitutes an effective program. Indeed, the Guidelines' definition has substantially shaped the field of compliance").

69. *See, e.g.*, Jed Greeg & Kavaljit Singh, *A Brief History of Transnational Corporations*, GLOBAL POL'Y F. (2000), https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html.

70. For a dramatic recitation of examples, see RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE: BIG BUSINESS POWER AND THE ABUSE OF THE PUBLIC TRUST 14–17 (1988).

71. *See infra* notes 72–75 and accompanying text.

72. *See Backgrounder on Oversight of Nuclear Power Plants*, U.S. NUCLEAR REG. COMM'N, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/oversight.html (last updated May 18, 2016) ("[NRC's] resident inspectors are stationed at each nuclear power plant. Resident inspectors provide first-hand, independent assessment of plant conditions and performance. Resident inspectors live near the nuclear power plant where they are assigned. They maintain offices at the plant during regular business hours and spend a portion of their time at the plant during weekends and evenings. Resident inspectors significantly increase the NRC's onsite monitoring of the plants. In addition, they greatly reduce the time needed to respond to events at the plant.").

airline regulators work hand in hand with industry.[73] Legislators, regulators, and judges all fly; but none are satisfied with the mere approach of "getting even" after they, personally, have died as a result of corporate malfeasance.[74] Rather, prevention is the priority.[75]

### *A. Objections to Compliance and Ethics*

As a new approach, compliance and ethics remains subject to challenge and questioning.[76] One challenge to this approach is the assertion that a focus on compliance and ethics is not necessary.[77] If the punishment of corporations is calculated correctly, this will prevent violations. This is the concept of an "optimal" deterrent.[78] According to this theory, business crime is the result of rational economic analysis.[79] If the payoff from a violation is greater than the cost of penalties times the risk of being caught, then the businessperson will commit the crime.[80] This theory certainly could make sense in simple scenarios, such as evaluating whether to risk a parking ticket when late to an appointment.[81] However, this approach is less applicable to the broad

73. FAA, AVIATION SAFETY INSPECTOR, Gs-1825, Announcement FAA/ASI-006, , http://ntl.bts.gov/data/letter_nz/safety.pdf (describing FAA on-site inspection activities) (last visited Jan. 4, 2017).

74. *Id.*

75. *Id.*

76. *See, e.g.*, Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491–93 (2003) [hereinafter Krawiec, *Cosmetic Compliance*]; Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. L. REV. 571, 572 (2005) [hereinafter Krawiec, *Organizational Misconduct*]; Stucke, *supra* note 1, at 770–75; Wils, *supra* note 1, at 55.

77. *See* Krawiec, *Cosmetic Compliance*, *supra* note 76, at 491–93; Krawiec, *Organizational Misconduct*, *supra* note 76, at 572; Stucke, *supra* note 1, at 770–75; Wils, *supra* note 1, at 55.

78. Nagel & Swenson, *supra* note 63, at 210 n.30.

79. Christopher Kennedy, *Criminal Sentences for Corporations: Alternative Fining Mechanisms*, 73 CAL. L. REV. 443, 447 (1985).

80. *Id.*

81. Gary S. Becker, Dep't of Econ., U. Chi., Nobel Lecture: The Economic Way of Looking at Life 38, 41 (Dec. 9, 1992), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1992/becker-lecture.pdf. Professor Becker illustrated the rational economic approach by using an example in his own life, calculating the risk of a parking ticket as compared to his need to be on time for a meeting. *Id.* Becker did note, however, that he had "tried to pry economists away from narrow assumptions about self interest. Behavior is driven by a much richer set of values and preferences. The analysis assume[d] that individuals maximize welfare *as they conceive it*, whether they be selfish, altruistic, loyal, spiteful, or masochistic." *Id.* at 38. This does not necessarily support the simplistic

range of misconduct that applies to organizations.[82] One of the significant flaws with this approach is seen in the concept of agency theory.[83] The agents who carry out organizational misconduct have different payoffs and risks than the organization as a whole.[84] The threat to punish the organization misses the target of the specific agent.[85]

Another flaw of the Becker approach is that humans are not "econs."[86] The work of behavioral economists has demonstrated some of the motivational factors that affect behavior.[87] So, while optimal punishment continues to have a following—particularly in antitrust, where economic theory appears to hold greater sway[88]— those with the greatest concern about the public cost of harm from misconduct by large organizations generally favor a broader range of steps designed to interdict misconduct earlier in the process and with greater recognition of the complexity of human behavior.[89]

idea that there is an optimal deterrent, mathematically discoverable by simply determining monetary penalties times probability of detection versus probable financial gain.

82. Scott Killingsworth, *Modeling the Message: Communicating Compliance through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 966 n.15 (2012) ("Though this model is intuitively persuasive and often right, behavioral economists and cognitive psychologists have made mincemeat of the 'rational' assumption, exposing a large number of variables that distort our perception of risks and rewards, or influence whether proposed behavior is even perceived as noncompliant or punishable in the first place.").

83. *See* Sokol, *supra* note 57, at 230.

84. *Id.*

85. *Id.*

86. Lawrence M. Mead, *Econs and Humans*, 9 CLAREMONT REV. BOOKS 18 (2009), http://www.claremont.org/crb/article/econs-and-humans/ (last visited Jan. 4, 2017) (reviewing RICHARD THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009)) ("[T]he efficient calculators imagined in economic theory, able to weigh multiple options, forecast all the consequences of each, and choose rationally.").

87. *See, e.g.*, DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES 9 (2012).

88. Sokol, *supra* note 57, at 201–02 (explaining that the U.S. and other countries generally accept the Chicago School approach relating to cartel enforcement, which is based on the optimal deterrence framework).

89. Stucke, *supra* note 1, at 778. Among the human factors that confound those who try to reduce human nature to economics, and focus exclusively on the degree of punishment, is the basic factor of arrogance. *Id.* at 781 n.65. For someone who believes they are too smart to get caught, the threat of punishment is irrelevant. *Id.* No mathematical formula can accurately capture this variant, which may be completely irrational but is extraordinarily powerful. As Professor Stucke accurately noted,

Another school of thought is that compliance and ethics programs do not work.[90] It is asserted that despite compliance programs, violations occur, and thus programs do not work.[91]

Fundamentally, however, trying to determine whether compliance and ethics work is the same as asking if management works. Do management steps work to control organizations? The question itself sounds misdirected because management steps are the core of organizations; there is no other way to run organizations other than through the use of management steps. So, too, if there is any desire in the organization to do the right thing, then there will be a compliance and ethics program because it will take management steps to make this (or anything else) happen in an organization.[92] Whether programs work will, ipso facto, be a function of what was done. Managers decide what direction to take and then use management tools to achieve results.[93] So, too, if there is a management commitment to doing the right thing and management steps to make that happen, this is not merely the best way to make things happen; it is the only way.[94] Logically, then,

"executives—given their dispositional biases, their imperfect willpower, and the prevailing situational factors—do not behave like their rational neoclassical economic counterparts." *Id.* at 780.

90. *See* Krawiec, *Cosmetic Compliance*, *supra* note 76, at 487, 491 (decrying a supposed "enthusiastic embrace" for what the author calls "compliance structures"—presumably meaning compliance programs—because there is not enough evidence that they work); Krawiec, *Organizational Misconduct*, *supra* note 76, at 572. These assertions also ignore the impact of factors in the legal system that undercut compliance and ethics programs. *See infra* Part IV.

91. Stucke, *supra* note 1, at 791 ("[D]espite the Guidelines' financial incentive, ineffective compliance and corporate crime persist."). Of course, if the existence of misconduct proves a system does not work, one would quickly conclude that the existing legal system has been profoundly unsuccessful. Interestingly, Professor Stucke built much of his conclusion based on antitrust examples, despite the fact that antitrust enforcers in the United States and the European Union had deliberately not participated in any incentive-based experiment to promote compliance programs and relied exclusively on the old system of strict liability. *Id.* at 774. Thus, antitrust may be the one area already following Professor's Stucke's approach of relying on intrinsic motivation, rather than an example of his asserted failure of an incentive-based system.

92. BRIAN SHARPE, MANAGEMENT BEATS MYSTIQUE: COMPREHENSIBLE DUE DILIGENCE 8, 14 (1997) (on file with author) ("Moreover, it becomes clear that what is required is a genuine management system as managers would normally understand that term, so that good operating procedures and management supervision are crucial. Moreover, a true management system is the only way to ensure that things are done correctly throughout a large organization.").

93. *Id.*

94. *Id.*

whether something works in an organization is always a factor of the level of commitment and the nature of the steps taken to achieve the results.

Other elements of pushback involve the notion that it is not possible to assess programs and that "sham" programs will get credit from enforcers, regulators, and courts.[95] Partly, this is built from a misconception that compliance programs are essentially paper exercises dependent on codes of conduct and perhaps lectures by lawyers.[96] This view tends to be expressed by those who are not the compliance and ethics professionals who have conducted actual assessments of programs.[97] For the author, having done assessments both for companies of their own programs and for government,[98] the concern is understandable as a reaction to anything that is new and unexplored.[99]

95. Wils, *supra* note 1, at 67 ("It is thus not possible for authorities and courts to distinguish reliably and at reasonable cost between situations where antitrust compliance programmes are part of a culture and practice of real compliance and situations of symbolic or cosmetic compliance."). Professor Wils also claims that granting penalty reductions for companies having a compliance program would allow companies to retain the financial benefits of their violations. *Id.* at 70. However, this appears to confuse punishment, which is all that would be relieved in an environment of interactive corporate compliance with restitution or damages which would not be eliminated or even reduced. *See* Damien Geradin, *Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils* 1(2) J. ANTITRUST ENFORCEMENT 325 (2013).

96. *See supra* notes 27–31 and accompanying text.

97. *See supra* note 77 and accompanying text.

98. For a practical guide for government investigators to assess programs, see JOSEPH E. MURPHY, ASSESSING COMPLIANCE AND ETHICS PROGRAMS: A GUIDE FOR ENFORCERS [hereinafter MURPHY, ASSESSING COMPLIANCE AND ETHICS PROGRAMS] (on file with author). The author has also provided guidance for enforcers and regulators on how to assess programs, including a presentation for the U.S. Securities and Exchange Commission's Foreign Corrupt Practice Act (FCPA) Task Force entitled "Don't Get Conned." There are also plus factors that are readily identifiable in programs that indicate whether a program is creditworthy. *See* Joseph E. Murphy, Draft, *"Wow" Factors in Compliance & Ethics Programs*, RADICALCOMPLIANCE.COM, http://radicalcompliance.com/wp-content/uploads/2016/05/Wow-Factors-Murphy.pdf (last visited Jan. 4, 2017).

99. Where the concern may have validity is the attempt to pre-judge programs and certify them in advance. This is very different from the context of actual cases and the assessment of programs ex-post in litigation. The entity doing the ex-ante assessment is likely limited to examining a pre-developed package presented by a company, and thus at some point simply trusts the company requesting pre-certification. This certainly undercuts credibility. If companies are also allowed to select the entity that does the pre-certification assessment, then there will be enormous pressure on certifiers to give positive results. A certifier that has a reputation as a "tough marker" will be shunned in favor of those who are more "flexible." *See* Rachelle Younglai & Sarah N. Lynch, *Credit*

In the course of a government investigation, there is no trust involved. In the investigation of wrongdoing, it is already established the organization violated the public's trust by breaking the law. The company now bears the difficult burden of establishing that there were individual violators who went to significant effort to hide their wrongdoing.[100] The government, for its part, can start making its assessment of the program at the beginning of the investigation.[101] Interaction with the company at a variety of levels during the course of an investigation provides an opportunity to assess the reach and impact of the program.[102] For those individual employees tied into the

*Rating Agencies Triggered Financial Crisis, U.S. Congressional Report Finds*, HUFFINGTON POST (Apr. 13, 2011), http://www.huffingtonpost.com/2011/04/13/credit-rating-agencies-triggered-crisis-report_n_848944.html, discussing conflicts of interest involved when those being rated by the ratings agencies are the same ones who selected and paid the raters. There can thus be an artificial bias both in the process and in the selection of certifiers. While this can be remedied by controlling the certification process to remove trust and biased selection by the company being certified, it will not be as focused as an examination ex-post in the context of a specific violation.

100. *See* Press Release, U.S. Dep't of Justice, Former Morgan Stanley Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-534.html. In this prominent case where the Department of Justice declined to prosecute a company for an alleged violation of the FCPA based in part on the company's compliance and ethics program, the individual defendant "admitted [] that he actively sought to evade Morgan Stanley's internal controls in an effort to enrich himself and a Chinese government official," said Assistant Attorney General Lanny A. Breuer. *Id.* "This defendant used a web of deceit to thwart Morgan Stanley's efforts to maintain adequate controls designed to prevent corruption." *Id.*

101. One of the foremost proponents of the view that it is impossible for the legal system—courts, prosecutors or regulators—to assess programs competently, undercuts her position by accurately observing that "employees are keenly aware of the extent to which such policing measures are cosmetic . . . ." Krawiec, *Organizational Misconduct*, *supra* note 76, at 577. In my experience, this is exactly right, and it is one of the many elements that make it relatively straightforward to determine if a program is sham in the context of litigation. If thousands of employees know something, it is not particularly challenging to discover this; this is especially so in a litigation context where the company bears the burden of proof.

102. There is no reason for investigators to make the mistake of simply waiting for a company to present a "dog and pony show"; asking employees a few key questions before a grand jury or otherwise in the course of the investigation will provide important insight on the bona fides of a compliance and ethics program. *See* MURPHY, ASSESSING COMPLIANCE AND ETHICS PROGRAMS, *supra* note 98, at 9; *see also* Jaclyn Jaeger, *Defining Compliance Program Effectiveness*, 13 COMPLIANCE WK. 26, 26 (2016) (quoting Steven Cohen, then-associate director, Division of Enforcement, U.S. Securities and Exchange Commission (SEC): "I like to ask compliance officers to come in to hear about their compliance programs at the outset of an investigation . . . . Lots of times, lawyers look at

violation, the more the effectiveness of the program is established, the greater the risk of punishment for them. Thus, they have no interest in helping protect the company at their own expense. In such an adversarial environment, where the investigator has access to the inner parts of the company, the burden is on the company, and the focus is on the compliance efforts in the particular area at issue,[103] the risk of a wrong result is probably less likely on the issue of the compliance program than it is on the overarching issue of whether the entity committed the violation in the first place. In this context, determining whether a real compliance and ethics program existed is no more difficult than other issues of fact routinely addressed in litigation.[104]

me quite stunned when early on in an investigation I ask not only to hear about the compliance program, but recently I've even asked to meet the chief compliance officer").

103. Government investigators in criminal cases have the opportunity to question those within the company before a grand jury. In any investigation there are typically opportunities to talk with those associated with the company. Reviews of documents and company records also provide insight into what was happening in the company's program. For example, if, through all the interviews, questioning, and reviews of documents, there is very little trace of a compliance program, this is a strong signal to the investigators that the program is not effective.

104. Professor Krawiec's concern that companies will routinely get credit for "cosmetic compliance" rests on an assumption of substantial incompetence in the legal system. *See* Krawiec, *Cosmetic Compliance, supra* note 76, at 490–91. We must assume judges and enforcers do not have the discernment to distinguish a sham program from a real one. *Id.* By contrast, in the context of strict liability, she accepts that these same judges and enforcers are able to make very sophisticated determinations of liability and guilt relating to organizational violations, even with the government carrying the burden of proof. Krawiec, *Organizational Misconduct*, *supra* note 76, at 577.

But there is another striking paradox in her thesis. The professor, as noted, acknowledges that if a program is sham, the employees will be keenly aware of this fact. *Id.* at 577. How then would a company effectively engage in having a sham program that would nevertheless reap benefits if investigated by government and then assessed by a judge?

We start with the reality that, in a criminal case, the government will have already concluded the company has committed a crime, and thus is likely to be highly skeptical. There is also the reality that in a major investigation, the government will be reviewing records, talking with others in the field, and interviewing employees. In criminal cases, employees, former employees, managers, and even customers, victims, suppliers, and competitors may be called to testify and may volunteer information as well. They also have ready access to the enforcers—information is just an email away.

For the program to achieve the company's supposed objective of getting credit from the government for a sham program, the company must have successfully convinced all the employees (and perhaps others as well) that it is genuinely serious about the program. Also, to get credit, a company must implement all the management steps required under the Sentencing Guidelines (steps critics of compliance and ethics programs often minimize, edit down, or ignore, instead disparaging things like codes of

There are even those who posit that programs are used to commit violations, rather than prevent them.[105] This may be either intentional or an unintended result of having a program. On the latter point, for example, employees engaged in price fixing might learn from training that their acts violate the law and also understand better how to conceal the misconduct. It has also been asserted that a company would search out violations in order to better conceal them from discovery.[106]

On the point that there could be inadvertent negative impact from a program, this is no different than the risks possible from any management step. The idea that education might enable better law breaking proves far too much and leads to absurd results. If this concept were legitimate, then the worst perpetrators would be the enforcers who publicize their cases for all in industry to know. Yet, no rational person would criticize government for doing this. So, too, with compliance training, the possibility that someone might learn how to

conduct, which are not mentioned in the Sentencing Guidelines, as if these were all that a program required). Thus, there must be, inter alia, practical training, internal controls on misconduct, a chief compliance officer, screening of promotions, support by senior management, oversight by the board, investigations, discipline, use of incentives to promote the program, regular evaluation of the effectiveness of the program, a reporting system, audits and monitoring, checks to ensure the program is at least as good as those in peer companies, and regular risk assessment. (William Kolasky and I determined that the actual steps are closer to twenty, rather than the seven nominally listed in the Guidelines. *See* Joseph E. Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26 ANTRITRUST 61, 63 (2012)). It is worth remembering that these steps are minimums, not options, so if the company fails to prove even one element it fails to meet the minimum. The program must also be "diligent" to receive any credit.

The company must also do this in a way that convinces the employees (and likely others who interact with the company) that the program is serious. Otherwise, the government will quickly figure out the company's game. This is no small task, as any compliance and ethics professional can attest. Employees also tend to be skeptical in assessing management's intentions.

All of this is necessary to convince the government and the employees—likely an impossible task if the program is actually a sham. But the next step is also necessary. The company must achieve all this without causing the employees to act in response to the program or to take it seriously in their actual conduct—otherwise the purpose of this enormous charade is lost. In other words, it must both convince the employees the program is real, yet simultaneously convince them not to act on the messages of the program. (Note, too, that program activities like training and communications prime the pump for whistleblower calls to government agencies if the company is not responsive.) To succeed, it must first accomplish the impossible, and then must surreptitiously induce all those it has convinced to ignore what they have been convinced is real.

105. Wils, *supra* note 1, at 61.

106. *Id.*

break the law by learning about the law would suggest that the best way to prevent violations of the law is not to let anyone know about the law, i.e., to rely on regulation by ambush. The practical point that people may misuse knowledge is nothing more than background noise and of no value for any policy purpose. It is also balanced by the point that other, knowledgeable employees who see signs of improper conduct now know enough to raise issues and report possible violations.

For someone with experience in staffing a compliance program, the idea of creating a compliance and ethics program specifically for the purpose of committing violations of law is rather like using a blowtorch to find a gas leak. If a program is developed with all the management steps required in standards like the Sentencing Guidelines[107] and the Organization for Economic Co-operation and Development (OECD) Good Practice Guidance,[108] management will have set in motion a monster that can quickly spin out of its control. Enabling employees and managers with a message of compliance and ethics is a terrible way to promote and cover-up wrongdoing; instead, it is an excellent way to breed angry and resentful employees who will be dangerous witnesses against the company and likely sources of external whistleblowing. Fundamentally, there are far more effective ways to commit and cover up crimes than creating a potential do-gooder Frankenstein within the corporation.[109] The point here is not to dispute that there are certainly actors in corporations who pursue crime and misconduct. Rather, it is that they would do so in a way that was efficient with the least chance of being uncovered. Training thousands of employees on what the law is, providing helplines for them to raise issues, issuing guides that explain the law, promulgating ethics standards, etc., would be a particularly wasteful and risky way to promote criminal conduct. It is much more likely that those who posit this concept do not understand what a compliance and ethics program involves, and still view it as the old approach of paper and preaching by lawyers.

The critics of government efforts to recognize and promote effective compliance and ethics programs are, however, entirely consistent with the underlying current in the legal system that undercuts compliance

107. U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2015).

108. ORGANISATION FOR ECON. CO-OPERATION AND DEV., *supra* note 25.

109. *See Introducing the FAST RAT Program*, COMPLIANCE NETWORK, http://www.compliance-network.com/wp-content/uploads/2012/09/Fast-Rat-Booklet-copy-PDF.pdf (last visited Jan. 4, 2017) (parodying the way to take advantage of competition law voluntary disclosure programs without the expense and risks of an antitrust compliance program).

and ethics efforts, and with the approach of those enforcers and regulators that fail effectively to promote compliance and ethics programs, remaining completely wedded to the old system that is familiar to them.[110]

110. *See infra* Part IV. Those who propose simply to banish compliance programs from the process and rely on strict liability have to ignore the substantial flaws in relying solely on the old system. This approach depends fundamentally on a legal fiction that large, publicly traded companies are just big human beings, or the alternative idea that simply punishing managers will deter all corporate crime. They seem to believe that the existing strict liability litigation system is fine, or only needs penalties to be increased to the theoretical optimum level; in this view, decreasing penalties because companies have made efforts to prevent violations will not work. But if companies are punished severely enough, this is all that is needed.

Among the flaws in this approach when dealing with large publicly-traded companies are:

1. Corporate "criminals" do not pay the fines; effectively the public shareholders pay the fine. These include pension funds and sovereign wealth funds, i.e., retirees or a country's citizens who pay taxes. An instructive example is a case involving hundreds of millions in penalties imposed on VimpelCom for corrupt practices. Richard L. Cassin, *VimpelCom Reaches $795 Million Resolution with U.S., Dutch Authorities*, FCPA BLOG (Feb. 18, 2016, 5:28 PM), http://www.fcpablog.com/blog/2016/2/18/vimpelcom-reaches-795-million-resolution-with-us-dutch-autho.html. However, later in the news stories it is revealed that VimpelCom is part of Norway's Telenor. *Id.* Norway's government owns fifty-four percent of Telenor. *Id.* Thus, Norway's taxpayers pay fifty-four percent of the fine. *Id.* Corporate managers, in effect, write a check on the accounts of these shareowners who had nothing to do with the violation.

2. Companies' shares are traded from moment to moment. Bryant Urstadt, *Trading Shares in Milliseconds*, MIT TECH. REV. (Dec. 21, 2009), https://www.technologyreview.com/s/416805/trading-shares-in-milliseconds/ (discussing high-speed, high-volume trading). Even if it made sense to punish shareholders, no fine reaches back to hit past shareholders who owned stock when the crime occurred.

3. If the theory of optimal punishment was correct, thus removing the need to promote compliance programs, then all corporate crime would have disappeared after Arthur Andersen suffered the corporate death penalty. *See generally* Stephan Landsman, *Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 CHI.-KENT L. REV. 1203 (2003). It is impossible to be more "optimal" than killing an entire company.

4. If simply punishing managers in the optimal amount worked, then all corporate crime would have ceased after WorldCom's Bernie Ebbers was effectively sentenced to life in prison. Krysten Crawford, *Ebbers Gets 25 Years*, CNN MONEY (Sept. 23, 2005), http://money.cnn.com/2005/07/13/news/

newsmakers /ebbers_sentence/. Short of death, what punishment could be more optimal for an individual than life in prison?

5. Agency theories point out that the motives of individual actors in the company, who are the ones to actually engage in conduct that breaks the law, differ from what is in the best interests of the company; they get their pay, promotions, perks, and future careers set long before the corporate fine hits. Sokol, *supra* note 57, at 230.

6. Markets do not necessarily punish wrongdoing; they punish uncertainty. Typically, when the enormous fine is announced, thus showing a matter has ended, the company's stock goes up. *See, e.g.*, Jill Treanor & Dominic Rushe, *Banks Hit by Record Fine for Rigging Forex Markets*, GUARDIAN (May 20, 2015), https://www.theguardian.com/business/2015/may/20/banks-hit-by-record-57bn-fine-for-rigging-forex-markets ("Barclays was fined £1.5bn by five regulators, including a record £284m by the UK's Financial Conduct Authority. . . . Yet Barclays' stock market value rose by £1.5bn as a result of a 3% rise in its share price amid relief the fine was not even larger. RBS's shares also rose 1.8%. The increases came even though the regulators said there could be more fines to come.").

7. Fines sufficient to impact large companies would likely over-deter socially beneficial conduct. William T. Allen, *Commentary on the Limits of Compensation and Deterrence in Legal Remedies*, 60 L. & CONTEMP. PROBS 67, 75 (1997).

8. Huge fines and potential bankruptcy for large companies cause enormous collateral damage to innocents, including employees, suppliers, customers, and neighboring communities *See Andersen Died in Vain: 10 Years After an Ill-Fated Indictment*, CHI. TRIB. (Mar. 14, 2012), http://articles.chicagotribune.com/2012-03-14/opinion/ct-edit-andersen-20120314_1_andersen-s-professional-standards-group-andersen-case-founder-arthur-andersen.

9. All fine money comes from somewhere; if it is removed from the market, it is not then available for employment, investment, and other productive uses.

10. Fines are no longer typically imposed by judges after trials; they are determined by prosecutors and regulators. The ability to force billion dollar-plus penalties puts enormous power in the hands of unelected officials. *See* Weissmann & Newman, *supra* note 1, at 414 ("Contrary to the system of checks and balances that pervades our legal system, including the criminal law with respect to individuals, no *systemic* checks effectively restrict the government's power to go after blameless corporations."); *id.* at 425.

11. For its power, the law depends greatly on legitimacy and an appearance of fairness. When companies that have made substantial efforts to prevent wrongdoing are treated the same as those who willfully flout the law, the fundamental unfairness of the process and result undercuts the law's legitimacy and may even encourage an "outlaw" approach.

Nothing in the critiques takes away from the basic truth that is the basis for the emphasis on and promotion of compliance and ethics:

1) Organizations, but especially large ones, are sources of enormous potential harm.

2) The legal system takes action only after the harm is done.

3) In organizations, there is one, and only one, way to accomplish anything: the use of management steps.

4) Effective management techniques work; poor ones do not.

5) Government, through its system of incentives, can move companies to use management steps that work, i.e., effective compliance and ethics programs.

6) Companies do not do this spontaneously; otherwise they would already be there in operation.

Currently, the message from government and the legal system is, at best, mixed, with some incentives, mostly weak and not well-directed.[111]

This is not to say that violators, including corporate criminals, should escape punishment (and certainly not the compensation of victims, which some commentators forget is different from punishment), but only that it is foolish to do this without a sense of reality. Society will rightly demand that any actor, including a company, be held accountable for wrongdoing—at least wrongdoing that it could have controlled. But unlike the fictions of the old approach, the compliance and ethics concept looks at how organizations actually work, walks away from relying on fiction, and uses management steps to achieve the desired results. No human system is perfect, but given the flaws in the current model, there can hardly be a presumption that the current system should operate alone without considering more practical and targeted approaches.

111. One of the strongest critics of compliance programs, Professor Krawiec, asserts that the legal system has gone too far in providing benefits for companies having compliance programs. *See* Krawiec, *Cosmetic Compliance*, *supra* note 76, at 487; Krawiec, *Organizational Misconduct, supra* note 76, at 574, 596, 597, 610. In language that is striking for its tone, Professor Krawiec refers to "the legal regime's extreme reliance on internal compliance structures" and its "enthusiastic embrace," Krawiec, *Organizational Misconduct, supra* note 76, at 574, then states that "the U.S. legal regime has so quickly transitioned to internal compliance-based liability regimes," asks why "the law place[s] so much reliance on factors, such as internal compliance structures," refers to "the legal regime's heavy reliance on internal compliance structures," *id.* at 596, and builds to a crescendo of "the legal system's extreme reliance on internal compliance structures." *Id.* at 610.

But the facts show a different reality; after twenty-five years of experience with the Sentencing Guidelines and other incentive approaches, there are precious few examples where one could point to specific benefits tied to compliance and ethics program efforts. Likely there are at least as many examples where companies were made to pay a price for even trying to have effective programs.

Consider, for example, an area Professor Krawiec includes in her examples of alleged overemphasis, as a case where companies "escape" liability: accountability for harassment. *Id.* at 593–96; *Krawiec*, *Cosmetic Compliance, supra* note 76, at 506–09. In the only type of case where a company can avoid liability for harassment based on compliance activities, a company itself in fact commits no offense and reaps no gain; rather, it is held accountable for obnoxious conduct by individual managers. Krawiec, *Cosmetic Compliance*, *supra* note 76, at 506–07. Here, in only extremely narrow circumstances, a company may defend itself for responsibility for the bad conduct of individuals as long as there was no tangible employment impact. *Id.* at 507. To do this, a company which has received no business benefit from the actions of a miscreant manager which it did not authorize, endorse, or support, must thread the needle exactly in order not to be held liable. And even in this limited area, local authorities remain free to undermine a compliance and ethics approach by creating a different standard under local law that ignores compliance efforts. *See* Zakrzewska v. New School, 928 N.E.2d 1035, 1036 (N.Y. 2010) (finding that a defense available at the federal level did not apply under New York City's Administrative Code); *see also* State Dept. of Health Servs. v. Superior Court, 79 P.3d 556 (Cal. 2003) (holding that California law creates strict liability but applying the common law doctrine of avoidable consequences to limit damages plaintiff could recover).

In the second employment discrimination area that the Professor decries as going too far, we find that for punitive damages, which are supposed to be extraordinary civil penalties for outrageous conduct, a company can prove that discriminatory conduct ran against its diligent preventive efforts. Krawiec, *Cosmetic Compliance*, *supra* note 76, at 504–05. Even so, the company remains fully liable for any damages, but is not held to the extra penalty associated with punitive damages. *Id.* In no case does a company "escape" anything. These timid benefits are treated as if they were a license for companies to run rampant in pursuing discriminatory conduct, whereas there appears to be nothing in this field suggesting that companies are now engaged in rampant disregard for the law. However, it would have been better policy for the Supreme Court to have used the full Sentencing Guidelines compliance program standards rather than just promoting a few elements such as a policy and a reporting system.

Regarding the Sentencing Guidelines, as innovative as they were, their impact has been almost entirely symbolic; they addressed a system that, for the most part, no longer existed. Major companies have long since opted out of the American criminal trial system. Case resolutions are negotiated with prosecutors. *See* Randall Eliason, *The Crisis in Corporate Criminal Liability*, SIDEBARS (Jan. 12, 2015), https://rdeliason.com/2015/01/12/corporate-criminal-liability/. Thus, it is notable that none of Professor Krawiec's assertions that the legal system has gone too far in promoting compliance programs is accompanied by what would be expected: a string of examples of major companies escaping punishment or even having it reduced under the Sentencing Guidelines. There simply have not been cases or trials where compliance programs at major companies are part of the judicial process in setting sentences. How courts would address the issues of fact relating to compliance programs is as of yet unexplored because it has not arisen.

At the same time, there are also strong signals that companies should *not* use effective techniques because they will be turned against them by the legal system.[112] The result is that programs today are far from where they should be to have a real effect in preventing and detecting corporate and organizational wrongdoing.

## III. CONFLICTS IN THE SYSTEM THAT UNDERCUT COMPLIANCE AND ETHICS

There is no question the Sentencing Guidelines have had a dramatic impact, but it cannot be argued that this is because major companies have had occasion or been able to convince a judge that they met the rigorous standards of the Sentencing Guidelines.

The Department of Justice ("Department")) in the U.S. Attorney's Manual, and before in official policy guidance to federal prosecutors, has pointed out that compliance programs are to be taken into consideration. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.300 (2009), http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf; *see also* Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys, Regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

In the current enforcement environment, this is a far more convincing source. But one could look long and hard before finding any reported case where just having a compliance program resulted in a company not being prosecuted, or even receiving any type of benefit in the process. As this author and others have pointed out to representatives of the Department, even in the few cases where programs are mentioned, the Department always emphasizes that the company also voluntarily disclosed a violation and cooperated; compliance program references often seem to appear more as an afterthought. *See, e.g.*, Letter from Dennis McInerney, U.S. Dep't of Justice to Mary Spearing, Baker & Botts 1 (Nov. 4, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10noble-corp-npa.pdf (listing a compliance program as one of many factors).

Indeed, as the author, along with others in this field, can attest, when asked to demonstrate to management that the government does consider programs, we all work from the same tiny list, always including the Morgan Stanley case as one of the extremely small number where there was any detail mentioned in the Department's decision not to prosecute. *See* Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-534.html (involving voluntary disclosure and cooperation on behalf of Morgan Stanley). We see this same pattern throughout the legal system—there is occasional talk about the value of compliance programs but almost no evidence that anyone in government really takes this seriously. One of the major reasons for the six weaknesses described below is that government provides so very little ammunition in this fight to improve programs.

Far from the legal system offering garlands and roses to companies that implement compliance programs, the rare benefits seem to be given grudgingly, and in tiny, if not invisible, amounts. As noted in this Article, even this small amount of impetus has been undercut by the legal system.

112. *See infra* Part IV.

The litigation system is a well-established feature of modern society. We accept that business misconduct will subject companies to regulatory and enforcement action,[113] and that wrongdoers on some level will be punished. There is, however, a tension between holding the corporate entity responsible and holding the individual actors responsible.[114] Perhaps the tension between the two reflects the unpleasant reality that neither approach is particularly satisfying. As a result, compliance and ethics has developed as a more practical, preventive step, and also a tool with a better ability to assign responsibility more deeply and effectively within the corporation.[115]

A core concept underlying compliance and ethics is that the values behind the law are essential, and that the objective is to have all those in society adhere to those laws and act in a positive manner.[116] Law enforcement plays a role in this by providing a deterrent and offering a resolution when anyone in society breaks those rules.

While bringing wrongdoers to justice serves a purpose, it is one, and only one, policy tool to reach the larger end—promotion of society's essential values and compliance with the law. Against this background, logically, prevention is far better than punishment. Thus, on the scale of priorities, prevention should take first place, and resolution of failures should be secondary.

The concept of compliance and ethics calls for organizations of all forms to engage in self-policing toward this end. Thus, steps that promote such self-policing and serve to make it more effective serve society's interests more than steps that merely catch violations and fix harms after they occur.[117]

113. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493 (1909) (imputing an agent's acts to the employer).

114. *See* Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Assistant U.S. Att'ys and U.S. Att'ys (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download (emphasizing the need to pursue individual offenders in corporate criminal cases).

115. Under the Sentencing Guidelines standards, a program only merits credit if a company imposes discipline for "failing to take reasonable steps to prevent or detect criminal conduct." U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6)(B) (U.S. SENTENCING COMM'N 2004). Thus, the company needs to go deeper than the legal standard for criminal violations, and impose discipline for management dereliction and negligence that leads to violations.

116. *See* Roy Snell, *The Forest Through the Trees*, 1 COMPLIANCE & ETHICS 2 (Nov. 2004), http://www.corporatecompliance.org/Portals/1/PDF/Resources/Compliance_Ethics_Professional/1104/CE1104_02_CEO.pdf.

117. In the analysis of compliance and ethics programs, it is sometimes overlooked that programs play a larger, socially beneficial cognitive and normative function, promoting

This is the theory. However, in practice those who are part of the litigation system appear to view litigation as being a value in itself.[118] In other words, the promotion of the enforcement and litigation process becomes an objective that is given priority treatment. Anything that interferes with this existing system is resisted through use of the litigation system.[119] Compliance and ethics poses a threat to the *ancien regime*. Giving organizations sufficient freedom and recognition to develop effective preventive systems is a disruption in the old ways of doing things. Through the legal system, it has met resistance that undermines the very effort to prevent violations.[120]

It may well be that this resistance has succeeded in keeping compliance and ethics from reaching its potential as a preventive vehicle. This has happened through two developments. The first has been steps that actively undercut compliance efforts.[121] These consist of approaches that severely restrict the operation of compliance programs and those that exploit programs so that companies draw back from using effective techniques.[122] The second comes from those that refuse to recognize programs in their enforcement efforts and those who, while nominally recognizing programs, fall short of sending the necessary message to companies about the steps they need to take in order to make their programs truly effective.[123]

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the standards, policies, and values of the law to large numbers of employees; these employees, in turn, interact with others in society, and may move on to positions in other companies and carry these lessons with them. *See* Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 YALE L. & POL'Y REV. 367, 411 (2007) (making this point with respect to "aspirational codes of conduct"); Anne Riley & Margaret Bloom, *Antitrust Compliance Programmes—Can Companies and Antitrust Agencies Do More?*, 10 COMPETITION L. 21, 37 (2011) ("Compliance programmes also deter wrongdoing by generating social norms that champion law-abiding behaviour.").

118. Perhaps the noblest expression of this bias can be found in *United States v. Nixon*, 418 U.S. 683 (1974), *superseded on other grounds by* FED. R. EV. 801(d). Referring to areas protected by privilege the Court stated: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 710. Not all those who have been exposed to the American litigation system would necessarily describe it first as the "search for truth."

119. *See infra* Section IV.B.

120. *See infra* Section IV.B.

121. *See infra* Section IV.B.

122. *See infra* Section IV.B.

123. *See infra* notes 221–29 and accompanying text.

The following analysis identifies some of the elements that undermine preventive efforts, discusses some of the resulting weaknesses in compliance programs, and provides a framework for balancing the competing policies. In this section, we examine some of the more prominent examples that have been barriers to effective programs and that illustrate the ways the litigation system handicaps compliance and ethics programs.

### *A. Sacrificing Compliance and Ethics to Litigation*[124]

Performing compliance and ethics work in organizations can take extensive digging and information gathering.[125] It also involves intensive interaction with employees and others acting for the organization.[126] This is at the heart of an interactive approach; involvement with the actors in the corporation generates information and insight.[127] When it is done right, it results in obtaining information about what is actually happening in the organization. As observed by the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines in 2003:

> Effective compliance efforts are, by definition, epistemological, in that an organization must seek knowledge about its own operations by obtaining the information that resides within its employees and agents. Effective compliance efforts require that an organization learn from its employees about potential problems and take steps to rectify such problems. Even as early as the risk assessment stage, such communication is essential to effective compliance efforts.[128]

124. This has also been referred to as the Litigation Dilemma. RICHARD BEDNAR ET AL., AD HOC ADVISORY GRP. ON THE ORGANIZATIONAL SENTENCING GUIDELINES, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 6–7 (Oct. 7, 2003) [hereinafter AD HOC REPORT], http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/advisory-group/AG_FINAL.pdf.

125. *See* Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 5 (Jan. 1997).

126. *Id.*

127. SIGLER & MURPHY, *supra* note 34, at 79–107.

128. AD HOC REPORT, *supra* note 124, at 109.

Indeed, a hallmark of an effective compliance and ethics program is this interaction and gathering of information.[129] However, in a system where enforcement and litigation can use any such information against the organization generating it, there is a clear conflict between values and policies.[130] As the advisory group noted in discussing the costs of a compliance program:

> All of these costs of compliance, however, pale in comparison to the principal disadvantage identified time and time again by organizations: the fact that, "by adhering to its compliance program, a company may generate evidence that ultimately may harm the organization" in litigation. Indeed, audits and investigative reports may become litigation roadmaps for potential adversaries.[131]

Considering some of the key functions in compliance and ethics illustrates this point. Internal investigations are the most obvious examples, where an allegation of wrongdoing triggers an intensive internal review. But while this is a prominent example, it is only one of several.

Any form of compliance auditing has the same risks. Looking for indications of wrongdoing, or even looking for instances where the compliance and ethics program was not followed, also has the potential for adverse use against the organization.[132] Similarly, operating a helpline or any other form of "speak up" program has this same risk.[133]

As a threshold step in any compliance and ethics program, it is expected that the company will conduct an in-depth risk assessment.[134] Here, the same tension exists. Anything that points out where the risks

129. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5) (U.S. SENTENCING COMM'N 2015) (auditing and monitoring, reporting systems, and evaluation of the program).

130. For an excellent, in-depth explanation of this conflict, see generally Goldsmith & King, *supra* note 125 (Professor Goldsmith previously served on the U.S. Sentencing Commission).

131. AD HOC REPORT, *supra* note 124, at 108 (internal citations omitted).

132. SIGLER & MURPHY, *supra* note 34, at 72–74.

133. Andy Guess, *Anonymity (Almost) Guaranteed*, INSIDE HIGHER ED. (Sept. 4, 2007), https://www.insidehighered.com/news/2007/09/04/ethics (discussing a state-owned university's helpline records being publicly exposed under an open-records request from the student-run newspaper).

134. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(c) (U.S. SENTENCING COMM'N 2015).

of wrongdoing may lie, and also looks at whether the company is addressing those risks, can be potential poison in litigation.

Even training,[135] which might appear to the uninitiated to be safe, suffers from these same types of risks. Training and other compliance materials may be used against a company to show it knew it had risks but failed to address them.[136] Even worse, notes taken by employees during training may be exploited against a company in litigation.[137]

Against this element of risk, organizations can and do use various legal doctrines to limit and control the risk. Likely the most common is the use of attorney-client privilege,[138] or the somewhat related protection of the work-product doctrine.[139] There are also specialized forms of protection more aligned with the nature of compliance and ethics. These have been analyzed under a variety of names,[140] but they are described generally as the self-evaluative privilege.[141]

There have been a number of courts that have, to at least a limited degree, recognized a policy basis for limiting adverse use of corporate self-evaluative materials. This policy does not simply protect any

135. Training and communications are included as one of the Sentencing Guidelines elements, *id.* § 8B2.1(b)(4), and are common in compliance and ethics standards.

136. *See* Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987) (observing in a supervisor harassment case that: "There is no question that it was foreseeable. Had it not been, [the company] would not have had a policy attempting to deal with it"), *overruled in part by* Hicks v. SSP Am., Inc., 490 F. App'x 781, 786 (6th Cir. 2012) (overruling *Yates*'s analysis on evidence of retaliation).

137. *See* Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 330, 336 (N.D. Cal. 1992) (holding that compliance training notes could be used against company as basis for punitive damages).

138. Following the Supreme Court's guidance in *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981).

139. FED. R. CIV. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495, 510–12 (1947).

140. *See, e.g.*, Clyde C. Kahrl, Comment, *The Attorney-Client Privilege, the Self-Evaluative Report Privilege, and* Diversified Industries, Inc. v. Meredith, 40 OHIO ST. L.J. 699 (1979); Charles D. Creech, Comment, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C. L. REV. 179 (1988); Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983); Press Release, Nat'l Ass'n of Mut. Ins. Cos., Kansas Self-Audit Law Boon to Consumers and Industry; *Yes, Virginia, There Is an "Insurance Compliance Self-Evaluative Privilege"*, PRESNELL ON PRIVILEGES (Mar. 10, 2016), https://presnellonprivileges.com/2016/03/10/yes-virginia-there-is-an-insurance-compliance-self-evaluative-privilege/.

141. *See* Joseph E. Murphy, *The Self-Evaluative Privilege*, 7 J. CORP. L. 489 (1982); Anton R. Valukas, Robert R. Stauffer & Joseph E. Murphy, *Threshold Considerations*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, at 5:40–5:50.

corporate effort to improve or to address mere business issues,[142] but it has been tied to efforts designed to protect the public.[143] Courts have found this protection in a variety of cases.[144]

However, there has remained strong resistance to what is perceived as an encroachment on the legal system's search for evidence. The privilege has been recognized in cases involving antitrust law,[145] railroad safety,[146] product safety,[147] drug and medical device safety,[148] environmental compliance,[149] securities law,[150] and workplace safety.[151] However, there continues to be a division of authority on the application of the privilege in these contexts.[152] There has also been general

142. *See, e.g.*, Palma v. Lake Waukomis Dev. Co., 48 F.R.D. 366 (W.D. Mo. 1970).

143. *See infra* notes 146–52 and accompanying text.

144. *See infra* notes 146–52 and accompanying text.

145. *See* Cohn v. Wilkes Gen. Hosp., 127 F.R.D. 117 (W.D.N.C. 1989), *aff'd*, 953 F.2d 154 (4th Cir. 1991); Cameron v. New Hanover Mem'l Hosp., Inc., 293 S.E.2d 901, 915 (N.C. Ct. App. 1982) (recognizing the privilege under state antitrust law).

146. *See* Granger v. Nat'l R.R. Passenger Corp., 116 F.R.D. 507 (E.D. Pa. 1987).

147. *See* Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D. Ind. 1985).

148. *See* Letter Opinion, Inter Med. Supplies Ltd. v. EBI Med. Sys., Inc., No. 95-6035 (SMO) (D.N.J. Mar. 13, 1997) (Magistrate Judge Joel B. Rosen), in Inter Med. Supplies Ltd. v. EBI Med. Sys., Inc., 975 F. Supp. 681 (D.N.J. Aug. 28, 1997), *aff'd in part*, *rev'd in part*, 181 F.3d 446 (3d Cir. 1999) (on file with author) (letter opinion covering medical device safety); NeoRx Corp. v. Immunomedics Inc., 28 U.S.P.Q.2d (BNA) 1797 (D.N.J. 1993).

149. Joiner v. Hercules, Inc., 169 F.R.D. 695, 698–99 (S.D. Ga. 1996) (following *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994)).

150. *See* In re Crazy Eddie Sec. Litig., 792 F. Supp. 197, 205–06 (E.D.N.Y. 1992); N.Y. Stock Exch., Inc. v. Sloan, 22 Fed. R. Serv. 2d 500, 501–03 (S.D.N.Y. 1976).

151. *See* Hickman v. Whirlpool Corp., 186 F.R.D. 362, 362–64 (N.D. Ohio 1999) (protecting minutes of a safety team meeting).

152. *See* In re Winstar Commc'ns, Sec. Litig., No. 01 CV 3014 (GBD), 2007 WL 4115812, at *2 (S.D.N.Y. Nov. 15, 2007) ("[T]he trend over the last several years has been to find that the privilege is inapplicable in securities fraud actions . . . where an accounting firm is being sued for allegedly engaging in a massive accounting fraud."); Reich v. Hercules, Inc., 857 F. Supp. 367, 368–69 (D.N.J. 1994) (rejecting privilege in the workplace safety context); In re Salomon Inc. Sec. Litig., Nos. 91 Civ. 5442 (RPP), 1992 WL 350762, at *4 (S.D.N.Y. 1992) (rejecting self-evaluative privilege protection in a securities law case); United States v. Dexter Corp., 132 F.R.D. 8, 9–10 (D. Conn. 1990) (rejecting the use of the self-evaluative privilege against EPA in an environmental enforcement case); Wei v. Bodner, 127 F.R.D. 91, 98–100 (D.N.J. 1989) (rejecting peer review protection in an antitrust case); Robinson v. Magovern, 83 F.R.D. 79, 88–89 (W.D. Pa. 1979) (rejecting peer review protection in another antitrust case). Interestingly, the D.C. Circuit noted in *First E. Corp. v. Mainwaring*, in dicta, that a court would unlikely fashion such a self-evaluative privilege in a securities fraud case. 21 F.3d 465, 467 n.1 (D.C. Cir. 1994). Oddly, the circuit court incorrectly described the privilege as applying only to public health or public safety. *Id.*

skepticism expressed about the existence and legitimacy of the privilege.[153]

In one circuit court case, the court rather summarily asserted that such exploitation would not, in fact, have any chilling effect on companies' development of compliance programs.[154]

One of the most striking examples of compliance materials being used against a company occurred in an employment discrimination case, *Stender v. Lucky Stores, Inc.*[155] In that case, a federal district court focused solely on litigation considerations and allowed a plaintiff to exploit notes from an anti-discrimination training course to establish a basis for claiming punitive damages.[156] The court simply noted in passing that the company's lawyers had shut down the training,[157] probably based on the very litigation risk the court had allowed to be exploited.[158] It was as if the only important consideration was litigation, and that the lesson for company lawyers and compliance people was

153. *See, e.g.*, Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342, 351 n.12 (3d Cir. 2009) (noting the privilege has never been recognized by Third Circuit); Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) (noting the 9th Circuit has not recognized the privilege and could not find any Oregon cases recognizing it); Lindley v. Life Inv'rs Ins. Co. of Am., 267 F.R.D. 382, 387 (N.D. Okla. 2010) (highlighting that no Oklahoma or 10th Circuit cases have adopted privilege); Gordon v. Sunrise Senior Living Mgmt., Inc., No. 08-cv-02299-REB-MJW, 2009 WL 2959213, at *1 (D. Colo. Sept. 10, 2009) (holding that the privilege is not recognized by 10th Circuit or Colorado); Zoom Imaging, L.P. v. St. Luke's Hosp. & Health Network, 513 F. Supp. 2d 411, 413–14 (E.D. Pa. 2007) (noting the Supreme Court's hesitancy to expand upon common law privileges); Davis v. Kraft Foods N. Am., No. 03-6060, 2006 WL 3486461, at *2 (E.D. Pa. Dec. 1, 2006) (observing that most circuits have not recognized or applied the privilege).

154. *See* Dowling v. Am. Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992) ("[R]eviews will rarely, if ever, be curtailed simply because they may be subject to discovery."); *see also* Ligon v. Frito-Lay, Inc., 19 Fair Empl. Prac. Cas. (BNA) 722 (N.D. Tex. 1978) (noting that a frank evaluation in affirmative action plans will not be discouraged by disclosure in lawsuit). *But see* Goldsmith & King, *supra* note 125, at 6 n.12 (1997) (arguing that the fear of misuse causes companies to "examine fewer internal activities, undertake fewer types of investigations, translate fewer findings into corrective plans, distribute criticism less widely and retain analysis for shorter periods"); Joseph E. Murphy, *Compliance on Ice: How Litigation Chills Compliance Programs*, 2 CORP. CONDUCT Q. 36 (1992) (detailing ways that litigation undercuts compliance program activities); *see also* United States v. Nixon, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.").

155. 803 F. Supp. 259 (N.D. Cal. 1992).

156. *Id.* at 330.

157. *Id.* at 294.

158. *Id.*

worth the cost: never be so foolish as to allow employees to surface discriminatory attitudes in a classroom—even if that is very effective as a teaching device and even if this method helps in the fight against discrimination—and do not let attendees take notes. Yet the author can recount personally that countless trainers have been warned to caution employees in training courses not to take notes.[159] Logical advice, perhaps, for lawyers and judges, but terrible for the development of effective training in compliance efforts.

These attacks on corporate self-policing do carve out a limited exception for lawyers. If, but only if, a lawyer is involved, then materials can be shielded under the attorney client privilege.[160] This adds enormously to the cost of any compliance efforts and also cuts against their effectiveness. Compliance and ethics needs to be about reaching the broadest number of people within a corporation in the most effective way; it is not about confidentiality and restricting compliance activities only to lawyers. Requiring a cloak of privilege diminishes effectiveness in these efforts and serves no social purpose.

Commentators tied to the traditional approaches of the legal field tend to announce that the cases and policy supporting the self-evaluative privilege are little more than a sport in the law that rarely surfaces and is rarely accepted, and that the privilege is not necessary.[161] Yet the reality is not so simple. There are instances where the policy supporting preventive efforts clearly comes through as an

159. Joseph Murphy, *Compliance Trainers Beware*, 1 CORP. CONDUCT Q. 11 (1991); Amy Stevens, *Anti-Discrimination Training Haunts Employer in Bias Suit*, WALL ST. J., July 31, 1991, at B1. See Kimberly Krawiec, *Cosmetic Compliance*, *supra* note 76, at 515 n.97, for a discussion of the impact of such cases on diversity training. "[L]egal compliance professionals now encourage a more 'sterilized' version of diversity training, in which management is discouraged from openly expressing any views that might be usable in litigation and all training materials are prepared with an eye toward litigation." Kimberly Krawiec, *Cosmetic Compliance*, *supra* note 77, at 515 n.97. Like the court in *Lucky Stores*, which appeared unconcerned with why lawyers shut down the training, however, Professor Krawiec never recognizes the connection between the negative impact of the litigation system—which she, instead, criticizes for doing too much to promote compliance and ethics programs—and the weaknesses she describes in such programs.

160. The same claim is sometimes incorrectly made about work product. However, as the Federal Rules of Civil Procedure make clear, the protection applies for any party preparing for litigation, not just the party's lawyers. FED. R. CIV. P. 26(b)(3). In practice, the reality is that almost any company anticipating litigation is going to have recourse to a lawyer.

161. *See, e.g.*, James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551 (1983); S. Kay McNab, Note, *Criticizing the Self-Criticism Privilege*, 1987 U. ILL. L. REV. 675. (1987)

objective worthy of protection and promotion, as expressed in legislation.[162] Nevertheless, as the Supreme Court noted in *Upjohn*, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all,"[163] and the heavy shadow of misuse in litigation continues to hang over compliance and ethics programs.

### *B. The National Labor Relations Board Addresses Hypothetical Labor Issues While Imposing Real Harm on Compliance Efforts*

One of the anomalies in the fight against corporate crime has been the efforts of labor law regulators to push into this area and to find fault with corporate self-policing efforts. Beginning in 1991, the National Labor Relations Board (NLRB or the "Board") began seeing harm in companies' efforts to prevent corporate crime and misconduct. In *American Electric Power Co.*,[164] the Board announced that it was an unfair labor practice for a corporation to apply a code of conduct to its employees.[165] Among the Board's assertions was that the company had not shown "that the subject matter of their Corporate Codes of Ethics is necessary for the protection of the core purposes of the Respondents' enterprise—the generation and transmission of electricity."[166] Indeed the Board specifically found "that the evidence does not demonstrate that integrity goes to the protection of the *core purposes* of the Respondents' enterprise."[167] In other words, acting ethically and legally was not central to the business. Moreover, implementation of the code by the parent company earned it equal condemnation; a warning to companies to step back from pushing compliance efforts down the organizational chain. Nor did the Board uphold any part of the code;

162. *See, e.g.*, Equal Credit Opportunity Act Self-Testing Privilege, 62 Fed. Reg. 66411 (Dec. 18, 1997). For an overview of state environmental audit statutes, see CAROL DECK, DESIGNING AN EFFECTIVE ENVIRONMENTAL COMPLIANCE PROGRAM §§ 4:12–4:14 (2016) (surveying state environmental audit statutes). State statutes attempting to protect corporate self-policing in such areas as environmental auditing are, however, severely undermined by the risk that any protected materials are still subject to exploitation in federal cases, such as proceedings brought by the Environmental Protection Agency. *See* Mem'l Hosp. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981). Thus, while the purpose of these state laws may be to promote self-evaluative compliance efforts, the impact of the overhanging risk at the federal level drains these protections of their real potential force.

163. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

164. 302 N.L.R.B. 1021 (1991), *review denied*, 976 F.2d 725 (4th Cir. 1992).

165. *Id.* at 1022–23.

166. *Id.* at 1023 (citing Peerless Publ'ns, Inc., 283 N.L.R.B. 334, 335 (1987)).

167. *Id.* at 1022.

rather it simply ordered that the code "be rescinded in its entirety."[168] Nowhere in the opinion is there even a suggestion that the company was acting in a manner that promoted the public interest or had significant value. The company might as well have been engaged in some truly pernicious acts as far as the Board was concerned.

More recently, the NLRB has taken an arguably more refined approach by parsing the language of employee manuals—which would extend to codes[169]—to discern language it interpreted as interfering with employees' right to engage in protected labor activities.[170] Examples of unlawful provisions included language that could be found in many companies' codes:

- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."[171]
- "[B]e respectful to the company, other employees, customers, partners, and competitors."[172]
- Do not make "insulting, embarrassing, hurtful, or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."[173]

168. *Id.* at 1023.

169. In theory, it is possible the General Counsel of the NLRB literally intended only employee handbooks to be subject to this analysis, not codes of conduct. Indeed, there would be a basis for this, given that the analysis purports to be focused on context, with a number of similar examples of handbook language being distinguished as lawful or unlawful based on context. Had this been the case, however, the memorandum issued by the General Counsel could have easily stated that an ethics or compliance code, focused on preventing misconduct, would usually not provide a context for concluding that "employees would reasonably construe the rule's language to prohibit Section 7 activity." Memorandum from Richard F. Griffin, Jr., Gen. Counsel, Office of the Gen. Counsel, to All Regional Directors et al., Report of the General Counsel Concerning Employer Rules 2 (Mar. 18, 2015), https://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf. Indeed, an agency that understood the value of internal compliance and ethics efforts would certainly have included this type of language to show deference to this important value.

170. *See id.*

171. *Id.* at 4 (alteration in original).

172. *Id.* at 7 (alteration in original).

173. *Id.* at 10.

- "[A]ssociates are not authorized to answer questions from the news media. . . . When approached for information, you should refer the person to [the Employer's] Media Relations Department."[174]

Each of these has a fairly obvious compliance objective, including privacy, preventing harassment and bullying, and preventing statements to the press that could violate securities laws' limits on disclosure. It is difficult to imagine a typical compliance and ethics professional, focused on using language that would be understandable to employees and would convey a clear message, would guess that anything in this language would be illegal.

On the other hand, it would be much easier and safer for a company to prescribe an entirely legalistic code that could be defended in court as simply stating the law. Whatever excuses a company's managers might have had before for not having a code of conduct and other compliance efforts, or for simply having the lawyers handle it in the safest way, the NLRB has now given them real reasons that an honest compliance and ethics professional would be hard-pressed to rebut. It is not very satisfying for a compliance and ethics person to say to a client, "Oh, don't worry about this 'law'; you probably won't get caught if you break it." A smart company could realize that any code could be an invitation for aggressive NLRB enforcers to find easily an unfair labor practice in a code that expresses more than very limited legal language. Under the threat of NLRB enforcers, a company could just keep its code completely technical, and safely limit it to reciting legislative language.[175] Again, perhaps a completely technical code is a satisfactory result for lawyers but it would be a disaster for compliance and ethics purposes. Certainly this would go against the advice of those applying the insights of behaviorists for making programs effective.

What is immediately apparent from reading any of these decisions by the NLRB is that its lawyers assign little or no value to compliance and ethics. In fact, in the recent general counsel's message, the memorandum is directed only to "labor law practitioners and human resource professionals."[176] For the general counsel of the NLRB,

174. *Id.* at 12 (alterations in original).

175. This is also another example of the legal system driving compliance and ethics work to lawyers, rather than those trained in behavioral approaches more likely to be effective with employees.

176. *Id.* at 3. It is notable that no effort was made to seek input from those in the compliance and ethics field; in fact, there was no rulemaking whatsoever. Instead the

compliance and ethics professionals—the ones who actually write codes of conduct today—were not considered in this process.

### *C. European Union: Privacy and the Conversion of Helplines into "Data Processing"*

As a result of a series of major corporate scandals, the U.S. Congress enacted the Sarbanes-Oxley Act of 2002.[177] In this legislation Congress enacted some elements related to compliance programs,[178] but with a somewhat limited understanding of the topic. Rather than incorporating the existing standards of the Sentencing Guidelines, Congress pulled together bits and pieces. One of these was the requirement to have an anonymous and confidential system for reporting financial misconduct.[179] Of course, companies had been doing this on a broader basis through hotlines and helplines, well beyond the requirement of the Sarbanes-Oxley Act, for some time.[180] But Sarbanes-Oxley may have simply been more public and received more attention.[181]

In Europe at this time, there had been a separate development relating to the protection of privacy. As a result of a European Union (EU) directive, each member state of the EU had established a separate

entire area was approached by litigation and making examples of companies through finding unfair labor practices.

177. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of the U.S. Code).

178. 116 Stat. 745 sec. 301 (codified as amended in 15 U.S.C. § 78j) (reporting systems); *id.* sec. 307 (codified as amended in 15 U.S.C. § 7245) (escalation requirement for securities lawyers); *id.* sec. 406 (codified as amended in 15 U.S.C. § 7264) (codes of ethics for senior financial officers).

179. *Id.* sec. 301.

180. There are numerous articles and materials from the 1990s and even earlier on hotlines and helplines. *See, e.g.*, SIGLER & MURPHY, *supra* note 34, at 87 ("One technique would be to provide a confidential hot-line for this purpose."); Joseph E. Murphy, *Hotlines: An Overview*, 4 CORP. CONDUCT Q. 7 (1995); Patrick J. Rodgers, Hughes Aircraft Co., "Ethics Hotlines," Sixth Annual Business Ethics Conference – Ethics and the Challenges of a Global Economy, May 4–5, 1994 (on file with author). One type of reporting option, the ombuds office, has its origins in Europe, long before there were privacy agencies. *See* Christine A. Wardell & Jacqueline P. Minor, *Retaliation, Whistleblowers, and Reporting Systems*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, § 14:27.

181. AHMED NACIRI, CORPORATE GOVERNANCE AROUND THE WORLD 94 (2008) ("Sarbanes-Oxley has received much attention at the most important US CG initiative in the wake of the recent corporate scandals in the US.").

agency to regulate the developing area of privacy.[182] In France, this led to an agency focus on, what appeared to be, an irritating piece of border crossing by American companies; the assertion that they needed helplines to comply with Sarbanes-Oxley.[183] Apparently the newly empowered French privacy agency, La Commission Nationale de l'Informatique et des Libertés (CNIL), saw some low-hanging fruit and pounced on this as an affront to privacy. The agency purported to reject the operation of two companies' helplines as if these were an invasive form of cancer, threatening privacy.[184]

The reporting systems CNIL addressed were already severely restricted by the companies proposing them. For example, in the system proposed by McDonald's, only those in headquarters and executives and managers in the restaurants were targeted.[185] There was no obligation on anyone to use the system. Staff members accused of wrongdoing were to have a right of access and to contest.[186] The process would be overseen by company lawyers and the ethics director.[187] If there were no negative results of the report the records were to be destroyed within two business days.[188] In other words, the system was already restricted in ways that might have made its effectiveness less than optimal.

CNIL, with almost no explanation of how it reached its results, went on to reject the proposal, concluding:

> [T]he commission considers that this system is disproportionate to the objective sought and risks of slanderous denunciations and the stigmatization of employees who were the subjects of an "ethics alert." The Commission notes that henceforth other legal means exist to guarantee compliance with legal provisions and

182. Directive 95/46/EC of the European Parliament and Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data 1995 O.J. 95 (L281) art. 25(1), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URIS ERV%3Al14012.

183. John Gibeaut, *Culture Clash: Other Countries Don't Embrace Sarbanes or America's Reverence of Whistle-Blowers*, 92 Am. Bar Ass'n J. 10 (May 2006) (providing examples of actions taken to comply with Sarbanes-Oxley).

184. McDonald's France, La Commission Nationale de l'Informatique et des Libertés, Decision No. 2005-110 (26 May, 2005); Exide Technologies, La Commission Nationale de l'Informatique et des Libertés, Decision No. 2005-111 (26 May, 2005).

185. McDonald's France, La Commission Nationale de l'Informatique et des Libertés, Decision No. 2005-110 (26 May, 2005).

186. *Id.*

187. *Id.*

188. *Id.*

> company rules (programs of consciousness raising through information and training, audits and alerts by the statutory auditors of financial and accounting matters, bringing matters before the Labour Inspector or the competent Courts).[189]

It is not at all clear how the CNIL determined that its focus on privacy weighed more heavily than the prevention of offenses such as bribery, money laundering, consumer fraud, poisoned food, worker safety, environmental contamination, anticompetitive cartels, and the rest of the offenses large corporations are capable of committing. One would have thought it was the prerogative of the legislature, not a privacy bureaucracy, to make such important policy assessments. Moreover, the agency cited no source for its assertion that reporting systems are "disproportionate" or unnecessary in compliance programs.[190] The idea that merely having training, audits,[191] and statutory auditors would be enough to prevent and detect all forms of misconduct would appear on any level to be completely unsupported in the field of compliance and ethics.

There is much to question about CNIL's approach to helplines. But it can be noted that, other than making reporting systems mandatory for a broad group of companies, there was nothing at all new in what Sarbanes-Oxley required. Companies had been using helplines and reporting systems as part of their commitments to social responsibility and to fight organizational crime well before Sarbanes-Oxley.[192]

The reaction to this agency was swift, and the agency gave some ground quickly. One can imagine a call reminding CNIL, for example,

189. Marisa A. Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 Berkeley J. Emp. & Lab. L. 375, 413 (2007) (quoting McDonald's France, La Commission Nationale de l'Informatique et des Libertés, Decision No. 2005-110 (26 May, 2005)).

190. McDonald's France, La Commission Nationale de l'Informatique et des Libertés, Decision No. 2005-110 (26 May, 2005).

191. CNIL never attempts to explain why a carefully controlled reporting system is more intrusive of privacy than would be the case with audits, which can involve reviews of employees' records and include interviews that may well solicit information about other employees' misconduct. Also, it is the experience of trainers, including the author, that employees spontaneously report misconduct by fellow employees during and after training. So there appears to be no distinguishing characteristic in the opinion, other than that the helpline was required by an American law.

192. *See supra* Section IV.B.

that France had in fact signed a treaty against foreign bribery,[193] and that reporting systems were core tools for companies engaged in this battle.[194]

CNIL, in its effort to fix a problem it had created, set itself up as the arbiter of which values were important in the French Republic, and thus worthy of allowing employees to report them through a helpline. Those laws CNIL determined were important were allowed in a specific carve out, which did not require special permission from CNIL,[195] although the various regulatory restrictions remained. All other matters of law and ethics required special approval before employees were allowed to call in crimes and other misconduct.[196] The peculiar nature of this system was highlighted when the country's own competition law enforcer had to request permission from the privacy bureaucrats in order to mandate that cartelists settling a serious case of illegal conduct would have to install a helpline system.[197]

Of course, like many questionable ideas that serve specific political interests, this one spread quickly, reaching other EU members. In Spain[198] and Portugal,[199] the privacy agencies claimed even more authority and purported to assert the power to flatly ban anonymous

193. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998).

194. *See generally* ORGANISATION FOR ECON. CO-OPERATION AND DEV., *supra* note 25 (spelling out elements of compliance and ethics programs, such as reporting systems).

195. Philip M. Berkowitz et al., *More CNIL Guidance for Multinationals Seeking to Comply with SOX & Dodd-Frank*, LITTLER: INSIGHTS (Mar. 4, 2014), http://www.littler.com/more-cnil-guidance-multinationals-seeking-comply-sox-dodd-frank. As noted, once CNIL released this tiger, French courts followed this restrictive approach. *Id.*

196. *See id.*

197. *See* BUREAU OF NAT'L AFFAIRS, *Two Major Rental Laundry Firms Will Pay Fines, Create Alarm System*, 93 ANTITRUST & TRADE REG. REP., July 20, 2007, at 28. The carve-out was subsequently extended to compliance with competition laws. *See* Berkowitz et al., *supra* note 195.

198. Agencia Española Protección de Datos, *Creación de Sistemas de Denuncias Internas en las Empresas (Mecanismos de "Whistleblowing")* [Creation of Internal Complaint System in Companies (Whistleblowing Mechanisms)], Informe Jurídico 0128/2007, Gabinete Jurídico (Spain).

199. Comissão Nacional de Protecção de Dados, *Princípios Aplicáveis aos Tratamentos de Dados Pessoais com a Finalidade de Comunicação Interna de Actos de Gestão Financeira Irregular (Linhas de Ética)* [Principles Applicable to the Treatment of Personal Data for the Purpose of Internal Communication of Irregular Financial Management Acts (Line of Ethics)] Deliberação n.º 765/2009 (Port.).

calls.[200] It remains undetermined whether this extraordinary power is limited to telephone systems, or whether these agencies also have the power to control other forms of communications, such as mailed messages, hallway discussions, ombuds offices, or other ways for workers to raise concerns about powerful bosses. It is also unclear whether these bureaucracies now claim to control all intra-corporate communications, or whether the same employee who is barred from using a helpline can nevertheless report the same concerns to a boss, human resources, or legal or internal audit (but not to a compliance and ethics organization).

What is clear, however, is that those claiming the banner of privacy regulation have assigned little value to compliance and ethics. Imagined harm to privacy cancels out the need for strong self-policing efforts. The privacy bureaucrats have given companies yet another excuse to hold back on implementing strong and effective compliance and ethics programs. Companies have had to waste more resources in bureaucratic exercises; wasted resources are then not available to do this difficult work. These privacy outreaches have led companies to work at the worst common denominator: rejecting calls from scared employees because they do not fit the privacy bureaucrats' checklist or even refusing to listen to an employee's urgent call because she is so scared of her boss that she will not give her name.

### *D. European Union: In-House Privilege*

It is the nature of compliance and ethics that it is internal to the organization. Organizations are not effectively managed from outside; for a program to be effective, it must live within the company. Of course, services and advice, such as helpline operations, can be obtained outside,[201] but the day-to-day work of promoting compliance and ethics needs to be part of the life of the corporation.

Given the absence of predictable privilege protection for compliance and ethics programs noted above, companies have necessarily turned to

200. Donald C. Dowling, Jr., *Global Whistleblower Hotline Toolkit: How to Launch a Legally-Compliant International Workplace Report Channel*, 45 INT'L L. 903, 922 (2001) (explaining that Spain & Portugal both prohibit anonymous calls).

201. Anne Riley & Margaret Bloom, *Antitrust Compliance Programmes—Can Companies and Antitrust Agencies Do More?*, 10 COMPETITION L. 21, 32 (2011) ("It is considered to be good practice to establish a confidential system which individual employees can use anonymously to report compliance concerns. Generally, this is a helpline operated by a third party: usually a compliance services organization or external counsel." (footnote omitted)).

legal counsel.[202] This is not ideal and certainly raises the cost of compliance and ethics, but it at least gives employees some level of comfort when raising questions about possible misconduct. In the United States, the Supreme Court helped this cause by ruling that attorney-client privilege would apply to corporate counsel in communications with a broad range of company employees.[203] As the Court said, the absence of strong protection "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[204]

In the EU, however, national standards vary on this substantially; some countries protect employee communications with a company's in-house legal counsel, and some do not.[205] So when the question arose for the EU-wide competition law enforcers, the Directorate General of Competition, they had to decide whether they would promote these company efforts to prevent violations by not pursing the work of company counsel or alternatively exploit the trust employees placed in their company lawyers. With success in litigation as their guiding light, the enforcers preferred harvesting whatever benefits they could get in litigation, without regard to prevention.[206] The view asserted was that

202. This is especially so for investigations. *See* Anton R. Valukas et al., *Response to Problems: Investigations, Disclosure of Violations, and Crisis Response*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, § 15:7 ("The investigation should ordinarily be conducted or overseen by an attorney in order to maximize confidentiality through the availability of attorney-client and work-product privileges.").

203. Upjohn Co. v. United States, 449 U.S. 383, 383–84 (1981).

204. *Id.* at 392.

205. Nina MacPherson & Theodore Stevenson, III, *Attorney-Client Privilege in an Interconnected World*, 29 ANTITRUST 28, 31 (2015); Dorothy G. Raymond, *International Developments: The In-House Attorney-Client Privilege*, *in* AM. BAR ASS'N, ANTITRUST SECTION, COMPLIANCE & ETHICS SPOTLIGHT 12 (Spring 2016) (stating that the UK and Ireland recognize privilege for in-house counsel); Anthony Paonita, *Over There: The ECLA's Sergio Marini Talks About Privilege and Cybersecurity in Europe*, CORP. COUNSEL (Apr. 15, 2016), http://www.corpcounsel.com/id=1202755048199/Over-There-The-ECLAs-Sergio-Marini-Talks-About-Privilege-and-Cybersecurity-in-Europe?slreturn=20160716132030.

206. Jettie van Caenegem, *Analysis: A Right Or a Privilege?*, LEGALWEEK (June 2, 2004), http://www.legalweek.com/sites/legalweek/2004/06/02/analysis-a-right-or-a-privilege/?slreturn=20170002125845 ("At the European level, it has been the EC, or more specifically, the Directorate-General for Competition, that has been at the forefront of efforts to maintain this position, the suspicion among opponents being that it is simply opposed to anything that potentially gets in its way. Its investigators see communications between directors and their internal legal advisers as a source of evidence for their

those working in-house were not independent, and those working outside were.[207] There was no effort empirically to look deeper into what the facts or motivations might actually be. In its campaign, the regulators won over the courts, with the result that company employees cannot raise questions and report concerns safely in-house.[208]

The competition law enforcers thus undercut in-house lawyers' efforts to prevent violations.[209] Instead, if a company wanted any form of protection it had to inform employees to call the company's outside counsel;[210] this is something employees generally are less likely to do than call their own in-house resources.[211] Moreover, the cost implications of having any employee start the meter on outside counsel would work as a major deterrent to such reporting.[212] It was of no interest to the European enforcers that there was a much easier remedy to any concern they might have had about the role of in-house lawyers, or any other lawyers. In the United States, if a lawyer is participating in or giving advice to assist in a violation, there is no protection under what is known as the crime-fraud exception.[213] The same type of doctrine could readily be applied by the Directorate General. But internal self-policing was given little or no value.[214]

investigations and one that would be shut off if professional privilege was extended to corporate counsel.")

207. *Id.*

208. Case C-550/07, Akzo Nobel Chems. Ltd. v. Comm'n, 2010 EUR-Lex LEXIS 807 (Sept. 14, 2010).

209. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 383–84 (1981).

210. Raymond, *supra* note 205, at 15 ("[T]he EU rules stand in the way of robust compliance. . . . Using external counsel for all these activities creates unnecessary hurdles for effective compliance. In particular, the use of external counsel can hamper reactivity. In-house experts generally also have a better grasp of industry-specific facts and rules and can thus be more effective.").

211. Based on the author's twenty years experience as an in-house lawyer, outside counsel is typically more expensive. Outside counsel is also a company contractor, and there may be company policies and procedures limiting engagement and use of outside contractors. Employees are also much more likely to have had personal contact with inside counsel than outside counsel, and thus be more familiar with the person.

212. Sokol, *supra* note 57, at 215 ("Qualitative survey respondents noted that the lack of the privilege increases the cost of compliance because outside law firms are more expensive.").

213. *See, e.g.*, In re John Doe Corp., 675 F.2d 482, 491 (2d Cir. 1982).

214. Even after the ruling in *Akzo-Nobel*, however, the enforcers could nevertheless adopt a policy of respect for communications with in-house legal counsel, at least where national law recognizes a privilege. There have been no indications that they would consider this step.

### *E. Antitrust—Disdain*

In the antitrust field there has been a disdain for compliance and ethics, and at times even a degree of hostility. In the United States, the Antitrust Division of the Department of Justice had for some time refused to consider compliance programs for any purpose, whether in making decisions to prosecute or in recommending sentences for violators.[215] In the EU, the European Commission has copied this approach but is taking it one step further and actually using a company's compliance program as evidence against it. If a parent company plays a role in assuring that its subsidiaries obey the law, the European Commission considers this a way to increase fines by holding the parent company responsible.[216] The EU considers any program that allows even one violation a "failed" program and consistently gives no benefit to any company, no matter how much effort it has put into its program.[217] This pattern likely owes its genesis to a rather bizarre case involving British Sugar.[218] Prior to this case, the European Commission had naively given violators reduced punishment if they merely promised to implement a program ex post, without subsequent checking or monitoring.[219] But the European Commission was made to look very foolish when British Sugar made such a commitment to obtain a

215. *See generally* Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the 56th Annual Spring Meeting of the ABA Section of Antitrust Law: Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program (Mar. 26, 2008), http://www.justice.gov/atr/public/speeches/232716.pdf. Antitrust Division's Assistant Attorney General, James Rill stated, "[o]nce a violation occurs, the compliance program can do little, if anything, to persuade the Department not to challenge the offense." Jeffrey M. Kaplan, *The Corporate Sentencing Guidelines: Making Compliance Programs 'Effective'*, 1 CORP. CONDUCT Q. 1, 10 (1991).

216. Case T–76/08, EI DuPont de Nemours & Co. v. European Comm'n, ¶ 59 (Ct. of First Instance, 7th Chamber Feb. 2, 2012), http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=119007&occ=first&dir=&cid=1074767 (viewing the sharing of a compliance program between parent and subsidiary as evidence of the subsidiary's lack of autonomy and a basis for holding the parent liable for the subsidiary's violation; fines were thus calculated based on the parent's revenue, rather than the subsidiary's).

217. Joaquín Almunia, Vice President, European Comm'n Responsible for Competition Pol'y, Keynote Speech at BusinessEurope—US Chamber of Commerce Second Annual Joint Competition Conference 5 (Oct. 25, 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/586&format=PDF&aged=1&language=EN&guiLanguage=en.

218. *See generally* Commission Decision 1992/210/EC, 1998 O.J. (L 76), 1 (EC).

219. *See, e.g.*, Commision Decision 1982/853/EC, 1982 O.J. (L 354), 28 (EC).

reduced fine in settling an abuse of dominance case and then entered into a cartel with its competitors.[220] Thereafter, it appears the European Commission wanted nothing to do with compliance programs.

At the same time, an innovative enforcement process was developing in anti-cartel enforcement of enforcers offering complete immunity to the first violator to come forward to report a violation.[221] The Antitrust Division in the U.S. Department of Justice initiated this in 1993, and it has subsequently been adopted by over fifty jurisdictions.[222] But the Antitrust Division offered no incentive to companies to implement compliance programs. In fact, it had so little regard for compliance programs that, even for admitted corporate criminal violators who were given complete amnesty, there was no requirement to implement a compliance program.[223]

More recently the approach has been shifting, led by an informal, international network of reformers devoted to strengthening competition law compliance programs.[224] An increasing number of competition law enforcers have realized the importance of compliance and ethics in preventing cartel and other anticompetitive conduct;[225] even the Antitrust Division, while not granting any benefits for prior programs, has shifted in its approach.[226] But the EU and many of its

220. Commission Decision 1992/210/EC, 1998 O.J. (L 76), 1 (EC).

221. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY 1 (1993).

222. Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Criminal Enf't Antitrust Div., The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Remarks at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010).

223. Brent Fisse, *Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity*, *in* ANTI- CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 179, 180–81 (Caron Beaton-Wells & Christopher Tran eds., 2015).

224. *See About Us*, COMPLIANCE NETWORK: THE ANTITRUST & COMPETITION LAW COMPLIANCE DISCUSSION FORUM, http://www.compliance-network.com/about-us/ (last visited Jan. 4, 2017) ("The Antitrust and Competition Law Compliance Discussion Group is a group of people who share an interest in the development of effective anti-cartel compliance programs as a means to prevent and detect cartel behavior. They also share an interest in the role of government in promoting such programs."). The author was founder of this informal group.

225. *See, e.g.*, Nathalie Jalabert-Doury at al., *Enforcers' Consideration of Compliance Programs in Europe: A Long and Winding—But Increasingly Interesting—Road*, CPI ANTITRUST CHRONICLE, JUNE 2015, (2) at 2, https://www.mayerbrown.com/files/News/27238db4-bd9c-476a-af96-086aba13a670/Presentation/NewsAttachment/21b113eb-57ef-4870-b90a-0b7ec9e01332/art_jalabert-harrison-schmidt_2015.pdf.

226. Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Compliance Is a Culture, Not Just a Policy, Remarks As Prepared for the International

member states continue to undercut compliance and ethics programs in this area.[227] The result of this history of negative approaches by

Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop 9–10 (Sept. 4, 2014), https://www.justice.gov/atr/file/517796/download.

227. Defenders of the EU's approach, and others opposed to recognition of compliance programs, have to assume that companies will sua sponte implement effective compliance and ethics program steps, or that the threat of increasing penalties will cause this to happen. History does not support this. Indeed, if this were the case, no article like this one would be written because we would have been living in a world of ideal compliance efforts and low incidents of corporate misconduct, without any effort to promote this by government. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 742 (1997) ("The simplest conclusion of our Article is that traditional strict corporate civil and criminal liability for employees' wrongdoing will not induce firms to monitor employees and to investigate and report wrongdoing optimally."). Rather, left to their own inclinations, companies in the past, and certainly before the Sentencing Guidelines, issued more papers, especially codes, and delivered more lectures. Governments that refuse to give any credit for compliance programs completely forfeit their important leverage to get companies to improve their efforts and are left with companies that use the old paper and preaching approach. For example, why would a company pay heed to the EU's guidance on compliance programs when the Commission is vocal in its refusal to consider programs for any purpose (other than for use against companies). *See* EUROPEAN COMM'N, COMPLIANCE MATTERS: WHAT COMPANIES CAN DO BETTER TO RESPECT EU COMPETITION RULES (special 1st ed. 2011), http://bookshop.europa.eu/en/compliance-matters-pbKD3211985/?CatalogCategoryID=8BYKABstR7sAAAEjupAY4e5L (providing guidance on compliance programs). Thus, while the guidance contains some good points, the European Commission's effort to promote programs is completely cosmetic, with nothing backing it up. Innovative and effective management steps will not be adopted when the government forfeits its leverage for the sake of increasing its fine revenue.

If, indeed, the EU's approach was valid, one would assume that antitrust compliance programs, especially in the EU, would be the shining beacon for others to emulate. Yet the ongoing string of major cartel cases faced by the EU at least sheds doubt on this conclusion.

There is, instead, a risk that the cumulative effect of the EU's approach has backfired, and has not signaled a positive, normative message. From an industry perspective, the EU's approach: (a) is marked by striking unfairness in taking a one-size-fits-all approach, which treats complete corporate arrogance and disregard for the law the same as serious and diligent compliance efforts, and ignores good faith compliance efforts completely; (b) relies on amoral gamesmanship—"leniency" under which equally immoral conduct is rewarded or punished based solely on who wins the game—with no requirement for the "winner" to reform its ways through adopting or enhancing its compliance efforts, *see* Sokol, *supra* note 57, at 212 (surveying antitrust practitioners and observing that "[n]early all practitioners stated that the strategic use of leniency (strategic in the sense that the leniency program may be used to punish rivals and in some cases even to help enforce collusion) is a reality and the only issue was the frequency and severity of the strategic gaming."); (c) uses programs against companies, so that the more diligent a parent company's efforts (including applying the EU's own advice

enforcers has led to weaker compliance and ethics efforts in this risk area.[228]

### *F. Other Attacks on Compliance and Ethics*

While these examples illustrate the problem, they are only some of the prominent circumstances where the legal system has undercut compliance programs. There remain many ways the legal system can present a threat to strong, effective compliance programs and provide a basis for cautious legal counsel to assert control and limit compliance efforts.

Codes of conduct and other compliance materials can be used against companies to confuse juries when the companies purportedly do not follow their own standards, even when those standards exceed those required by the law.[229] They may also be interpreted as contracts, binding against the company.[230]

in "Compliance Matters"), the more the parent is likely to be held accountable for a subsidiary's violations; (d) exploits in-house counsel's role in providing legal advice including compliance advice as just another tool to obtain fines from companies; and (e) in its overall approach appears more focused on generating revenue for the EU through massive fines than in preventing violations from ever happening. Not only does this not generate a morally-oriented environment, but its solely aggressive and opportunistic approach may indeed result in equally aggressive "mock dawn raids" by industry and even an environment which views cartels as merely a high-stakes engagement in gamesmanship without a normative sanction. In this game environment, corporate agents who end up losing the game at most pay penalties from shareholders' funds. This may, indeed, be consistent with the Commission as a revenue generator, but is certainly questionable from a public policy perspective.

228. *Id.* at 223–24 ("Current compliance programs in antitrust may now include nothing more than a day of lectures with some PowerPoint slides. However, this does not solve compliance problems, and may, in fact, breed cynicism on the part of employees."); Joseph E. Murphy, *Antitrust Compliance Programs: SCCE's Survey Says They Are Less Than They Should Be*, CORP. COMPLIANCE INSIGHTS (June 20, 2012), http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/ (noting that the overwhelming majority of companies lack antitrust auditing that would meet even minimum Sentencing Guidelines standards).

229. *See* Brown, *supra* note 117, at 396 ("If the corporation fails to implement or enforce its code of conduct, it may be subject to a greater level of liability than if it had not adopted any code at all."); Paine, *supra* note 20, at 115 (noting in a company whose program the author praised that there have been cases where "employees dismissed for violating the code of ethics sued Martin Marietta, arguing that the company had violated its own code by imposing unfair and excessive discipline").

230. Brown, *supra* note 117, at 397; Pitt & Groskaufmanis, *supra* note 36, at 1606 n.281.

In at least one case, state open-records laws have been used to expose helpline calls and cases from compliance operations in a state university.[231]

The Equal Employment Opportunity Commission (EEOC) has warned companies that using criminal records to refuse to hire a potential employee can run afoul of antidiscrimination laws—even when the same approach is used by parts of the government in its hiring decisions.[232]

Other forms of checking, such as review of a potential employees' social networking activity, may violate specific laws[233] or be seen as infringing on privacy.

In the securities law field, ambiguous liability for "supervisors" threatens to increase substantially the legal risk of any compliance officer who actually has the authority to get things done and hold employees responsible, thus providing a perverse incentive to have compliance officers avoid having significant powers.[234]

Compliance managers run the risk of being sued for defamation for publicizing disciplinary cases, even though this is one of the most effective methods of reaching employees with the compliance

231. Guess, *supra* note 133 (discussing an editor of a student run newspaper who requested, under Ohio's open records law, all reports obtained through Ohio University's helpline since its beginning; the university then put a halt to the helpline and contacted subjects of the report to warn them that their names could be released).

232. MICHELLE N. RODRIGUEZ & BETH AVERY, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1–6 (2016), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf (discussing state and local governments banning employers from asking in employment applications whether an applicant has been convicted of a crime); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.002 EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 6 (2012), https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

233. Joanne Deschenaux, *State Laws Ban Access to Workers' Social Media Accounts*, SOC'Y FOR HUM. RESOURCE MGMT. (Jul. 29, 2015), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-social-media.aspx (enumerating state legal restrictions on such access).

234. Susan L. Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169, 192–96 (2015).

message.[235] They can also be sued just for conducting an investigation that leads to employee discipline.[236]

The Occupational Health and Safety Administration (OSHA) has announced overt hostility to any program that rewards work units for having strong safety performance on the theory that employees will be deterred from reporting injuries—even if the incentives in fact reduce injuries.[237]

Privacy laws may impose restrictions on compliance audits, monitoring, and investigations.[238] Even testing employees' understanding of compliance materials has been restricted by local laws in Europe.[239] Companies have been told they cannot have a code unless it is negotiated with unions, giving labor groups the ability to veto such codes.[240]

235. *See* Killingsworth, *supra* note 82, at 984 ("Yet in most cases, the outcomes of disciplinary actions are kept confidential, mainly for fear of privacy or defamation claims by disciplined employees.").

236. *See Disciplined Employees Sue Compliance Officer, Hotline Caller, Managers*, 10 REP. ON MEDICARE COMPLIANCE 1 (2001) ("This is do or die for the compliance program[.] . . . If this case is lost or settled and they get money for doing what they did, it undermines the compliance program completely.").

237. *See* OCCUPATIONAL SAFETY AND HEALTH ADMIN., PROTECTING WHISTLEBLOWERS: RECOMMENDED PRACTICES FOR EMPLOYERS FOR PREVENTING AND ADDRESSING RETALIATION 3, http://www.whistleblowers.gov/protecting_whistleblowers.pdf; Allen Smith, *OSHA Issues Draft Guidance on Anti-Retaliation Training*, SOC'Y FOR HUMAN RES. MGMT. (Nov. 19, 2005), https://www.choate.com/uploads/1178/doc/Keating-_OSHA_Drafts_Guidance_on_Anti-Retaliation_Training.pdf. OSHA proposes this step as part of an anti-retaliation program:

> Eliminating all formal and informal workplace incentives that encourage or allow retaliation or discourage reporting. Examples of problematic incentives include rewarding employee work units with prizes for low injury rates or linking supervisory bonuses to lower reported injury rates.

OCCUPATIONAL SAFETY AND HEALTH ADMIN, *supra*, at 3. For additional information on incentive programs, see Memorandum from Richard E. Fairfax, Deputy Assistant Sec'y, Occupational Health & Safety Admin., to Regional Administrators, Whistleblower Program Managers (Mar. 12, 2012), http://www.osha.gov/as/opa/whistleblowermemo.html.

238. *See* Neil Baker, *Rules in Europe Obscure Cross-Border Investigations*, COMPLIANCE WEEK, Oct. 2014, at 60.

239. As explained to the author by practicing lawyers in Europe, for example, for a German company to gain access to test results on employees' online compliance training, it is necessary to negotiate this with Works Councils; given the variety of matters companies have to negotiate with such councils, steps that make compliance training more effective are likely to be sacrificed.

240. *See* Am. Elec. Power Co. v. NLRB, 302 N.L.R.B. 1021 (1991), *rev. denied*, 976 F.2d 725 (4th Cir. 1992); LABOUR COURT OF WUPPERTAL, June 15, 2005, No. 5 BV 20/05 (Ger.); Sabine Schmeinck, *Germany—Labour Court of Appeal Düsseldorf Confirms Wal-Mart*

Diligence in extending compliance efforts to third parties and independent contractors can boomerang, causing the company exposure to more, rather than less, risk.[241]

### *G. An Important Mission Under Attack*

Compliance and ethics represent an essential mission in preventing corporate misconduct. The field has grown enormously over the three decades since *Interactive Corporate Compliance* was published. But those who share this mission need to have their eyes open; the old regime will not readily give up its prerogatives, power, and control.

In this uncertain environment there should be no mistake about the result: society is paying a serious price for this legal gamesmanship. While there are certainly excellent efforts and initiatives in company compliance programs, the result is nowhere near where it could be and needs to be. Public health is threatened, economies are shaken, governments are corrupted, and enormous harm is being caused by corporate and other organizational misconduct. Anything that inhibits and undermines preventive efforts should have a high burden of proof before it is permitted to flourish. The stakes are too great to continue otherwise.

## IV. MAKING COMPLIANCE AND ETHICS PROGRAMS EFFECTIVE

### *A. Dangerous Weaknesses in Compliance and Ethics Programs Today*

When the U.S. Sentencing Guidelines were adopted in 1991, it was recognized that this was an experiment.[242] It is still an ongoing experiment in the prevention of organizational misconduct. Like any

*Decision*, LINKLATERS (Dec. 14, 2005), http://www.linklaters.com/Insights/Publication1403Newsletter/PublicationIssue20051214/Pages/PublicationIssueItem825.aspx; Bettina Wassener, *German Blow to Wal-Mart Ethics Code*, FIN. TIMES (June 17, 2005), http://www.ft.com/cms/s/0/26ca4d4e-decd-11d9-92cd-00000e2511c8.html?ft_site=falcon&desktop=true#axzz4UEPGnIEJ.

241. The point of these examples is not that all compliance and ethics efforts should be exempt from the law, but that the law should not be allowed to undercut them with little or no regard for their importance.

242. Jed S. Rakoff, A*n Overview of the Organizational Sentencing Guidelines*, *in* JED S. RAKOFF & JONATHAN A. SACK, CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION §§ 1.01, 1–3 (2005) ("[T]he Organizational Guidelines embody a radical change and an experiment in the sentencing of impersonal organizations.").

experiment, there is a need to monitor results and react. In the preceding part, the discussion addressed ways that the legal system has undercut this experiment, perhaps to an extent that could be toxic to effective compliance and ethics work.

While compliance and ethics is playing an important part in preventing organizational misconduct, there remain gaps in this effort. What are the areas where compliance and ethics programs need to improve to reach their potential? What should be the focus of government in providing incentives, and compliance and ethics professionals in improving company programs? Based on years of working in this area, and observing the patterns of company violations and scandals, these are the points most in need of attention:

1) Not addressing company executives as the highest risk in the company;

2) Chief ethics and compliance officers being underpowered, disconnected from decision making, and not independent;

3) Not recognizing the power of incentives;

4) Relying on trust as a control;

5) Being distracted by clichés, buzz words, and other bright, shiny objects; and

6) Shopping the Sentencing Guidelines.

This is not to say that these six are all that matter. There are certainly many ways that programs can be improved in a variety of areas, from training to conducting compliance audits, to handling investigations.[243] But these six points dangerously undercut the development of effective compliance and ethics programs, and are most likely to lead to serious violations.

1. Not Addressing Company Executives As the Highest Risk in the Company

243. *See generally* Joseph E. Murphy, 501 IDEAS FOR YOUR COMPLIANCE AND ETHICS PROGRAM: LESSONS FROM 30 YEARS OF PRACTICE (2008) (reminding compliance and ethics practitioners of the many types of steps companies can consider beyond mere paper and preaching).

When one works for an organization, it is very difficult to suggest that the greatest compliance risks a company faces come not from a rogue employee out in a remote office, but from the trusted executives at the top of the company. However, in at least a number of high profile compliance risk areas, this is the case.[244] While the program may be focused on the workers, the greatest risk exists among the executives.[245] Yet politically, it is extremely difficult for either inside compliance managers or outside retained experts to press this point. For the outsider, it is, in effect, biting the hand that feeds. For the insider, suggesting to one's superiors that they cannot be trusted is a career-threatening step. Absent an external force pushing for this, resistance can be very high.

It is the failure to recognize executives as the highest risk in the company that lies at the heart of the ineffectiveness of many programs in dealing with high-level violators. There is a saying in the compliance and ethics field that "the big guys get in trouble and the little guys get ethics training."[246] Even after a debacle that lies at the feet of the top executives, the first instinct of many organizations is to adopt "zero tolerance" rules that appear to be mostly targeted at workers who did nothing wrong and to roll out ethics training for the workers who had nothing to do with the misconduct.[247]

The reality, however, is that senior executives are often front-and-center in violations.[248] Arrogance at this level can be remarkable; in the

244. *See infra* note 248 and accompanying text.

245. *See infra* note 248 and accompanying text.

246. The author has heard this said in informal discussions with compliance and ethics practitioners.

247. Based on numerous discussions with company and government employees required to take ethics training after scandals involving executive and high-level wrongdoing, such as New Jersey's UMDNJ scandal. *See* Joe Ryan, *UMDNJ to Pay $8.3 Million to Settle Kickbacks Case*, NJ.COM (Sept. 30, 2009), http://www.nj.com/news/index.ssf/200 9/09/umdnj_to_pay_83_million_to_set.html.

248. *See, e.g.*, CORPORATE FRAUD TASK FORCE, REPORT TO THE PRESIDENT §§ 1.3, 1.6 (2008) (explaining the prominent role played by senior executives through a broad range of corporate crimes); Andreas Stephan, *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels* 8–10 (Econ. & Soc. Research Council Ctr. for Competition Policy & Norwich Law Sch., University of East Anglia, Working Paper No. 09-09, 2009), http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1432340. Susan F. Divers, *Tracing Corporate Train Wrecks back to Toxic Tone at the Top*, FCPA BLOG (July 21, 2016, 8:28 AM), http://www.fcpablog.com/blog/2016/7/21/susan-divers-tracing-corporate-train-wrecks-back-to-toxic-to.html#sthash.4JiEFACz.dpuf. They may be active participants in the wrongdoing, or involved in covering it up after the fact.

author's experience this tendency can border on low comedy. For example, in one company that provided online compliance and ethics training, the assistant for the chief executive of a client called the training company and asked if the records could be changed to show that the boss had taken the ethics training.[249] After all, the assistant said, "He's busy and he already knows this stuff."[250] As it turned out, this was impossible to do in the training system, and the training provider would not have done it in any event.[251] But the whole idea of an executive delegating to a subordinate a request to cheat in ethics training is a stunning example of arrogance at high levels.[252]

There is also the point that most, if not all, standards and guidance materials on compliance and ethics emphasize the need for executive-level support for compliance and ethics.[253] Yet it likely remains the case that in the typical risk area, a lawyer writes a statement that the chief executive officer signs, sometimes with and sometimes without reading it. This is not a sign of commitment; quite the contrary, it is a symptom of failure. The chief executives need to lead the program actively, not merely recite sound bites. This leadership can come in many practical forms.[254]

Real leadership in the compliance and ethics program is a very difficult thing to ask for or to get from "busy" executives. But even more daunting is to have the system of controls actually apply to them. For example, training needs to be more thorough for these executives, and not the preferred "executive summary" that lasts no more than fifteen

249. Circumstances related to the author by an employee of an online training company.

250. *Id.*

251. *Id.*

252. *Id.*

253. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(A)–(B) (U.S. SENTENCING COMM'N 2015).

> First, it starts at the top. A company's senior executives and board of directors must fully support and engage with the company's compliance efforts. If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one. Employees will pick up on the lead of their bosses. If the bosses take compliance seriously, the employees are far more likely to take it seriously. If they don't, the employees won't. It's as simple as that.

Snyder, *supra* note 226, at 4–5.

254. For examples of ways that executives can demonstrate "tone at the top" beyond mere talk, see Joseph E. Murphy, *Tone at the Top: How the CEO Can Do More Than Just Talk*, COMPLIANCE & ETHICS PROF., Oct. 2014, at 80.

minutes.[255] Controls that apply to junior employees also have to be applied for the top bosses. Audits that check salespersons' vouchers also need to be applied to the vice president of sales. Of course, the executives may not like this; it likely never occurs to them that the sales people do not like it either. But program elements need to be based on degree of risk,[256] and, at the top where the air is rarified, the risks are greatest.

The resistance can be intense. This means that ultimately there needs to be someone in the organization positioned to know what is going on at the executive level, and who is positioned to say "no" and make it stick. This person is the chief ethics and compliance officer ("CECO").[257] The CECO needs to be able to stand toe-to-toe with an angry executive, say "no," and survive.

2. CECOs Underpowered, Not Connected, and Not Independent

When an organization intends to accomplish an objective, it places someone in charge to ensure the objective is pursued.[258] So, too, if management is serious about compliance and ethics, it places someone in charge. This person is the CECO. Considering the role of corporate senior executives in some of the worst violations and the need for authority to achieve results in an organization, the positioning of the person responsible for the compliance and ethics program would necessarily be among the most important factors in relation to a program's success.

However, in practice this may be one of the most important weaknesses in compliance and ethics programs. It appears that in key respects the CECO is, instead, positioned to fail.[259] For example, when

255. Under the Sentencing Guidelines standards, training is required to include "members of the governing authority, high-level personnel, substantial authority personnel" and others. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(4)(B) (U.S. SENTENCING COMM'N 2015).

256. *Id.* § 8B2.1(c)(requiring risk assessment).

257. Organizations have used a variety of names for CECO, including compliance officer, ethics officer, business practices officer, etc. CECO is used here to cover the highest-level officer with this responsibility, and combines ethics and compliance in the function.

258. In the homespun words of well-known compliance and ethics practitioner Marjorie Doyle, "[I]f everyone is supposed to feed the dog, the poor dog starves."

259. *See generally* SCOTT RONEY ET AL., ETHICS RESOURCE CTR., LEADING CORPORATE INTEGRITY: DEFINING THE ROLE OF THE CHIEF ETHICS AND COMPLIANCE OFFICER (CECO) (2007), http://www.corporate-ethics.org/pdf/Leading_Corporate_Integrity_Report.pdf; MICHAEL D. GREENBERG, RAND CTR. FOR CORP. ETHICS & GOVERNANCE, PERSPECTIVES OF

the CECO is a lawyer junior to the general counsel,[260] this person is in effect being called upon to "police up," i.e., to monitor and attempt to control those above him or her. But, in any organization, this can be a career-ending step. Calling out one's boss, the boss' peers, and superiors is highly hazardous. There is also an appearance issue. If the company calls a junior employee the "ethics officer," it seems not to notice the irony in lying about the person's title. Junior people are not officers—they are midlevel managers. Giving them a false executive title with no real power does not help the program. Lying about ethics cannot set the right tone at the top and can be one of the factors that helps undermine the company's culture.

To be effective in the real world where the executives may be the ones most in need of monitoring, the CECO's position has several requirements.[261] This position needs the authority or power to do the job and say "no" to senior people. The person running the program needs the independence to do this without adverse consequences and without the ability of others to control his or her conduct.[262] The CECO

CHIEF ETHICS AND COMPLIANCE OFFICERS ON THE DETECTION AND PREVENTION OF CORPORATE MISDEEDS: WHAT THE POLICY COMMUNITY SHOULD KNOW 29 (2009), http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2009/RAND_CF258.pdf; Donna Boehme, From Enron to Madoff: Why Most Corporate Compliance and Ethics Programs are Positioned for Failure, Remarks presented at the RAND Conference (Mar. 5, 2009), http://www.compliancestrategists.org/wp-content/uploads/2012/09/March-5-2009-Boehme-PDF-Download.pdf ("In many companies today, the CECO is still poorly positioned, and lacking in the empowerment and independence needed for successful discharge of the critical role he or she is expected to play.").

260. It may well be that much of the criticism in the literature about compliance and ethics programs has little to do with the Sentencing Guidelines standards and much more to do with company lawyers, practicing only as lawyers and not as compliance and ethics professionals, attempting to treat the subject as merely a subsidiary part of normal legal practice. *See, e.g.*, Paine, *supra* note 20, at 106 (observing that the compliance approach is "[d]esigned by corporate counsel"). The issue of programs not resonating with employees may not really be the result of programs focusing on "compliance." An alternative explanation for such program weaknesses may simply be having programs controlled by lawyers who are unsuccessfully attempting to perform a management function for which they were not trained.

261. *See* Jaeger, *supra* note 102, at 26 (quoting Steven Cohen, then-associate director, Division of Enforcement, SEC, that the Commission looks to see whether the CECO has the necessary resources, clout, authority, and independence to do the job; how the CECO is hired and fired; what the CECO's reporting lines are; and whether the compliance officer is part of senior management).

262. The need for independence was forcefully articulated by the Brazilian competition law enforcers in their guide on competition law compliance programs: "[T]he most important aspect about compliance leadership is ensuring that the individual coordinating the program and monitoring its implementation is sufficiently independent

needs to be connected and part of the key decision making process. And the CECO needs "line of sight"[263] to what is happening throughout the organization, including in the field and in each of the compliance risk areas. These things are also necessary for the CECO to be able to protect and empower the compliance and ethics professionals working throughout a company and who may be exposed to adverse action by managers, absent such protection.[264]

3. Not Recognizing the Power of Incentives

Almost from the beginning of the field of compliance and ethics there has been controversy about the role of incentives in compliance programs. The 1991 version of the U.S. Sentencing Guidelines did not explicitly include them, although they could easily have been read into those standards.[265] However, after gaining experience with the subject, the Sentencing Commission made this explicit when it revised the standards in 2004.[266]

Yet companies and commentators appear to remain uneasy about the topic, suggesting a range of objections to this compliance program step.[267] Perhaps at its core the concern comes from the reality that

so that his or her decisions get to the governing bodies and are effectively given due consideration." MINISTRY OF JUSTICE, ADMIN. COUNCIL FOR ECON. DEF., GUIDELINES FOR COMPETITION COMPLIANCE PROGRAMS 19 (Braz.), http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf.

263. DONNA BOEHME, CORP. COUNSEL, WHAT'S YOUR COMPLIANCE OFFICER'S LINE OF SIGHT? (July 22, 2014), http://compliancestrategists.com/csblog/wp-content/uploads/2014/07/Whats-Your-Compliance-Officers-Line-of-Sight.pdf.

264. These are the individuals who show everyday courage in working to do the right thing in organizations but are mostly ignored by governments and commentators. *See* Joseph E. Murphy, *Why We Do What We Do*, SOC'Y OF CORP. COMPLIANCE & ETHICS, Aug. 2009, at 4.

265. Joseph E. Murphy, *Evaluations, Incentives and Rewards in Compliance Programs: Bringing the Carrot Indoors*, 3 CORP. CONDUCT Q. 40, 41 (1994).

266. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6)(A) (U.S. SENTENCING COMM'N 2015); AD HOC REPORT, *supra* note 124, at 1–3.

267. JOSEPH E. MURPHY, USING INCENTIVES IN YOUR COMPLIANCE AND ETHICS PROGRAM 4–10 (Nov. 2011) [hereinafter MURPHY, USING INCENTIVES IN YOUR COMPLIANCE AND ETHICS PROGRAM], http://www.corporatecompliance.org/Portals/1/PDF/Resources/IncentivesCEProgram-Murphy.pdf (listing and discussing objections to the use of incentives); ICC COMM'N ON COMPETITION, THE ICC ANTITRUST COMPLIANCE TOOLKIT 62 (2013), http://www.iccwbo.org/Data/Policies/2013/ICC-Antitrust-Compliance-Toolkit-ENGLISH/ ("[U]nlike more mainstream antitrust compliance programme measures, such as training and in-depth antitrust legal assessments, incentives have often proven to be controversial in theory and difficult to implement in practice. Therefore, you should

incentives are important in organizations and definitely get management's attention. As Professor Mollie P. Morland has acutely observed, "[a] company's true code of conduct is its budget."[268] The late management expert Peter Drucker expressed the point well: "[p]eople in organizations . . . tend to act in response to being recognized and rewarded—everything else is preaching."[269] Unfortunately, preaching is much more acceptable in organizations than interfering with pay, promotions, and recognition.

The reason incentives are so controversial may well be because they work.[270] That is why companies use them—they drive behavior.[271] This is also why they are indispensable in compliance and ethics. Organizations communicate what is most important to them through their incentive systems. This is how they motivate, and this is their most important tool to shape culture.[272] For example, in any company, if one knows who gets promoted and why, then one has a true handle on the culture. Of course, incentives may vary based on the nature of the organization; the concept of incentives is not automatically the same as cash.[273] The concept of incentives captures whatever reward and recognition systems are valued in the organization.[274]

carefully consider what incentives your company wishes to (or can legally) provide to ensure that antitrust compliance processes are followed."). Of the seventy-nine pages of otherwise very practical advice given in the toolkit, this is the only one with such foreboding ambiguity. ICC COMM'N ON COMPETITION, *supra*, at 62.

268. Mollie P. Morland, Professor, Nottingham Bus. Sch., Address at the University of Pretoria, Center for Business & Professional Ethics, Workshop on Corporate Culture: Getting it Right (Feb. 8–9, 2007).

269. Peter F. Drucker, *Board of Contributors: Don't Change Corporate Culture—Use It!*, WALL ST. J., Mar. 28, 1991, at A14.

270. James D. Gwartney et al., *Incentives Drive Human Behavior*, REALCLEAR BOOKS (Sept. 2, 2016), http://www.realclearbooks.com/articles/2016/09/02/incentives_drive_human_behavior_162.html.

271. *Id.*

272. The power of incentives can be seen in the scandal that enveloped Wells Fargo over its use of incentives to promote cross-selling, resulting in the alleged opening of large numbers of unauthorized accounts for customers. Thomas R. Fox, *Wells Fargo: Lessons in Compliance and Ethics*, NAT'L DEF. MAG. (Dec. 2016), http://www.nationaldefensemagazine.org/archive/2016/december/Pages/WellsFargoTheLessonsofanEthicsFailure.aspx.

273. *See, e.g.*, Scott A. Jeffrey & Victoria Shaffer, *The Motivational Properties of Tangible Incentives*, COMP. & BENEFITS REV. (June 2007), https://www.researchgate.net/publication/242141086_The_Motivational_Properties_of_Tangible_Incentives (discussing various non-cash tangible rewards).

274. Susan M. Heathfield, *What Are Incentives at Work? How to Fairly Provide Incentive Pay*, BALANCE (Aug. 26, 2016), https://www.thebalance.com/what-are-incentives-

There are a variety of tools that can be used to integrate the use of incentives into compliance and ethics programs.[275] For example, the Fraud Section of the U.S. Department of Justice's Criminal Division has noted, in describing its approach to assessing compliance programs that it will consider "[h]ow a company's compliance personnel are compensated and promoted compared to other employees."[276] The then-associate director of the Securities and Exchange Commission's Division of Enforcement, Steven Cohen, said in 2016 that "[p]ay and incentives for ethics and compliance behavior—as part of pay, bonuses, or otherwise—is certainly an extremely strong indicia of a company that has a good culture of compliance and ethics."[277]

Failure to provide compliance and ethics input into the incentive program and missed opportunities to use incentives to drive the program mark another area where weaknesses undermine compliance efforts. If an empowered CECO is not included to provide guidance, how a company sets its incentives for things like sales and cost cutting can drive an enormous variety of misdeeds. Carving the compliance and ethics program out of the incentive-setting process removes needed controls from the very core of the business,[278] and cuts into the ability to mold a culture that promotes ethics and compliance.

4. Relying on Trust As a Control

One of the core principles of *Interactive Corporate Compliance* was that compliance and ethics programs had to be interactive.[279] It was never enough to simply send messages out to the employees and hope that something happened. Any program that was serious needed to check actively to know what was going on. Also, while there is nothing

at-work-191799 ("An incentive is an object, item of value or desired action or event that spurs an employee to do more of whatever was encouraged by the employer through the chosen incentive.").

275. MURPHY, USING INCENTIVES IN YOUR COMPLIANCE AND ETHICS PROGRAM, *supra* note 267, at 18–36 (listing and describing ways incentives can be used in compliance programs); Jeffrey M. Kaplan, *Compliance Incentives*, *in* CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2011, at 185 (2011).

276. ANDREW WEISSMANN, U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 7 (Apr. 5, 2016), https://www.justice.gov /opa/file/838386/download.

277. Jaeger, *supra* note 102, at 27.

278. *See, e.g.*, LINDA K. TREVINO & KATHERINE A. NELSON, MANAGING BUSINESS ETHICS: STRAIGHT TALK ABOUT HOW TO DO IT RIGHT 186–89 (3rd ed. 2004).

279. *See generally* SIGLER & MURPHY, *supra* note 34.

wrong with being optimistic and believing in human nature in general, programs cannot be based on trust alone. Even among the best companies, if there are a large number of employees, there will certainly be potential wrongdoers. Indeed, statistics suggest that in a company with one hundred thousand employees, four percent may well be sociopaths.[280] Yet in compliance programs and in the literature in the field there remains a reluctance to focus on the "harder edge" of compliance—the steps designed to ferret out violations that would otherwise remain unknown, punish those who allowed wrongdoing to occur, and build in systems that reduce or minimize the opportunities for wrongdoing.

One very common example is the way that practitioners and commentators interpret the language of item one of the Sentencing Guidelines standards. The language of this item sends a straightforward message on the use of internal controls. In section 8B2.1(b)(1), organizations are called upon to have "standards and procedures" to prevent violations.[281] The commentary states, "'[s]tandards and procedures' means standards of conduct and *internal controls* that are reasonably capable of reducing the likelihood of criminal conduct."[282] Yet consistently in the literature and in practice, the guideline is read as if it said "standards and standards" with a great deal of attention to codes of conduct, some discussion of policies, and almost nothing about internal controls.[283]

The Sentencing Guidelines also remind organizations to conduct audits "to detect criminal conduct."[284] But again, little is covered on this in the literature, and less attention is given to this than to other areas such as training and helplines.

280. *See, e.g.*, Steven Morris, *One in 25 Business Leaders May Be a Psychopath, Study Finds*, GUARDIAN (Sept. 1, 2011), https://www.theguardian.com/science/2011/sep/01/psychopath-workplace-jobs-study; James Pratt, *Review* - The Sociopath Next Door, 10 METAPSYCHOLOGY ONLINE REVIEWS (Dec. 26, 2006), http://metapsychology.mentalhelp.net/poc/view_doc.php?type=book&id=3433&cn=393. While any such numbers are subject to debate, the point is that a large company may have thousands of employees who are not going to be reached by positive approaches.

281. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(1), at 507 (U.S. SENTENCING COMM'N 2015).

282. *Id.* § 8B2.1 cmt. app. notes 1 (emphasis added).

283. Joseph E. Murphy, *Where Do the Sentencing Guidelines Say "Standards and Standards"?*, COMPLIANCE & ETHICS PROF., Sept./Oct. 2012, at 76. Notably, codes of conduct are not mentioned in the Sentencing Guidelines.

284. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(A), at 508 (U.S. SENTENCING COMM'N 2015).

Another example can be seen in one of the areas where companies do commonly reach out to employees: surveys. Use and discussion of surveys appears to be very common in the field.[285] But often practitioners forget what it is that surveys actually measure. They do not measure facts. They only measure what perceptions employees care to give in the surveys at the moment they are answering the questions. Surveys can be useful guides, but they do not provide complete answers. It is always necessary to go past the trust factor with feet on the ground and find out what is actually happening in the field.[286]

In the gentler areas like training and codes there has been a serious effort to keep up with technology. Thus, companies use online training tools,[287] and even applications,[288] to communicate their compliance message. But despite the broad awareness of the era of "big data," there remains resistance to using such techniques to detect violations. Thus, a state-of-the-art tool like screening is rarely, if ever, used in sensitive compliance areas like antirust.[289] Notwithstanding the clear direction of the Sentencing Guidelines to check, and not rely merely on sending materials out to people, this harder edge is typically given lower priority.[290]

285. Edward Petry, *Ethics and Compliance Surveys*, *in* JEFFREY M. KAPLAN & JOSEPH E. MURPHY, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES §§ 18:1–18:2, Westlaw (database updated Oct. 2016).

286. *See* Edward Petry, *The Limitations of Ethics Surveys (Part I)*, 21 ETHIKOS & CORP. CONDUCT Q. 1, 1, 3 (2008); Edward Petry, *The Limitations of Ethics Surveys (Part II)*, 22 ETHIKOS & CORP. CONDUCT Q. 1, 4, 13 (2009).

287. *See* Timothy C. Mazur, *Training and Other Communications: Web-Based Training*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, § 12:27.

288. Raphael Richmond, *Compliance? There Should Be an App for That!*, COMPLIANCE WK., Aug. 2015, at 40, http://mydigimag.rrd.com/article/Compliance%3F+There+Should+Be+an+App+for+That!/2236556/0/article.html.

289. *See* Rosa M. Abrantes-Metz et al., Manuscript, Antitrust Screening: Making Compliance Programs Robust 7, 11 (July 26, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648948 (advocating for screening to be implemented in antitrust areas).

290. There is concern expressed about the impact on employees and culture about having a so-called "command-and-control" approach. *See* Killingsworth, *supra* note 82, at 975–76 ("Around three to four percent of any sizable group operate largely without a conscience, and command-and-control is the only way to govern these amoral actors." (footnote omitted)). However, there are a variety of tools available, and each should be used for its purpose. So, while softer behavioral tools have a place for reaching the majority of well-intentioned employees, companies are also responsible for the acts of sociopaths and psychopaths on their payrolls. No large organization, not even the Catholic Church, which experienced the impact of sexually deviant clerics, can simply rely on

5. Being Distracted by Clichés, Buzz Words, and Other Bright, Shiny Objects

Organizations rightly examine what their values should be and how values relate to their missions.[291] They also increasingly hear the references to culture and realize that culture has an enormous impact on the behavior of all those who act for the company. Yet throughout there remains a dangerous impulse to avoid the hard and often difficult work of internal crime prevention.[292] Instead there appears often to be a fascination with clichés, buzz words, and other bright, shiny objects. Thus, if a new, self-styled guru appears on the scene and announces that everything before him or her was wrong because they failed to see the light, there are too many who are impressionable enough to be drawn in this direction.

One reason for this phenomenon is that the field of compliance and ethics is truly multidisciplinary.[293] The downside of this is that, at least while the field is still in its formative years, it can be subject to being pulled by related fields. This can be seen in the efforts of other fields to assert dominion over this interesting new turf.[294] But the field is not a subset of human resources, law, risk management, social responsibility, or governance, although it definitely touches on all of those fields. It is not government, risk, and compliance ("GRC"),[295] enterprise risk

culture to assure its members will always act ethically and properly. Thus, in the corporate context, trust is essential, but so is verification. Each must be tailored to suit the specific circumstances.

291. Reggie V. Lee et al., *The Value of Corporate Values*, 39 STRATEGY + BUS. 1, 1, 3 (2005), http://ssrn.com/abstract=956170.

292. *See* Roy Snell, *Good Grief, They Are at It Again*, COMPLIANCE & ETHICS BLOG (Mar. 28, 2016), http://complianceandethics.org/good-grief-they-are-at-it-again/ ("You have to look for, find, and fix problems before you can build an ethical culture.")

293. Jason L. Lunday, *The Ethics and Compliance Officer's Many-Colored Hat*, COMPLIANCE & ETHICS BLOG (Feb. 15, 2016), http://complianceandethics.org/ethics-and-compliance-officers-many-colored-hat/.

294. *See, e.g.*, Ben W. Heineman, Jr., *Don't Divorce the GC and Compliance Officer*, CORP. COUNSEL, Jan. 2011, at 48–49, http://www.law.harvard.edu/programs/corp_gov/articles/Heineman_CorpCounsel_12-14-10.pdf (claiming the area of compliance for lawyers).

295. Sean Lyons, *The Corporate Defense Continuum: (Part 1) Governance, Risk and Compliance (GRC)*, SSRN (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1069723 ("The term GRC represents an evolution towards an integrated program of governance, risk and compliance management. This approach aims to unify the management of 'Governance,' 'Risk' and 'Compliance' and optimize these activities in order to help overcome the problems caused by business fragmentation and disjointed approaches.")

management ("ERM"),[296] or any other combination of areas. Nor is it corporate social responsibility ("CSR"), focused on benefits to a broader community.[297] It is a field focused on preventing and detecting misconduct in organizations. This is an enormously complex field, requiring focused attention. It is also difficult work, and thus, unfortunately, softer techniques may have appeal as a gentler alternative.

The concept of culture also deserves special attention. It is sometimes said that "culture trumps compliance,"[298] as if these were separate things. But of course, the culture of an organization is really its human environment; it is best described in a company as "the way we do things around here."[299] Culture is certainly important in preventing misconduct in organizations. But there is no basis for putting it in opposition to compliance and ethics. There is no secret formula for culture, no guru who can arise from the mist and magically transform it. This is an area that the Sentencing Guidelines hit squarely on target, in language that has been frequently ignored. The Sentencing Guidelines do not call for "culture" as an itemized element to be added to a checklist. Rather, they recognize that the compliance and ethics program elements are, in fact, the same tools managers use to accomplish things.[300] The Sentencing Guidelines are, in substance, a

296. Mark S. Beasley, *What Is Enterprise Risk Management?*, ENTERPRISE RISK MGMT. INITIATIVE (2016), https://erm.ncsu.edu/az/erm/i/chan/library/What_is_Enterprise_ Risk_ Management.pdf. ("The objective of enterprise risk management is to develop a holistic, portfolio view of the most significant risks to the achievement of the entity's most important objectives.")

297. For a comprehensive discussion of the scope of CSR, see Brown, *supra* note 117, at 368–71.

298. *See, e.g.*, Stephen Paskoff, *Why Culture Trumps Compliance*, WORKFORCE (Aug. 5, 2014), http://www.workforce.com/2014/08/05/why-culture-trumps-compliance; Ed Petry & Mary Bennett, *2015 Trends: #3 Culture (Still) Trumps Compliance*, NAVEX GLOBAL: ETHICS & COMPLIANCE MATTERS (Jan. 9, 2015), http://www.navexglobal.com/blog/2015-trends-3-culture-still-trumps-compliance; Dick Weisinger, *Ethics and Compliance: Culture Trumps Compliance*, FORMTEK (Dec. 18, 2003), http://formtek.com/blog/ethics-and-compliance-culture-trumps-compliance. The slogan is useful to remind people to pay attention to culture, but not if it is misinterpreted to suggest that culture (a result) substitutes for effective management steps (the means to mold and shape culture).

299. TERRENCE E. DEAL & ALLAN A. KENNEDY, CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE 60 (2000).

300. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (U.S. SENTENCING COMM'N 2015) ("Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following [seven elements] . . . .").

list of sound management tools. That is the reason they are there, and that is why they work in organizations. Like any management system, there are smart ways and dumb ways to use them. But if one does not use management tools in an organization, nothing changes and nothing gets done. It follows inexorably that these seven elements or tools are what creates, molds, and changes culture.

One simple example illustrates this, and also demonstrates the impact of failing to address incentives—one of the other dangerous weaknesses. What management rewards and how it rewards will inevitably impact culture. The story of a manager who broke the rules but was successful in making a big sale and was therefore promoted will quickly become a story that is part of an organization's culture.

Of course, culture is a factor in preventing wrongdoing, but it is not the only one. Even if one knows the overall culture, there will also be subcultures throughout any organization.[301] Any of these might be conducive to particular violations. It also needs to be remembered that corporate crime is not committed by majority vote. Even if ninety-five percent of employees love the company, always want to do right, and believe in the company's values, in a company with one-hundred thousand employees, this means five thousand do not share this view. Given that it only takes one to commit a serious crime, it should be clear that no simple concept, such as focusing only on culture, is going to work. Trust, even in the best corporate culture, is not a control. And no clever-sounding formula will replace the need to use meaningful management steps to achieve the objective of an ethical and compliant organization. This is, and will continue to be, hard work.

6. Shopping the Sentencing Guidelines

The Sentencing Guidelines set out the minimum steps for an effective program.[302] This should mean that no program gets credit or

301. *See* Edward S. Petry, *Corporate Culture and Compliance Programs*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES *supra* note 4, § 7:9; Miriam H. Baer, *Governing Corporate Compliance,* 50 B.C. L. REV. 949, 987 (2009) ("[M]ultiple cultures may exist across geographic regions, task-oriented divisions, or between rank-and-file employees and their managers.").

302. While this is literally only true in the United States, the core management steps tend to be similar among program standards, with the OECD's Good Practice Guidance being particularly close to the Sentencing Guidelines. Generally, any company following the Sentencing Guidelines' standards will be well-positioned under any other standard, with relatively minor adjustments (e.g., in Australia including a customer complaint line as part of the compliance program. *See Complaints handling: Why should you care?*, GRC

recognition unless it covers all the elements. The list of items is nominally seven, although in practical terms it is closer to twenty.[303] Nevertheless, the message should have been completely clear: unless you cover all seven, as written, the program does not meet the minimum standards. Within those minimum standards, companies have enormous flexibility. Thus, the approach has been well-described as "structured flexibility."[304]

Yet, despite twenty-five years on the record, the approach generally tends to be to ignore this simple point and treat the seven as a list of options from which one can choose as one pleases. This has been true both for companies developing programs, and for government agencies borrowing from the Sentencing Guidelines' standards. Even academics who address this field omit critical elements of the Sentencing Guidelines' standards.[305] For example, it would be straightforward for prosecutors and regulators, when requiring companies to implement or enhance programs, to start with the fundamental point: the program must meet the minimum standards of the Sentencing Guidelines. Yet this has been strangely absent. When the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council ("Councils") purported to incorporate the Sentencing Guidelines to ensure consistency of approach in the Federal Acquisition Regulation ("FAR") in requiring compliance programs for federal government contractors, instead of starting with a statement that the Sentencing Guidelines were to be incorporated by reference, the Councils used an ersatz

INSTITUTE, http://thegrcinstitute.org/news/view/1428 (last visited Jan. 4, 2017) ("A cornerstone of a good compliance program is a complaints handling function built into a continuous feedback loop with information and communications delivery.").)

303. *See* Joseph Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26 ANTITRUST 61, 62 (2012) (listing twenty elements).

304. Winthrop M. Swenson & Nolan E. Clark, *The New Federal Sentencing Guidelines: Three Keys to Understanding the Credit for Compliance Programs*, 1 CORP. CONDUCT Q. 1, 2 (1991).

305. For example, Kimberly Krawiec, a prominent critic of what she describes as "compliance structures," in addressing the sentencing Guidelines' Standards, omits many of the core elements of an effective compliance program with no explanation of why that is appropriate. *See* Kimberly D. Krawiec, *Organizational Misconduct*, *supra* note 76, at 583–84 (omitting from the Guidelines' standards, e.g., incentives, discipline, care in delegating responsibility, internal controls, oversight by the board, and program evaluation, but mentioning codes of conduct which are not included in the Guidelines' standards). Such abbreviated versions of the standards would, in any case, make them considerably less effective.

version, omitting important elements.[306] The Antitrust Division of the Department of Justice, in imposing a compliance program in both a criminal case[307] and a civil case,[308] failed to take this simple step, instead using a different approach in each case.

Shopping the list is a potentially fatal flaw in programs. The points that are omitted, while they may only appear to be small parts of any given Sentencing Guidelines element, are vital to the success of any program. These types of "shopping errors" include:

1) Omitting "internal controls" as part of item one, and reading item one as if it only said "codes of conduct." In the commentary, "procedures" in item 1 is defined to include "internal controls."[309]

2) Ignoring item three's requirement that promotions be screened to prevent those with a likelihood for misconduct from being promoted.[310]

3) Failing to provide full "training" of boards of directors, as set forth in item four;[311] not just giving them high-level presentations on the program.

4) Not conducting monitoring and auditing as required in item five, designed "to detect criminal conduct."[312] This is more than counting how many people have had training; it is the

306. *See* Joseph E. Murphy, *Things That Don't Make Sense: A Standard Too FAR,* COMPLIANCE & ETHICS PROF., July–Aug. 2012, at 72.

307. Declaration of Heather S. Tewksbury in Support of United States' Sentencing Memorandum at 25–33, United States v. AU Optronics Corp., No. CR-09-0110 SI, 2012 WL 3966339 (N.D. Cal. Sept. 20, 2012), http://www.justice.gov/atr/cases/f286900/286934_7.pdf; Joseph E. Murphy, *AU Optronics—The Antitrust Division Imposes a Compliance Program in a Criminal Case*, COMPLIANCE & ETHICS SPOTLIGHT, (Am .Bar Ass'n Section of Antitrust Law, Chicago, Ill.), July 2013, at 7.

308. United States v. Apple, Inc., Nos. 1:12–CV–2826, 1:12–CV–3394, 2013 WL 4774755, at *4–5 (S.D.N.Y Sept. 5, 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

309. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1.(b)(1) & cmt. app. note 1 (U.S. SENTENCING COMM'N 2004).

310. *Id.* § 8B2.1(b)(3), cmt. app. note 4(B).

311. *See id.* § 8B2.1(b)(4).

312. *Id.* § 8B2.1(b)(5)(A).

difficult job of looking for violations among those most likely to commit them.[313]

5) Not fulfilling item five's requirement to evaluate the program for effectiveness.[314] All aspects of the program need to be measured; companies need to listen to their people. If the training is boring or condescending, it will not work, and may even backfire. If investigations and discipline are coming across as vindictive and discriminatory, something needs to be changed. Flaws like these can undermine program efforts and poison the culture. But merely asking a few questions in an annual survey, while helpful, cannot possibly meet this standard. There needs to be real evaluation of how each step is working.

6) Not following item five's message to prevent retaliation.[315] Swearing a mighty oath in the code not to retaliate is meaningless if nothing is done to back it up.

7) Ignoring item six's direction to impose discipline for failure to take reasonable steps to prevent and detect violations.[316] While companies certainly discipline workers for offenses, they tend not to discipline managers for this specific type of failure.

8) Not using incentives to promote the program, as directed by item six.[317] This is a major item, as noted above.

9) Ignoring the commentary's requirement that a program be up to industry practice.[318] This is part of the Sentencing

313. *See, e.g.*, Neil E. Roberts, *Antitrust Compliance Programs Under the Guidelines: Initial Observations from the Government's Viewpoint*, 2 CORP. CONDUCT Q. 1, 2 (1992) (calling for "affirmative steps to detect price fixing or bid rigging, premised on the possibility or even the assumption that education and admonition will not deter personnel who will act in bad faith")

314. *Id.* § 8B2.1(b)(5)(B).

315. *Id.* § 8B2.1(b)(5)(C).

316. *Id.* § 8B2.1(b)(6)(B).

317. *Id.* § 8B2.1(b)(6)(A).

318. *See id.* § 8B2.1(b) cmt. app. note 2(A)(i), 2(B); *see also* Winthrop M. Swenson, *An Effective Compliance and Ethics Program*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, § 4:6, at 152 n.10.

> Guidelines, yet people tend not to read the essential comments that go with the standards. The impact of this item is that, if a program is not at least as good as others, it does not meet the minimum standards.

Of the dangerous flaws in programs, this last flaw is one where the fault likely rests directly with government enforcers. If the government had made it clear from the beginning that "minimum" means "minimum," that the Sentencing Guidelines' standards were not a collection of synonyms, and that each element was in the standards for a reason, companies would have started to get the message.

### *B. What Will It Take to Make Effective Programs?*

This list of dangerous weaknesses does not purport to be comprehensive; there are certainly other ways in which compliance steps can be improved, but the six weaknesses discussed in the previous section are listed here because of their high level of danger. Until these are addressed, it is likely that programs will fail in too many tests of strength where wrongdoers in organizations attempt to have their way.

There are certainly companies that will attempt to address some of these weaknesses and implement strong programs. But as a general matter, it is a safe prediction that companies will not make the tough changes by themselves. History since the Sentencing Guidelines teaches us that companies do respond when government approaches this the right way.

Why will it not occur spontaneously? One reason comes from an observation in the political sphere, made by Lord Acton, that "[p]ower

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> [W]hile the guideline commentary literally read seems to require adherence to industry practice, it seems obvious that what the Sentencing Commission had in mind was that companies' compliance standards and procedures be at *least as good* as prevailing industry practice. It is doubtful the Commission intended to stifle innovation that could foster effective approaches for individual companies or for organizations generally.

*Id.* This was written by the senior staff person at the Commission responsible for the drafting of the provisions.

tends to corrupt and absolute power corrupts absolutely."[319] Those in charge of companies have significant power over their domains. A truly effective compliance and ethics program represents an encroachment on that power. Those with power tend not to give it up lightly.

The idea behind compliance programs, as explained in *Interactive Corporate Compliance*, is that government causes companies to create within themselves compliance constituencies—organizations within the organization whose *raison d'etre* is to pursue objectives and interests beyond the compensation system of the company.[320] They serve to represent the public interest within these large, powerful economic bodies.[321]

In this context, government, and only government, has the power to cause change. How does government do this? The Sentencing Commission set the pattern for this by doing two things: setting out in the Sentencing Guidelines a practical formula (the Sentencing Guideline's "7 steps") and making a commitment (sentence reduction).[322] In hindsight, the commitment turned out to be different from the original model; consideration of compliance programs by enforcers, rather than courts at sentencing, has been the true motivating factor. But the Sentencing Guidelines' formula was powerful enough nevertheless to create ripples that have reached around the world.

How can government move this to a higher, more effective level? These are the steps:

1) Make it very clear that only truly effective programs matter, applying all the steps set out in the Sentencing Guidelines, and offering very serious incentives. This includes actually applying each one of the Sentencing Guidelines steps.

2) Put the burden of proof on the company.

3) Make it very clear, through actual cases, that government is actually doing this and will recognize good programs

319. Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), *in* 1 LECTURES ON MODERN HISTORY (John N. Figgis & Reginald V. Laurence eds., 1906). http://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524_label_010.

320. SIGLER & MURPHY, *supra* note 34, at 73, 103–04, 147–48, 194.

321. *Id.*

322. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2015).

4) Have the expertise in the government so companies know government can tell real from sham programs.[323]

5) Provide actual case examples so that industry can learn from experience.

6) Remove the harmful conflicts in the legal system that seriously undermine programs.

### *C. How to Rationalize the Conflict*

For those addressing the harm that organizations can cause, the question is how to balance the potentially conflicting policy questions and address the compliance and ethics program weaknesses. It is important to note, however, that many who champion the old approaches and are litigation-oriented may not even see that there is a conflict. It is not unusual for those who benefit from an existing system not to see the need for change. But for those who have lived in the heart of this system and seen its flaws, the need for doing a better job is urgent.

The first step, then, in resolving the conflict is to recognize that there is a conflict. To get the attention of the existing system, it is necessary to establish clearly that compliance and ethics, and the control of organizations before the harm is done, are important societal values. All regulators, enforcers, and judges need to receive this message. They should not feel free to pursue their own political or regulatory interests by dismissing other values that society finds to be important. All actors in the system should be expected to recognize the role of compliance and ethics and balance this interest heavily in accommodating other policies.

Another important step in achieving this balance is to require all government entities in all branches of government, to implement compliance and ethics programs themselves. This serves two purposes. The first is to protect the public from possible misconduct by these organizations. The model for this is in the Sentencing Guidelines, which include government agencies within the scope of "organizations."[324] Any

323. Some have pointed to the fact that the Fraud Section of the Department of Justice recently retained one expert in the field of compliance and ethics to assist in assessing programs. What is really newsworthy about this is not that one section in one division finally did this; it is that no one in enforcement did anything like this until a quarter of a century after the Guidelines took effect.

324. *See supra* note 1 and accompanying text.

organization that employs human beings can create risk against the public interest. They should all be applying management tools for this purpose. Second, there is no better way to understand something than to experience it. Government agencies will be better able to understand compliance and ethics when it is part of their own environments.[325]

All societies, but America's in particular, need to understand that litigation in all its various applications is just one policy tool, not an end in itself. Where the use of compliance and ethics creates a conflict with the legal system, it is not automatically to be sacrificed. Rather, the significant role of compliance and ethics needs to be protected as a paramount value.

In order for compliance and ethics to blossom in companies, the champions of this effort need to be given the authority to do their difficult jobs. There is thus a need to recognize the role of compliance and the compliance and ethics professionals. These professionals play a special and different role from others in the company.[326]

There also needs to be recognition of the reality of incentives and disincentives. It would be a pleasant world indeed if business people (and people in all organizations) included compliance and ethics as a serious part of their missions and implemented effective compliance programs *sua sponte*. But nothing in history supports the notion that this will happen spontaneously. Rather, it is evident that organizations must respond to stimuli for this to happen. Credible threats of enforcement, combined with recognition and incentives tied only to serious compliance and ethics efforts, are what actually works.

Nor can society blink the reality that disincentives also have a strong impact. The more government ignores the value of compliance and ethics, the more it punishes those who attempt to implement programs, and the more it places obstacles to this important work, the less effective compliance and ethics becomes. A government at war with itself in policy terms is a tragic loss in the battle against corporate misconduct.

325. *See* RUTGERS CENTER FOR GOV'T COMPLIANCE & ETHICS, COMPLIANCE AND ETHICS PROGRAMS FOR GOVERNMENT ORGANIZATIONS: LESSONS FROM THE PRIVATE SECTOR 25 (2010), http://rcgce.camlaw.rutgers.edu/sites/rcgce/files/rcgce_whitepaper.pdf.

326. *See* SOC'Y OF CORP. COMPLIANCE & ETHICS, CODE OF PROFESSIONAL ETHICS FOR COMPLIANCE AND ETHICS PROFESSIONALS 3, http://www.corporatecompliance.org /Portals/1/PDF/Resources/SCCECodeOfEthics_English.pdf; Joseph E. Murphy, *Compliance & Ethics As a Profession—In the Public Interest*, *in* TRANSFORMING COMPLIANCE: EMERGING PARADIGMS FOR BOARD MANAGEMENT, COMPLIANCE OFFICERS, AND GOVERNMENT 46 (2014), http://www.rand.org/content/dam/rand/pubs/conf_ proceedings/CF300/CF322/RAND_CF322.pdf.

Finally, a last word about the use of compliance program efforts against companies in litigation. This conflict has consistently been mischaracterized as an issue of "privilege."[327] But as the author's contracts professor at the University of Pennsylvania Law School cautioned, when a judicial opinion begins with a reference to "the widow Brown," you know how the case is going to end. Anything characterized as a "privilege" starts with a strike against it. A "privilege" is something special that is normally minimized.[328] It is an exception against the norm. But the issue with the use of compliance and ethics materials against companies is not, and has never been, about "privilege." It is about protecting an alternative system for preventing misconduct in organizations.

Drawing from this misconception, an even more misdirected characterization occurs. For compliance and ethics work to qualify for privilege protection it needs to be "confidential."[329] This idea derives from such genuine privileges as the attorney-client privilege. Such actual privileges are indeed tied to confidential communications between attorney and client.[330] Confidentiality is core to legal representation. But compliance and ethics is not tied to confidentiality; in fact, the success of compliance and ethics depends to a great extent on the use of techniques that reach large numbers of people associated with companies, including those acting for the company who may not technically be employees. Although confidentiality is important in dealing with reporting systems and investigations, it is not otherwise the issue with compliance and ethics, and artificially imposing this as a requirement only hinders the effectiveness of compliance and ethics programs. What is needed, instead, is to remove such self-policing from adverse use in litigation, without reference to whether it was confidential.[331]

327. *See supra* notes 46–47, 140–61 and accompanying text (discussing the self-evaluative privilege).

328. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.")

329. Anton R. Valukas, Robert R. Stauffer & Joseph E. Murphy, *Threshold Considerations*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, § 5:24.

330. Upjohn Co. v. United States, 449 U.S. 383, 388–96 (1981).

331. Any such protection from use in litigation would be contingent on the material not being "at issue" in the litigation. Anton R. Valukas, Robert R. Stauffer & Joseph E. Murphy, *Threshold Considerations*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, § 5:24. Thus if an internal review was used to

The point for compliance and ethics is that it is the method through which companies prevent and detect wrongdoing. Confidentiality is not the issue; rather, the role of incentives is the core policy point. Companies have many choices in how great their commitment is to compliance and ethics. They also have many other productive uses for their resources. The more compliance and ethics activity represents mere fodder for use against companies in litigation, the less likely it is that companies will do this diligently and on a results-oriented basis.

Moreover, the material produced in compliance and ethics programs does not change underlying fact patterns that remain, as before, open to discovery and use in litigation. If a company engages in price-fixing, the facts of that conduct remain for adversaries to discover. The compliance and ethics program does not change that. But if the program produces training notes, risk assessments, and program evaluations, these do not alter the underlying facts. The product of compliance and ethics efforts should not be seen as special bonuses for adversaries in litigation to make their work easier. If all the program steps were removed from the picture, the underlying facts would remain what they were. Thus, in real terms, removing them from the litigation process creates no detriment to litigants; they are left exactly where they would have been if the compliance program had not existed.

Society thus has a choice: Allow compliance program work to be exploited, and thus ultimately suppress such efforts—the result of which is no net benefit to society. Or protect these efforts, and leave litigants with everything they had in the absence of the compliance and ethics program. The choice seems fairly clear.

There are some who would respond by saying the answer is simply to mandate compliance and ethics programs. But this approach, which seems so simple to those with no experience doing this, will have negative and unintended consequences.[332] First among these is that

destroy evidence, the review itself would be the issue and would be placed into litigation. Thus, the Supreme Court's decision in *University of Pennsylvania v. EEOC*, where a faculty peer review was in fact an issue in the case, is an example of an "at issue" matter. 493 U.S. 182, 191–92 (1990). Had the review been protected, there would have been no recourse for anyone injured by the review itself. In contrast, for concepts like the self-evaluative privilege, the review is ex post and does not change the event that created the original allegations of wrongdoing and liability. *See* Anton R. Valukas, Robert R. Stauffer & Joseph E. Murphy, *Threshold Considerations*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 4, § 5:24.

332. Government-compelled compliance programs are the clearest example of a true "command-and-control" approach now criticized by those with a behavioral orientation. *See* Killingsworth, *supra* note 82, at 975–76. It has been observed that a command-and-

requiring something by law moves it into the domain of the lawyers. If the law says to train everyone for two hours every two years, the lawyers will parse exactly what this means and ensure that the minimum standard is met. If the law contains certain language, the lawyers will have the company parrot back that exact language.[333] The reality of a world with scarce resources is, if the government sets a minimum, that will quickly become the maximum that a company will do. Instead of applying imagination and experience in the compliance and ethics field, companies will be ticking all the boxes, guided carefully by lawyers, so the government cannot bring an enforcement action against them. Rather than the company needing to convince a skeptical enforcer that its program merits credit despite misconduct having occurred, a harried enforcer will be trying to convince a skeptical judge that a company failed to meet its specific mandatory compliance program minimum standards.

Dictating minimums will also tend to freeze learning and development in the field of compliance and ethics. Once a court has said *X*, *Y*, and *Z* meet the minimum standard, why would any rational company go on to add *W*? The lawyers will tell management they are done with this topic, and it is time to move on to something more important. The law of unintended consequences may not have been

control approach can "reduce the employees' trust, productivity, engagement and commitment to comply with the law." Stucke, *supra* note 1, at 818. This may, indeed, be an accurate observation about government-mandated programs. However, as an observation about the Sentencing Guidelines, it is inaccurate. The Guidelines call for a full suite of management steps, not focusing merely on controls. Indeed, in my experience, there is a tendency to move away from the difficult, control-oriented work. The better observation is that any one of the Guidelines elements, if done in a dumb way, will fail or backfire (as is true of any management step). But if a program's enforcement is diligent and fair, employees will welcome the fact that those who break the rules, especially the "higher ups," are held accountable. Moreover, as noted earlier, the behavioral approaches are designed for the average employee, not the narcissists and psychopaths; employees are not stupid, and will understand controls whose focus is these types of wrongdoers.

Regarding government-mandated programs, those trying to measure the impact and value of compliance and ethics programs who base conclusions on industries where programs are mandated by government (and which people may tend to resent and resist) are likely to miss this point in their assessments. Mandated programs also tend to be driven by lawyers focused on meeting the specific legal requirements, rather than achieving an effective compliance and ethics program. Incentive-based programs following the Sentencing Guidelines model of structured flexibility are the basis of the compliance and ethics field, and were the intent of *Interactive Corporate Compliance*.

333. This could be seen after Sarbanes-Oxley was enacted, with companies drawing code language from the statute and from language adopted by the NYSE listing rules. Stucke, *supra* note 1, at 820–22.

enacted by the legislature, but in this area, it operates with full force. Compliance and ethics is difficult work; there are no simple answers.

How, then, do we move forward? What is needed is a step back by the legal system to encourage and provide meaningful incentives for meaningful compliance and ethics. If a company undertakes a diligent compliance and ethics effort, none of those steps should be available for use in litigation. Consider, for example, the federal rule on banks testing for discrimination, which is a version of the self-evaluative privilege.[334] To the extent that bank compliance people act in good faith and remedy any adverse findings, their work cannot be used against them.[335] The model is not tied to confidentiality. Rather, it is recognition that banks are well placed to ferret out such misconduct, but will not do so as effectively if their good work can then be used against them. As in that context, protection requires that the program steps actually be used to prevent and detect misconduct. If they are, then they are protected.

This returns the discussion to the beginning proposition. Great organizations can cause great harm. The litigation system has an ongoing role to play, but not an exclusive one. Thus, there has developed a second system whose purpose is prevention. It cannot replace the litigation system; deterrence and forced remediation will remain necessary. But all should accept that both systems are necessary and that the new system of compliance and ethics must not be sacrificed by overvaluing the litigation system.

There are perhaps many paths forward to this destination. But for society to signal what its values are, legislation should serve as a key tool. This would be most effective if it starts with the core proposition that organizations that implement effective compliance and ethics programs are acting in the public interest. To underscore this point, legislatures should make clear to regulators, enforcers, and judges that this is a public value that must be heavily balanced in the operations of the litigation system. Prevention should clearly take its place as a value to be respected and promoted throughout the litigation system.

## V. DRAFT LEGISLATION

The following draft is relatively simple, setting out the core policy points supporting organizations that implement effective compliance

334. Equal Credit Opportunity, 60 Fed. Reg. 66,414, 66,416 (Dec. 18, 1997) (to be codified at 12 C.F.R. pt. 202).

335. *Id.*

and ethics programs. Such legislation would require courts, enforcers, and administrators to take compliance and ethics programs into account, and not undervalue them in pursuing their own agendas.

While this draft sets out core elements, more detail could be added as appropriate to address specific policy conflicts experienced in a given jurisdiction. Specific points that could be covered include:

1) Codes of ethics, conduct, and similar manuals are not unfair labor practices, and no legitimate public purpose is served by undercutting company codes.

2) Helplines and "speak-up" systems are not data processing and do not need special privacy regulation or restrictions; workers raising concerns should be protected, not suppressed.

3) Codes of conduct, compliance manuals, and other elements in compliance programs are not "gotchas" to be used against companies. The fact that a company did not follow its code standards in specific circumstances cannot be used to establish negligence or confuse juries on applicable legal standards.

4) Training notes are not tools to be used by courts as shortcuts to establish liability.

5) Open records laws should not be used to expose sensitive compliance operations, such as helplines, when operating as parts of compliance and ethics programs in government and other public agencies.

6) Conducting background checks is not a discriminatory practice.

7) Compliance and ethics officers and professionals are not to be soft targets for regulators—they are not responsible for their company's conduct.

8) Publicizing disciplinary cases is not defamation.

9) Offering incentives to groups of employees for achieving compliance objectives, such as improved safety, is not an unsafe or improper practice.

10) Audits, investigations, and other monitoring activities are not privacy violations.

11) Testing employees on their understanding of compliance policies and rules is not an invasion of their privacy or labor rights.

12) Efforts to ensure compliance by third parties, agents, and consultants are not a factor in converting them into employees or for extending liability.

13) It is advisable for companies to consult with labor organizations and works councils, but labor groups cannot block compliance and ethics efforts.

One caution with this more detailed approach, however, is the risk that resistant regulators and courts will focus too much on the specifics and assume if something is not covered, it is then free to pursue the old ways of undercutting compliance efforts in order to pursue their own agendas. A fair and realistic reading of the general statute should prevent these agency and court abuses, but caution will always be necessary.

*A. The Model Effective Compliance and Ethics Program Promotion Act*

1) Effective compliance and ethics programs, as used in organizations to prevent violations of law and promote ethical conduct, are in the public interest. Corporations and other organizations can provide great benefits to society, but can also cause great harm. The public's health, safety, protection, and financial security are at stake in dealing with such organizations. Prevention of such harm is an essential function of government, and a priority for all those in government. Thus, organizations that adopt and operate effective compliance and ethics programs are acting in the public interest.

2) The provisions of this Act are to be broadly construed to further its intent to protect and promote compliance and ethics programs. This will in turn promote the various laws that are addressed in such effective programs.

3) An effective compliance and ethics program is a program that meets the standards of the U.S. Sentencing Guidelines.[336]

4) Agencies should act to promote and recognize effective compliance and ethics programs and to guide organizations to make their programs effective.

5) Agencies should avoid actions that discourage or interfere with the development and operation of effective compliance and ethics programs.

6) Effective compliance and ethics programs, including the records of such programs, should not be used against organizations in litigation, should not be admitted into evidence, and should not be subject to discovery.

7) Agencies should adopt effective compliance and ethics programs for their own operations.

8) The provisions of this Act only apply to an effective compliance and ethics program that meets the standards of this Act. A compliance program that is used to commit or conceal violations of law shall not be considered effective and shall not have the protections provided by this Act.

9) Definitions:

   a) "Litigation" includes civil litigation, criminal proceedings, and administrative proceedings.

   b) "Organization" shall have the same meaning as used in 18 USC § 18.

   c) "Agency" includes all agencies, administrations, authorities, regulatory bodies, enforcement offices, and any other part of the government that may interact with organizations.

336. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 8B2 (U.S. SENTENCING COMM'N 2015). Jurisdictions outside the United States could substitute an appropriate alternative, such as the ORGANISATION FOR ECON. CO-OPERATION AND DEV., *supra* note 25.