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Effective Corporate Compliance: A Holistic Approach for the SEC and the DOJ

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EFFECTIVE CORPORATE COMPLIANCE: A HOLISTIC APPROACH FOR THE SEC AND THE DOJ

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Abstract: Today, most global corporations claim to have effective compliance programs that ensure and monitor their compliance with all state, federal, and even international requirements. A growing body of literature and regulatory activity indicates that truly effective compliance programs must incorporate all of the "Seven Elements of an Effective Compliance Program" contained in the Federal Sentencing Guidelines. Despite these Guidelines and growing industry and regulatory interest in effective compliance, noncompliance continues, and many companies run into trouble when noncompliance brings their actions to the attention of the SEC and the DOJ. In turn, the SEC and the DOJ struggle to encourage effective compliance programs within these noncompliant companies and in the wider corporate community. This Comment proposes that the SEC and the DOJ should take a more integrated and holistic approach to compliance by regularly and publicly incorporating all of the elements in the Guidelines into deferred and non-prosecution agreements and penalty settlements. The agencies should also consider greater use of independent monitorships to ensure effective compliance.

INTRODUCTION

From 2006 to 2010, the Swedish corporation, Telia Company AB, entered into contracts worth over $331 million for consulting services and network codes with the Gibraltar-based company Takilant Ltd.[1] The consulting services were a sham—Takilant was a shell-company owned by Gulnara Karimova, the daughter of former Uzbek President Islam Karimov.[2] Telia bribed Karimova to exert her significant influence over Uzbek officials.[3] With Karimova smoothing the way, Telia acquired Coscom LLC in Uzbekistan as well as the necessary licenses, frequencies, channels, and number blocks to do business in the country.[4] A Telia

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1. *See* Mark Mendelsohn & Alex Oh, *Telia's $965 Million Global Bribery Settlement*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 11, 2017), https://corpgov.law.harvard.edu/2017/10/11/telias-965-million-global-bribery-settlement/ [https://perma.cc/L2P7-7UA9].

2. *Id.*

3. *Id.*

4. *Id.*

executive and "certain manage[rs] and employees . . . understood that they had to regularly pay [Karimova] in order to enter the Uzbek telecommunications market and continue to operate there."[5] This state of affairs continued until September 2012 when a Swedish documentary exposed Telia's corrupt dealings, and government agencies in several countries began to investigate.[6]

On September 21, 2017, in the third largest settlement of Foreign Corrupt Practices Act[7] (FCPA) claims to date, Telia agreed to pay $965 million as part of a deferred prosecution agreement (DPA) with the U.S. Department of Justice (DOJ), the U.S. Securities & Exchange Commission (SEC), and Dutch officials.[8] Following the scandal, Telia instituted a "new and robust compliance function throughout the company."[9] In the DPA, the DOJ discounted Telia's fine in exchange for remedial measures including, among other things, enhancing the company's compliance program.[10] In short, the DPA states, "the Company has enhanced and has committed to continuing to enhance its compliance program and internal controls, including ensuring that its compliance program satisfies the minimum elements."[11] The DPA instructed Telia to maintain a compliance program that "incorporates . . . policies and procedures designed to effectively detect and deter violations of the FCPA."[12] At a minimum, this program must address: high-level commitment, policies and procedures, periodic risk-based review, proper oversight and independence, training and guidance, internal reporting and investigation, enforcement and discipline, third-party relationships, mergers and acquisitions, and monitoring and testing.[13] This explicit and detailed focus on effective corporate compliance was the result of a 2016 FCPA pilot program made permanent in 2017 and reflected the growing wealth of knowledge concerning the

5. Deferred Prosecution Agreement at 4, United States v. Telia Company AB, No. 17 CR 581 (Sept. 21, 2017), 2017 WL 8185886 [hereinafter Telia DPA].

6. *Id.* at 21.

7. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.

8. *See* Mendelsohn & Oh, *supra* note 1; Press Release, SEC, Telecommunications Company Paying $965 Million For FCPA Violations (Sept. 21, 2017), https://www.sec.gov/news/press-release/2017-171 [https://perma.cc/6SNM-C773].

9. Telia DPA, *supra* note 5, at 4.

10. Mendelsohn & Oh, *supra* note 1.

11. Telia DPA, *supra* note 5, at 8; *see also In re* Telia Co. AB, Securities Exchange Act of 1934 Release No. 81669, 2017 WL 4175053 (Sept. 21, 2017) (cease and desist order) (discussing Telia's responsibilities going forward).

12. Telia DPA, *supra* note 5, attachment C, at 1.

13. *Id.* attachment C, at 1–7.

need for, and elements of, effective compliance.[14] The DOJ and SEC have only recently begun to recognize and direct corporate compliance in FCPA DPAs. Business concerns and regulatory requirements have pushed corporations to develop compliance programs that address a variety of issues beyond the FCPA, but not all of these programs are effective.[15] The DOJ and the SEC could do more to encourage effective compliance programs.

This Comment examines the current state of corporate compliance programs and regulatory reactions to such programs. This Comment focuses on the SEC and the DOJ because these agencies have immense regulatory power to examine and influence corporate activity and can serve as an example for other regulatory bodies.[16]

Part I will discuss the development of corporate compliance. First, Section I.A will define corporate compliance as it is used today. Then, Section I.B will outline why companies decide to implement compliance programs with special emphasis on the Federal Sentencing Guidelines' "Seven Elements of an Effective Compliance Program" (the Guidelines). Part II will explain in more detail each of the elements necessary for effective compliance and how they interact with each other. Part III will showcase how, despite strong motivation and knowledge about effective compliance programs, companies fail to comply and agencies fail to adequately encourage effective compliance programs. Part IV will propose that the Guidelines serve as a baseline for regulatory enforcement and that the SEC and DOJ regularly and publicly incorporate all the elements of the Guidelines into DPAs, declinations, penalty settlements,

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14. *See* Leslie R. Caldwell, *Criminal Division Launches New FCPA Pilot Program*, U.S. DEP'T JUST. ARCHIVES (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program [https://perma.cc/6JME-VDNF]; U.S. DEP'T OF JUSTICE, 9-47.120, FCPA CORPORATE ENFORCEMENT POLICY (Nov. 2017) [hereinafter PILOT PROGRAM]; *Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act*, U.S. DEP'T JUST. (Nov. 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign [https://perma.cc/XZX3-JC28] [hereinafter Rosenstein Remarks]; David A. Silva, *DOJ Adopts New FCPA Corporate Enforcement Policy*, 14 PROF. LIABILITY LITIG. 16, 16 (2018) ("[T]he revisions described by Rosenstein formalize existing practices that the Department of Justice (DOJ) rolled out in 2016 as part of its voluntary disclosure pilot program . . . .").

15. *See infra* Section I.B, Part II.

16. *See* CAROLE L. BASRI, CORPORATE COMPLIANCE 22–23 (2017) (discussing how the Sarbanes-Oxley Act gives the SEC the power to require corporate codes of ethics and conduct); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 952–53 (2009) ("Although numerous agencies participate in the regulation of compliance through various industries, this Article focuses primarily on the Department of Justice . . . . Through their unequaled power to indict corporate entities, federal prosecutors have grasped the ability to define and impose notions of what constitutes effective 'corporate compliance.'").

and administrative orders. Lastly, this Comment will argue that the SEC and DOJ should consider using independent monitorships more often to ensure that companies develop effective compliance programs.

I. THE DEVELOPMENT OF CORPORATE COMPLIANCE

A. Defining Corporate Compliance

Corporate compliance "means different things to different people."[17] Definitions of compliance evolved over time to incorporate new areas of government regulation.[18] For many years, corporate compliance as an area of study included only financial mismanagement and anti-corruption law.[19] "In the past, each compliance effort," whether antitrust or employment discrimination, "was confined to its own silo."[20] Even today, to some, "[c]ompliance risk may be a function of issues that any company faces (e.g., Sarbanes Oxley, Dodd-Frank, antitrust, Foreign Corrupt Practices Act (FCPA), data privacy, insider trading, auditing, and tax) or sector specific issues (e.g., financial services, health care)."[21] Scholars and practitioners also debate whether "soft" law ideas (e.g., corporate social responsibility) should be included in definitions of compliance, or whether only "hard" law, where government punishment for violation is clearly evident, should be part of compliance.[22] In practice, many companies do not distinguish between the two, and corporate compliance becomes "a system of self-governance established by a business organization seeking to conform its conduct to the demands of public policy" more generally.[23]

Over time, compliance has been recognized as comprising two elements: "management commitment to do the right thing" and

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17. D. Daniel Sokol, *Teaching Compliance*, 84 U. CIN. L. REV. 399, 401 (2016).

18. GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 158–60 (2d ed. 2017).

19. BASRI, *supra* note 16, at 3.

20. Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUTGERS U. L. REV. 422, 427 (2017) [hereinafter Murphy, *Policies in Conflict*].

21. Sokol, *supra* note 17, at 401–02.

22. *See* Christiana Ochoa, *Corporate Social Responsibility and Firm Compliance: Lessons from the International Law-International Relations Discourse*, 9 SANTA CLARA J. INT'L L. 169, 177 (2011) ("Scholarship in a number of areas that are highly relevant to CSR global governance suggests that firms regularly comply with legal regimes, even when enforcement is lacking or sanctions-and/or the likelihood of sanctions-is low."); Erika R. George, *The Place of the Private Transnational Actor in International Law: Human Rights Norms, Development Aims, and Understanding Corporate Self-Regulation as Soft Law*, 101 AM. SOC'Y INT'L L. PROC. 473, 475–76 (2007).

23. BASRI, *supra* note 16, at 3.

"management steps in order to make this happen."[24] Stated differently, compliance refers to the "processes by which an organization seeks to ensure that employees and other constituents conform to applicable norms—norms that can include either the requirements of laws and regulations or the internal rules of the organization."[25] It is now well-accepted "that companies should have [compliance] programs to prevent and detect various forms of misconduct."[26]

Despite the ubiquity of compliance programs, critics continue to question their utility. Some argue that punishment is the optimal deterrent for corporations and if government punishments for violations were calculated to create compliance, then there would be no need for compliance programs.[27] Others point out that "[t]oo much monitoring reduces the ability of agents to perform their jobs" and corporations need freedom to pursue business objectives.[28] Still others point out how, despite compliance programs, violations continue to occur thereby proving that compliance programs simply do not work.[29] Lastly, some argue that it is impossible for regulatory bodies to assess complex compliance programs, and, thus, impossible to reward those companies with effective programs.[30]

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24. Murphy, *Policies in Conflict*, *supra* note 20, at 424.

25. MILLER, *supra* note 18, at 3; *see also* Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 700 (2017).

26. Murphy, *Policies in Conflict*, *supra* note 20, at 423; *see also* DELOITTE, COMPLIANCE WEEK, IN FOCUS: 2016 COMPLIANCE TRENDS SURVEY 4 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/governance-risk-compliance/us-advisory-compliance-week-survey.pdf [https://perma.cc/2W7S-9PQ2]. Deloitte received 558 qualified responses from senior-level executives selected from a wide range of industries. *Id.* at 2.

27. CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS 58 (2015).

28. Sokol, *supra* note 17, at 412.

29. *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491–93 (2003); Anna C. Mourlam, *Moral Enforcement: The Futility of Corporate Compliance Programs*, 61 RES GESTAE 10, 10 (2017) ("Strikingly, internal programs actually designed to foster ethical conduct tend to have minimal (if any) impact on actual moral behavior.").

30. *See* Wouter P. J. Wils, *Antitrust Compliance Programmes and Optimal Antitrust Enforcement*, 1 J. ANTITRUST ENFORCEMENT 52, 52–53 (2013) ("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.").

B. Why Corporations Implement Compliance Programs

Despite the above criticisms, corporations have greater and greater incentive to develop effective compliance programs because business considerations push them to do so, regulatory bodies either require compliance programs or reward effective programs, and corporate leaders face individual liability for failing to ensure compliance.

1. Business Considerations

Many corporations believe that effective compliance programs can give them a competitive advantage by allowing them to attract investors and avoid scandals that lead to drops in stock prices.[31] Many institutional investors "now seek sustainability reporting" on Environmental, Social and Governance (ESG) compliance matters in deciding whether to invest.[32] Strong compliance programming also comes into play when companies conduct due diligence related to mergers and acquisitions.[33] During merger negotiations, strong compliance programs can help to alleviate "quality uncertainty," boosting the value of a company.[34] Lastly, companies also seek to avoid expensive private suits that distract key employees, forcing them to focus on litigation rather than corporate goals.[35]

2. Regulatory Pressure

During the nineteenth century, the United States saw "extraordinary growth in the scope and complexity of regulation."[36] Expanding regulation has made it more difficult for companies to comply with every regulatory requirement, incentivizing them to develop programs to

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31. *See generally* Paul A. Gompers et al., *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107 (2003); SALLY BERNSTEIN & ANDREA FALCIONE, PWC, MOVING BEYOND THE BASELINE: LEVERAGING THE COMPLIANCE FUNCTION TO GAIN A COMPETITIVE EDGE (2015), https://www.pwc.com/us/en/risk-management/state-of-compliance-survey/assets/pwc-2015-state-of-compliance-survey-final.pdf [https://perma.cc/R2V7-A62E].

32. Kristopher Keys, *Corporate Governance and Compliance*, 2017 ABA RECENT DEV. INFRASTRUCTURE & REG. INDUS. 101, 102 (2017); *see also About Sustainability Reporting*, GRI, https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx (last visited Apr. 22, 2019).

33. Vivek Ghosal & D. Daniel Sokol, *Compliance, Detection, and Mergers and Acquisitions*, 34 MANAGERIAL & DECISION ECON. 514 (2013).

34. *See id.* at 514.

35. Sokol, *supra* note 17, at 403–04.

36. MILLER, *supra* note 18, at 161.

systematically address all obligations.[37] Some regulatory bodies additionally began to require corporate compliance programs. For example, under the Bank Secrecy Act, financial institutions are required to "establish anti-money laundering programs including" basic compliance functions like conducting "employee training," maintaining "internal policies, procedures, and controls," and employing "a compliance officer."[38]

The 2002 Sarbanes-Oxley Act[39] (SOX) presented a significant step forward in government intervention in compliance. SOX Section 406 requires corporations to disclose codes of ethics for senior financial officers.[40] The commentary to the Final Rule also strongly encourages companies to develop comprehensive codes of conduct for all employees.[41] Other sections of SOX require corporate officers to certify their responsibility for internal controls and to create confidential reporting frameworks.[42] Under investment law and regulations, each investment company is required to "[a]dopt and implement written policies and procedures reasonably designed to prevent violation of the Federal Securities Laws," to review those policies and procures for effectiveness, and to designate a chief compliance officer.[43] In the private sector, New York Stock Exchange Rule 303A and NASD Rule 4350 require listed companies to adopt codes of business conduct which are to be posted publicly and to disclose if any officers are choosing to waive any part of the code.[44]

In enforcement, agencies have also begun to recognize compliance programs. The DOJ enumerated specific factors that prosecutors should consider when investigating companies, when determining whether to bring charges, and in negotiating agreements.[45] These, known as the "Filip Factors," include "the adequacy and effectiveness of the corporation's compliance program" and the corporation's efforts to improve that

37. *See id.*

38. 31 U.S.C. § 5318(h) (2018).

39. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

40. 15 U.S.C. § 7264 (2018).

41. Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 5,110, 5,118 (Jan. 31, 2003) (codified at 17 C.F.R. pts. 228, 229 and 249 (2018)).

42. *See* 15 U.S.C. §§ 7241, 78u-6.

43. 17 C.F.R. § 270.38a–1(a).

44. BASRI, *supra* note 16, at 25.

45. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL §§ 9-28.300, 9-28.1000 (2018) [hereinafter JUSTICE MANUAL], https://www.justice.gov/usam/title-9-criminal (last visited Apr. 26, 2019).

program or implement new effective compliance programs.[46] Additionally, the Fraud Section issued a memorandum on compliance programs detailing eleven categories of questions prosecutors should ask concerning the corporation's compliance program.[47] Prosecutors can, of course, decline to prosecute.

3. *Declinations, DPAs, and Monitorships*

In the FCPA context, prosecutors can decide not to prosecute and issue a declination letter.[48] The DOJ announced a one-year pilot program in April 2016 to encourage transparency and accountability.[49] For companies to receive a declination, they must, among other things, conduct thorough analyses of the causes of underlying conduct, self-disclose violations, cooperate fully with the DOJ, and implement effective compliance programs.[50] In 2016, ten prosecutors and three Federal Bureau of Investigations (FBI) squads joined the FCPA Fraud Unit.[51] Companies that chose not to comply with the 2016 pilot-program requirements faced "coordinated, international enforcement" and fines up to $2.6 billion.[52] At least in the FCPA context, companies have a clear incentive to implement compliance to avoid prosecution.

DPAs that incorporate mandatory compliance program improvements serve as a regulatory tool for encouraging companies to implement compliance programs.[53] When the DOJ or the SEC decide to take action against a particular company, the company and the government can enter into a DPA—an agreement in which the company agrees to aid the

46. JUSTICE MANUAL, *supra* note 45, § 9-28.300(A); *see* SEC, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (Oct. 23 2001), https://www.sec.gov/litigation/investreport/34-44969.htm [https://perma.cc/WJ4Q-7NGR]. While serving as Deputy Attorney General, Mark Filip developed the first iteration of the factors. Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51, 56 n.29 (2015).

47. FRAUD SECTION, U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1–7 (2017) [hereinafter DOJ EVALUATION], https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/UTS4-GTN9].

48. *See* JUSTICE MANUAL, *supra* note 45.

49. Caldwell, *supra* note 14; *see also* Rosenstein Remarks, *supra* note 14 ("[T]he FCPA Corporate Enforcement Policy states that when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination.").

50. JUSTICE MANUAL, *supra* note 45, § 9-47.120.

51. Caldwell, *supra* note 14.

52. Keys, s*upra* note 32, at 104.

53. MILLER, *supra* note 18, at 322.

government investigation and to "implement remedial measures"—and, in exchange, the government defers filing charges for a limited period of time.[54] If the company fully complies with the terms of the DPA, then the government will decline to prosecute.[55] Similarly, if a company reports violations and assists promptly with the investigation, the parties may enter into a non-prosecution agreement (NPA) in which the government agrees not to charge the company.[56] Both DPAs and NPAs are privately negotiated agreements that contain factual allegations and legal conclusions.[57] DPAs are filed with the court but do not undergo "meaningful judicial scrutiny," and NPAs are not subject to judicial review at all.[58]

As in the Telia DPA, these agreements often contain a provision discussing the company's compliance program.[59] For example, the HSBC Agreement with the SEC and DOJ concerned anti-money laundering law violations and required HSBC to institute structural changes within its entire global operations, to increase accountability for chief officers, and to invite an external compliance monitor to assess compliance programming.[60] The use of DPAs rather than more formal adjudication has been criticized for failing to deter noncompliant corporate conduct.[61] However, others point to the percentage of DPAs which include compliance program improvements (74.9% in the period between 1993

54. *Id.*

55. *Id.*

56. *Id.* In this Comment, "DPA" constitutes shorthand for both DPAs and NPAs.

57. Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 504–05 (2015).

58. *Id.* at 505; *see also* Baer, *supra* note 16, at 974–75; Brandon Fox & Natalie K. Orpett, *Second Circuit Limits Districts' Supervision of Deferred Prosecution Agreements*, PROGRAM ON COMPLIANCE & ENFORCEMENT N.Y.U. (July 28, 2017), https://wp.nyu.edu/compliance_enforcement/2017/07/28/second-circuit-limits-district-courts-supervision-of-deferred-prosecution-agreements/ [https://perma.cc/9ML8-RNAQ].

59. *See* Baer, *supra* note 16, at 957; Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1015 (2017).

60. Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [https://perma.cc/RK5K-ZKVV].

61. Koehler, *supra* note 57, at 499 ("The disturbing impact is that while NPAs and DPAs yield a higher quantity of FCPA enforcement, they also yield a lower quality of FCPA enforcement."). Koehler ultimately argues that DPAs provide no "meaningful deterrence." *Id.* at 513.

and 2013) and argue that DPAs "can play a significant role in improving corporate governance."[62]

To help ensure corporate compliance with a DPA, the DOJ may assign an independent corporate monitor.[63] The monitor serves as a "compliance watchdog" sometimes with "enormous power to effect change within large organizations."[64] A monitor is an expert in the field typically selected by the DOJ in consultation with the company, and whose goals and duties of the monitor are laid out in the DPA.[65] The scope of a monitor's power can range from mere advisory power to almost complete autocratic power to direct corporate change.[66] The monitor develops a "work plan" outlining who they will interview and what documents they will review.[67] Corporations that have been assigned a monitorship are incentivized to direct resources toward compliance and to evaluate and improve their compliance programs.[68] For example, as part of its five-year DPA, HSBC agreed to hire a government-approved, experienced, well-resourced, and independent monitor to assess its anti-money laundering compliance programs and provide recommendations for improvement.[69] The monitor submitted annual reports indicating some concern that HSBC lacked "integration, coordination, and standardization."[70] The monitorship was to conclude in July 2018, but in December 2017, the DOJ filed a motion to dismiss the DPA saying that HSBC met its obligations in strengthening its compliance program in part because of the monitor's favorable reports concerning HSBC's improved compliance program.[71]

62. Wulf A. Kaal & Timothy A. Lacine, *Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 69, 104–07, 113 (2014).

63. Baer, *supra* note 16, at 977.

64. Amy Walsh, *Is the Opaque World of Corporate Monitorships Becoming More Transparent?*, 2015 BUS. L. TODAY 1, 1 (Dec. 2015).

65. *See* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 697, 711 (2009).

66. *See id.* at 707–09.

67. *See id.* at 715.

68. *See id.* at 720.

69. Deferred Prosecution Agreement at 15–16, United States v. HSBC Bank USA, N.A., No. 12-763 (E.D.N.Y. Dec. 11, 2012), 2012 WL 6120512.

70. Rachel Louis Ensign & Max Colchester, *U.S. Monitor Says HSBC Anti-Money Laundering Systems Need Upgrade*, WALL ST. J. (Apr. 1, 2014, 3:27 PM), http://online.wsj.com/news/articles/SB1000142405270230 4157204579475390409390188 (last visited Apr. 15, 2019).

71. Jill Teanor, *US Authorities Lift Threat to Prosecute HSBC*, GUARDIAN (Dec. 11, 2017, 10:12 AM), https://www.theguardian.com/business/2017/dec/11/hsbc-prosecution-threat-us-money-laundering [https://perma.cc/HXV8-LC9G]; Letter from Ronald L. Capers, U.S. Att'y E.D.N.Y., to the Honorable Ann M. Donnelly, U.S. Dist. Judge (Apr. 1, 2016),

4. *The Organizational Sentencing Guidelines*

Arguably, the most significant development in compliance was the creation of the Organizational Sentencing Guidelines.[72] The Organizational Sentencing Guidelines—a section of the Federal Sentencing Guidelines—address corporate behavior.[73] The Federal Sentencing Guidelines set out a uniform sentencing policy for individuals and organizations convicted of felonies and serious misdemeanors in a federal court.[74] Under the Organizational Sentencing Guidelines, companies with effective compliance programs can avoid or reduce penalties for violations if they have maintained effective compliance programs as defined under the Guidelines.[75]

The legislative history of the Guidelines helps to illuminate their purpose and intended impact. The Sentencing Reform Act of 1984[76] created a Sentencing Commission tasked with creating federal sentencing guidelines.[77] Congress sought to eliminate unwarranted disparity and uncertainty in sentencing primarily for individuals, but the Act also indicated that organizations could be sentenced to probations or fines.[78] Congress did not limit the power of the commission's authority in organizational sentencing and expected that the Commission would create guidelines on any matters it considered pertinent.[79] The Commission released a preliminary discussion draft of the Guidelines in 1988.[80] This

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https://globalinvestigationsreview.com/digital_assets/63dd8c22-4eda-40f1-b7a5-83e8b1da2d93/HSBC-monitor-report.pdf [https://perma.cc/XVU3-NE6A].

72. BASRI, *supra* note 16, at 25–26; *see* Root, *supra* note 59, at 1013.

73. U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 (U.S. SENTENCING COMM'N 2018) [hereinafter U.S. SENTENCING GUIDELINES].

74. U.S. SENTENCING GUIDELINES MANUAL ch. 1, at 1 (U.S. SENTENCING COMM'N 2000).

75. *See* U.S. SENTENCING GUIDELINES, *supra* note 73, §§ 8B2.1, 8C2.5(f); J. Paul McNulty, Jeff Knox & Patricia Herned, *What an Effective Corporate Compliance Program Should Look Like*, 9 J.L. ECON. & POLICY 375, 379 (2013).

76. 28 U.S.C. § 994 (2018).

77. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987–2040.

78. *See* S. REP. NO. 97-307, at 6 (1981); 28 U.S.C. §§ 991(b)(1)(B), 994(f); KETANJI B. JACKSON & KATHLEEN GRILLI, THE HISTORY OF THE ORGANIZATIONAL SENTENCING GUIDELINES AND THE EMERGENCE OF EFFECTIVE COMPLIANCE AND ETHICS PROGRAMS (1999), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2017/Org_History.pdf [https://perma.cc/F4AL-J36Y].

79. *See* S. REP. NO. 98-225, at 169 (1984).

80. JOHN C. COFFEE, JR., RICHARD GRUNER & CHRISTOPHER STONE, U.S. SENTENCING COMM'N, DISCUSSION DRAFT OF SENTENCING GUIDELINES AND POLICY STATEMENTS FOR ORGANIZATIONS, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS (1988), https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/historical-development/071988_Organizational_Sanctions.pdf. [https://perma.cc/YR9J-ECY8].

draft did not identify compliance programs as a mitigating factor to reduce monetary sanctions but did suggest that compliance could decrease the "offense multiple."[81] However, the draft cautioned that courts needed to determine whether "the preventive benefits of the sentence outweigh[ed] the obvious costs of judicial oversight of private business operations."[82] Drafters noted that "[t]he central aim of these guidelines is to improve the corporation's own monitoring controls and to increase the probability that internal warning systems will detect future criminal behavior."[83] One working group member pointed out that "[t]he key to an effective organizational sentencing system lies in selecting penalty rules that will provide organizations with the most desirable incentives for their compliance efforts."[84]

After hearing comments from an attorney working group as well as the public, the Commission stated, "'the first goal of the guidelines should be to provide sufficient incentives so that self-policing becomes a reality,' and suggested that 'the Commission investigate the possibility of beginning with a presumptively high fine range and work downward to zero for a "good citizen" corporation.'"[85] The Commission went through four drafts of the guidelines, convened another expert panel of judges, consulted extensively with industry advocates, held many public hearings, and, in April 1991, voted to promulgate the new Guidelines.[86] The Guidelines authorized a three point reduction in the culpability score, resulting in a reduced fine range if "the offense occurred despite an effective program to prevent and detect violations of law."[87] The commentary identified what is now known as the "Seven Elements of an Effective Compliance Program": "established compliance standards and procedures," high level compliance personnel, due diligence in checking the backgrounds of corporate leadership, employee compliance training,

81. *See id.* § 8.3.

82. *Id.* at 8.5.

83. *See* JOHN C. COFFEE, JR., RICHARD GRUNER & CHRISTOPHER STONE, U.S. SENTENCING COMM'N, DRAFT PROPOSAL ON STANDARDS FOR ORGANIZATIONAL PROBATION, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS, pt. II, at 7 (1988).

84. Jeffrey A. Parker, Staff Working Paper on Criminal Sentencing Policy for Organizations (May 1988), *in* U.S. SENTENCING COMM'N, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS, pt. IV, at 9 (July 1988).

85. JACKSON & GRILLI, *supra* note 78, at 19 (quoting U.S. Sentencing Comm'n, Public Meeting Minutes (Feb. 15, 1990) (on file with Commission)); U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS app. A (1991).

86. JACKSON & GRILLI, *supra* note 78, at 29.

87. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (U.S. SENTENCING COMM'N 1991) [hereinafter 1991 SENTENCING GUIDELINES].

other "reasonable steps to achieve compliance with its standards"—like auditing and monitoring systems, disciplinary mechanisms, and reasonable steps following an offense to prevent further similar offenses.[88]

The Commission also noted that compliance programs would be assessed in light of "the size of the organization," "the likelihood that certain offenses may occur because of the nature of its business," the organization's prior history, and the existence of applicable industry standards.[89] Lastly, the Commission stated that if an individual within high-level personnel participated in, condoned, or was willfully ignorant of the offense, then the organization was ineligible for the culpability score reduction.[90]

In 2004, the Commission amended the Guidelines by elevating the criteria for effective compliance from the commentary into a separate guideline and added requirements that an organization "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law," and "periodically assess the risk of the occurrence of criminal conduct."[91] The amendment "elaborate[d] upon [these seven elements], introducing additional rigor generally and imposing significantly greater responsibilities on the organization's governing authority and executive leadership."[92]

In 2010, the Commission once again amended the Guidelines requiring organizations to "remedy the harm resulting from the criminal conduct" and to "assess[] the compliance and ethics program and make[] modifications necessary to ensure the program is effective."[93] The Commission also created a limited exception to the general prohibition against applying the culpability score decrease to organizations when high-level personnel are involved in the offense.[94] An organization can receive the reduction if compliance officers have direct reporting obligations to organizational leadership, the program detected the offense before discovery outside the organization, and "the organization promptly reported the offense to the appropriate governmental authorities."[95]

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88. *Id.* § 8A1.2, cmt. 3(k); *see infra* Part II for a detailed explanation of the elements.

89. *See* 1991 SENTENCING GUIDELINES, *supra* note 87, § 8A1.2, cmt. 3(k).

90. *See id.* § 8C2.5(f).

91. *See* U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, amend. 673 (U.S. SENTENCING COMM'N 2004).

92. *Id.*

93. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. 6 (U.S. SENTENCING COMM'N 2010) [hereinafter 2010 SENTENCING GUIDELINES].

94. *See id.* § 8C2.5(f)(3)(B).

95. *See id.* § 8C2.5(f)(3)(C).

The Organizational Guidelines are the product of meticulous drafting, years of experience, and expert opinion. Their primary purpose is to encourage corporations to develop their own effective compliance programs. The Guidelines have been credited with "achiev[ing] significant success in reducing workplace misconduct by nurturing a vast compliance and ethics movement and enlisting business organizations in a self-policing effort to deter law-breaking at every level of their business."[96] The Guidelines have achieved prominence beyond DOJ enforcement and continue to serve as an example for other regulatory bodies[97] and businesses.[98]

5. *Leadership Liability*

The final reason corporations implement compliance is because individual corporate leaders may now face personal liability for compliance failure. Beginning in 1996 in *In re Caremark International Inc. Derivative Litigation*,[99] courts began to assign compliance obligations to directors under the fiduciary duty of loyalty.[100] The board of directors must make good-faith efforts to ensure that a corporation has adequate reporting and information systems, and the board will be liable for "sustained or systemic failure . . . to exercise oversight."[101] In *Stone ex rel. AmSouth Bancorporation v. Ritter*,[102] the Delaware Supreme Court confirmed two elements of *Caremark* duty including an initial duty to establish a compliance and ethics program and an ongoing duty to address compliance and ethics.[103]

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96. *See* ETHICS RES. CTR., THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS: A CALL TO ACTION FOR MORE EFFECTIVE PROMOTION AND RECOGNITION OF EFFECTIVE COMPLIANCE AND ETHICS PROGRAMS, at i (May 2012), https://www.theagc.org/docs/f12.10.pdf [https://perma.cc/RW7L-77US].

97. Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 713 (2002) [hereinafter Murphy, *Federal Sentencing Guidelines*]; Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 797–98 (2014).

98. Root, *supra* note 59, at 1014 ("Thus, the Organizational Guidelines as currently written are generally considered a strong source of guidance for corporations interested in developing, on their own initiative, an effective compliance program.").

99. 698 A.2d 959 (Del. Ch. 1996).

100. *See id.* at 967.

101. *Id.* at 971.

102. 911 A.2d 362 (Del. 2006).

103. *Id.* at 370.

Directors need not design and implement compliance programs but rather must exercise oversight to make sure management does so.[104] Plaintiffs bringing fiduciary duty lawsuits against directors must plead specific facts showing that directors knowingly disregarded their ongoing duty to oversee the corporation's compliance program.[105] These obligations are stated succinctly in the Guidelines, "[t]he organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance program."[106]

Under the Securities Exchange Act[107] and SOX, CEOs and CFOs must certify that they have reviewed the company's internal controls on a regular basis, and, in the case of misconduct, run the risk of having to return incentive-based compensation.[108] SOX Section 404(a) requires reporting companies to indicate "the responsibility of management for establishing and maintaining an adequate internal control structure."[109] An organization's Chief Compliance Officer (CCO) is responsible for overseeing the development and implementation of an organization's compliance program.[110] CCO's "should be competent and knowledgeable."[111] CCOs have even broader oversight responsibilities than other corporate executives.[112]

These obligations force corporate leadership to oversee compliance. Compliance failures may lead to shaming of individual senior executives or directors.[113] Individual prosecutions of compliance officers and company executives are on the rise.[114] In September 2015, former Deputy

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104. *See id.* at 372.

105. *See id.* at 373.

106. U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1(b)(2)(A).

107. 15 U.S.C. §§ 78a–78qq (2018).

108. *See* 15 U.S.C. § 7243; 17 C.F.R. § 240.13a-14 (2018). Incentive-based compensation is variable contingent compensation, like cash bonuses, based on the attainment of certain firm or employee performance metrics. *See Definition of Incentive-Based Compensation*, LAW INSIDER (2013), https://www.lawinsider.com/dictionary/incentive-based-compensation [https://perma.cc/Y2BK-JLX3].

109. 15 U.S.C. § 7262.

110. BASRI, *supra* note 16, at 182.

111. Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74,714, 74,720 (Dec. 24, 2003) (codified at 17 C.F.R. pts. 270, 275 and 279 (2018)).

112. *See generally* Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169 (2015).

113. Sokol, *supra* note 17, at 405.

114. *See id.*; Martin S. Bloor, *Increased Prosecutions Will Likely Lead to Welcomed FCPA Clarity*, N.Y. L.J. (Apr. 2, 2019), https://www.law.com/newyorklawjournal/2019/04/02/increased-

Attorney General Sally Yates released a memo entitled, "Individual Accountability for Corporate Wrongdoing" emphasizing that corporations must report relevant facts about *all* "individuals involved in corporate misconduct" in order to be eligible for cooperation credit.[115] During confirmation hearings, former Attorney General Jeff Sessions "indicated an intent to preserve the broad emphasis on charging individuals tied to corporate wrongdoing."[116] CCOs in particular run the risk of individual liability for willful misconduct and participation in illegal activity when they "engage in efforts to obstruct or mislead [regulators]" and "where the CCO has exhibited a wholesale failure to carry out his or her responsibilities."[117] Some current examples include a $1 million civil penalty suit against the CCO of MoneyGram for failing to implement an effective anti-money laundering program and the arrest of a Volkswagen AG compliance executive after a diesel emissions scandal.[118]

Executives can face fines, incarceration, and later career consequences. Individuals can be barred from serving as directors or officers of a public company or from the securities industry as a whole.[119] In consequence, corporate leadership may be slow to report violations. A CCO may face a Catch-22 when their reporting obligations require them to report other executive officers to regulatory bodies because corporate leadership might retaliate. For example, in *Sullivan v. Harnisch*[120] a company terminated a compliance officer after he reported his company's CEO and President to the SEC for violating securities laws even though he had a legal obligation

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prosecutions-will-likely-lead-to-welcomed-fcpa-clarity/ [https://perma.cc/PX65-2BFU] ("The Fraud Section charged more individuals in 2018 than in previous years.").

115. Memorandum from Sally Q. Yates, Deputy Att'y Gen., to Asst. Att'ys Gen. and U.S. Att'ys, Individual Accountability for Corporate Wrongdoing 3 (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/53WG-KKW2].

116. Keys, *supra* note 32, at 107; *see also* Rosenstein Remarks, *supra* note 14 ("Effective deterrence of corporate corruption requires prosecution of culpable individuals. We should not just announce large corporate fines and celebrate penalizing shareholders.").

117. *See* Andrew Ceresney, Dir., Div. of Enf't, SEC, Keynote Address at the National Conference, 2015 National Society of Compliance Professionals (Nov. 4, 2015), https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-cereseney.html [https://perma.cc/AM4Z-ZRN3].

118. *See* Keys, *supra* note 32, at 108; Adam Goldman, Hiroko Tabuchi & Jack Ewing, *F.B.I Arrests Volkswagen Executive on Conspiracy Charge in Emissions Scandal*, N.Y. TIMES (Jan. 9, 2017), https://www.nytimes.com/2017/01/09/business/volkswagen-diesel-emissions-investigation-settlement.html (last visited Mar. 20, 2019).

119. Renee M. Jones, *Unfit for Duty: The Officer and Director Bar as a Remedy for Fraud*, 82 U. CIN. L. REV. 439, 441 (2013).

120. 969 N.E.2d 758, 759 (N.Y. 2012).

to report them.[121] Corporate leaders may now face difficult decisions and personal liability for compliance failures. As a result, leaders will be motivated to ensure their company maintains an effective compliance program.

II. EFFECTIVE COMPLIANCE PROGRAMS

Corporate executives must know how to evaluate whether their company's compliance program is effective. The Guidelines provide the foundation, and a growing body of research unpacks and adds to each of the elements: standards and procedures, leadership oversight, vetting employees to exclude bad actors, training, monitoring compliance, incentives and discipline, and remediation and updating of the program after violations occur.[122] Additionally, risk assessment and corporate culture increasingly play a role in evaluating effective compliance programs.[123]

A. Risk Assessment

Risk assessment is a "threshold step" for any company wishing to implement effective compliance.[124] Regular risk assessment produces an in-depth understanding of the risks embedded in the company's business model, including its products and services, third-party agents, customers, government interactions, industry, or geographic areas or operation.[125] The DOJ and the SEC have affirmed that risk assessment is key to compliance because effective compliance programs must be "tailored to the company's specific business and to the risks associated with that business."[126] In February 2017, the Trump Administration released its "Evaluation of Corporate Compliance Programs" identifying eleven areas of emphasis.[127] This guidance instructed the DOJ to look at the methodology "the company used to identify, analyze, and address"

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121. *Id.*; *see* 17 C.F.R. § 275.206(4)-7(a), (c) (2018).

122. U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1.

123. *Id.* § 8B2.1(a)(2); *id.* § 8B2.1(c) ("The organization shall periodically assess the risk of criminal conduct.").

124. Murphy, *Policies in Conflict*, *supra* note 20, at 448.

125. *See* CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 58–59 (2012) [hereinafter RESOURCE GUIDE]; BASRI, *supra* note 16, at 30.

126. RESOURCE GUIDE, *supra* note 125, at 56; U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1(c) ("the organization shall periodically assess the risk of criminal conduct").

127. *See* DOJ EVALUATION, *supra* note 47, at 1.

particular risks, to consider the metrics the company used to gather information, and to ensure that employees "in relevant control functions" receive risk-based training.[128] Even before 2017, the DOJ recognized the importance of risk assessment. For example, the settlement agreement in *Re Lender Processing Services, Inc. Foreclosure Fraud*[129] recognized how the company "acceptably enhance[ed] its risk management program."[130]

B. Standards and Procedures

The first element listed in the Guidelines states, "[t]he organization shall establish standards and procedures to prevent and detect criminal conduct."[131] These policies and procedures should be drafted by people from multiple departments and should align across the company.[132] At a high level, they may include mission statements, letters from the CEO or president, and codes of conduct.[133] A corporation's global code of conduct sets out "baseline rules that apply across . . . worldwide operations."[134] For example, Amazon.com's Code of Conduct starts out with the words, "[i]n performing their job duties, Amazon.com employees should always act lawfully, ethically, and in the best interests of Amazon.com. This Code of Business Conduct and Ethics (the 'Code of Conduct') sets out basic guiding principles."[135] Sector-based codes of conduct help industries harmonize but can also help companies to determine what their code of conduct should contain.[136] However, strong codes of conduct "meet[] the issuing organization's own business needs by tailoring a provision on each

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128. *Id.* at 4–5.

129. Press Release, Dep't of Justice, Florida-Based Lender Processing Services Inc. to Pay $35 Million in Agreement to Resolve Criminal Fraud Violations Following Guilty Plea from Subsidiary CEO (Feb. 15, 2013), https://www.justice.gov/opa/pr/florida-based-lender-processing-services-inc-pay-35-million-agreement-resolve-criminal-fraud [https://perma.cc/YZ43-GEJZ].

130. Letter from Denis J. McInerney, Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, to Paul J. McNulty, Esq. & Joan Meyer, Esq., Baker & McKenzie LLP, Non-Prosecution Agreement, Re: Lender Processing Services, Inc. 2 (Feb. 14, 2013), https://www.justice.gov/criminal-fraud/file/836356/download [https://perma.cc/28VD-7TVU].

131. U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1(b)(1).

132. DOJ EVALUATION, *supra* note 47, at 3; BASRI, *supra* note 16, at 31.

133. BASRI, *supra* note 16, at 31.

134. *Id.* at 115.

135. *Code of Business Conduct and Ethics*, AMAZON (2018), http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-govconduct [https://perma.cc/Y7EP-XPQX].

136. *See generally* Dennis D. Hirsch, *In Search of the Holy Grail: Achieving Global Privacy Rules Through Sector-Based Codes of Conduct*, 74 OHIO ST. L.J. 1029 (2013).

topic the code issuer needs to align across borders."[137] Each corporation needs to carefully develop their own code.[138]

Additionally, more detailed written policies and procedures addressing different risk areas are necessary to ensure compliance.[139] Corporate culture generally is a set of internalized beliefs, values, and ideologies shared by those who work for a given corporation.[140] Organizational commitment to compliance and ethics is linked to employee perception of the integrity of the company's executives.[141] Even if a company has a wonderful compliance program on paper, unethical and noncompliant executives can alter a company's culture entirely.[142]

For example, in *SEC v. Kenneth Lay, et. al*,[143] the SEC vividly described how three senior Enron executives continually broke the law, misled employees, and created acceptance of illegal activities at Enron.[144] In another recent example, after being assigned online compliance training modules, three Credit Suisse leaders asked their administrative assistants to complete the modules for them, presumably to save themselves the time and trouble.[145] Element three of the Guidelines requires companies to use "reasonable efforts" to ensure that leaders like these who have engaged in "illegal activities or other conduct inconsistent with an effective compliance and ethics program" are excluded from its "substantial authority personnel."[146] Companies often chose to do this

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137. BASRI, *supra* note 16, at 120.

138. *See* Stucke, *supra* note 97, at 820–21 (discussing "copycat compliance" under SOX); Henry Cutter, *The Morning Risk Report: SEC in Texas Flags 'Canned' Compliance Programs*, WALL ST. J. (Jan 30, 2018, 7:33 AM), https://blogs.wsj.com/riskandcompliance/2018/01/30/the-morning-risk-report-sec-in-texas-flags-canned-compliance-programs (last visited Apr. 9, 2019) ("[S]ome companies still see compliance systems as an off-the-shelf product that will work for one firm as well as for another.").

139. RESOURCE GUIDE, *supra* note 125, at 58.

140. *See* DELOITTE, CORPORATE CULTURE: THE SECOND INGREDIENT IN A WORLD-CLASS ETHICS AND COMPLIANCE PROGRAM (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-corporate-culture-112514.pdf [https://perma.cc/5AB2-3PSZ].

141. Scott Killingsworth, *Modeling the Message: Communicating Compliance through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 971 (2012).

142. *See generally* Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1 (2003) (describing the negative impact of Enron's leadership team).

143. SEC v. Causey, No. H-04-0284, 2015 WL 7301080 (S.D. Tex. Nov. 18, 2015).

144. *See generally* Second Amended Complaint, Jury Demanded, SEC v. Kenneth Lay, No. H-04-0284 (S.D. Tex. Feb. 9, 2007), 2004 WL 1600016.

145. Bradley Keoun, *Credit Suisse Bankers Got Secretaries to Do Their Compliance Training*, THE STREET (Feb. 14, 2018, 5:11 PM), https://www.thestreet.com/story/14488740/1/credit-suisse-bankers-pawned-off-compliance-training-on-secretaries.htm [https://perma.cc/YQ6Y-JNLC].

146. U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1(b)(3).

through background checks to ensure that those who might obstruct compliance do not join a company; this can also communicate company values to prospective employees.[147]

C. Training

Corporate leadership can enhance compliant corporate culture by overseeing employee compliance training. Element four of the Guidelines instructs companies to "take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program."[148] Training is required "to make sure that everybody gets the information and knows what is expected of them" in order to "raise[] awareness that the company actually has resources available" and to "raise[] awareness of the regulations and laws that are important for the company."[149] "Training does not itself necessarily change conduct, but it is an essential component to remind people that there are standards, there are laws, and there are regulations."[150] Companies must develop training plans and consider best practices and problems with different training methods.[151] The appropriateness, language, content, use of stories, and repetition in compliance training should be carefully considered.[152] The types of training given to different individuals should reflect the "nature of their jobs" and relevant areas of risk.[153] Employees should not be spectators who passively watch the training but rather active participants.[154] Trainers should also emphasize the availability of guidance and continuing advice.[155] Training should not constitute a one-time event, but should be ongoing because,

> [m]essages have a better chance at cultural impact if they hang together as a coherent story; if they draw on already-established ideas, themes, or symbols; if they are consistent and frequently repeated through multiple channels; if they come from admired or authoritative sources; if they are relevant to our status in a

147. BASRI, *supra* note 16, at 207.

148. U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1(b)(4)(A).

149. McNulty, Knox & Harned, *supra* note 75, at 381, 387.

150. *Id.* at 387.

151. BASRI, *supra* note 16, at 34.

152. Killingsworth, *supra* note 141, at 964–66.

153. MILLER, *supra* note 18, at 210; RESOURCE GUIDE, *supra* note 125, at 58.

154. Killingsworth, *supra* note 141, at 979.

155. MILLER, *supra* note 18, at 210; RESOURCE GUIDE, *supra* note 125, at 58.

> group we consider important; if they resonate with experience (or constitute experience!); if they are broadly useful; and if they carry a strong emotional charge.[156]

D. Monitoring Compliance, Internal Investigations and Audits

Although a company may have effective compliance training, it also needs to make sure its compliance program contains "appropriate incentives to perform," "appropriate disciplinary measures," and monitoring.[157] Compliance should be a normal part of employee performance evaluation and should be linked to compensation and advancement.[158] Corporations should have clearly defined mechanisms for monitoring as well as response plans when violations occur.[159] Corporations can monitor employee activity through surveillance of employee work email, telephone calls, and on-site activity.[160] Companies can also test the efficacy of their compliance programs or discover violations through "sting operations" in which an employee fakes a violation or a fake violation is reported.[161] Audit reports should be widely distributed at various levels of management.[162]

Adequate reporting mechanisms are essential for effective compliance.[163] Many companies have chosen to implement anonymous reporting "hotlines."[164] SOX requires such anonymous reporting mechanisms.[165] Hotlines should protect the confidentiality of callers, solicit relevant information, and receive ample advertisement.[166] In general, compliance staff should be accessible and other reporting mechanisms should also be available.[167] Whistleblower protection is

156. Killingsworth, *supra* note 141, at 965.

157. U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1(b)(5)–(6).

158. *See* Killingsworth, *supra* note 141, at 985–86.

159. BASRI, *supra* note 16, at 34–35; DOJ EVALUATION, *supra* note 47, at 6.

160. MILLER, *supra* note 18, at 214.

161. BASRI, *supra* note 16, at 279.

162. *Id.* at 285.

163. *See* DOJ EVALUATION, *supra* note 47, at 5.

164. BASRI, *supra* note 16, at 34–35.

165. Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 18,787 (April 16, 2003) (codified at 17 C.F.R. pts. 228, 229, 240, 249 and 274 (2018)).

166. BASRI, *supra* note 16, at 325.

167. DOJ EVALUATION, *supra* note 47, at 5.

another key element of effective compliance.[168] Failing to protect whistleblowers can lead to public scandal and SEC investigation.[169]

Companies must conduct internal investigations after violations.[170] Investigators must be independent, knowledgeable and have enough power to collect the necessary information.[171] When monitoring or investigation uncovers violations, companies must also adequately respond to misconduct by self-reporting violations, cooperating with law-enforcement, and denouncing the behavior in question.[172] Information learned during investigations should be used to improve compliance programs.[173] In sum, companies must "demonstrate recognition of the seriousness of the company's misconduct . . . and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks."[174]

E. Third-Party Issues

One of the most complex and difficult compliance problems companies face is not the compliance of their own employees but rather the noncompliance of business partners. In 2016, compliance experts noted that, "third-party risk continues to be the most widely cited challenge to compliance and ethics programs."[175]

Even when companies are not directly responsible for compliance violations, and have outsourced their liability to subsidiaries or third parties, global scandals can still generate criticism.[176] For example, Costco faced public outcry, expensive litigation, and a stock price decrease when information became public that it was selling farmed shrimp from a supplier that sourced the shrimp's diet of cheap fish from a company that

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168. MILLER, *supra* note 18, at 339–69.

169. *See, e.g.*, Matt Egan, *Wells Fargo Admits to Signs of Worker Retaliation*, CNN (Jan. 24, 2017, 4:21 PM), http://money.cnn.com/2017/01/23/investing/wells-fargo-retaliation-ethics-line/index.html?iid=EL [https://perma.cc/6WVQ-UAQ3] (discussing Wells Fargo's failure to protect internal whistleblowers).

170. DOJ EVALUATION, *supra* note 47, at 5; *see* U.S. SENTENCING GUIDELINES, *supra* note 73, § 8B2.1(b)(7); JUSTICE MANUAL, *supra* note 45, § 9-28.000.

171. *See supra* note 170.

172. *See* SEC, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (2001), https://www.sec.gov/litigation/investreport/34-44969.htm [https://perma.cc/9YCU-X2W8]; BASRI, *supra* note 16, at 619–24; MILLER, *supra* note 18, at 224.

173. RESOURCE GUIDE, *supra* note 125, at 61–62.

174. PILOT PROGRAM, *supra* note 14, at 4.

175. DELOITTE, *supra* note 26, at 5.

176. Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747 (2014).

used the efforts of unpaid, forced labor.[177] Risks of third-party noncompliance must be integrated into risk assessment.[178] Companies should communicate compliance expectations with their partners and enforce penalties when they find partners in violation.[179] Many companies have instituted supplier codes of conduct and company standards along with their general codes of conduct.[180] For example, Clorox has a general "Business Partner Code of Conduct" communicating the company's commitment to human rights, safe working conditions, environmental protection, ethical conduct, and fair business practices.[181] Other companies have more detailed requirements for business partners.[182] Due diligence should be built into procurement and accounts payable operations.[183]

Several regulatory bodies have specifically addressed third-party issues. The SEC may have the power to force companies to monitor third-party compliance.[184] For example, the Conflict Minerals Rule in Section 1502 of the Dodd-Frank Act requires companies to ensure that when they purchase minerals used in production, the money is not used to support conflict in the Congo.[185] The FCPA applies when an organization makes a payment to a third party knowing that the third party will then make a forbidden payment to a foreign government official.[186] A company may be deemed to know of a third-party's bribe if the company "is aware

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177. Joel Rosenblatt, *Costco Defeats Lawsuit Over Shrimp Linked to Thai Slave Labor*, BLOOMBERG (Jan. 24, 2017), https://www.bloomberg.com/news/articles/2017-01-25/costco-defeats-lawsuit-over-shrimp-linked-to-thai-slave-labor (last visited Mar. 19, 2019).

178. DOJ EVALUATION, *supra* note 47, at 7.

179. RESOURCE GUIDE, *supra* note 125, at 60.

180. BASRI, *supra* note 16, at 686.

181. THE CLOROX CO., BUSINESS PARTNER CODE OF CONDUCT (2013), https://www.thecloroxcompany.com/wp-content/uploads/clorox-business-partner-code-of-conduct.pdf [https://perma.cc/29ZF-75P8].

182. MICROSOFT, STANDARDS OF SUPPLIER CONDUCT AT MICROSOFT (2018), https://www.microsoft.com/en-us/procurement/supplier-conduct.aspx [https://perma.cc/TM66-2UL9].

183. Laura Jacobus, *DOJ's Andrew Weissmann and Hui Chen Talk Corporate Compliance in Exclusive Interview*, ETHICS & COMPLIANCE INITIATIVE (Feb. 2, 2016, 8:47AM), https://connects.ethics.org/blogs/laura-jacobus/2016/02/01/doj-interview [https://perma.cc/RW9L-RWAL] (quoting Hui Chen, DOJ Compliance Expert).

184. RESOURCE GUIDE, *supra* note 125, at 61.

185. 15 U.S.C. § 78m(p) (2018). The Trump Administration has been hostile to such reporting/monitoring requirements and went so far as to use the Congressional Review Act (CRA) to disapprove a similar rule in Section 1504 requiring corporations to disclose payments to U.S. and foreign governments in developing oil, gas or mineral sites. Keys, *supra* note 32, at 103. Section 1502 could not be repealed via the CRA because it went into effect in January 2013.

186. 15 U.S.C. § 78dd-1(a)(3).

of a high probability" that a bribe might be made.[187] To avoid liability for third-party actions, organizations are instructed to implement compliance programs to prevent and detect misconduct.[188]

F. The Interconnectedness of the Elements

Companies must implement all of the elements in concert with each other for effective compliance. A DOJ compliance expert once described compliance as "similar to how an insurance company might risk-assess a car and driver [with] the various components of the compliance function" compared to "the control panel, seat-belts, and air bags" and the driver analogized to the "leadership and key stakeholders of the company."[189] Every component is necessary to detect and minimize harm and "resources and processes must be a shared effort."[190] It is easy to see the interconnectedness of the elements and the problems that can arise when only a few of the elements are implemented; policies and procedures are meaningless without employees who understand, with employees who understand but have no way to report violations, or with employees who understand but in practice are incentivized toward noncompliant behavior.[191] The careful drafting of the Guidelines indicates that "each element was in the standards for a reason."[192]

III. CONTINUED NONCOMPLIANCE AND ENFORCEMENT PROBLEMS

Despite the growing importance of compliance and the wealth of information available concerning what makes an effective compliance program, compliance programs still fail to prevent noncompliant actions. Although "no compliance program can ever prevent all criminal activity by a corporation's employees"[193] evidence of continued noncompliance is substantial.[194] Corporate crime continues.[195]

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187. 15 U.S.C. § 78dd-1(f)(2)(B).

188. RESOURCE GUIDE, *supra* note 125, at 60.

189. Jacobus, *supra* note 183 (quoting Hui Chen, DOJ Compliance Expert).

190. *Id.*

191. Murphy, *Policies in Conflict*, *supra* note 20, at 481–84.

192. *Id.* at 484.

193. JUSTICE MANUAL, *supra* note 45, § 9-28.800(B).

194. *See* Ochoa, *supra* note 22, at 177 n.32; Stucke, *supra* note 97, at 782.

195. ORG. FOR ECON. COOPERATION & DEV., POLICY ROUNDTABLE: PROMOTING COMPLIANCE WITH COMPETITION LAW 2011, at 23 (Aug. 29, 2012), http://www.oecd.org/daf/competition/promotingcompliancewithcompetitionlaw2011.pdf [https://perma.cc/P7KS-LJ29]; FBI, FINANCIAL

Many companies have incomplete or subpar compliance programs.[196] Compliance programs are often poorly funded or understaffed.[197] For example, in the early 2000s, Siemens's compliance department only had six lawyers to monitor the behavior of 400,000 employees.[198] The DOJ indicted a Siemens board member for involvement in bribing Argentinian officials to win a contract.[199] A former Deputy Attorney General noted that "[t]here was no clear message from the top of the organization that corruption was unacceptable. Instead the message was keep your sales figures up, meet your sales goals, and do whatever you need to do, just do not let us know about it."[200]

Compliance officers often do not receive the support and influence they need to do a good job[201] and "21% of companies do not have a designated CCO."[202] Of the companies that do have CCOs, "[n]ot quite half . . . (43%) reported that the CCO held a seat on the CEO's executive management committee, or its equivalent, while 37% of responses said their CCO held no such seat . . . . [T]he CCO clearly could receive more top-level visibility."[203] "Many chief compliance officers and their departments struggle to win the battle of convincing others that compliance matters, which is critical for the cultural transformation to which any serious compliance program aspires."[204]

In some ways, compliance programs remain difficult to assess. "Organizations are complex and what works at one level of an

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CRIMES REPORT TO THE PUBLIC: FISCAL YEARS 2010–2011, https://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011 [https://perma.cc/79KU-JL9V].

196. *See* Muel Kaptein, *The Ethics of Organizations: A Longitudinal Study of the U.S. Working Population*, 92 J. BUS. ETHICS 601, 615 (2010) (finding from surveyed employees of organizations with over 200 employees from eleven industries that only 15.6% of their organizations adopted all seven of the Guidelines' components and that 18.38% of their organizations lacked an ethics code).

197. *See* PWC, GETTING AHEAD OF THE WATCHDOGS: REAL-TIME COMPLIANCE MANAGEMENT 2018 STATE OF COMPLIANCE 1, 5 (2018) (37% of 825 risk and compliance executives worldwide say that "insufficient budget to meet additional needs associated with technology is a top challenge"); DELOITTE *supra* note 26, at 6 (noting "[a] majority of responses (59%) reported having a total annual budget for enterprise-wide compliance functions—including people, processes, and technology—of less than $5 million").

198. McNulty, Knox & Harned, *supra* note 75, at 384.

199. *Id.*

200. *Id.*

201. *See generally* Linda K. Trevio et al., *Legitimating the Legitimate: A Grounded Theory Study of Legitimacy Work Among Ethics and Compliance Officers*, 123 ORG. BEHAV. & HUM. DECISION PROCESSES 186 (2014).

202. DELOITTE, *supra* note 26, at 6.

203. *Id.* at 7; *see also* Stucke, *supra* note 97, at 832.

204. DELOITTE, *supra* note 26, at 9.

organization may not work at another level of the same organization."[205] A 2016 Deloitte study found that "[d]espite utilizing a myriad of ways to measure effectiveness, the majority of [corporate compliance executives] were either not confident (14%) or only somewhat confident (45%) that the metrics of their compliance program assessments gave a realistic sense of how well the compliance program is working. Only 32% were confident (27%) or very confident (5%)."[206]

A. Piecemeal Enforcement and Adjudication

Another problem with compliance is the piecemeal nature of compliance enforcement and adjudication coming from many different regulatory bodies and courts.[207] The DOJ, the SEC, and many other agencies as well as different units within them have different compliance requirements which sometimes omit some of the elements of effective compliance as recognized in the Guidelines.[208] The problem is that "there is not consistency between agencies in terms of the criteria they are applying if they are applying any criteria at all for judging an ethics and compliance program" also "if there is more than one agency involved, it is unclear the extent to which" they are applying "different standards" and using "different criteria."[209] Different divisions within the DOJ can address different types of violations (e.g., antitrust, fraud), but sometimes fail to address overall problems with compliance.[210]

Furthermore, because enforcement personnel will recognize compliance efforts during prosecution decisions, settlement negotiation, and sentencing, corporations are incentivized to implement effective compliance programs.[211] However, it is unclear to companies the extent to which ethics and compliance programs factor into enforcement decisions and "also the extent to which companies were actually given credit" for effective compliance.[212] Few judges evaluate a company's compliance program under the Guidelines because most enforcement decisions are made by the DOJ or some other enforcement agency prior

205. Sokol, *supra* note 17, at 411.

206. DELOITTE, *supra* note 26, at 10.

207. Root, *supra* note 59, at 1010.

208. *Id.* at 1031; *see also* Stucke, *supra* note 97, at 481–84.

209. McNulty, Knox & Harned, *supra* note 75, at 392; *see also* Murphy, *Policies in Conflict*, *supra* note 20, at 482.

210. Root, *supra* note 59, at 1032.

211. *See supra* Section I.B.

212. McNulty, Knox & Harned, *supra* note 75, at 392.

to courtroom litigation.[213] The language contained in most DOJ DPAs (outside of the FCPA context) is sparse, and the SEC rarely publishes declinations or the reasons for DPAs.[214]

When the latest amendments to the Guidelines were released in 2010, some "hoped that the government would announce a more robust incentive for corporate compliance programs such as blanket non-prosecution policy or affirmative defense for companies with effective anti-bribery measures," but the Guidelines did not incorporate such incentives.[215] Notably, 84% of compliance officers said that "when there is information from an enforcement agency about how an ethics and compliance program mattered in the enforcement decision, [they] take that and use it with their boards and their CEOs and their C suite executives to help make the case for continued investment in their [compliance] program."[216]

Occasionally, enforcement decisions focus on specific aspects of compliance rather than the whole program.[217] This approach pushes corporations to use cost analysis to determine whether to implement specific elements of effective compliance.[218] This is unfortunate because, "[w]hen 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."[219] Some regulatory bodies have no structure for assessing compliance programs,[220] Prosecutors may lack the time, resources, or expertise to evaluate compliance reforms.[221] Additionally, agencies only intervene when a violation has already occurred meaning that they may have "hindsight" bias and view the corporation's compliance program more harshly.[222]

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213. *Id.*

214. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS 23, 33 (Dec. 18, 2009).

215. Paul E. McGreal, *Corporate Compliance Survey*, 69 BUS. L. 107, 110 (2013).

216. McNulty, Knox & Harned, *supra* note 75, at 392.

217. *See* Plea Agreement, United States v. ABB, Inc., No. H-10-664, at *6 (S.D. Tex. Sept. 29, 2010); Deferred Prosecution Agreement, United States v. Biomet, Inc., No. 1:12-cr-00080, at *3 (D.D.C. Mar. 26, 2012).

218. Stucke, *supra* note 97, at 800.

219. Murphy, *Policies in Conflict*, *supra* note 20, at 426–27.

220. *Id.* at 427.

221. Jacobus, *supra* note 183 (quoting Hui Chen); *see also* Donald C. Langevort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 971 (2017).

222. Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 774–78 (2004).

IV. NEW APPROACHES TO COMPLIANCE FOR THE SEC AND THE DOJ

The SEC and the DOJ already have the framework and authority to promote compliance programs, and they should do so by incorporating the Guidelines as a baseline during regulatory action. More DPAs and declination letters should reference the entirety of the Guidelines rather than solely one or two elements, and these documents should be publicized with an emphasis on the positive role of effective compliance programs. Lastly, the agencies should consider requiring independent monitoring of compliance programs in agreements and penalty settlements with companies.

A. Framework and Authority: The Guidelines as a Baseline in Criminal and Civil Actions

The DOJ directs prosecutors to consider the "existence and effectiveness of the corporation's pre-existing compliance program" and the corporation's efforts "to implement an effective corporate compliance program or to improve an existing one" when "determining whether to bring charges and in negotiating plea or other agreements."[223] DPAs sometimes reference the Guidelines, but "these enforcement-related incentives, however, do not typically encourage corporations to engage in comprehensive modifications to their compliance programs; instead, the focus is on a particular aspect of a firm's compliance program."[224]

The Guidelines are for criminal actions and technically do not govern or restrict behavior associated with civil enforcement actions.[225] However, the over-arching purpose of the Guidelines was to lay out a framework for corporation-wide long-lasting effective compliance; "[p]unishment is thus not the ultimate purpose of the organizational guidelines . . . [r]ather their ultimate purpose is the promotion of good corporate citizenship."[226] All of the elements contained in the Guidelines are necessary for an effective compliance program.[227]

DOJ divisions and the SEC could eliminate the problems of piecemeal enforcement by utilizing the elements in the Guidelines, and the wealth of

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223. DOJ EVALUATION, *supra* note 47, at 1.

224. Root, *supra* note 59, at 1014–15; *supra* Part II.

225. Root, *supra* note 59, at 1015.

226. Murphy, *Federal Sentencing Guidelines*, *supra* note 97, at 706; *see supra* Section I.B.4.

227. *See supra* Part I.

guidance surrounding them, in enforcement decisions.[228] The Guidelines can provide consistency for companies seeking to understand how their compliance program will be evaluated. Many federal agencies have already incorporated at least some elements and reference the Guidelines in their compliance information, so the only change would be to make compliance guidance more complete.[229] The DOJ should actively encourage widespread adoption of the language of the Guidelines across agencies. The DOJ and the SEC should refrain from "shopping the sentencing guidelines."[230] A corporation should have the burden to show that its compliance program, at minimum, incorporates the seven elements contained in the Guidelines along with risk assessment and cultural considerations. No company should receive mitigation credit without meeting the minimum seven elements. DPAs that require companies to enhance compliance should reference all elements.

The DOJ and the SEC are in a good position to assess compliance and are developing their expertise and guidance in this area. They interact with companies from varied industries with effective compliance programs and companies with failed compliance programs.[231] These agencies already receive company documentation and know a company's history with compliance.[232] They have the power to dialogue with companies as equals. The federal government has the power to trigger positive change in corporate compliance programs and should employ that power to make the Guidelines a minimum requirement.[233] One day, Congress may be in a position to amend SOX to incorporate the Guidelines as a prophylactic measure companies are required to take. Until that day, the DOJ and SEC should intentionally widen their enforcement focus to include all elements.

B. A Publicized Holistic Approach to Incorporating the Guidelines into DPAs

In the last decade, "the number of []DPA provisions pertaining to compliance programs has been increasing consistently;" however, these

228. *See supra* Part II.

229. DOJ EVALUATION, *supra* note 47, at 8.

230. Murphy, *Policies in Conflict*, *supra* note 20, at 481 ("shopping" refers to the practice of se lecting only some guidelines to enforce while ignoring others).

231. Root, *supra* note 59, at 1039 ("[T]he government is already in possession of all the data and resources it need to allow it to effectively assess the types of misconduct that corporations are resolving with governmental actors.").

232. Murphy, *Policies in Conflict*, *supra* note 20, at 485.

233. *Id.*

DPAs often focus on a limited selection of the elements of effective compliance programming.[234] Even when DPAs reference compliance programs, it is often unclear to corporations to what extent the agency considered the corporation's existing compliance program in making the decision whether to prosecute and unclear exactly what the agency was looking for when examining the compliance program.[235] In order for the Guidelines to have the strongest impact, the DOJ and the SEC must provide companies with information about the use of the Guidelines, or other compliance requirements, in agency agreements with companies they investigate.[236] "[F]irms will demand, and the courts and DOJ must supply, uniform, clear, and objective evaluative standards and a public accounting of how and when ethics programs are taken into account" in DPAs, mitigation, and settlements.[237] In short agencies must "[m]ake it very clear, through actual cases, that government is actually [using the Guidelines] and will recognize good programs."[238]

The DOJ should consider publishing more declination letters and/or statements of the DOJ's reasoning behind declination or DPAs. This will alleviate the informational uncertainty discussed above and provide CCOs with the information they need to bolster executive and board support for their compliance programs.[239] For example, the DOJ's declination letter in *Re: Nortek Inc.* simply states that Nortek undertook steps "to enhance its compliance program and its internal accounting controls" but did not describe the steps.[240] All of the declinations issued since the DOJ's launch of the FCPA pilot program in 2015 contain this sparse language.[241] When contemplating the pilot program, Assistant Attorney General Leslie Caldwell stated, "transparency informs companies what conduct will result in what penalties and what sort of credit they can receive for self-disclosure and cooperation with an investigation."[242] The language of current declination letters provides little meaningful transparency about

234. Wulf A. Kaal & Timothy A. Lacine, *Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. L. 61, 104–06 (2014).

235. *See supra* Part III.

236. *Id.*

237. Stucke, *supra* note 97, at 801.

238. Murphy, *Policies in Conflict*, *supra* note 20, at 485.

239. *See supra* Part III.

240. *See* Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, Criminal Div., to Luke Cadigan, Esq., K&L Gates (June 3, 2016), https://www.justice.gov/criminal-fraud/file/865406/download [https://perma.cc/NT3P-CKMM] (DOJ Declination Letter to Nortek).

241. *See Declinations*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations, (last visited Feb, 25, 2018).

242. Caldwell, *supra* note 14.

what the DOJ looked at when assessing a company's compliance program in practice.[243]

The pilot program has led to some detailed compliance assessments in FCPA DPAs, like in the Telia DPA.[244] In 2017, the DOJ entered into five FCPA DPAs with in-depth compliance instruction and published two FCPA declination letters, but the other seven DPAs contained little assessment of the company's compliance program.[245] For example, the *Prime Partner Non-Prosecution Agreement* related to tax fraud failed to mention compliance at all.[246] The Evaluation of Corporate Compliance Programs, published in 2017, provides general notice as to what DOJ looks for in compliance programs.[247] This is a good start, but companies must know the DOJ's actual criteria in determining real cases.

As "the DOJ and courts discourage firms from taking a checklist one-size-fits-all approach to compliance, it would be counterproductive if they used a checklist for compliance measures to assess an ethics program's effectiveness."[248] Each corporation's program should have an "individualized determination."[249] To this end, the DOJ's new compliance counsel should be involved in DPA negotiations, and the SEC should consider creating a similar role dedicated to assessing compliance.[250] The SEC appointed the compliance counsel to "help prosecutors develop

243. Occasionally, DOJ personnel have later highlighted what they valued when assessing compliance programs. *See, e.g.*, *Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE OFFICE OF PUB. AFFAIRS (Nov. 16, 2012), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-american-conference-institute-s-28th [https://perma.cc/QF9V-S8LK]. Breuer highlighted Morgan Stanley's "extensive training of bank employees" as a reason why the DOJ chose not to prosecute the bank.

244. *See generally* Telia DPA, *supra* note 5.

245. GIBSON DUNN, *2017 Year-end Update on Corporate Non-Prosecution Agreements (NPAS) And Deferred Prosecution Agreements (DPAS)* 1, 17–19 (Jan. 8, 2018), https://www.gibsondunn.com/2017-year-end-npa-dpa-update/ [https://perma.cc/K65H-9ZEG].

246. Letter from Sarah E. Paul & Kiersten A. Fletcher, U.S. Dep't of Justice, Criminal Div., to Michael C. Durney, Esq., Law Offices of Michael C. Durney (Aug. 14, 2017), https://www.gibsondunn.com/publications/PublishingImages/Prime-Partners-NPA.PDF [https://perma.cc/L77T-9AJD].

247. DOJ EVALUATION, *supra* note 47.

248. Stucke, *supra* note 97, at 802; *see also* DOJ EVALUATION, *supra* note 47, at 1 ("The topics and questions below form neither a checklist nor a formula.").

249. DOJ EVALUATION, *supra* note 47, at 1.

250. Hui Chen, DOJ Compliance Counsel, was appointed in 2015, but quit during the summer of 2017 citing concerns about the Trump Administration's ethics. The position was advertised but has yet to be filled. Judy Godoy, *DOJ Compliance Counsel Quits, Cites Administration Ethics*, LAW 360 (July 3, 2017), https://www.law360.com/articles/940857/doj-compliance-counsel-quits-cites-administration-ethics (last visited Mar. 19. 2019); *see also* Paul E. McGreal, *Corporate Compliance Survey*, 73 BUS. L. 817, 822 (2018) ("[T]he application date has passed and there has been no new hire.").

appropriate benchmarks for evaluating corporate compliance and remediation measures and communicat[e] with stakeholders in setting those benchmarks."[251] Agency compliance counsel can provide transparency and expertise, ensuring that the agency takes a holistic approach to compliance. When Hui Chen was appointed as compliance counsel in 2015, compliance professionals followed her work and priorities closely.[252] They prepared for "thorough" evaluation of their compliance programs requiring them to "prove" their compliance programs were working and "provide tangible 'metrics'" about program improvements.[253] The attention of compliance professionals can only improve the quality of DPAs and the quality of corporate compliance programs.

A holistic approach would allow companies to avoid "command-and-control" messaging that undermines a compliant corporate culture by focusing too much on monitoring, detection, and punishment.[254] Compliance programs that focus on deterrence and the threat of punishment encourage employees to use cost-benefit analysis to determine their self-interest in complying rather than reinforcing employee commitment to ethical values.[255] A holistic approach, referencing all of the elements, places less emphasis on deterrence and punishment. "By encouraging a more comprehensive overhaul of firms' compliance programs, governmental actors may prompt compliance gatekeepers within firms to consider questions of ethics in addition to questions associated with ensuring effective policing methods within the organization."[256] This programmatic focus on ethics, in turn, would refocus compliance on corporate culture, an essential element of effective compliance, allowing employees to develop a "source of internal guidance in novel situations," making the compliance program more resilient in the long term.[257]

251. Press Release, U.S. Dep't of Justice, *New Compliance Counsel Expert Retained by the DOJ Fraud Section* (2015), https://www.justice.gov/criminal-fraud/file/790236/download [https://perma.cc/Q9Y8-AG3D].

252. Joan Meyer & Richard Dean, *DOJ's New Compliance Counsel: Role, Responsibilities, and Lessons from Early Encounters*, *in* 11TH ANNUAL NATIONAL INSTITUTE ON SECURITIES FRAUD E-1, E-13 (2016).

253. *Id.*

254. Killingsworth, *supra* note 141, at 966–67, 973.

255. *Id.* at 967.

256. Root, *supra* note 59, at 1051.

257. Killingsworth, *supra* note 141, at 969.

C. *Independent Monitoring to Promote Effective Compliance Programs*

The commentary to the Guidelines currently explains that, "[t]o assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program."[258] Thus, some DPAs already include the appointment of an independent compliance monitor when a company has committed persistent violations.[259] In 2010, about 32% of FCPA settlements included a compliance monitorship, but monitorship is less popular in other areas of DOJ and SEC enforcement.[260] The DOJ and the SEC should consider making independent monitoring a regular component of DPAs and settlements with companies lacking complete and effective compliance programs. In the same way that the SEC requires independent financial auditing, agencies should require independent compliance monitoring that addresses effective compliance and the Guidelines holistically.[261]

Monitorships are beneficial because monitors provide expertise and develop "recommendations that the organization should implement to ensure long-term legal and regulatory compliance,"[262] and because "private firms" find the appointment of an independent monitor "unpalatable" and are thus motivated to "make comprehensive compliance reform a priority."[263] Monitorships are expensive and time-consuming.[264] However, utilizing a monitorship helps to avoid the problem of uninformed prosecutors or bureaucrats assessing compliance, and a monitor's stamp of approval can restore public confidence in a

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258. 1991 SENTENCING GUIDELINES, *supra* note 87, § 8D1.4 cmt. 1; *supra* Part II.

259. *See* Press Release, U.S. Dep't of Justice, Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017), https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act [https://perma.cc/MW8C-BSNM].

260. F. Joseph Warin, Michael S. Diamant & Veronica Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 322 (2011). *But see* ELIZABETH MURPHY, SEC, G-TRADE SERVICES LLC, CONVERGEX GLOBAL MARKETS LIMITED, & CONVERGEX EXECUTION SOLUTIONS LLC, SEC CEASE-AND-DESIST ORDER 12 (Dec. 18, 2013), https://www.sec.gov/litigation/admin/2013/34-71128.pdf [https://perma.cc/ZDA8-YWZH] (ordering company to retain a "qualified independent, ethics and compliance consultant").

261. *See* 17 C.F.R. § 240.10A-2 (2018).

262. Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109, 128, 152 (2016) [hereinafter Root, *Modern-Day Monitorships*].

263. Root, *supra* note 59, at 1041.

264. Warin, Diamant & Root, *supra* note 260, at 321.

corporation's compliance function and help the corporation to regain market benefits.[265]

The compliance industry has grown exponentially in the last decade reaching a point where there are compliance professionals in every industry and many large well-recognized companies with expertise in compliance.[266] Both the government and the monitored organization typically take an active role in the selection of the monitor, as the organization submits three potential candidates and the DOJ selects one.[267] Monitors use their expertise to "engage in a sort of root-cause analysis," rather than simply assessing compliance with specific government demands.[268] "The goal of a monitorship is to ensure that the corporation implements an effective ethics and compliance program,"[269] and monitors are well-situated to assess the elements of an effective compliance program within a specific corporation. The role of the monitor is not to punish the company but to work alongside the company.[270] For example, Miron's NPA required the construction company to retain a monitor to develop long-term compliance recommendations concerning its billing, financial reporting, and Corporate Responsibility Program.[271]

Some authors have expressed concern that monitors fail to take "deep dives into the corporation's culture."[272] This concern would be alleviated by ensuring that monitors are experts in regards to the requirements of the Guidelines, the need for a compliant corporate culture, and the industry concerned. For example, the Miron monitor had forty-one years of public accounting experience serving the construction industry but little experience with the Guidelines and compliance programming.[273] The ABA recently adopted the *Monitor Standards*, in an attempt to push the

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265. *See* Root, *Modern-Day Monitorships*, *supra* note 262, at 129–30; *supra* Part III.

266. *See supra* Part II.

267. *Id.*

268. Root, *Modern-Day Monitorships*, *supra* note 262, at 128.

269. Ford & Hess, *supra* note 65, at 734.

270. Crowell & Moring LLP, *White Collar - Corporate Monitors: Peace, at What Cost?*, LEXOLOGY (Jan. 24, 2018), https://www.lexology.com/library/detail.aspx?g=bb842efc-3a8b-4c46-9594-0e244b60644a [https://perma.cc/LWD3-WDWN].

271. Press Release, U.S. Dep't of Justice, The Office of the United States Attorney Reaches Settlement with Miron Construction Company, Inc. and Corporate Officers (Apr. 16, 2014), https://www.justice.gov/usao-edwi/pr/office-united-states-attorney-reaches-settlement-miron-construction-company-inc-and [https://perma.cc/4BSX-YMET].

272. Ford & Hess, *supra* note 65, at 737.

273. Press Release, U.S. Dep't of Justice, United States Attorney Announces Selection of Monitor in Miron Case and Describes Remedial Reasons and Purposes for Monitoring (June 30, 2014), https://www.justice.gov/usao-edwi/pr/united-states-attorney-announces-selection-monitor-miron-case-and-describes-remedial [https://perma.cc/A2P5-QV7Z].

DOJ to standardize its selection and use of monitors.[274] Guidelines expertise should be part of this process. In general, monitorships must be crafted "for the case at hand" and monitors must be independent parties who conduct their own initial assessment of a company's compliance program.[275] Corporations have the same need for transparency and consistency when it comes to monitorships.[276] The DOJ should publish the details of the monitor selection process, monitor work plans and ultimately some facts about monitor assessment of compliance programs.[277] Additionally, agencies and the DOJ might consider creating a system for preserving the institutional compliance knowledge of monitors for use during future monitorships.[278]

Agencies should utilize monitorships more often and the role of the monitor should be defined to ensure that the monitor considers the Guidelines and all the elements of effective compliance. DPAs and settlements that require monitorships should incorporate language referencing the Guidelines and monitor assessments should contemplate all elements of effective compliance.

CONCLUSION

The corporate and regulatory demand for effective corporate compliance has only grown in the last several years.[279] This demand led to the creation of the seven elements of an "Effective Compliance and Ethics Program."[280] These elements have sparked additional dialogue about how to make compliance programs effective.[281] However, companies still sometimes fail to create effective compliance programs.[282] The SEC and the DOJ can do more to encourage those companies with effective compliance programs and push for better programs at companies with compliance failures. In order to encourage effective corporate compliance, the DOJ and the SEC should use the Guidelines as a baseline and should publicly reference all of the elements delineated in the

274. *See Monitors Standards*, ABA (Jan. 18, 2019), https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/ [https://perma.cc/J9TH-Z355].

275. Ford & Hess, *supra* note 65, at 731.

276. Walsh, *supra* note 64, at 1.

277. *See id.* at 2.

278. Ford & Hess, *supra* note 65, at 736.

279. *See supra* Part I.

280. 2010 SENTENCING GUIDELINES, *supra* note 93, § 8B2.1.

281. *See supra* Part II.

282. *See supra* Part III.

Guidelines in DPAs and declination letters.[283] Additionally, the agencies should look toward monitorships for an added layer of compliance expertise and assurance in situations where corporations have failed to develop effective compliance programs.[284]

283. *See supra* Part IV.

284. *See supra* Part IV.