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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Paper by Mr. Joseph Murphy --

*This paper by Mr. Joseph Murphy (Society of Corporate Compliance and Ethics) is circulated to Competition Delegates FOR INFORMATION in preparation of its forthcoming meeting to be held on 29-30 June 2011.*

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**PROMOTING COMPLIANCE WITH COMPETITION LAW: DO COMPLIANCE  
AND ETHICS PROGRAMS HAVE A ROLE TO PLAY?**

**-- By Mr. Joseph Murphy \* --**

**1. Introduction: The role of compliance and ethics programs in promoting compliance with competition law**

1. This paper is provided for purposes of facilitating a discussion of the possible role of compliance and ethics programs in promoting compliance with competition law. In this paper we first define, in section II, what is a modern compliance and ethics program, and distinguish this from older concepts of compliance. In section III we then pose the policy question on these programs: does even a small program effort merit a free pass for offending companies, should programs, no matter how diligent, be completely irrelevant, or is there a useful middle ground? We next propose in section IV, that the area of compliance relating to cartels may deserve different consideration from more sophisticated areas such as abuse of dominance and price discrimination.

2. Shifting the focus exclusively to cartels, in section V we raise the question whether current company<sup>1</sup> approaches to preventing cartels may have failed to develop or even atrophied from what should have been expected given the history of the development of these programs. In section VI we ask whether company compliance and ethics programs can actually have any effect against cartels, given the characteristics of these types of violations. In section VII we question whether small and medium-sized enterprises can really afford anti-cartel programs, and ask how to bring these companies into the fight against cartel behavior.

3. We then look at what has been happening among enforcement authorities in their approaches to compliance programs, covering first in section VIII competition law enforcers and then in section IX enforcers in other areas particularly corruption. If agencies are to consider compliance and ethics programs they need to be able to assess them; in section X we explore this issue. In section XI we ask how, if governments want to recruit the private sector into the battle against cartels they can do so. Section XII offers a list of possible follow-up action steps based on the topics discussed here. Section XIII briefly discusses the resources available on compliance and ethics programs. Appendix I experiments with the OECD Working Group on Bribery's "Good Practice Guidance" by adapting it to cartels instead. Appendix II is a quick list of sample questions an agency investigator could ask of company employees to begin an assessment of a claimed compliance and ethics program. Appendix III is an inventory of the ways governments can promote effective compliance and ethics programs.

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\* This note has been prepared by Mr. Joseph Murphy from Society of Corporate Compliance and Ethics, USA. The views reflected in this paper are the personal responsibility of the author. They should neither be attributed to the OECD Secretariat nor to OECD member countries.

<sup>1</sup> As used herein, "company," "corporation" and "organization" refer to all forms of organizations and undertakings.

## 2. What is a compliance and ethics program?

4. We begin with the question whether competition law and antitrust (hereinafter “competition law”) compliance and ethics programs have a significant role to play in promoting compliance in this important area of the law. But, of course, it is difficult to discuss this question without first agreeing on the meaning of basic terms.

5. As a starting point, the reference here is to “compliance and ethics programs.” There may be many ways to describe some or all of the means companies can use to prevent violations of law – e.g., compliance programs, internal controls, self-policing, diligence, ethics programs, compliance management systems, etc. – but we will use the reference to “compliance and ethics program” to capture what is state of the art today.

6. Modern programs reject old notions of simply throwing laws, booklets, and lawyers at employees and hoping that something actually works. In the past companies might have satisfied themselves that they were doing “all they could possibly do” by sending out codes and manuals, having employees sign certifications, and having lawyers give lectures on the statutes. But this is no longer considered an effective approach.

7. Nor is there acceptance of any check the box process. While there are a number of lists available of steps that should be in programs, none of these offers a magic formula for companies. The two most prominent standards are probably the US Organizational Sentencing Guidelines<sup>2</sup> and the OECD Working Group on Bribery’s Good Practice Guidance.<sup>3</sup> The Sentencing Guidelines has a nominal list of seven elements; the Good Practice Guidance has twelve. But none of the items in either of these lists could be satisfied by simply filing out a form or checking a box. Why is this so?

8. Over the years, the most important transition in approaches to compliance and ethics is that today it is recognized that programs must employ all the management techniques that are used in organizations to get things accomplished. No company would rely on a code and training to sell its products, manage its costs, motivate its people, or develop innovative products and services. And no company can prevent and detect violations of law unless it uses effective management techniques. In short, a compliance program can be summed up as: 1) management commitment to do the right thing, and 2) effective management measures and steps to make that happen.

9. One additional point needs some explanation: the inclusion of the word “ethics.” There has been extensive debate over the years pitting the concept of law and rules-based compliance efforts versus ethics and values-based approaches. Lawyers are seen as taking a one-dimensional “follow the details of the law or go to jail” course, while values-based methodologies may tend to discount laws as formalities and to appeal to employees’ sense of ethics. Without delving into lengthy discussion of the merits of this debate, the concept of “compliance and ethics” synthesizes the two, recognizing that law and threats without values has little appeal to employees in companies, but values without law can be too subjective and vague, and even lead to rationalizing serious legal violations. We focus instead on getting employees to do the right thing through utilizing management techniques. In the context of competition law this would emphasize both what the law requires and the underlying value of free and fair competition.

10. Below we will discuss further the types of management steps that can be used to control what happens in companies, including hard core cartel conduct.

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<sup>2</sup> U.S.S.G. section 8B2.1(b). [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Chapter\\_8.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf).

<sup>3</sup> OECD, Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II [http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation\\_Web\\_English.pdf](http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf).

### **3. Competition law and programs: The policy questions**

11. Should programs have a role from a policy perspective? One possibility is that companies could be given a complete “pass” from any enforcement actions just for having some form of compliance effort. Thus if there is a manual, some training, and a high-sounding policy, a company could avoid prosecution even if it committed a violation. In this scenario, it would be a complete defense simply to say, “but we told them not to.” But, of course, this would be a pass not based on having a program, but on merely going through the motions. In the research for this paper and in the author’s experience, government agencies do not endorse this type of approach. Nor would it be good policy, because it would breed sham programs that would not have any value at all.

12. A second alternative is that compliance and ethics programs should be completely ignored and irrelevant at all stages of the legal system no matter what level of diligence and effort the company has shown. In this scenario government takes no role promoting or assessing programs, and a corporation’s status as a good citizen is determined without reference to any effort made by the company to avoid violations. Companies that make no effort, those that do a small amount, and those who buy in completely to preventing violations stand equal in the legal system.

13. Between these two ends of the spectrum is the possibility of a middle ground. Then the question becomes one of degree. What types of corporate self-policing efforts should be recognized, and which ones ignored? If there is to be any recognition, then what recognition should governments consider providing? Must this be an all or nothing approach, or are there possible gradations? What steps can governments take to promote programs – is there a flexible range of tools available?

14. Once we move into the middle zone there is also the question of how governments – enforcement authorities, regulators, and courts - can assess the bona fides of a company’s compliance and ethics program. Is this practical, and what methods can be used? Have other government agencies done this, and what can be learned from their experiences? Is it possible for governments actually to have an effect on the development of compliance and ethics programs, and especially to improve their effectiveness? These are questions which can take a great deal of consideration, analysis and empirical work. In this paper we hope to offer some direction for pursuing this further.

### **4. Recognizing different aspects of competition law**

15. Compliance and ethics programs are common in many types of industries and are used to address an enormous range of ethical and legal risks. It is worth considering first, in the broadest sense, the range of competition law risks a program could address. In this respect, competition law may be different from many other legal areas because of an unusual dichotomy in the range of misconduct that competition law addresses.

#### ***4.1 Economically complex matters***

16. The first half of this picture looks at a zone of compliance more associated with large, powerful companies. Here we deal with such issues as abuse of dominance/ monopolization, tie-ins, distribution issues, and price discrimination. These are usually complex issues, typically addressed by managers with advice of counsel. Of course, companies may choose not to follow counsel’s advice, or counsel may only advise on the degree of risk associated with particular conduct, leaving decisions to the managers’ business judgment and risk tolerance.

17. In this area the conduct at issue tends to be at least somewhat visible and detectable. Decisions are based on calculated business risk decisions. Compliance for these risks typically means having legal counsel advise regarding difficult issues. There may also be a need for expert economists to analyze such

factors as market shares, market definition, elasticity of demand, and ease of entry. Issues may be difficult, even gray, and companies may be willing to take that calculated and open risk going forward. These are also typically not criminal matters. In this zone, there is less of a focus on a company-wide compliance and ethics program; compliance may be more a matter of getting sound advice and following it.

18. A note of caution is in order here, however. These points are admittedly generalities, and there are certainly exceptions to these statements. While the risks in this zone are mostly associated with large companies, there are complex issues that even small companies can face. And compliance programs can, for example, play an important role in making sure that remote subsidiaries and business units in all parts of the world adhere closely to corporate policy. Thus, a dominant company should know that it needs to be more careful in its marketplace conduct than its smaller competitors, and this calls for an embedded compliance program and infrastructure. This is also the zone where compliance manuals are applicable – complex matters that require careful review of the circumstances. But in terms of the major cases and most serious, systemic issues, the decisions are typically made at the top, with advice of counsel, and the results are, relatively speaking, visible to the world.

#### **4.2 Cartels**

19. In the second zone are the hard-core violations – cartels or what are called “per se” violations. These are typically in the range of criminal enforcement in those jurisdictions that impose criminal penalties for competition law violations and are the offenses for which leniency programs are designed. They are not accidental, gray, or reasonable interpretations that go beyond the limits of the law. They are typically deliberate, conspiratorial violations. Legal counsel is not involved, and they are secretive by nature. Making sure that management has access to competent outside counsel will do nothing in this area of compliance; violators generally know they are breaking the law. Complex analyses of sophisticated issues provided in manuals are typically beside the point with respect to undercover cartel violations. They do not need economists or experts in competition law to tell them what they are doing is wrong. Unlike the first zone, this one is particularly similar to other legal areas involving conspiracy and fraudulent conduct, where deception is used to shield crime from public view. This is the area of the greatest compliance challenge, and the area for the greatest potential for compliance and ethics programs. It is also perhaps the area with the greatest opportunity to learn from the experiences in compliance and ethics efforts in other areas of criminal law dealing with fraud and conspiracies.

### **5. What is wrong with company competition law programs today?**

#### **5.1 Questions about competition law compliance efforts**

20. Often times those who write about compliance and ethics programs will point to the US defense industry scandals of the 1980s as the beginning of the development of such programs. They are wrong. Most likely the real genesis was the electrical equipment antitrust conspiracy cases in the US in the 1950s and 1960s. After GE experienced the first serious criminal antitrust case it implemented a compliance program to prevent this from ever happening again. This was likely the first benchmark for corporate compliance programs. In the 1960s a literature started to develop dealing with antitrust compliance programs.<sup>4</sup> In the 1970s the approach to all forms of compliance was jolted by the introduction of the first compliance docu-drama in this area, a movie/video called “The Price,” by Commonwealth Films. This antitrust compliance film shifted the compliance approach from formalistic lawyers’ lectures to dramatic, emotional media that reached people in a strong way. The author, who has been in this field for over 30 years, still remembers the impact of seeing this film for the first time.

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<sup>4</sup> Federal Trade Commission, “FTC’s Model Antitrust Compliance Audit Program” fn \* (listing sources dating back to early 1960s).

21. Given this rich history, competition law compliance and ethics programs should lead the field in innovation, reach and effectiveness. In the author's experience, they do not. This is a disappointing development for those who view cartel behavior as a core criminal act no different from common theft.

22. This observation is based on the author's work on compliance and ethics programs touching on numerous compliance areas in a broad variety of industries on six continents. It is not, however, based on published research because it appears that no one is even asking questions in this area, much less conducting empirical research.

23. Nevertheless, there may be a pattern here that merits further study. Enforcement of competition law has ramped up substantially – penalties are at extraordinary levels with corporate fines reaching the hundreds of millions and individual offenders facing prison terms of 10 years in some jurisdictions. Competition law compliance programs had their genesis in large companies beginning decades ago. Yet there are unsatisfying patterns.

24. Why, given this strong upward trend in punishments has there been recidivism among large companies? Why, when there are well-publicized leniency programs and extreme penalties, do the cases show patterns of cartel behavior enduring for years, even as long as a decade? Why would well-paid business executives who have so much to lose, repeatedly risk so much in patterns of cartel behavior? If the patterns in the cases make anything clear, it is that these violations are not accidents, or the stray behavior of a few uninformed innocents. They are not misjudgments about complicated economic matters. These are malicious cartels of wealthy and well-educated business leaders, conducted under cover like thieves in the night. As the Lysine conspiracy videotapes illustrate, they even laugh arrogantly at the enforcement authorities.

25. What has happened to competition law compliance programs, which once led the way in the development of programs, and once moved the field with the use of then-advanced technology and effective drama? Have competition law programs possibly fallen behind efforts in other fields? Who runs competition law compliance efforts in companies? Have they become the exclusive domain of lawyers, while other areas focus on more effective management techniques? Is anyone even asking these questions today? Is it possible that competition law compliance programs have actually atrophied since the days of "The Price"?

## 5.2 *Leniency programs*

26. There is one additional question that has to be considered in this context. Competition law has led the world in developing the concept of corporate voluntary disclosure or leniency programs. Other areas of the law typically offer only lukewarm welcomes to those who disclose violations, often including the imposition of punishment for those who disclose. But in competition law the protection is firm: reveal your violation and that of your conspirators and there will be no punishment for your company or your employees who cooperate. This is the model used in the US and EU and generally by others.<sup>5</sup> Given that a compliance and ethics program can help companies find internal violations and thus win the race to report, could it be concluded that nothing more need be said about these programs, since the leniency offer covers all that is needed? A steady stream of violators seems to enter the government's doors; is this enough?

27. Here there is a threshold issue of the goals of enforcement. Notwithstanding the growth of penalties, and the flow of cases coming in through leniency programs, it can be difficult to make a

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<sup>5</sup> Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades" (Feb. 2, 2010) (Remarks at the 24th Annual National Institute on White Collar Crime) <http://html.documation.com/cds/ABA10/PDFs/011.pdf>

convincing case that this is enough. If catching violations is the only goal, leniency certainly has an impressive track record. But if prevention and detection at the earliest possible stage are the goal then one is left with an uneasy sense that more should be possible. Is it the only measure of success in an enforcement program that fines and prison terms are increasing? Is it a success when a cartel that has thrived for a decade is finally unearthed? Or are there additional means to promote prevention other than finding and punishing large, global cartel violations?

28. Additionally, the history of repressing crime simply by imposing draconian penalties is not encouraging. In the US, for example, Arthur Anderson faced the corporate equivalent of capital punishment; ironically the firm's conviction was reversed after the figurative death penalty was inflicted and it went out of business. In the Enron era senior executives were sent to prison for the equivalent of life sentences. But one would look long for an American who would claim that these examples of strong penalties dramatically curbed corporate crime and misconduct generally in the business community. Penalties are a necessary part of the formula, but because human beings are not simply "econs<sup>6</sup>," sitting in quiet meetings rationally calculating the risks of being caught and the exact amount of fines, it appears that governments rely merely on penalties at their peril. It might be, for example, that the power and insularity of high corporate office breeds the arrogance that convinces these business leaders that they are too smart to ever be caught. Not even capital punishment deters those who believe they are invincible.

29. Moreover, another fundamental point in this analysis is that all punishment comes after the crime is committed. And in the case of cartels the crimes appear to extend for inordinately long periods of time.<sup>7</sup> Discovery of the vitamins cartel is considered an enforcement victory, but for an entire decade consumers had their pockets picked by this nefarious cartel ring. When consumers are the victims the functioning of the legal system raises troubling questions. In most of the world there is no effective recourse to class actions to recover these losses to the consuming public. In the United States, where private actions are more common, Supreme Court precedent limits recovery to direct purchasers, who are often not the consumers.<sup>8</sup> This environment adds to the concern about the duration of violations and the limits of the legal system in making the victims whole.

30. For companies there is no assurance that a compliance program, no matter how vigorous and expensive, will result in a company being first to disclose and reap the benefits of a governmental leniency program. Simple luck can be as important a factor in discovering cartels.<sup>9</sup> In fact, companies using such common program elements as manuals and lectures may discover to their chagrin that this very training caused their conspiring employees to take greater steps to cover their tracks (this is based on a client's actual experience). Given this pattern, a clever manager could decide to save the expense of pouring substantial resources into a competition law program, and just hope to be the first in the door if something happens, or at least to be the second in jurisdictions where that matters. It may even be possible that this environment has helped breed a sense of cynicism and futility regarding the value of programs, at least in jurisdictions where leniency seems to be the only significant policy.

<sup>6</sup> "[T]he efficient calculators imagined in economic theory, able to weigh multiple options, forecast all the consequences of each, and choose rationally." Econs and Humans: A review of Nudge: Improving Decisions About Health, Wealth, and Happiness, by Richard Thaler & Cass R. Sunstein, [http://www.claremont.org/publications/crb/id.1616/article\\_detail.asp](http://www.claremont.org/publications/crb/id.1616/article_detail.asp)

<sup>7</sup> A cartel among producers of prestressing steel endured for an incredible 18 years. See "EU Imposes Fines of Over 269 Million [Euros] On 17 Steel Producers for 18-Year Cartel," 100 Antitrust & Trade Reg. Report 399 (Apr. 8, 2011).

<sup>8</sup> Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

<sup>9</sup> As an illustration of the role of luck and unpredictable factors in unearthing cartels, one need only read K. Eichenwald's The Informant (Broadway Books; 2000) for a memorable example of the types of bizarre circumstances that can motivate human behavior in this context.

31. Will leniency effectively reward and encourage compliance diligence consistently? There are typically certain conditions to immunity that could affect this position and undercut the basis for having a compliance and ethics program. Consider, for example, the standards set by the US Antitrust Division.<sup>10</sup> One of the blockers for immunity is the following:

*“whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity.”*

32. From a policy perspective this certainly makes sense. Otherwise, a company could lead its competitors into a cartel and then turn them in. But consider the fact that corporations act through individual employees. A wrongdoing manager could, on his own, readily contact his or her peers in competitors and solicit them to join a cartel. The manager might even do this not initially realizing the gravity of the offense. The corporate compliance and ethics department then uncovers the misconduct in the course of an in-depth audit. Under the leniency guidelines, even if the manager was not an executive, the company is not eligible for leniency because of its manager’s leadership role, and its program receives no credit, even though the program unearthed the violation.

33. Consider a second scenario. Assume a company manager has participated in, but not led or coerced others into joining, a cartel. After strong interactive training the manager realizes what she did was improper and calls the compliance and ethics department. While they start up their investigation she also calls her own legal counsel, and together they immediately call the Justice Department and provide all the information they have, including documents and detail about all collusive discussions. This is enough for the Department to begin its investigation. The company conducts its own prompt and in-depth investigation and then requests leniency. But by this time the Division has all the evidence and records it needs from the disclosing manager. Under the leniency program, there is no benefit for the company because of this blocker:

*“2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;”*

34. Again, from a policy perspective the Division’s policy makes sense; it has what it needs. But the reason it has the information is because of the company’s compliance and ethics program. Nevertheless, under the Division’s approach to programs the company gets no credit.

35. Consider a third scenario. The company receives a helpline tip on its well-publicized compliance helpline. This is just based on a clerical employee’s suspicion, so the company has no basis for going to the Division yet. It does, however, institute an investigation. At the first sign of an investigation a manager who was involved in the misconduct hears of the investigation and calls his counterpart and co-conspirator at a competitor’s office. The two individual conspirators agree to “hang tough,” and the calling manager does nothing to assist the internal investigation. But the other company’s manager had simply lied to his erstwhile co-conspirator and now runs to his company’s lawyer and immediately confesses all. That second company, on the same day, calls the Antitrust Division and requests immunity, providing all the information and the documents the manager has. This second company does not have and never did have a compliance program because it did not want to spend the money. But it is first in the door to the Division as a result of the first company’s program activities.

36. The first company must take longer to uncover what happened because its own manager fails to cooperate. When it does contact the Antitrust Division it is blocked from getting credit.

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<sup>10</sup> U.S. Department of Justice, Corporate Leniency Program, <http://www.justice.gov/atr/public/guidelines/0091.pdf>



37. In the above scenarios a company may have invested substantial resources in good faith to have an effective compliance and ethics program. It may also have devoted serious management time and commitment to this effort. But because of circumstances that could readily occur, the existence of the leniency program offers it no benefit. Other companies, that made no such effort, would get credit because of factors beyond the control of the first company.

### 5.3 *Competition law compliance programs today*

38. It should be emphasized that much of this discussion is based on the author's personal observations and discussions with other practitioners, plus attention to the literature and presentations in compliance and ethics. And there is no doubt that much good work is done in competition law compliance and ethics programs. Companies do dedicate substantial resources to this area. The development of new, effective techniques in the broader world of compliance and ethics has certainly influenced compliance and ethics programs in the competition law area at least to some extent; as the saying goes, a rising tide lifts all boats. But there is nevertheless the sense that compliance and ethics efforts in competition law are not what they could or should be and no longer lead the way as they once did. What does this mean in practice?

39. Consider the findings of the American court in the Stolt-Nielsen<sup>11</sup> case, one of the few cases actually dealing with a compliance and ethics program. The Court there concluded that the defendant company had taken "prompt and effective action" to end its role in a cartel and was very impressed by the fact that the company, after finding a violation, took certain actions. These essentially consisted of senior management instructing employees to cease illegal conduct, conducting mandatory training, having a handbook, requiring employee certification, and informing competitors of its commitment.<sup>12</sup> While these were certainly seen as serious efforts by the court, the court could have written the same opinion based on the same set of facts as early as the 1960's; nothing much seemed to have changed in approaches to competition law compliance programs. The author has listened to presentations on antitrust compliance programs in the US - the discussions sounded starkly like the same discussions he heard when he started in this field in the 1970s (when the government was "sending a message" by sending individuals to prison for months, not years, and imposing fines in six figures, not nine). There was much talk in these presentations about policies and training, with the additional talismanic reference to "tone at the top." But "tone" typically translated into having the chief executive sign off on statements (almost always drafted by lawyers, a fact that employees know as well). There was discussion of "audits," but in fact these were really risk assessment exercises, not true audits. And no one seems to talk about how one actually conducts such audits, or what logistics would be involved to do one on an unannounced basis. Surveys, incentive programs, and empowered chief ethics and compliance officers, as well as other highly-regarded modern program steps, are mostly omitted from these sessions. These are in sharp contrast to programs like the Compliance Academies staged for compliance and ethics professionals presented by the SCCE, and in which the author is a faculty member. No Academy would last if it limited itself to policy statements, manuals, lawyers' speeches, and similar formalistic steps.

40. There is a need for current empirical work on what is actually in competition law compliance programs today. It should be noted, however, that this is extremely difficult to do with any level of accuracy, because those completing any form of survey will have a strong motivation to interpret questions to favor their companies.<sup>13</sup> Absent such data, the author offers the following hypothesis on the weaknesses

<sup>11</sup> United States v. Stolt-Nielsen S.A., No. 06-cr-466 (E.D. Pa. Nov. 29, 2007)(Memorandum and Order).

<sup>12</sup> United States v. Stolt-Nielsen S.A., No. 06-cr-466, at 14-15 (E.D. Pa. Nov. 29, 2007)(Memorandum and Order).

<sup>13</sup> In fact, in one reported survey of company compliance program elements, whenever two or more people in the same company were asked the same questions, there were always differences in their answers, suggesting a subjective element in unverified surveys.

of competition law programs, both in practice and also in terms of what some government agencies and other competition law experts have often called for in programs. This is offered with the caveat that it reflects personal experience and observations; actual study of these hypotheses would be extremely valuable.

- Competition law programs may tend to be at least somewhat siloed and managed by lawyers, rather than fully integrated into a broader, empowered compliance and ethics program. As the OECD stated in the context of anti-corruption programs, “to be effective, such programmes or measures should be interconnected with a company’s overall compliance framework”;
- There is little understanding of the essential role of the chief ethics and compliance officer (“CECO”), despite the fact that serious violations most often involve executives; absence of empowerment and independence for the CECO is perhaps the most lethal weakness in any program.<sup>14</sup> In the words of the OECD, again in the anti-bribery context, those running the program should be “senior corporate officers, with an adequate level of autonomy from management, resources, and authority”;
- “Tone at the top” is now much talked about but is typically translated into “talk at the top” and not action at the top;
- Compliance audits appear to exist more in talk than in implementation; some commentators even confuse them with risk assessment. They are not targeted using sophisticated screening techniques. Nor are the other common compliance and ethics measurement techniques such as focus groups, deep dives, exit interviews, etc., much discussed in the competition and ethics field;
- Little mention is ever made of the use of and control over incentives, although this is well covered in the Canadian Competition Bureau’s Bulletin;
- Little is said about disciplinary processes, and particularly disciplining managers for failure to take steps to prevent violations and the need to publicize actual disciplinary cases internally;
- Little is said about the use of controls – techniques that work as barriers to violations, sometimes almost mechanically, and often by removing the ability to commit improper acts; and,
- Training is much discussed, but not with a spotlight on the need to provide the most pointed, interactive and extensive (rather than the briefest) training sessions targeted at the senior executives, the ones most likely to break the law.

41. What we may be seeing is that competition law compliance tends to be more the domain of lawyers, perhaps becoming somewhat isolated from the broader and more dynamic community of compliance and ethics professionals. Competition law programs may be detached from experts who can focus on the types of things that can drive an effective program, like adult education and training, and the actual human motivations for doing the right (or wrong) thing. Compliance programs are arguably based on the lawyers’ view of what employees need to know, like a law school course, with insufficient thought about management techniques or what actually motivates corporate behavior. What more can be done? We will discuss that below.

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<sup>14</sup> On the essential role of the CECO and the dangers of under-positioning this key element in programs, see Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance Officer (August 2007) [http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO\\_Definition\\_8-13-072.pdf](http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO_Definition_8-13-072.pdf); Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds (RAND 2009) [http://www.rand.org/pubs/conf\\_proceedings/CF258/](http://www.rand.org/pubs/conf_proceedings/CF258/)

## 6. Can compliance and ethics programs have any effect in preventing cartels?

42. Limited though leniency may be, there can be no real argument that these government programs do surface cartels, even if this happens only after the cartel has thrived for years. But can the same be said of compliance and ethics programs? Do they have a place in the fight against cartels?

### 6.1 *The nature of cartels*

43. Here it is important to focus on the nature of these offenses. There are two salient characteristics that tie into any techniques used to control them. First, they are hidden. The perpetrators know they are doing something wrong and work to cover their tracks. This is not always the case, of course. The author has personally experienced business people (from small businesses) describing to him things they had done or were planning to do that would have been price fixing, and these individuals were completely unaware (these were casual discussions, not requests for legal advice). But this seemingly innocent conduct is not the pattern in the cases that make the newspapers and blogs.

44. The second outstanding characteristic is that the violators are typically senior managers. It is true that even a junior salesperson in a remote location could single-handedly commit a violation, e.g., agreeing with a former co-worker who now works for a competitor on who will handle which customers. But as was noted about “innocent” violations, high-level offenders are now what make up the major, most economically damaging and criminal cases.

45. How, then, can a company prevent and detect at an early stage a secret, high-level crime/cartel? We can start this analysis by looking at certain misconceptions about programs that would cause one to be skeptical about their value in dealing with cartels. Those unfamiliar with modern programs may mistake a few of the elements in a program for being the entire program – particularly the “paper and preaching” part. This consists of a policy, such as that found in a code of conduct. It may be more sophisticated and be spelled out in detail in a compliance manual. There would also be training. This might be small group discussions with a lawyer, or even lectures to large assemblies of employees.

46. If programs were nothing more than this, then they would very likely be ineffective against cartels. But then they would very likely be ineffective against any type of misconduct as well. Mere words do not control wrongdoing and they do not constitute a compliance and ethics program.

### 6.2 *Training*

47. We will discuss further the types of compliance and ethics program activities designed to deter and ferret out cartel behavior. But even training, which some might dismiss as ineffective because violators already know they are breaking the law, can nevertheless play an important role as part of an anti-cartel compliance and ethics program if, but only if, it is done well.

48. The first point of note is that training is not simply the transfer of information so that employees know what is covered by the letter of the law; training must also be motivational. Many businesspeople have a vague idea that pricefixing is illegal, but may not have been confronted with the reality of what this means. Effective motivational training will not likely convert the hard-boiled cartel participant, but it might reach the newest member of the cartel who is just continuing what his predecessor told him to do. It may reach the cartel participant who is angry about being passed over for a promotion, or who has a change of heart based on any number of possible personal reasons.

49. Moreover, as the Canadian Competition Bureau recognized in its guidance bulletin on compliance programs, training is not just for the perpetrators; it is also for the helpers and witnesses<sup>15</sup>. Experience with human nature teaches us that it is extraordinarily difficult for people to keep secrets; indeed, when most people say they will keep a secret they seem to mean only that they will try to limit the number of people they talk to about it. Secretaries, travel staff, assistants, subordinates and others often suspect something is “funny,” but only through training do they learn how serious it really is, and that there is something they can do about it. It appears that most people will not willingly go out of their way to report on their friends and colleagues, but if given the opportunity and especially if asked they will talk. Those in the compliance and ethics field have seen this over and over again. It may not seem logical to outsiders, but does seem to be part of human nature.

50. While it may appear to some that training is just the one-way communications of the compliance message, for those who have done training, especially with small groups on an interactive basis it is much more. In fact, a good training program often takes on elements of a compliance audit and review. An experienced compliance and ethics person familiar with competition law can detect patterns and unusual reactions in the training audience. For example, when the trainer talks about what is a conspiracy, how they are discovered, and what happens to violators, he or she may experience negative reactions from the audience. There may be extreme sarcasm, or panic, or uncertainty, but to the trained eye it is visible. Participants’ questions such as “what if a salesperson were doing x” or, “come on, they don’t really go after these types of cases, do they” can communicate important information that calls for follow ups.

51. On this point the author can speak from personal experience. As a result of providing actual company training sessions the author has had, more than once, company managers report violations or nascent violations that were surfaced directly as a result of interactive training sessions. These training experiences were not simple lectures, but involved interactive sessions with employees, and the use of dramatic videos to catch employees’ attention. It may well be that lectures in large halls (with the employees engrossed in their I-Phones and Blackberries) do not draw this response; the more intensive (but unfortunately more expensive) small group sessions with opportunities for informal chat with attendees, can surface a broad range of issues.

52. But if part of the purpose is to reach those who are not principals in a violation, how would staff and others know or suspect something was wrong? Some might believe that it is relatively easy to engage in cartel behavior; a few senior people meet discreetly a few times a year, and the cartel works. But cartels often require either a great deal of trust in competitors who are willing to engage in criminal collusion, or some form of policing. In the marine hose case competitors hired a cartel coordinator. In another case they made visits to competitors’ plants to police production limits. Moreover, effective cartels can produce tell-tale changes and patterns that can catch the attention of those in the company who know how the business had previously been conducted. To implement the cartel it can be difficult internally to control all the other players in the company whose cooperation is necessary to conform to the agreed-upon restrictions relating to such things as sales and production. Salespeople may not understand why they cannot pursue a lucrative deal and related commission; plant people may not see why they must shut down, even as sales have been increasing. They may not know all the facts or have enough information to meet governmental investigation thresholds, but for an in-house compliance and ethics professional it is exactly these types of red flag signals that determine how we allocate internal audit, review and investigation resources. Training, as well as other compliance and ethics program techniques, can reach these people.

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<sup>15</sup> In the words of the Competition Bureau, “staff at all levels who are in a position to potentially engage in, *or be exposed to*, conduct in breach of the *Acts*.” Competition Bureau Canada, Corporate Compliance Programs 9 (2010). [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf) (emphasis added).

### 6.3 *The harder edge*

53. Those who have not had first-hand experience implementing compliance and ethics programs may believe they are simply paper and formal matters: issue policies and a booklet, deliver a few presentations, and that is the program. But an effective compliance and ethics program must have much more, both to meet the generally accepted standards for such programs and to be effective. In dealing with cartels these aspects of programs are referred to here as the “harder edge” of compliance and ethics. In particular they would include:

- A strong, empowered and independent compliance and ethics infrastructure, led by an executive level chief ethics and compliance officer (CECO) directly responsible to (and removable only by) the board;
- Competition law compliance is integrated into the compliance and ethics infrastructure, not standalone and isolated
- Actual senior management support characterized by action, not just words<sup>16</sup>;
- Controls designed to raise barriers to engaging in violations, and even to make violations as close to impossible as a management system can get;
- Audits, monitoring and other techniques targeted to discover violations;
- Systems for employees and others to surface misconduct safely;
- Strong protections against retaliation for those who raise concerns;
- Ongoing evaluations of the implementation and effectiveness of the program;
- Discipline, including anti-scapegoating measures to discipline managers who fail to act to prevent violations and publicity for instructive disciplinary cases;
- Use of incentives to give the program potency; and
- Mechanisms for professional investigations, including root cause analyses to prevent recurrence of violations.

54. These types of techniques go beyond simply sending messages out to the employees and hoping they do the right thing. They do not depend on trust and good faith. Rather, they use management tools to ensure that people abide by the law.

55. We could discuss here at length what is involved in each of these techniques. In fact, there is an entire literature on most of these techniques, and they are often covered separately in training for compliance and ethics professionals.

### 6.4 *Screening*

56. There is one technique, however, that may deserve some special attention with respect to competition law compliance both because of its potential, and because it is likely never or rarely ever used in companies. This is the technique of screening, or using computer-based statistical analysis. In companies there may be a sense of fatalism about cartel behavior. The author has heard lawyers say, “we trained them, what more could we have done?” There are laments about how a large company could ever know, in its far-flung global outposts, whether a local manager was engaged in cartel behavior. The author believes that

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<sup>16</sup> For the author’s views on what executive action could look like, see Murphy, “How the CEO Can Make the Difference in Compliance and Ethics”, 20 *ethikos* 9 (May/June 2007).

the types of methods listed above, if done well, provide a very good avenue for surfacing even hidden misconduct. But there is one more step that can help uncover cartels and other conspiracies. The use of screening can find unusual competitive patterns that would not even be discernable to the unguided eye. But with the right systems and expertise, patterns can emerge. These could include market shares that are unusually stable, margins that are uncharacteristically high, even bidding numbers that raise questions under Benford's law. This technique does not, on its own, find enough information to determine that a violation has definitely occurred, but when used intelligently it can narrow the focus of audits and other detection techniques to allow them to be targeted on a cost-effective basis. Indeed, just the existence of sophisticated detection techniques can act as a serious deterrent to those who would otherwise believe their violations would be undetectable. For more on this technique, see Abrantes-Metz, Bajari & Murphy, "Enhancing Compliance Programs Through Antitrust Screening," 4.5 The Antitrust Counselor 4 (September 2010).<sup>17</sup>

## 7. Are compliance & ethics programs too expensive for small and medium-sized enterprises ("SMEs")?

57. Often when there is discussion of the role of compliance and ethics programs it is assumed that the place for such programs is only in large companies such as multinationals. Who else could afford the lawyers needed to analyze cases and statutes in order to draft the extensive competition law manuals? Who else could hire partners from leading law firms to present the law to the senior officers? Who else could have expensive legal counsel and economists by their side to determine the appropriate application of difficult economic concepts like barriers to entry and substitutability of demand?

58. But, in fact, this is one of the most important reasons for distinguishing cartels from other competition law compliance issues. When the issues are clarified and we look at cartel behavior, the "cost" issue takes on an entirely different hue. Here we are addressing fundamentally unlawful conduct without difficult shades of gray. And here we can also see that the issue is not cash, but commitment. Where the senior management believes something like compliance is important in a small business, it is far more likely that everyone who works there will also know this message. They will know it, because they each personally know the CEO and he or she knows them. The cost to the company is not a budget item, it is a personal item – will the CEO and the rest of the leadership step up to the level of commitment needed. In large companies budgets and financial resources may well be key to reaching thousands or hundreds of thousands of employees around the world. CEOs of these companies may not even know the names of all of their subsidiaries, let alone all of the employees. Commitment is also essential, but financial resources necessarily drive the wheels of large organizations.

### 7.1 A dollar a day?

59. The Society of Corporate Compliance and Ethics (SCCE) is a strong advocate of promoting effective compliance and ethics programs in small businesses. We do not believe that cost is the barrier. In fact, we have published a tract for practitioners on this point, Murphy, "A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs"<sup>18</sup>. This document provides on a detailed level the types (and cost – usually \$0) of steps a small and medium-sized enterprise can take to ensure its employees obey the law. The document is based on the commonly-used standards for compliance and ethics programs, including those of the Sentencing Guidelines and the OECD Good

<sup>17</sup> More detail is provided in the same authors' "Antitrust Screening: Making Compliance Programs Robust," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648948](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648948)

<sup>18</sup> (SCCE; 2010) <http://www.corporatecompliance.org/AM/Template.cfm?Section=Surveys&Template=/surveyform.cfm&survey=DollarCompliance>.

Practice Guidance. But the source of the standards is not the issue; rather, the items included are also fundamental management steps that any competent manager would use to achieve any management objective. Implementing an effective compliance and ethics program is only “impossible” for those business managers who do not want the bother of taking the rules of the road seriously.<sup>19</sup>

60. In response to this thesis, however, one might object that if it is so easy, why do not smaller companies routinely do this? The first response is that having an effective program is never “easy,” because it requires serious management commitment. But it is not something unavailable to these companies for lack of funds. Why is it, then, that SMEs do not generally adopt programs? How can we reach them to recruit them into the fight against cartels?

61. Here the analysis can start with asking why an SME would take time and energy to address possible violations of the law.<sup>20</sup> The life of an SME manager or owner is typically very full. There is the tension and excitement of managing the business. At any given point the very survival of the business can be on the line. While a manager in a large business may think about future plans, promotions, and stock options, the small business owner has to think about whether he or she will make payroll. Will the business make its next production deadline; will it make that big sale that was proposed this week? This can be simultaneously nerve-wracking and exhilarating.

62. To the SME owner, bureaucracy is an enemy, and nimbleness an advantage the SME has over larger competitors. Bothering with laws, lawyers, and regulations is a distraction from the objective of surviving and beating out the competition. In this environment, from a policy perspective, we need to ask if the threats of big cases, fines and prison terms even reach the SMEs? Do their owners and managers ever read about these big cases? Do they think any of this applies to them, or that any regulator or enforcement authority will even care what they are doing? Typically the SME manager is not hunting for news about the government; he or she is hunting for customers, cost savings, and business advantages. This is why they went into business – to compete and win. Worrying about what might happen or could happen in some remote future pales in comparison to the day-to-day needs and excitement of the small and medium business.

63. What, then, would reach SMEs? To recruit SMEs it is necessary to meet them where they focus, in the marketplace. Bigger fines and longer jail terms simply do not matter if you do not bother to find out about them and do not think they are at all relevant. Nor will they seek out guides and tools relating to compliance even if free and readily accessible. Why distract management attention from the business, to pursue what is perceived as a bureaucratic diversion. But developments in the marketplace are the life blood of the business person. So what formula would work?

64. There is certainly room for intelligent experimentation on this mission. The author’s belief is that causing larger companies to make compliance and ethics programs a marketplace factor in their dealings with SMEs is the best strategy. How would this work? Many SMEs hope to sell to the larger companies. Anything that provides a competitive advantage for this purpose matters. If large companies considered the compliance and ethics programs of those bidding and selling to them as a serious competitive factor, this could cause the marketplace to promote programs. For example, large companies could make the existence of a compliance and ethics program a minimum requirement for submitting bids for their business. They could make the quality of a supplier’s program a factor that counts very specifically in selecting suppliers. There are numerous steps larger companies could take in this regard.<sup>21</sup>

<sup>19</sup> We do not address at all the “cost of compliance”, i.e., the cost to business of following the law, which is beyond the scope of this paper, only the cost of having a program.

<sup>20</sup> Here the author is speaking as one who co-founded a small business and who has worked as a board member in a business association of small businesses in the town where he resides.

<sup>21</sup> For example, once (but only once) the author had a client provide a workshop for suppliers on how to have their own compliance programs.

65. What, in turn, would drive larger companies to do this? Experience in the US indicates that merely suggesting that this would be a noble thing to do falls on relatively deaf ears. The Sentencing Guidelines has contained such a suggestion since 2004, with little if any noticeable response.<sup>22</sup> Businesspeople know this advisory language is not considered by prosecutors or others in government in assessing their programs, so it is ignored. What method could be effective? Experience in this context tells us that companies, at least the larger ones that perceive themselves as more vulnerable to government attention, respond to tangible rewards and reasonably specific guidance on what needs to be done. The Sentencing Guidelines demonstrated the use of the carrot and stick, resulting in dramatic changes in the corporate world's approach to compliance programs. How could this lesson be applied?

66. If the governments that took compliance and ethics programs into account in positive ways – reductions in sentences and penalties, consideration in decisions whether to prosecute, etc. – made it clear that for programs to get credit they had to include outreach to suppliers, this would very likely get substantial and quick results. If standards like the Sentencing Guidelines in the US, the OECD Good Practice Guidance internationally, and program guidance like that provided in the UK by the Office of Fair Trading, make this a fundamental element of an effective program, the track record indicates that larger companies would follow this direction. This, in turn, could offer SMEs the kind of marketplace incentive they live for – a chance to open the sales door to the coveted blue chip market. But if governments do not offer these types of incentives to the larger companies, then there is likely no real leverage and no easy way to motivate SMEs.

## **8. What different approaches are taken to competition law compliance programs by authorities around the world?**

67. To address the role of compliance and ethics programs in competition law enforcement it is useful to review what enforcement agencies have been doing in this field. The author is not aware of any published studies on this issue, so observations here are based on the author's own experience, research and familiarity with the literature and some agencies' practices.

### **8.1 The US**

68. In the United States the Antitrust Division has taken the position that compliance programs are not taken into consideration in determining questions of corporate guilt, and are also not considered in determining whether to prosecute companies.<sup>23</sup> This view is confirmed in the US Department of Justice's US Attorneys' Manual, which carves out an exception from the Department's general policy considering programs in enforcement decisions.<sup>24</sup>

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<sup>22</sup> U.S.S.G. section 8B2.1 Commentary note 2(C)(ii) "As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs." [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Chapter\\_8.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf).

<sup>23</sup> Although Division representatives have reported that it is possible for programs to have an effect in enforcement decisions. See Block, "Antitrust Compliance Programs and Criminal Litigation: Myth and Reality," 7 *Antitrust* 10, 10 (1985) (reporting on one case where "a well-conceived and diligently enforced compliance program" had an effect on the Division's decision whether to indict a company for "isolated misconduct.").

<sup>24</sup> United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm) ("In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.") (No explanation is provided, and no other examples are given.).



69. Under the Organizational Sentencing Guidelines compliance programs are taken into account in determining sentences for corporations.<sup>25</sup> But there is a special provision significantly reducing the amount of benefit only in antitrust cases.<sup>26</sup> Moreover, in practice no company has ever received a reduction in fines for having a competition law compliance program in the 20 years that the Organizational Sentencing Guidelines have been in effect.

70. In the Antitrust Division's leniency program, the existence of a compliance and ethics program is not mentioned as a condition to admission to the program. Nor are companies that are admitted into the program required to institute such programs.<sup>27</sup>

71. The Antitrust Division itself has not officially issued any guidance on what should be in compliance programs. However, spokespersons for the Division have provided advice<sup>28</sup>. Representatives of the Division have also participated in continuing legal education programs dealing with compliance programs, explaining that the greatest benefit of a program, in addition to preventing violations, is enabling a company to be the first to report collusion and thus benefit from the leniency program. The Federal Trade Commission did issue a guidance on compliance programs based on a memorandum by Loftus Carson of the Bureau of Competition (February, 1979),<sup>29</sup> and the then-Assistant Director of the Bureau of Competition, Daniel Ducore, was quoted as saying in 1996 that for purposes such as compliance with FTC orders:

*"the more a company can tell the FTC about its efforts to keep its nose clean, the more likely the Commission is to see its actions as being in good faith and the more willing it is to permit mitigation, including mitigation down to zero penalties."*<sup>30</sup>

72. The author is aware of nothing official since that time. The FTC has, however, imposed compliance programs in the settlement of some of its cases, and these can contain significant detail. Some Antitrust Division cases have included settlement agreements that require a few compliance program steps, although these tend to be less detailed than is the case for settlement agreements in other areas of the law in cases settled by the US Department of Justice. As an aide for compliance programs, the Division has made available videos of the Lysine conspiracy which practitioners including the author have found useful in training company employees.

## 8.2 *The EU*

73. In the EU originally enforcement authorities took the somewhat unorthodox approach of giving companies credit for implementing programs after an offense had been found;<sup>31</sup> subsequently the EU rejected requests for any benefit for having a program. The EU's penalty policy lists several factors that

<sup>25</sup> [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Chapter\\_8.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf)

<sup>26</sup> Federal Sentencing Guidelines Manual § 2R1.1(d)(2).

<sup>27</sup> <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

<sup>28</sup> Roberts, "Antitrust Compliance Programs Under the Guidelines: Initial Observations From the Government's Viewpoint," 2 Corporate Conduct Quarterly 1 (Summer 1992); Kolasky, "Antitrust Compliance: The Government's Perspective," 16 ethikos 6 (Sept/Oct 2002).

<sup>29</sup> FTC, "Model Antitrust Compliance Audit Program"

<sup>30</sup> Murphy, "An FTC View of Compliance Programs: Good Faith Efforts Can Mean No Penalties," 4 Corporate Conduct Quarterly 53, 66 (1966) (interview by the author).

<sup>31</sup> See 31991D0532, 91/532/EEC: Commission Decision of 5 June 1991 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/32.879 - Viho/Toshiba).

may be considered in determining penalties including financial weakness in the offending company, but there is no reference to compliance programs.<sup>32</sup> Thus it appears programs play no role either in decisions to take enforcement action or in determining penalties. The author has been informed by practitioners that EU enforcement authorities do seek compliance program information to use against companies to establish that violations were willful and not negligent.

74. The EU does not require those admitted to the leniency program to have or institute compliance programs.<sup>33</sup> There is also no official guidance issued by the EU on what should be in compliance programs. The author is unaware of any statements by EU authorities offering guidance on what should be included in programs.

75. Member countries of the EU generally appear to follow the guidance of EU enforcement authorities in this area. Generally leniency programs do not require participants to institute programs, enforcement decisions are made without reference to the existence of a program, and penalty policies provide benefits for violators in weak financial condition (where a fine could cause a company to go out of business) but not for having a compliance program. However, while this description is generally true, there are exceptions, discussed below, among the member states that the author has reviewed.

### 8.3 *Other approaches*

76. It is not correct to conclude, however, that competition authorities consistently leave compliance programs out of the enforcement picture. One particularly interesting case is the Canadian Competition Bureau, which had in 1997 been a pioneer in issuing guidance on competition law compliance programs. More recently the Bureau decided to update its prior guidance and opened the draft for public comment. Based on comment from, among others, the American Bar Association, the Canadian Bar Association and the Society of Corporate Compliance and Ethics, the Bureau issued a quite detailed guide for programs. This Bulletin shares many of the features found in such standards as the US Organizational Sentencing Guidelines and the OECD Working Group's Good Practice Guidance.

77. The Bulletin also explains how programs may factor into various aspects of the enforcement picture, including decisions to proceed against companies, decisions on the remedies to be imposed, and decisions by courts in looking at companies. It also clarifies an often difficult point about the impact of a violation by a high-level official, providing that while the burden for a company would be more difficult in such a case, there could still be room for consideration of a company's program if it were sufficiently diligent. Unlike other jurisdictions that appear to omit reference to compliance and ethics programs in their approach to leniency for cartel offenses, the Canadians state:

*"The Bureau will strongly recommend that an immunity or a leniency applicant implement a credible and effective program using this Bulletin as a guide."*<sup>34</sup>

78. In the EU, on paper at least, the Norwegian standard for imposition of penalties varies from the EU standard in permitting a company's efforts to prevent cartel conduct to be taken into account,

<sup>32</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT)

<sup>33</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208\(04\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT) .

<sup>34</sup> Competition Bureau Canada, Corporate Compliance Programs 15 (2010). [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf)

particularly if the conduct at issue was the type that a program could have prevented. In determining the penalty consideration is to be given to “whether the undertaking through guidelines, instruction, training, supervision or other actions could have prevented the infringement.”<sup>35</sup>

79. In the UK the OFT has previously issued a guide on compliance programs.<sup>36</sup> In the past year it has reviewed this guide for possible revision and has opened the process up to public comment. It has also undertaken an extensive study of the subject, seeking input from those doing compliance work in corporations. The OFT has put up for consideration whether it should offer up to a 10% reduction in penalties for companies with diligent programs.

80. In France the competition authorities chartered a study of the subject of compliance programs. In settlement of cases French enforcement authorities have required the implementation of compliance programs, somewhat similar to the approach of the Criminal Division of the US Department of Justice. To the author’s knowledge the French authority is still considering what role programs should play in penalty decisions, and what kind of guidance to provide regarding what should be included in programs.

81. In Australia the competition authorities have a long history of actively participating in the development of the whole field of compliance in that country. The ACCC and its predecessor, the Trade Practices Commission, were the drivers of the Australian Standard for compliance programs, AS 3806, and can also be given much of the credit for the formation of the organization that became known as the Australasian Compliance Institute,<sup>37</sup> a membership organization dedicated to the compliance field.

82. The ACCC has provided detailed guides relating to compliance programs.<sup>38</sup> And while, on their face, not as incentive-oriented as the Canadians, they do acknowledge that courts may consider programs. It is also very clear that ACCC in resolving cases will require a diligent compliance program.

83. In this commentary the author has drawn on first-hand knowledge of the circumstances in Australia, participation in filings on the Canadian Bulletin, and review of English language reports on the actions of the French Competition authorities, and has followed and commented on behalf of SCCE to the OFT. For other parts of this discussion the author has relied on publicly available materials issued by the different national authorities and cannot comment on how they are implemented or their continued application.

84. For Singapore the Competition Commission has published a penalty policy, and included the existence of a compliance program as a factor. The brief definition of a compliance program suggests that only serious efforts are to be considered.

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<sup>35</sup> <http://www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines/>

<sup>36</sup> Office of Fair Trading (UK), “How your business can achieve compliance: A guide to achieving compliance with competition law” (March 2005)  
[http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_mini\\_guides/oft424.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft424.pdf)

<sup>37</sup> [http://www.compliance.org.au/www\\_aci/](http://www.compliance.org.au/www_aci/).

<sup>38</sup> Australian Competition and Consumer Commission, Corporate Trade Practices Compliance Programs (Nov. 2005).  
<http://www.accc.gov.au/content/item.phtml?itemId=717078&nodeId=0de4ca0a69fe9dde037bf81391b2cda&fn=Corporate%20trade%20practices%20compliance%20programs.pdf>

*“2.12 Mitigating factors include:*

*... .*

- adequate steps taken with a view to ensuring compliance with the section 34 prohibition or section 47 prohibition, for example, existence of any compliance programme;*

*... .*

*2.13 In considering how much mitigating value to be accorded to the existence of any compliance programme, the CCS will consider:*

- whether there are appropriate compliance policies and procedures in place;*
- whether the programme has been actively implemented;*
- whether it has the support of, and is observed by, senior management;*
- whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and*
- whether the programme is evaluated and reviewed at regular intervals.”<sup>39</sup>*

85. The Israel Antitrust Authority has issued “Model Internal Compliance Program,” a guidance document on compliance programs covering such important points as the need to have the board of directors appoint the compliance officer. The guidance document explains that under Israeli law the diligence reflected in a compliance program would be part of a due diligence defense for officers who could otherwise face liability for a corporate offense. There is also an affirmative incentive offered to companies with programs:

*“First, the IAA will give **priority** to answering questions regarding its areas of expertise which are asked by corporations that carry out an internal compliance program. This priority will take the form of a relatively shortened schedule for providing ongoing assistance to these corporations as compared to the schedule for other corporations.”<sup>40</sup>*

86. In India the Competition Commission issued “Competition Compliance Programme for Enterprises” which both explains the law and provides detailed how-to guidance on programs. For example on auditing it advises:

*“While auditing the procedures, documents and emails of each and every employee may be a herculean task it would be always possible to identify those individuals who are most at risk and to conduct an audit of a “snap shot” of their emails on a given day.”<sup>41</sup>*

87. It also advises not to do the program in isolation, but that:

*“It would be advisable to integrate the competition “Compliance Programme” into the overall compliance programmes of the enterprise.”<sup>42</sup>*

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<sup>39</sup> [http://app.ccs.gov.sg/cms/user\\_documents/main/pdf/CCSGuideline\\_Penalty\\_20071033.pdf](http://app.ccs.gov.sg/cms/user_documents/main/pdf/CCSGuideline_Penalty_20071033.pdf)

<sup>40</sup> Israel Antitrust Authority, Model Internal Compliance Program 7 (Nov. 1998), <http://www.antitrust.gov.il/Files/HPLinks/Internal%20Compliance.pdf>

<sup>41</sup> Competition Commission of India, Competition Compliance Programme for Enterprises 26 (June 2008) [http://www.cci.gov.in/images/media/Advocacy/comp\\_compliance\\_pro.pdf?phpMyAdmin=NMPFRahGK\\_Yeum5F74Ppstn7Rf00](http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGK_Yeum5F74Ppstn7Rf00)

<sup>42</sup> Competition Commission of India, Competition Compliance Programme for Enterprises 32 (June 2008) [http://www.cci.gov.in/images/media/Advocacy/comp\\_compliance\\_pro.pdf?phpMyAdmin=NMPFRahGK\\_Yeum5F74Ppstn7Rf00](http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGK_Yeum5F74Ppstn7Rf00)

88. Like the Israeli guidance it recognizes the role of the compliance officer as an essential element. And without additional detail it offers the following comment on the value of programs:

*“The existence of a strong Compliance Programme reflecting the eagerness of the management to comply may temper the severity of the punishment that may be meted out for violation.”*

*“The benefits of compliance include the following  
Helps avoid fines or mitigate the level of the fine”<sup>43</sup>*

89. For those considering this policy issue it may be worthwhile to commission a more thorough-going review of the topic, to see what other authorities have done in this area, what the experiences have been, and what options might be suggested by those experiences.

## **9. Are there possible insights from approaches taken to compliance and ethics programs in other areas of the law?**

90. There may be potential to learn more about government approaches to compliance and ethics programs from studying the experiences of competition law enforcement authorities, but compliance and ethics is not a field confined to this one area of the law. Rather, these programs are used to control corporate and other organizations<sup>44</sup> conduct across a broad spectrum of legal areas. While each area of the law may have its own distinctive elements, the components of an effective compliance and ethics program are remarkably similar no matter what legal area is involved. This is not surprising given that effective program steps are essentially adaptations of management techniques that would apply in any organization. The emphasis and techniques vary, but the fundamentals remain essentially the same. Given this observation there may be much potential to learn from the experiences of enforcement authorities in other areas of the law in considering how to address the issues that arise in the area of compliance and ethics.

### **9.1 US DOJ Criminal Division**

91. In the US, the Department of Justice is divided into major divisions, including the Antitrust Division. That Division has exclusive jurisdiction within the Department for all antitrust law matters. But in general for other criminal matters the Criminal Division is responsible for enforcement. The Criminal Division, and particularly the Fraud Section, has responsibility for criminal enforcement of the Foreign Corrupt Practices Act. (The Securities and Exchange Commission also enforces the FCPA.)

92. The Department of Justice, in its guidance to the US Attorneys' offices around the US, has instructed them to consider the existence of a compliance program in all decisions on whether to prosecute a company<sup>45</sup>, and has provided some detail on how to assess programs.<sup>46</sup> Similarly, enforcement officials in the Department's headquarters have been public about the fact that programs will matter in enforcement decisions.

<sup>43</sup> Competition Commission of India, Competition Compliance Programme for Enterprises 15-16 (June 2008) [http://www.cci.gov.in/images/media/Advocacy/comp\\_compliance\\_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00](http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00)

<sup>44</sup> Compliance and ethics programs have even been adopted by government agencies. In the US, both the FBI and the SEC have compliance programs. Rutgers University has a center dedicated to the study of governmental compliance and ethics programs, the Rutgers Center for Government Compliance and Ethics, <http://rcgce.camlaw.rutgers.edu/>.

<sup>45</sup> Except for antitrust cases.

<sup>46</sup> United States Attorneys' Manual, 9-28.800 Corporate Compliance Programs, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm)

93. The Department has also provided guidance on what should be in compliance programs through its settlement procedures.<sup>47</sup> When companies voluntarily disclose criminal violations they will receive, as appropriate, reductions in their penalties (although unlike the Antitrust Division there is no guarantee of complete leniency). But in settling cases companies are required to reform their practices and implement diligent programs. The Criminal Division does not leave this to chance or the company's own judgment; there are specific program elements spelled out by the Division (in FCPA cases drawing on the OECD Good Practice Guidance), and often a monitor required to ensure the program is implemented properly.

94. Thus programs matter both at the beginning of cases and at their end, and it has been very clear that only serious efforts at compliance will be credited. Recently the Criminal Division has indicated that it will consider providing even more guidance on what types of programs will be given credit, so that practitioners can use this guidance in convincing managers to implement more effective programs.

95. In the United States a number of other regulatory and enforcement authorities have pursued similar policies to promote compliance and ethics programs. The Criminal Division is discussed here because it appears to be the closest analogy to the Antitrust Division.

## **9.2 World Bank Leniency program**

96. A second interesting model comes from the World Bank, which may have the only full leniency program in the field of anti-corruption enforcement. Those performing contract work for the World Bank who voluntarily disclose to the Bank their involvement in corruption can avoid debarment through the Bank's leniency program. But unlike the leniency programs in the competition field, the World Bank requires all those admitted to the program to implement compliance programs. And like the US Criminal Division, the Bank does not trust those admitted to do this; the programs must be monitored.

### *"2. Program Summary*

*The VDP gives firms, other entities, or individuals who have entered into or been a party to contracts related to projects financed or supported by the IBRD, IDA, IFC, or MIGA the opportunity to confidentially partner with the World Bank and:*

- a. Cease corrupt practices;*
- b. Voluntarily disclose information about Misconduct that is sanctionable by the Bank (e.g., fraud, corruption, collusion, coercion) by conducting internal investigations at the Participant's cost; and*
- c. Adopt a robust "best practice" corporate governance Compliance Program which is monitored for 3 years by a Compliance Monitor.*

*In exchange, the Bank does not publicly debar Participants for disclosed past Misconduct and keeps their identities confidential.*

*If, however, a Participant does not disclose all Misconduct voluntarily, completely, and truthfully; continues to engage in Misconduct; or violates other material provisions of the Terms & Conditions of the VDP, that Participant faces mandatory 10-year public debarment in accordance with regular World Bank procedures."<sup>48</sup>*

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<sup>47</sup> See, e.g., *US v. Metcalf & Eddy, Inc.*, CA No. 99CV-12566-NG (D. Mass. Dec. 14, 1999), Consent and Undertaking Of Metcalf & Eddy, Inc., offers examples of the types of program steps required by the Fraud Section. Recently these compliance program requirements have been enhanced by including language from the OECD Good Practice Guidance. See, e.g., *In re Noble Corporation, Non-Prosecution Agreement* (Nov. 4, 2010), Attachment B <http://www.justice.gov/criminal/fraud/fcpa/cases/noble-corp/11-04-10noble-corp-mpa.pdf>

<sup>48</sup> The World Bank, Voluntary Disclosure Program, [http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP\\_Guidelines\\_2011.pdf](http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf)

### 9.3 *OECD Working Group on Bribery*

97. A third, international model, is offered by the OECD Working Group on Bribery, which is dedicated to fighting corruption globally. As part of these efforts the Working Group conducted a public review of how to recruit the private sector to the fight against bribery, and focused on the role of compliance and ethics programs. The 38 national signatories to The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997, in 2009 issued a recommendation to its members focused on pursuing this mission.<sup>49</sup> It states that the Working Group:

*“III. RECOMMENDS that each Member country take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:*

...

*v) company and business accounting, external audit, as well as internal control, ethics, and compliance requirements and practices, in accordance with section X of this Recommendation;*

...

*X. RECOMMENDS that Member countries take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business, according to their jurisdictional and other basic legal principles.*

...

*Internal controls, ethics, and compliance*

*Member countries should encourage:*

*i) companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto, which is an integral part of this Recommendation;*

*ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto;*

*iii) company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery;*

*iv) the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards;*

*v) companies to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on*

<sup>49</sup>

OECD, Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions  
[http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation\\_Web\\_English.pdf](http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf).

*reasonable grounds, and should encourage companies to take appropriate action based on such reporting;*

*vi) their government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits.”*

98. Here all 38 countries have endorsed the importance of compliance programs as a weapon against illegal conduct, and called for the signatory countries to take actions to promote such programs. Governments are advised to consider these programs in their “decisions to grant public advantages” including licenses and public procurement. In addition, the Working Group issued a set of 12 principles called the Good Practice Guidance, to assist companies in designing effective programs to combat bribery.<sup>50</sup> The 12 principles of the Good Practice Guidance are mostly familiar points to compliance and ethics professionals because they reflect common management principles. The author has provided, in Appendix I, an edited version of the Good Practice Guidance that could be used for anti-cartel compliance and ethics programs.

99. As noted, the US Department of Justice’s US Attorneys’ Manual distinguished antitrust enforcement from other areas of the law, but does not provide any further analysis. The model in fighting corruption appears to suggest an important role for the private sector, and also a role for government in promoting company compliance and ethics programs. The author, as a practitioner with experience both in competition law and anti-corruption law, has not seen any distinguishing characteristic that would explain the differences in approach to compliance and ethics programs between the law related to cartels and the law relating to the other forms of conspiracies and fraud. If there is a strong difference it would be very helpful for competition law authorities to provide an analysis of those differences so that practitioners can understand the differences in approach and explain them to company managers.

## **10. How can governments practically assess how diligent a compliance and ethics program really is?**

100. When enforcement authorities consider the role and significance of compliance and ethics programs, they must then address a very difficult question: how does one distinguish diligent, good faith programs from sham ones? This is extremely important for all concerned, because mistakes in this assessment would allow malefactors to escape, and can discredit the whole field of compliance and ethics. Compliance and ethics professionals, who want their companies to take the function seriously and implement diligent programs, will in the long run lose out if government fails in this mission. Moreover, for compliance and ethics professionals, much of their authority and standing turns on the credibility of government as an evaluator of programs.

### **10.1 Burden of proof**

101. To address this task there are two essential pieces to the picture; without these the process is very likely to fail. The first is burden of proof and the second is expertise. On the burden of proof it is critical that the burden always be on the company. It would be extremely difficult and time-consuming for government to prove the absence of a program. Rather, the company which is claiming that it has a

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<sup>50</sup> OECD, Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II  
[http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation\\_Web\\_English.pdf](http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf).



program should be the one to prove that the program was real and creditworthy. In a context where the government is exercising discretion in its determination of how to treat a company there can be great flexibility in how the process goes forward, and how high the standard of proof would be.

## **10.2 Expertise**

102. The question of expertise also calls for careful consideration. As noted above, the field of compliance and ethics is a multi-disciplinary field, and is distinct from the practice of law. The fact that an enforcement lawyer may have years of experience investigating and prosecuting cases does not mean that he or she will have the expertise to assess a program and to spot its flaws. But for an experienced compliance and ethics professional there are definite questions and techniques to get to the truth. As in any field, to those outside it can appear murky; for those in the field there are steps that can get to the real picture.

103. The author has had the opportunity to participate in presentations and training for enforcement officials on assessing programs, and along with a colleague has previously been retained by a US Attorney for exactly this purpose. In the latter case a company subject to criminal prosecution was given the opportunity to present the facts of its program and we, as outside professionals, conducted the review and reported our conclusions back to the prosecutors. The company agreed to this process and paid the expenses.

104. For a training presentation to the US Securities and Exchange Commission's FCPA Task Force the author produced a series of questions that could be asked of a program, along with an analysis of what would constitute a sham, what would meet the minimum standards, and what factors would be clear signals of strong programs. Similar materials could readily be provided for any competition enforcement authorities interested in this issue. For example, in Appendix II the author has provided sample questions that can be asked of any company employee in the course of an investigation. These are fairly simple questions that can lead to very rapid initial assessment of a company's program, even in the absence of formal presentations by a company. In order to keep this paper reasonable in length the author has not included more extensive materials on how to conduct program assessments, but is willing to do so for anyone wishing to have more guidance on this topic.

105. For any government authority interested in this issue, perhaps the most efficient approach is to designate, at least initially, one expert in the unit who would become familiar with compliance and ethics programs. This individual could keep current with developments in the field, help develop tools to assist in conducting program assessments, and handle or advise on all matters relating to compliance and ethics programs including assessments.

## **11. How can governments promote effective compliance & ethics programs?**

106. As indicated in the examples above, effective company compliance and ethics programs have been recognized by policy makers as a useful tool in the fight against corporate crime and wrongdoing. This leads to the questions whether and how government can promote such programs, and how to promote programs that actually work.

### **11.1 Will businesses do this on their own?**

107. If we accept that programs have value, even if they may also need to be enhanced, the next question is whether government has a role to play. There are certainly some in the business community who believe that companies can and do implement programs because it makes business sense, and/or is the right thing to do. For these optimistic people government action is not necessary; all that is needed is to make the "business case" and appeal to the better nature of business people. The author is not among these

optimists and has seen mostly weak responses to such appeals. If programs were simply a response to normal business impulses then excellent programs would arise sua sponte. Managers may say they do this, but the author has for the most part not seen it happen and the history of the development of compliance and ethics programs provides little support for the thesis that good management intentions will suffice. Nor will they drive programs to use increasingly effective crime prevention and detection methods; it may indeed be the right thing for managers to do, but if it has not happened spontaneously by now there is little reason to believe it ever will.

### **11.2 *Will businesses do this in response to enforcement?***

108. A second theory is that government need only apply a large enough stick, and companies will be frightened into finding and implementing the most effective, innovative methods to police themselves. When companies become the direct targets of threatening and embarrassing government enforcement action there certainly do seem to be eruptions of compliance activities. But does this actually work and is it a complete solution? It appears that there are a number of currents that undercut this approach. People in businesses and in organizations in general seem to have an astonishing ability to distinguish other companies and situations from their own. The fact that a competitor may have been prosecuted may nevertheless not arouse a second competitor to take preventive steps. Company A may have faced investigations and suffered scandals, but to the managers in Company B this is probably because “those A managers are just stupid enough to make those mistakes; but we are too smart for that.” Until the wolf is actually at the door, business people are often in denial, or do not even hear the message the government is sending out. As discussed above, there is also the fact that enforcement, by its nature, always occurs after the crime is committed and the victims have suffered. Enforcement may work for getting managers’ attention, but only after the harm is done.

109. Finally, there are often limits to institutional memory. Right after the shock of the enforcement action, previous non-believers now become true believers. All managers swear a mighty oath never to sin again. But a few business cycles later, the formerly empowered compliance officer is now reporting to a junior lawyer in the legal department, and the competition law training is now confined only to those poor souls unable to escape. With no other active encouragement, with no monitoring, with no other specific guidance, short-term enforcement hits can remain just that – short term. Again, the author wants to be careful about generalizations. While what is described here is the general pattern the author has observed, there are always exceptions. Perhaps the most notable was the long term impact on GE of being the target of the Electrical Equipment Conspiracies prosecution; this appears to have lasted for generations. Ironically, the penalties imposed on GE would appear trivial today; yet massively larger penalties imposed in recent years do not always seem effective in preventing recidivism in the same company.

### **11.3 *Why would companies adopt strong and durable programs?***

110. What does cause companies to implement programs that are designed to be effective and enduring? Here the experience with the US Organizational Sentencing Guidelines is a highly useful guide. Prior to the issuance of the Guidelines in 1991, there was very little sense of compliance and ethics as a field of study, and there were few if any practitioners who would have described themselves as compliance and ethics specialists.<sup>51</sup> In most areas and for most purposes, compliance was about sending a message out to employees and hoping that some of it had an impact. “Compliance” was the exclusive domain of lawyers; “ethics” was a quasi-mystical concept for a few idealists who believed companies should be values oriented. None of this seemed to work particularly well. Compliance was also practiced almost

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<sup>51</sup> The author, with Rutgers University Professor Jay Sigler, wrote what is probably the first book on compliance programs generally in 1988 ([Interactive Corporate Compliance: An Alternative to Regulatory Compulsion](#) (Greenwood Press; 1988), and is addressing this topic from personal experience.

exclusively in silos; environmental compliance people had no reason to talk with antitrust compliance people. Those fighting foreign corruption were on a different plane from those concerned with protecting consumers.

111. But in 1991 the Sentencing Commission issued standards for sentencing of organizations in federal cases that changed all this. It provided that corporate sentences would be reduced under certain circumstances, including cases where companies had previously implemented effective programs to prevent criminal violations. Compliance, for almost the first time, was treated as a specific field. The Commission followed a formula that had remarkable success: it set a flexible but very practical formula for determining whether a program was effective (the seven steps), and it offered a commitment for those companies that followed that formula. The impact has been electrifying. Since that date companies and enforcement authorities around the world have built on this standard and the model of approach. Whereas previously programs were typically confined to a few lawyer-designed modest steps, companies now must be committed to meaningful management steps. For example, a program that does not include audits, does not impose discipline for managers' failure to take reasonable steps to prevent and detect violations, and does not have serious managerial oversight, simply receives no credit.

112. Interestingly, in the antitrust field, exactly this same formula is what drove the success of leniency programs. While the Antitrust Division had had a somewhat weak disclosure program prior to 1993, as soon as it shifted to setting an understandable and practical standard for leniency, and added a guarantee of better treatment, the program took off with astonishing success.

113. Based on these two dramatic successes, following the same formula, the author posits that nothing will work as effectively as this simple, incisive formula: set forth a practical standard and offer a commitment. The extremes of gentle appeals to good will and enormous sticks and corporate capital punishment do not have this record. The enforcement stick can even come with unwelcome collateral damage to employees, suppliers, customers and other constituents, and even to marketplace competition by removal of a competitor; this reality is apparently evidenced by those competition law enforcement authorities who reduce penalties for financially weak violators.

114. Should governments act to promote compliance and ethics programs? In the author's experience government pressure to implement effective programs is what drives corporate behavior. And increased and pointed pressure will be needed to cause companies to make these programs more effective. There is certainly an established track record of government having successfully started down this track, but there is also a great deal more needed to maximize these programs.

115. If government is the essential driver, and if compliance and ethics programs have the potential to be effective in preventing and detecting cartels at an early stage, can competition law enforcement authorities assume that initiatives in other parts of the legal system will achieve the desired results, as long as they continue the current enforcement campaigns? Or in words more familiar to economists, can competition law authorities benefit as free riders on the actions of other governmental authorities fighting corruption, fraud and other violations of public policy?

116. Again, looking at the track record, it appears highly unlikely that enforcement authorities unfamiliar with competition law will promote the types of programs that would have maximum effectiveness in fighting cartels. There is even the distinct possibility that resources, innovation and empirical work will be redirected into other compliance areas, with only incidental benefits to competition law compliance. (The author suspects, but cannot practically determine, that this is in fact happening, and that more compliance resources are currently devoted to other areas such as anti-corruption, at least in those jurisdictions where government ignores competition law compliance and ethics programs.) If the competition law enforcers do not devote attention to this field and do not take meaningful actions to

promote programs designed to fight cartels, the author is not at all optimistic about the results from abandoning the field to initiatives by others not familiar with cartels, such as the OECD Working Group on Bribery. If prevention of cartels is the objective, then who better to lead this fight than those whose dedicated mission is to eradicate this form of theft?

#### **11.4 *How can enforcement authorities promote more effective competition law programs?***

117. If competition law officials do believe programs are a useful tool in fighting cartels, or still need to consider the viability of taking action to promote programs, an essential question is what can enforcement authorities do specifically to promote programs? On this point Appendix III provides a list of possible options. This list was originally submitted by the author to the OECD Working Group on Bribery, but for the most part the options listed there could be used in most areas of compliance including competition law. Appendix III makes clear that far more can be done than simply telling companies they need programs or giving them a complete and unwarranted pass for having even anemic programs.

#### **11.5 *Offering guidance to companies.***

118. In the range of options, one that is relatively obvious is to offer advice to companies on what should be in programs. Is this an effective and viable option? The options range from giving absolutely no guidance, to giving guidance with the caveat that programs do not matter to the government, to giving practical advice that builds on existing standards like the Sentencing Guidelines. With the availability of excellent core standards such as the Working Group on Bribery's Good Practice Guidance, it is now much easier to build on those, adding extra insight appropriate for attacking cartels.

119. What will industry do with this guidance? Here there is a useful and familiar analogy – the way enforcement authorities treat company compliance programs. Real programs that use management tools and reflect senior executive support get a response. Sham programs that are no more than talk get no respect. The same is true for government “programs” offering advice to companies. If it is just talk there is little reason to expect rational managers to respond. If promotion of compliance programs by government is nothing more than talk, then government has no real leverage in getting companies to enhance their programs. If program guidance is actually backed up with meaningful action, however, then the regulated community will respond. Sham programs do not count – to government or to management. Meaningful, practical programs get results.

120. Some in the enforcement community may be concerned that any guidance on programs could be used against the government. Will business people claim “You told us this was what we were supposed to do; how can you now prosecute us after we followed your advice?” No litigation lawyer wants to hear this. But there are several responses to this. One is to have the types of caveats lawyers do very well, for example noting that the any guidance provided is not legally binding on the enforcement authority, and that the facts of each case determine what is appropriate. It is also helpful for this purpose, and also for practical reasons, that the government not try to give detailed rules on programs; it is better to use the Sentencing Guidelines and the Good Practice Guidance's approach – important, practical guidance and principles, but not micro-managed blueprints and checklists. Also, it should remain clear that all matters relating to compliance and ethics programs are subject to the company's carrying the burden of proof.

121. There should be no mistake, however, that the objective is not simply to have more company “programs” regardless of how well they work. Poor programs simply waste corporate resources and the time of enforcers in reviewing them. The objective needs to be development of programs that are serious and effective. Is this something government can do? Can government get companies to institute no-nonsense and sometimes intrusive programs that can prevent and detect violations at an early stage? It is not easy, but the answer is “yes.” In fact, government may be the only one that can achieve this result.

### 11.6 *The rationale for carrot and stick*

122. The formula is the simple one discussed above: make a commitment and provide a useful set of standards. A combination of carrot and stick is needed. Enforcement must be tough and a credible threat. But threats alone simply do not drive effective preventive efforts, and certainly do not drive enduring programs. The carrot – the use of incentives – does get the attention of management and corporate boards. Why is this so? There could certainly be an enormous amount of debate and analysis on this topic, but here is one simple analysis. Fear is not the only motivator in business and is probably not even the most important one. But even if it is, the fear of the remote threat of enforcement and penalties will almost always be more distant than the immediate threats posed by business circumstances. If the only factor driving program development is the perceived remote threat of a large fine, this will not drive companies to devote the management attention necessary to institute strong programs. And this analysis does not even take into account the reality of large, publicly-traded firms. With respect to fines, managers in these companies arguably pay the fines with other peoples' money (the shareholders) and when they make the payment are immediately rewarded in the stock market with a jump in the share price for removing the uncertainty of governmental enforcement. One-off events generally do not affect the ongoing price of stocks. So unless the fine is enough to kill the business and thus likely reduce competition (and penalty policies frequently are designed to prevent this), the expected deterrent effect is remarkably diminished.

123. If the senior managers do not face imprisonment or personal, non-reimbursable fines, they may be less deterred by the penalty structure; but more to the point, government actions typically appear more remote than immediate marketplace threats. Moreover, even if individual managers face imprisonment as is the case in the US and some other jurisdictions, this also can be diminished in impact for similar reasons:

- the enforcement threat is inherently remote when compared to day-to-day events and business threats;
- outside threats appear remote because of the insular nature of large organizations; and,
- the threat is often diminished by the apparently common phenomenon of white collar criminal offenders simply believing they are too smart to get caught.

124. None of this is to say that penalties are inappropriate, but just that they are frustratingly limited in the context of organizational crime.<sup>52</sup>

125. In contrast, effective compliance programs are immediate in their impact on everyone in a corporation, not remote like government and other outside forces. If the program, led by an executive level chief ethics and compliance officer, is empowered, connected, independent and professional it can do internally what the government attempts to do externally, but with much more presence, credibility and organizational insight. Internal investigators do not need probable cause, they do not have a legally-dictated burden of proof, and they do not need legal process to review the conduct of businesspeople. But what compliance people often lack is power. For this, the government can shift the balance.

### 11.7 *Government leverage*

126. Government cannot empower compliance people by mere words. But if government makes it clear that compliance programs matter, then compliance people take on a real importance. It is at this point that government can ratchet up the quality of compliance programs. If government leaves no doubt, for example, that companies with no empowered compliance officer, no real auditing, and no effort to detect

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<sup>52</sup> See Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (Harper; 1975).

cartels, will, in turn, get no credit, companies listen. The reason they listen is that their internal compliance and ethics professionals deliver this message from the government to them, and help make it clear what needs to be done. As a compliance and ethics professional who has done this for decades, it has consistently been my experience that this government leverage is a powerful tool.

127. What tools does government have at its disposal? In Appendix III we have provided an inventory of possible techniques. The possibilities are quite flexible, and certainly call for experimentation. Some techniques will appeal more to certain constituencies than others. For example, if compliance and ethics programs offer any form of incentive relating to litigation and penalties, government can count on the lawyers to bring this message to all their clients. Positive incentives relating to expanded business opportunities may appeal more to business managers. The potential is enormous. However, just as there were strong skeptics when the US Antitrust Division first initiated its enhanced leniency program and tested out the “commitment/reasonable standards” formula, so too there are likely to be skeptics when this same approach is applied to promote internal corporate self policing. But as was true for the leniency program, the threat of cartels deserves the best prevention and detection methods that we can devise.

## **12. What further steps might be considered?**

128. For those interested in recruiting the private sector into the fight against anti-competitive and collusive conduct, there are many models of approach to consider. There are some steps that could be taken that are relatively simple and straightforward and require little commitment. Some are simply exploratory to gain more background and perspective on the field. Others are directed toward finding solutions for specific questions. The following options are offered for consideration by the OECD collectively, and/or by individual members and the EU.

- Establish an OECD working group on recruiting the private sector to the fight against cartels through compliance and ethics programs.
- Individual country members can designate a compliance and ethics expert/liaison in their competition law enforcement agency.
- Commission a study of what companies actually are doing in their competition law compliance and ethics programs, with verification of the information. Possible sources include academic institutions and compliance and ethics professional organizations.
- Form a Working Group to address methods for reaching small and medium-sized enterprises (SMEs). Because this can be a challenge that cuts across different legal areas, consider pursuing this jointly with other enforcement bodies and agencies. Also consider including other types of governmental agencies that deal with SMEs and private sector organizations, including possibly some that represent SMEs.
- Issue a competition-law focused guidance on compliance and ethics programs similar to the OECD Working Group on Bribery’s Good Practice Guidance.
- Develop model tools/guides to assist enforcement agencies in assessing company compliance and ethics programs in the cartel area.
- Commission a more comprehensive study of how competition law authorities have been approaching compliance and ethics programs.

- Stage roundtable discussions with representatives of the private sector regarding anti-cartel compliance and ethics programs, to establish a dialog. These should include those who do the day-to-day work, not necessarily the defense litigation bar.
- Member countries can hold public hearings/workshops on compliance and ethics programs, to learn more about what can and should be done in these programs to make them more effective.
- Consider testing out the World Bank model in corporate leniency programs, requiring those admitted to such programs to institute compliance programs and to have the programs monitored.
- Solicit those interested in compliance programs to become consultative partners to any working group on compliance and ethics programs. SCCE has this role in the OECD Working Group on Bribery's programs on the role of the private sector.
- Establish an OECD Competition Law compliance and ethics network among enforcement agencies and designated officials with interest or responsibility related to private sector compliance and ethics programs.

### 13. What sources are available to learn more about compliance and ethics programs?

129. To find additional guidance in the field of compliance and ethics it is essential to start with an understanding of what the field is not. It is not the practice of law. It is not a simple matter of lawyers analyzing cases and then responding to client requests for advice. Rather, it is a multidisciplinary field that addresses this question: how do we assure that those acting for organizations act ethically and legally. In a sense, this field translates the legal advice into management action.

130. Compliance and ethics draws on a number of fields, including communications, human resources, auditing, motivational theory, organizational dynamics, ethics, adult learning, statistical analysis, information technology, risk and law. One cannot be effective in this field simply by focusing on law or the literature of law. A thorough understanding of the statutes, cases and legal interpretations of competition law are just as likely to mislead a compliance program manager as they are to be helpful.

131. The SCCE has available on its web site information about resources in this field at [www.corporatecompliance.org](http://www.corporatecompliance.org). There is also an SCCE social network where those interested in compliance and ethics can raise questions and exchange resources. This is open to all viewers; those wishing to file comments and resources are required to register, but there is also no charge for this. SCCE provides a four-day Academy on compliance and ethics practice, as well as shorter programs, webinars, books and a magazine.

132. For those interested in the range of actions that can be taken in a compliance and ethics program, the author has written, 501 Ideas for Your Compliance and Ethics Program: Lessons from 30 Years of Practice (SCCE; 2008). In a book co-authored with Jeffrey Kaplan, the authors have provided a bibliography of compliance resources in Chapter 12, Appendix 12-B, Kaplan & Murphy, Compliance Programs and the Corporate Sentencing Guidelines (1993 & ann'l supp; Thomson/West). The author is also willing to provide additional bibliographical references on request.

## APPENDIX I

**Note:** The following is an adaptation of the OECD Working Group on Bribery's Good Practice Guidance on fighting corruption. This version has been altered to address the fight against cartels. The edits were by Joe Murphy, and are not from the Working Group on Bribery.

### **Good practice guidance on ethics and compliance programs to fight cartels**

This Good Practice Guidance acknowledges the relevant findings and recommendations of the Competition Division, Directorate for Financial and Enterprise Affairs in its ongoing programme to combat cartels; contributions from the private sector and civil society through the Competition Division's consultations; and previous work on preventing and detecting cartels by the OECD as well as international private sector and civil society bodies. It also acknowledges the groundbreaking work of the Working Group on Bribery in International Business Transactions in developing a guidance for the analogous fight against foreign bribery.

#### **Introduction**

This Good Practice Guidance (hereinafter "Guidance") is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting cartels, and to business organisations and professional associations, which play an essential role in assisting companies in these efforts. It recognises that to be effective, such programmes or measures should be interconnected with a company's overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting cartels.

This Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter "SMEs"), according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

#### ***A) Good Practice Guidance for Companies***

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting cartels should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the cartel risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.



Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting cartels:

1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting cartels;
2. a clearly articulated and visible corporate policy prohibiting cartel behavior;
3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;
4. oversight of ethics and compliance programmes or measures regarding cartels, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;
5. ethics and compliance programmes or measures designed to prevent and detect cartels, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas:
  - i) pricefixing;
  - ii) market and customer allocation;
  - iii) bid rigging;
  - iv) collusive restrictions on production; and
  - v) collusion regarding other possible areas of competition.
6. ethics and compliance programmes or measures designed to prevent and detect cartels applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements:
  - i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
  - ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against cartels, and of the company's ethics and compliance programme or measures for preventing and detecting such cartels; and
  - iii) seeking a reciprocal commitment from business partners.
7. a system of internal controls, compliance audits, monitoring, and other steps reasonably designed to detect and reduce the opportunities for collusive conduct and cartels;
8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding cartels, as well as, where appropriate, for subsidiaries;

9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against cartels, at all levels of the company;
10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against cartels, and the company's ethics and compliance programme or measures regarding cartels;
11. effective measures for:
  - i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations;
  - ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and
  - iii) undertaking appropriate action in response to such reports;
12. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting cartels, taking into account relevant developments in the field, and evolving international and industry standards.

***B) Actions by Business Organisations and Professional Associations***

Business organisations and professional associations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting cartels. Such support may include, *inter alia*:

1. dissemination of information on issues related to cartels and collusive conduct, including regarding relevant developments in international and regional forums;
2. making training, prevention, due diligence, and other compliance tools available;
3. general advice on diligence in carrying out compliance and ethics programmes; and
4. general advice and support on resisting opportunities for collusive conduct.

## APPENDIX II

### Sample Assessment Questions

The following are sample questions for the purpose of assessing a company's compliance and ethics program to be asked of company employees in the course of an investigation:

1. What does the person know about the company's compliance and ethics program (remember, each company may use its own name for the program, e.g., integrity, ethics, business practices, etc.)
2. Who was the compliance officer? If people don't know this, especially those at executive level, that tells you something very important about the program's lack of impact.
3. Did they have a code of conduct? Did the person ever read it? Can the person remember anything at all about it?
4. Was there a system for reporting concerns? It is not important at all that anyone actually memorize the number, as long as they knew there was a system for bypassing local management if needed.
5. Was there a system for getting advice in the risk area at issue in this case? The traditional provision of corporate legal services can be a key part of compliance, especially in certain complex areas. If there is an available business unit lawyer who can provide advice on competition law, this is an important sign of commitment to compliance, even if the person is not formally designated as part of the compliance program. But it is useful to distinguish just having a business or deal lawyer from one whose focus is ensuring that people follow the rules in competition law.
6. Did the person have training on the risk area? If they don't remember if they had the training then that is about the same as having no training.
7. Was there anything in the person's annual assessment, evaluation or objectives related to compliance and ethics? Again, if they don't remember that pretty much tells you it was not taken seriously.
8. Did the person's boss/supervisor ever say anything about the code of conduct or compliance? Did the boss ever say anything about compliance related to the area under investigation?
9. Did the person personally know anyone associated with the compliance and ethics program? The better, more serious programs will have local representatives in the business units. These don't have to be full time, but compliance should be a serious part of what they do, and the people in the business unit should at least know the person is there.

### APPENDIX III.

#### **How Government Can Promote Compliance and Ethics Programs**

*By Joe Murphy, CCEP*

Here is a list of things governments can do to promote effective compliance and ethics programs. There is simply no question: when governments become serious about this they can make it happen:

1. Take effective programs into account in decisions to prosecute.
2. Offer a reduction in penalties for those with effective programs.
3. Publicize the actual benefits given to companies with good programs.
4. Use practical, flexible standards in assessing programs.
5. Publish a strong governmental policy favouring effective compliance and ethics programs as in the public interest.
6. Offer a benefit for effective programs in government procurement.
7. Include compliance programs in settlement agreements/enforceable undertakings.
8. Encourage stock exchanges to include effective programs in listing standards.
9. Have effective programs be a factor in voluntary disclosure programs.
10. Offer reduced regulatory requirements for those with effective programs.
11. Provide that programs may be a defence to related civil liability.
12. Provide that programs may also be a due diligence defence for directors' liability.
13. Encourage larger companies to promote programs in their supply chains.
14. Offer tax credits for initial program costs.
15. Make this a condition for government bailout money.
16. Have government officials actively participate in the compliance and ethics field, including conferences and seminars.
17. Get training on compliance and ethics for government officials.
18. Make the growth of compliance and ethics programs a measure of government success.
19. Work against other governmental actions and court rulings that hurt compliance and ethics program efforts.
20. Offer legal protection for compliance and ethics program efforts.
21. Provide a role model of a robust compliance and ethics approach through government agency compliance and ethics programs.
22. Make very specific commitments to reward compliance and ethics efforts.
23. Have an internal governmental official as compliance and ethics liaison.
24. Have a system for credible program assessment by the government.

We are happy to provide more details, citations and examples to elaborate on these steps.

For any of this to be effective, however, there are several conditions. First is that the burden of proof must always be on the company. A compliance and ethics program is an internal effort, and only a company can demonstrate what it has done. Second, the government must actually understand the field of compliance and ethics. There are many resources available for governments to do this. It is essential that benefits only be given for real programs with empowered compliance and ethics officers, not simply paper elements like codes and policies. But on the other hand, the benefits should not be an illusion that impossible government standards make unattainable. Third, government's commitment to recognize compliance and ethics program has to be real and not a "paper" effort. Enforcement authorities should be very public about granting benefits for good programs, and explain which elements of company programs are not considered effective and which ones are.

Joseph E. Murphy, CCEP  
30 Tanner Street  
Haddonfield, NJ 08033 USA  
1 (856) 429-5355  
JEMurphy@voicenet.com