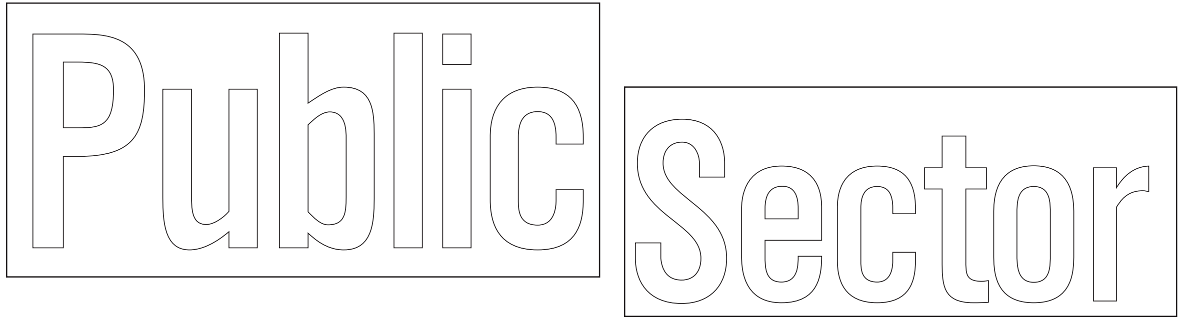
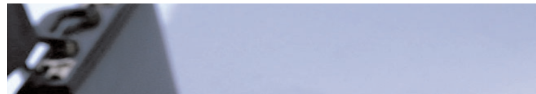
The Effective Answer to Corporate Misconduct:

Reprinted with permission of William B. Lytton, Winthrop M. Swenson, and the American Corporate Counsel Association/Global Corporate Counsel Association as it originally appeared: William B. Lytton and Winthrop M. Swenson, "The Effective Answer to Corporate Misconduct: Public Sector Encouragement of Private Sector Compliance Programs," *ACCA Docket* 20, no. 10 (2002): 42–57. Copyright © 2002 William B. Lytton, Winthrop M. Swenson, and the American Corporate Counsel Association/Global Corporate Counsel Association. All rights reserved. For more information or to join ACCA, call 202.293.4103, ext. 360, or visit www.acca.com.

William B. Lytton and Winthrop M. Swenson, "The Effective Answer to Corporate Misconduct: Public Sector Encouragement of Private Sector Compliance Programs," *ACCA Docket* 20, no. 10 (2002): 42–57.



Public Sector Encouragement of Private Sector Compliance Programs



By William B. Lytton and Winthrop M. Swenson

Twelve years ago, we (and others) collaborated on the development of a groundbreaking government initiative, an initiative that we believe still offers a promising model for tackling the kind of corporate scandals that have rattled the country in recent months. The government initiative was a somewhat obscure, but very important, set of laws called the Federal Sentencing Guidelines for Organizations ("FSGO"). These laws determine what penalties apply when corporations are convicted of federal crimes.[1]

Copyright © 2002 William B. Lytton, Winthrop M. Swenson, and the American Corporate Counsel Association/ Global Corporate Counsel Association. All rights reserved.

William B. Lytton recently left as senior vice president and general counsel at International Paper Company in Stamford, CT, to become the new executive senior vice president and general counsel at Tyco International, New York. He is also the immediate past chair, ACCA/GCCA's board of directors. He is available at wlytton@tyco.com.

Winthrop M. Swenson is a partner in Compliance Systems Legal Group in Washington DC, and a principal in Integrity Interactive Inc. in Dedham, MA. He is available at wswenson@cslg.com.

Back then, one of us (Lytton) was general counsel of a large subsidiary of a Fortune Ten company. The other (Swenson) chaired the task force at the U.S. Sentencing Commission ("Commission") responsible for drafting the FSGO. Our paths crossed because Swenson's task force, in an effort to craft a sensible approach to corporate sentencing guidelines, sought out private sector input and Lytton's company at the time, GE Aerospace, had been part of an innovative, industry-wide initiative to develop sound self-policing practices in the defense industry.[2]

With the benefit of this input, the Commission settled on an approach to the FSGO that remains instructive today: to be effective, government should do more than just focus on regulating and punishing corporate conduct. Rather, it should find ways to promote efforts by companies themselves to develop strong, internal compliance programs.

Let us be clear from the beginning: rewarding companies that implement effective internal compliance programs should supplement, but not replace, imposing criminal and civil penalties on companies that fail to implement such programs and break the law. When the carrot of rewarding companies that make it a priority to create an ethical and compliant culture is combined with the stick of penalizing those that do not, experience shows that the best results are achieved.

As this article will show, the Commission's approach, that of fostering good corporate citizenship in the form of effective compliance programs, has yielded tremendous dividends over the last decade. And yet despite the cacophonous cries that have echoed from Main Street to Wall Street to Capitol Hill to do something about corporate crime, few have focused on this compelling approach.

We believe that the legislators, regulators, prosecutors, and courts, collectively known as our government, are at a crossroads when it comes to corporate misconduct. Although the FSGO have spurred the development of strong and effective corporate compliance programs, there are limits to what one policy can do. Moreover, other laws and public policies actually create disincentives to effective compliance. Thus, we are faced with a clear policy choice that challenges us to decide between form on the one hand and substance on the other.

WHEN THE CARROT OF REWARDING COMPANIES THAT MAKE IT A PRIORITY TO CREATE AN ETHICAL AND COMPLIANT CULTURE IS COMBINED WITH THE STICK OF PENALIZING THOSE THAT DO NOT, EXPERIENCE SHOWS THAT THE BEST RESULTS ARE ACHIEVED.

Government can choose attention grabbing tactics that produce great stories but limited success, or it can focus on a highly effective approach that results in fewer headlines. "Dog Does Not Bite Man" stories rarely appear but actually bring us closer to achieving what should be our common goal: corporations that honor and obey both the letter and the spirit of the law. The first approach is a good recipe for generating the occasional caught-another-one headline. The second, we believe, is a recipe for actually making a sustained and sustainable difference.

THE THINKING BEHIND THE FSGO

When the Sentencing Commission started working on the FSGO in 1988, it began by looking at what the courts had been doing in corporate criminal cases historically. The Commission found curious results: criminal penalties ranged from

requiring one company to donate three executives' time to charity,[3] to a case in which a corporation was sentenced to a term of "imprisonment."[4] Some penalties for wrongdoing were steep, but others were so low as to be meaningless.[5]

Astonishingly, the review of hundreds of corporate sentencing cases revealed virtually no cases in which a court had tried to assess what would seem to be a rather fundamental question: Had the offending company tried to prevent and detect the misconduct in the first place through such activities as a code of conduct, policies, training, auditing—in short, a compliance program? This consideration simply did not seem to be on the courts' minds.

This fundamental question is where the Commission broke ground. Under the FSGO, courts sentencing convicted corporations must consider whether the company had a compliance program. If the company had such a program and otherwise acted as a good corporate citizen at the time of the offense, the fine is vastly lower than would otherwise be the case.[6] Compliance programs, in other words, are at the heart of the FSGO's carrot-and-stick penalty structure.

THE TRADITIONAL APPROACH TO ENFORCING CORPORATE CRIME LAWS WAS LIKENED TO THE WAY THAT STATE POLICE DEPARTMENTS ENFORCE SPEEDING LAWS ON INTERSTATES: BY DOTTING THE OCCASIONAL PATROL CAR ALONG MILLIONS OF MILES OF HIGHWAY.

In arriving at this compliance-centered policy, the Sentencing Commission made three observations that are as true today as they were in 1991 when the FSGO were promulgated. First, the Commission saw that there were decided limits to what prosecutors, investigators, or other after-the-fact enforcement officials—no matter what their numbers—could do to stem corporate crime. Of course, vigorous enforcement is a critically important tool in the fight against corporate crime, but the Commission saw a realistic recognition of the limits of what the enforcement community could do on its own.

The traditional approach to enforcing corporate crime laws was likened to the way that state police departments enforce speeding laws on interstates: by dotting the occasional patrol car along millions of miles of highway.[7] You catch some offenders that way, and traffic generally does slow down when the patrol cars are spotted, but realistically, the process is hit or miss at best, and where enforcement is not directly visible, experience shows that some will be tempted to flout the rules. The Commission reasoned, therefore, that to effectively prevent and detect corporate wrongdoing, companies themselves needed to be made part of the solution. Companies could work at the problem in a way that enforcement personnel could not: from the inside—like governors on cars that limit how fast the vehicle can travel.

The second observation on which the Commission hung its procompliance policy related to the broadly sweeping nature of the American legal doctrine of vicarious corporate liability.[8] The Commission recognized that under this doctrine companies could be convicted of corporate crimes rather easily, even when they had policies specifically directing their employees to comply with the law that had been violated.[9] All that a conviction really required was that a single employee out of perhaps tens of thousands of fellow workers broke the law during the course of employment.

Given the breadth of this doctrine, the Commission saw that very different kinds of companies could be convicted of crimes. On one end of the spectrum of potentially liable companies were those that had done everything reasonably possible to prevent violations and perhaps had even voluntarily disclosed the misconduct involved, but nevertheless had seen what amounted to a rogue employee break the rules.

On the other end of the spectrum were companies whose senior management actually participated in the misconduct. Both kinds of companies could be criminally liable for the acts of their employees, but the two categories of companies could not be more different. The Commission wanted the penalties dictated by the FSGO to reflect these starkly different kinds of companies.

The third observation that the Commission made—at the time, really more a hypothesis than an observation—was that putting in place a sentencing scheme that greatly varied penalties according to whether the company in question had a strong compliance program or not would, in turn, create incen-

tives for companies to adopt compliance programs. Such a policy would credibly and powerfully say that compliance programs counted.

These three ideas served as the rationale for the FSGO's procompliance policy. To make the formula work, however, the Commission had to define the kind of compliance program that would receive credit. Here, the Commission made another important decision. Building on self-policing principles instituted by the defense industry in the wake of the "Ill Wind" scandals in the late 1980s,[10] the Commission resisted the bureaucratic temptation to prescribe a highly detailed model for a qualifying compliance program. Rather, the FSGO definition of an effective program to prevent and detect violations of law outlines broad categories of activities, each of which is deemed critical to make compliance programs work.

These categories include conducting a realistic assessment of the company's actual risks, having high-level oversight of the program, communicating, training, and auditing with respect to compliance risks, and enforcing the program through discipline.[11] Companies are expected to determine the specific means to execute the prescribed categories of activity based on such matters as their size, the nature of their business, and their past history.[12]

The FSGO contain one additional, overarching criterion, however. The program must be "designed, implemented and enforced so that it generally will be effective."[13] With this requirement as the guiding principle and a carrot-and-stick formula that means that compliance really counts, the Commission expected that companies would, over time, develop compliance best practices.[14] The Commission itself conceded that its procompliance policy was an experiment.[15]

THE EFFECTS OF THE FSGO

Work remains, but the experiment has been a resounding success. Before 1991, when the FSGO were promulgated, no professional association of compliance and ethics officers existed, there was very little literature on the practicalities of managing compliance programs, few conferences focused on the topic, and, truth be told, too few companies outside the defense industry had sophisticated compliance programs. Most companies had policies, but the kind of comprehensive model for effective compliance prevention and detection outlined in the FSGO had yet to be widely adopted.

After 1991, this situation changed. The Ethics Officer Association ("EOA") was formed in 1992 with 12 members and, as a direct response to the FSGO, has ballooned to more than 800 in 2002. EOA's members regularly meet to share best practice information on how to implement and sustain compliance programs that meet the FSGO standards. Members include in-house compliance and

INSTEAD OF LABELING THESE INTERNAL REPORTING RESOURCES AS HOTLINES, WHICH TOO OFTEN CARRIED A STIGMA OF BEING "RATFINK" LINES, COMPANIES CALLED THEM COMPLIANCE ADVICE OR HELPLINES AND PUBLICIZED THEIR USE AS A BROAD RESOURCE FOR RAISING CONCERNS AND GETTING ANSWERS ABOUT HOW TO DEAL WITH PARTICULAR SITUATIONS BEFORE THEY BECOME PROBLEMS.

ethics officers from about half of the Fortune 500.[16] Other compliance associations specific to various industries, such as telecommunications and pharmaceutical, and compliance associations specific regions, such as New England Ethics Forum, Northwest Ethics Network, and Bay Area Compliance Association, also have sprung up to share best practices information.

The Practising Law Institute and the Conference Board began running annual conferences on corporate compliance in the 1990s, and the Sentencing Commission itself joined with EOA to run excellent regional programs on compliance.[17] Periodicals focusing exclusively on compliance programs have sprung into existence,[18] and treatises on compliance have been written.[19]

All of this activity coincided with a rapid growth in the number of companies with compliance programs. And as more companies developed and shared compliance experiences, the sophistication

of programs grew, as well. Companies learned that user friendly, values-based codes of conduct were more effective than unreadable, legalistic ones. Hotlines were implemented to encourage good faith reporting by employees of compliance issues when normal channels were unavailable, but best practice experience eventually led to a refinement. Instead of labeling these internal reporting resources as hotlines, which too often carried a stigma of being "ratfink" lines, companies called them compliance advice or helplines and publicized their use as a broad resource for raising concerns and getting answers about how to deal with particular situations before they become problems. Companies also have developed a variety of ways to better build compliance into everyday decisionmaking, ranging from having compliance reflected in performance evaluations to having compliance officers directly involved in setting business strategy.

WHAT IS HIGHLY SIGNIFICANT IS THAT, BY AND LARGE, COMPANIES WITH STRONG COMPLIANCE PROGRAMS HAVE EXCELLENT TRACK RECORDS ON COMPLIANCE. IN SHORT, THE EVIDENCE IS THAT COMPLIANCE PROGRAMS WORK.

More and more companies are today using technology to promote compliance, too. Compliance intranet sites with policy links and resources are common, and web-based training on compliance risk areas, such as antitrust, insider trading, and conflicts of interest, is becoming the norm. Companies are learning that web-based training does not obviate the need for all in-person training, but that it does create an effective baseline for teaching employees about compliance risks—wherever they are around the world. And by taking the lion's share of training off the shoulders of legal departments, lawyers are able to spend more time counseling in areas where in-person advice is most needed.

After the FSGO were promulgated, other enforcement policies and corporate liability case law, which up to that point had generally been oblivious to compliance programs, began following the FSGO rationale. This collection of policies and pronouncements further supported the trend within the business community of building more and better compliance programs.

The U.S Department of Health and Human Services developed "model compliance plans" explicitly based on FSGO compliance criteria that detail expectations for compliance programs in various health care subindustries.[20] Likewise, the U.S. Environmental Protection Agency adopted the FSGO compliance criteria in developing its policy, "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,"[21] which provides for reduced civil penalties and no criminal liability in some circumstances for companies with environmental compliance programs. Case law and policies in the equal employment opportunity ("EEO") area also now address the importance of compliance programs.[22]

Two of the most important developments were not tied to any specific compliance risk area but rather are general endorsements of compliance programs. First, in the 1996 case, *In re Caremark Derivative Litigation*,[23] the influential Delaware Chancery Court opined, in approving the settlement of a shareholder derivative suit, that compliance programs could make the difference in deciding whether directors and officers should be personally liable for the harm caused by employee misconduct.

Second, and perhaps most significantly, the Department of Justice weighed in on the importance of compliance programs in a seminal restatement of corporate criminal charging policy in 1999.[24] Known as the "Holder Memo" because it was first circulated under a cover memorandum by then Deputy Attorney General Eric H. Holder Jr., the policy is now part of the U.S. Attorneys Manual. It provides that—never mind about sentencing for the moment—evidence of a rigorous compliance program should be considered in determining whether criminal charges should be filed against a company at all. In other words, companies that have exemplary compliance programs may—for good policy reasons—escape criminal prosecution even though a legal basis for prosecution exists.

The success of these policies and particularly of the FSGO, which preceded and largely drove the creation of all of them, can be measured by one demonstrable fact: companies with rigorous compliance programs have generally avoided serious com-

pliance problems. Data maintained by the Sentencing Commission shows that these companies are almost never criminally charged.[25]

This observation is not to say that companies with compliance programs have perfect track records, but then again, perfection—while a laudable goal—would be an unreasonable standard. In large companies, just as is true in towns and cities of comparable size, some will flout the rules. Based upon the percentage of employees within an organization who typically commit fraud, it would not be unusual to find that government agencies have as much or more of a problem than most large corporations. The Department of Justice itself notes in its corporate charging policies that "the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees . . . ."[26]

UNDER THE FSGO, A COMPANY CONVICTED OF A CRIME THAT HAD A GOOD COMPLIANCE PROGRAM AND VOLUNTARILY DISCLOSED THE MISCONDUCT IN QUESTION IS LIKELY TO FACE ONLY A NOMINAL FINE.

What is highly significant is that, by and large, companies with strong compliance programs have excellent track records on compliance. In short, the evidence is that compliance programs work.

NOW THE BAD NEWS

In the wake of headline cases that have captured the country's attention, policymakers have been busy demonstrating that they mean business. Some of their responses have followed the procompliance idea. Proposed listing requirements by the New York Stock Exchange, for example, require codes of conduct,[27] and recent federal corporate crime legislation, the Sarbanes-Oxley Act of 2002, promotes protection from retaliation for those who report compliance issues internally, an accepted principle of compliance best practices.[28]

But overall, it is probably fair to say that a great deal of recent policymaking activity has been focused more on high-profile "get tough" symbolism—new penalties for this, higher penalties for that, more hoops for companies to jump through—than less visible but even more effective measures. This trend is too bad because, although the FSGO and their progeny over the last decade have done tremendous good in terms of conscripting companies into the fight against corporate crime, as one prosecutor aptly put it,[29] the sad reality is that much more needs to be done.

MIXED MESSAGES

The risk is that these various new laws and policies that are bolted on to existing rules will send mixed messages to companies about the importance and effectiveness of internal compliance programs. Indeed, even in cases in which companies are fully committed, some of these laws and policies actually make achieving effective compliance programs more difficult. Here are some examples.

Damned If You Do, Damned If You Don't

Under the FSGO, a company convicted of a crime that had a good compliance program and voluntarily disclosed the misconduct in question is likely to face only a nominal fine. And under the Department of Justice's corporate charging policies, the same company would be a good candidate for not being criminally prosecuted at all. If the misconduct happens to have involved fraud against the government, however, the same company, the one that had had a strong compliance program and had disclosed the misconduct, would likely be charged under the civil portion of the False Claims Act and face a civil fine as high as the highest FSGO criminal fines typically ever imposed. The highest FSGO criminal fines are typically twice the loss from the fraud and are reserved for "bad actor" companies without compliance programs.[30]

This Is Our Policy, But Don't Quote Us on That

As discussed above, the Holder Memo, which outlines policy of the Department of Justice on charging corporations, indicates that prosecutors should weigh a company's compliance program in determining whether to charge the company. The statements by the Department of Justice about actual cases, however, raise doubts about whether

(continued on page 53)

From this point on . . .
Explore information related to this topic.

ONLINE:

- Department of Health and Human Services, Office of the Inspector General, at www.hhs.gov/oig/modcomp.
- Gibson, Dunn & Crutcher LLP, "After Enron: Issues for Boards and Audit Committees to Consider," Feb. 13, 2002, available on ACCA Online℠ at www.acca.com/legres/enron/After_enron.pdf.
- John Howard and Timothy Donovan, "On Duty at the Corporate Helm: An Overview of Director and Officer Responsibilities," *ACCA Docket* 18, no. 9 (2000): 36–52, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/on00/officer.html.
- John K. Villa, *In-House Counsel: What Are Your Ethical Obligations When Management Engages in Illegal or Improper Conduct?* CORPORATE COUNSEL GUIDELINES § 3.07 (West and ACCA 2001), available on ACCA Online℠ at www.acca.com/legres/enron/corporateladder.html.

ON PAPER

- BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY.
- COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES (Kaplan, Murphy, and Swenson, eds.) (West 1993, annually supplemented).
- Commissioner Michael Goldsmith, "Commentary on Existing Law," in U.S. Sentencing Commission Symposium Proceedings, *Corporate Crime in America: Strengthening the "Good Citizen" Corporation* 351–57 (September 7–8, 1995).
- Goldsmith & King, *Policing Corporate Crime: The Dilemma of Internal Corporate Compliance Programs*, 50 VAND. L. REV. 1 (1997).
- William B. Lytton, "The Case for Greater Governmental Coordination: Civil Sanctions and Third-Part Actions," in U.S. Sentencing Commission Symposium Proceedings, *Corporate Crime in America: Strengthening the "Good Citizen" Corporation* 277–83 (September 7–8, 1995).
- Memorandum by Eric H. Holder, to Heads of Department Components and All United States Attorneys, "Bringing Criminal Charges against Corporations," June 16, 1999, and attachment, "Federal Prosecution of Corporations," now part of the United States Attorneys Manual.
- J. Murphy, *Compliance on Ice: How Litigation Chills Compliance Programs*, 2 CORPORATE CONDUCT Q. (now ETHIKOS) 36 (Winter 1992).
- J. Murphy, *Examining the Legal and Business Risks of Compliance Programs*, 13 ETHIKOS 1 (Jan./Feb. 2000).
- W. Swenson, "The Organizational Guidelines' 'Carrot and Stick' Philosophy, and Their Focus on 'Effective' Compliance" in U.S. Sentencing Commission Symposium Proceedings, *Corporate Crime in America: Strengthening the "Good Citizen" Corporation* 30–31 (September 7–8, 1995).
- JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES (West and ACCA 2001).
- R. Walker, *What We Can Learn about Effective Compliance Policies from Recent Employment Discrimination Cases*, 14 ETHIKOS 4 (July/Aug. 2000).

(continued from page 50)
the policy is really being implemented. Whenever the Department of Justice announces a decision to prosecute a big company, it or the local U.S. Attorney's office often issues a press release explaining why. These statements rarely indicate, even tangentially, that the company's compliance program has in fact been evaluated and virtually never what the results of any such evaluation were.

What better way to determine whether the acts of a relatively few lawbreakers really spoke for the entire firm than to see whether the firm had committed itself to instituting serious measures to prevent misconduct? Yet the Department typically says nothing about a corporate defendant's program or lack thereof in defending its decision to prosecute.

Perhaps the Holder Memo itself provides a clue as to why the Department of Justice says so little about compliance when it announces a charging decision. The Holder Memo candidly concedes, "The Department has no formal guidelines for [evaluating] corporate compliance programs."[31] This statement is revealing. Although compliance officials and law departments in the business community have been actively discussing best practices under the FSGO framework for the last 10 years or so, prosecutors have sat on the sidelines during these discussions.

Moreover, in developing the Holder Memo, which does, in fact, have some useful things to say about compliance programs, the Department of Justice apparently sought no input from compliance experts about what the compliance standards should be. Despite having an ex officio member on the Sentencing Commission, the Department of Justice declined to do the obvious, as other legal pronouncements and policies have,[32] and state that the FSGO compliance framework would be a touchstone for prosecutors in evaluating programs.

LAWS AND POLICIES THAT UNDERCUT EFFECTIVE COMPLIANCE

All in all, the procompliance principles of the Holder Memo are excellent in concept, but there are serious questions as to whether they can be meaningfully implemented. Absent standards, real-world experience, or training that would allow prosecutors to objectively and knowledgeably assess compliance programs, it is no wonder that the Department of Justice says nothing about such assessments when it brings corporate charges. Note the following problems.

No Good Deed Goes Unpunished

The FSGO's compliance standards call for "monitoring and auditing systems reasonably designed to detect criminal activity,"[33] and commenters have noted the benefits of additional evaluative techniques, ranging from employee surveys to focus groups, to determine how well a compliance program is working and how it might be strengthened.[34] More broadly, compliance experts have observed that programs can best be strengthened when compliance issues can be openly discussed.

ALL IN ALL, THE PROCOMPLIANCE PRINCIPLES OF THE HOLDER MEMO ARE EXCELLENT IN CONCEPT, BUT THERE ARE SERIOUS QUESTIONS AS TO WHETHER THEY CAN BE MEANINGFULLY IMPLEMENTED.

Although these activities can bolster compliance program effectiveness, as most lawyers know, however, they can also heighten litigation risks. What assurances do companies have that, if they critically audit and self-evaluate their compliance performance in order to improve it, the information that they unearth will not be used against them by the government or a third party?

The answer is none, and this lack of assurance understandably leads many companies to create programs without seriously evaluating their performance. The uncertainty can also push some companies to create formalistic and artificial means for communicating sensitive compliance issues to bring them under the attorney-client privilege. The effect, as one commenter has put it, is to put candid compliance communications, which promote program effectiveness, "on ice."[35] The EPA publicly opposed the adoption by many states of self-evaluative privilege statutes for environmental compliance programs in the 1990s, and despite a recognition

of the problem by members of the Sentencing Commission[36] and others, policymakers have kept their heads in the sand.[37]

Let's Pay Employees to End-run Their Company's Compliance Programs

The FSGO, EEO case law, and even the recent corporate crime legislation all recognize the importance to company compliance programs of providing a failsafe internal reporting mechanism, such as a helpline, that employees can use when they need to report compliance issues and normal channels are not realistic. This situation can happen, for example, when a supervisor in some distant location directs employees to bend rules to improve his department's performance. As long as there is such a thing as human nature, this kind of risk will continue to exist, and companies, through their compliance programs, work very hard to minimize it. Companies work especially hard at encouraging their employees to speak up when they become aware of such compliance problems because, frankly, it is also human nature for employees to be reticent about doing so without such encouragement.

MAYBE IT COMES DOWN TO THE IDEA THAT "DOG DOESN'T BITE MAN" STORIES RARELY GRAB HEADLINES, BUT ISN'T A WORLD WHERE HARM IS AVOIDED WHAT WE ARE REALLY AFTER?

Enter the federal government. Although Congress gave us the Sentencing Commission, the Equal Employment Opportunity Commission, and recent corporate crime legislation, each of which has a policy supporting internal employee reporting mechanisms, such as helplines, it has also given us the qui tam provision of the False Claims Act. This provision awards someone who brings an action alleging fraud against the government 30 percent of the ultimate recovery, which itself is up to three times the amount of the government's loss. Employees—and their profit-minded plaintiff's counsel—can walk away with millions of dollars in some cases, especially if they sit quietly by and watch the fraud mount.

Amazingly, there is no requirement that the employee ever make an effort to tell the company about the fraud first through the kind of internal reporting processes that the FSGO and other policies say is critical. Moreover, from the employee's point of view, doing so would likely kill his or her chance to hit the qui tam jackpot because, once the government knows about the fraud, the qui tam action is barred and most companies with rigorous compliance programs will immediately put a stop to the fraud and disclose it. Put simply, the qui tam law gives employees powerful monetary incentives to undercut their company's compliance program: they can profit handsomely if they contact a plaintiff's attorney rather than their company's compliance office.[38]

Other Issues

These examples are part of a much longer list of policies that are inconsistent with or actually obstruct corporate compliance efforts, including the following:

- An NLRB decision that says that a company that adopts a code of conduct without first having bargained with the union has engaged in an unfair labor practice.[39]
- Diverging and confusing voluntary disclosure programs among agencies and departments.
- Risk of defamation suits if an employee's former employer candidly describes noncompliant behavior to the employee's prospective employer.
- Even an agency interpretation of the Fair Credit Reporting Act that would say that, if an employee alleged that her manager had been sexually harassing her, the company would have to get the manager's permission before hiring an outside law firm to investigate.[40]

IS NO NEWS GOOD NEWS?

The picture is clearer than the hyperbole of pundits, prosecutors, and politicians has been making it out to be in recent months. Enforcement actions against bad actor companies is critical, but ultimately, corporate misconduct cannot be fixed from the outside by an army of enforcement personnel, no matter how big that army is. Companies have proven that strong compliance programs work.

These programs must be part of the solution. To optimize the benefits that corporate compliance programs offer, government should increase its focus on what it will take to improve the legal and policy environment in which corporate compliance programs operate. This increased focus means (1) sharpening the message, backed up by action, that compliance programs count in resolving allegations of misconduct against a corporation and (2) bringing rationality to an array of laws and policies that thwart effective compliance efforts.

Maybe it comes down to the idea that "Dog Doesn't Bite Man" stories rarely grab headlines, but isn't a world where harm is avoided what we are really after? Too often, corporate crime initiatives are like bunting on the Fourth of July, colorful, patriotic, but, in the end, mostly symbolic. Can the policymakers recognize that their greatest contribution in this area is not to generate more symbolism, but to build an environment in which effective corporate compliance programs can flourish?

Someone needs to make a policy decision as to what the mission is. Is it our goal to publicize miscreants, add up the fines and penalties, and declare victory? Or is it to search out effective new and not-so-new means of building ethical and law-compliant corporate cultures? Adopting means to achieve the former is not always consistent with the latter.

What we propose is not some probusiness scheme. Companies that do not take their ethical and legal obligations seriously should and do pay the penalty, both in the courthouse and in the marketplace. But any effective after-the-fact enforcement scheme needs to be supplemented by a proactive policy if we are to achieve our mission—our common goal as a people and a society—to respect the spirit, as well as the letter, of the law. ◘

NOTES

1. United States Sentencing Commission, GUIDELINES MANUAL (hereafter "USSG"), ch. 8.
2. The "Defense Industry Initiative on Business Ethics and Conduct" ("DII") was established in 1986 and continues today, at www.dii.org.
3. United States v. Mitsubishi Int'l Corp., 677 F.2d 785 (9th Cir. 1982).
4. United States v. Allegheny Bottling Co., 695 F.Supp. 856 (E.D. Va. 1988), *rev'd in relevant part*, 870 F.2d 656 (4thCir. 1989) (tbl.).
5. In this category were cases in which the Commission found that the penalty imposed was less than the cost of complying with the law that was violated. *See* W. Swenson, "The Organizational Guidelines' 'Carrot and Stick' Philosophy, and Their Focus on 'Effective' Compliance" in U.S. Sentencing Commission Symposium Proceedings, *Corporate Crime in America: Strengthening the "Good Citizen" Corporation* 30–31 (September 7–8, 1995) (hereafter "*USSC Symposium Proceedings*").
6. Compare the treatment of two hypothetical companies sentenced under the FSGO. Company A had a compliance program at the time of the offense, cooperated with authorities, and "accepted responsibility" (pleaded guilty) for the offense. Company B did not have a program, had senior management turn a blind eye toward the offense, and failed to accept responsibility or cooperate. Courts have some margin of discretion under the FSGO, but under these facts, Company A's fine would likely be nominal and could be as low as 1.3 percent of the fine that Company B would face. *See* USSG §§ 8C2.5–8C2.6.
7. *See* W. Swenson, *supra* note 5, at 31.
8. *See id*. at 33.
9. *See, e.g.,* United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983). The Sixth Circuit in Holland Furnace Co. v. U.S.,158 F.2d (6th Cir.1946), provided an early exception to this widely followed principle, holding that a policy directing compliance did insulate the company from liability, but the case has not been followed.
10. *See supra* note 2.
11. *See* USSG § 8A1.2, comment, n(3)(k).
12. *See* USSG § 8A1.2, comment, n(3)(k)(i–iii).
13. Emphasis added.
14. W. Wilkins Jr. (former Chairman, U.S. Sentencing Commission), foreword, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES (Kaplan, Murphy, and Swenson, eds.) (West 1993, annually updated).
15. *See id.*
16. For further information, visit www.eoa.org or call 617.884.9400.
17. EOA/Sentencing Commission regional forums have been held in San Francisco, New York, Minneapolis, Atlanta, Houston, and Columbus, Ohio, over the last several years.
18. *See, e.g.,* ETHIKOS; BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY.
19. *See, e.g.,* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 14; BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY; GUIDE TO PROFESSIONAL DEVELOPMENT IN COMPLIANCE (Aspen 1999) (Heller, Murphy, and Meany, eds.).
20. *See* www.hhs.gov/oig/modcomp.
21. A final version of the policy was published in 65 *Fed. Reg.* 19618 (Apr. 2000).
22. *See* R. Walker, *What We Can Learn about Effective Compliance Policies from Recent Employment Discrimination Cases*, 14 ETHIKOS 4 (July/Aug. 2000).
23. 698 A.2d 959 (Del. Ch. 1996).

24. *See* Memorandum by Eric H. Holder, to Heads of Department Components and All United States Attorneys, "Bringing Criminal Charges against Corporations," June 16, 1999, and attachment, "Federal Prosecution of Corporations" (hereafter Holder Attachment).
25. For a compilation of organizational sentencing data, *see* the U.S. Sentencing Commission's website, at www.ussc.org.
26. Holder Attachment, *supra* note 24, at 9.
27. *See* www.nyse.com (Aug. 16, 2002, Corporate Governance Rule filing).
28. *See* Sarbanes-Oxley Act of 2002, § 1107.
29. O. Obermeier, *Drafting Companies to Fight Crime,* N.Y. TIMES, May 24, 1992, at 11 (Forum Section).
30. Holder Attachment, *supra* note 24, at 9–10.
31. *Id.*
32. *See supra* notes 19–20, and accompanying text.
33. USSG § 8A1.2, comment n(3)(k)(5).
34. *See* Swenson, Avelino, and Ben-Chorin, *Measuring the Effectiveness of Compliance and Ethics Programs* in COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 14.
35. J. Murphy, *Compliance on Ice: How Litigation Chills Compliance Programs,* 2 CORPORATE CONDUCT Q. (now ETHIKOS) 36 (Winter 1992). *See also* J. Murphy, *Examining the Legal and Business Risks of Compliance Programs,* 13 ETHIKOS 1 (Jan./Feb. 2000).
36. *See* Commissioner Michael Goldsmith, "Commentary on Existing Law," in USSC Symposium Proceedings, *supra* note 5, at 351. *See also* Goldsmith & King, *Policing Corporate Crime: The Dilemma of Internal Corporate Compliance Programs,* 50 VAND. L. REV. 1 (1997).
37. For a detailed review of the debate and history of the self-evaluative privilege, *see* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES, *supra* note 14, at §§ 5:36–5:46.
38. For further discussion, *see* Lytton, "The Case for Greater Governmental Coordination: Civil Sanctions and Third-Part Actions," in USSC Symposium Proceedings, *supra* note 5, at 277 (see also questions and answers following this presentation in which a senior Defense Department official agrees that the qui tam provision should be amended to require employees to avail themselves of internal reporting mechanisms before filing an action).
39. American Electric Power Co., 302 NLRB 161 (1991).
40. *See* Hartman v. Lisle Park Dist. (ND ILL 8/16/01) (discussing this FTC interpretation, but rejecting its application to outside counsel).