THE TYSON STORY: BUILDING AN EFFECTIVE ETHICS AND COMPLIANCE PROGRAM

Dr. John D. Copeland[*]

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* Executive Vice President, Ethics and Environmental Compliance, Tyson Foods, Inc. B.A. 1971, University of Texas at Arlington, J.D. 1974, Southern Methodist University School of Law, LL.M. 1986, University of Arkansas School of Law, Fayetteville, Ed. D. 1997, University of Arkansas, Fayetteville. The author is an adjunct professor and advisor to the Donald D. Soderquist Center for Business Leadership and Ethics, John Brown University, Siloam Springs, Arkansas. From 1989 until August, 1998, the author was the Director of the National Center for Agricultural Law Research and Information, and Research Professor of Law, University of Arkansas School of Law, Fayetteville.

I. INTRODUCTION

In December of 1997, Tyson Foods, Inc. ("Tyson" or "Tyson Foods") pled guilty to one felony count of illegally giving United States Secretary of Agriculture, Mike Espy, approximately twelve thousand dollars in gifts and favors, including football tickets, trips, and food.[1] The company paid $4 million in fines and $2 million to defray costs of the investigation headed by Independent Counsel Donald Smaltz.[2] Two Tyson team members were also successfully prosecuted by the Independent Counsel as a result of the gifts to Secretary Espy.[3]

As part of the settlement with the independent counsel, Tyson Foods was placed on probation for four years.[4] Tyson also agreed to create an Ethics Office and a Corporate Code of Conduct.[5] In August of 1998, I was named Tyson's first Director of Corporate Ethics and Compliance.[6]

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1. *See* United States v. Tyson Foods, Inc., Case No. 97-0506, Judgment in a Criminal Case, at 1 (D.D.C. Jan. 12, 1998); Criminal Information, Case No. 97-0506, at 5 (Dec. 29, 1997) (compliance agreement among Tyson Foods, the United States Department of Agriculture (USDA), and the Office of Independent Council, on file with author).

2. *See Tyson Foods, Inc.*, Case No. 97-0506, Judgment in a Criminal Case, at 4.

3. *See* Christine Dorsey, *Schaffer Conviction Reinstated*, THE MORNING NEWS OF N.W. ARK., July 24, 1999, at A1; Anne Gearan, *Jury Convicts Two Tyson Foods Execs*, YAHOO! NEWS, June 26, 1998; Andrea Harter, *Jury: This Time, Schaffer Went Too Far*, ARK. DEMOCRAT-GAZETTE, June 28, 1998, at 1A; Don Michael, *Hearing Set on New Trial Motion in Schaeffer Case*, N.W. ARK. TIMES, Nov. 6, 1999, at A1; Carrie Rengers, *Tyson Spokesman is Silenced For Now*, ARK. DEMOCRAT-GAZETTE, Nov. 4, 1999, at 8E (regarding the prosecution of Archie Schaffer III only); <http://dailynews.yahoo.com/headlines/ap/washington/story.html?s=n/ap/980626/washington/stor6/26/98n_espy_5>.

Scathing criticisms of Independent Counsel Donald Smaltz's prosecutions of former U.S. Secretary of Agriculture Michael Espy, Tyson Foods, and Tyson executives, Archie Schaffer and Jack Williams, can be found in the following sources: David Grannis, *Prosecutorial Indiscretion*, THE NEW REPUBLIC, Feb. 2, 1998, *available in* <http://www.tnr.com/archive/0298/020298/grann020298.html>; June 12, 1995 Letter from Tom Green, Defense Counsel, to U.S. Attorney General Janet Reno, *Frontline: Secrets of an Independent Counsel* (visited Nov. 17, 2000) <http://www.pbs.org/wgbh/pages/frontline/shows/counsel/smaltz/greenletter.html>.

4. *See Tyson Foods, Inc.*, Case No. 97-0506, Judgment in a Criminal Case, at 2 .

5. *See* Criminal Information, Case No. 97-0506, Tab 2 at 1 (compliance agreement among Tyson Foods, the USDA, and the Office of Independent Counsel, on file with author). A summary of Tyson Foods' Plea and Compliance Agreements can be found in Matthew J. Merrick, *Tyson Foods Pleads Guilty to Gratuity in Espy Probe*, FED. ETHICS REPORT (CCH Wash. Serv. Bureau), Jan. 1998, at 1, 3.

6. *See* Maylon T. Rice, *Copeland Leaving UA's National Agri Law Center for Tyson Foods*, N.W. ARK. TIMES, Aug. 1, 1998, at A3; Sheri Venema, *Courts Look at Results, Not Mechanics, of Ethics Codes*, ARK. DEMOCRAT-GAZETTE, Aug. 16, 1998, *available in* <http://www.ardemgaz.com>.

The Espy incident was a personal tragedy for some Tyson team members and a blow to Tyson's reputation. My charge from Tyson's board of directors, chief executive officer, and other executives is, and has been, to create an ethics office that serves as a model to other agribusinesses, and restores government and public confidence in Tyson, while reassuring our own team members that Tyson is a company dedicated to ethical business practices.

This Article provides some general information on building an effective ethics and compliance program and specific details regarding Tyson's Compliance Program, thus *The Tyson Story*.[7] Our compliance program is a work in progress and, like any other effective program, will continue to evolve. The goal, however, will always remain the same–to be a model for other corporate ethics and compliance programs and the standard by which they are measured, particularly in agribusiness.

II. WHY ESTABLISH AN ETHICS OFFICE?

"Why bother to establish another expensive business layer?" is an all too common response by some executives when first approached with a proposal to establish an ethics and compliance office. The negative response is rooted in such beliefs as: everybody is aware of the difference between right and wrong; bad actors within the company are rare and are routinely discovered and dismissed by the human resources department; an ethics office would be a duplication of other efforts, another bureaucratic layer, and an unnecessary expense.[8]

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7. A detailed discussion of the legal theories and justifications for holding corporations liable for the misdeeds of their employees is not included in this article. The courts, however, have universally adopted the doctrine of respondeat superior as the legal predicate for both civil and criminal liability. Criminal penalties are imposed on corporations to encourage them "to develop effective compliance programs." *Compliance Programs and the U.S. Sentencing Guidelines*, *in* BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY 1:13 (1993) [hereinafter *Compliance Programs and the U.S. Sentencing Guidelines*]. Because a company is in the best position to supervise its employees, and employee misconduct is often attributable to corporate pressures, the company should be held liable when its employees violate the law. *See id. at 1:13-1:14.* An excellent treatise on the history and rationales of corporate criminal liability is RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING (1997). *See also* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct,* 78 GEO. L.J. 1559, 1571 nn.55-57 (1990). *See generally* Seth Maxwell, Comment, *The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability*, 29 UCLA L. REV. 447 (1982) (describing the meaning of corporate criminal liability further including limitations placed on states in holding corporations liable for criminal acts).

8. Ethics and compliance are often used as synonymous terms. In reality, however, they are distinct. "Compliance emphasizes the need to follow written laws, regulations, or policies. In the case of the Sentencing Guidelines, these are criminal laws." *Epilogue*, *in* BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY 7:3 (1993) [hereinafter *Epilogue*]. "The emphasis in business ethics is on putting values such as honesty, fairness, integrity, and concern for others into practice in daily business relationships." *Id.* A company's corporate code of conduct must address both ethics and compliance to be successful. For this article, when either the terms "ethics" or "compliance"

A. *Common Myths About the Ethics Office*

In addition to the misconceptions just described, various myths concerning the ethics office have also developed, impeding the growth and staffing of such a crucial department.

1. *Myth: The Office is Primarily a Policing or Legal Function*

Only about nineteen percent of ethics offices are staffed by attorneys and only three percent by persons with security backgrounds.[9] The most common areas of expertise are financial/internal audit and human resources (each comprises about twenty-three percent).[10] The compliance officer's role, however, has been compared to that of a trial lawyer who must convince a jury that the facts of a case are as portrayed by the attorney's client.[11] Having been a trial lawyer, I know how difficult it is to convince a jury or judge of the correctness of one's case. But a compliance officer faces an even more daunting task. He or she must often persuade thousands of a company's employees to learn, accept, and apply written internal rules of behavior (i.e. a corporate code of conduct) in such diverse areas as antitrust and environmental law.[12] Even more importantly, the compliance officer must stimulate such change so compliance becomes permanently ingrained in the corporate culture.[13]

At Tyson Foods, our Corporate Code of Conduct applies to a workforce in excess of sixty-six thousand team members spread over twenty-seven states and a number of foreign countries. Since the workforce constantly changes, it requires constant exposure and re-exposure to Tyson's Corporate Code of Conduct and Compliance Policy.

Although some compliance programs are headed by attorneys the operation of a compliance program must be separate from a company's legal department. Effective compliance is much more than giving legal advice to clients who request it. It is a management function that calls for skill and diligence in managing the ways in which a business conducts its daily affairs.[14]

The oversight of an ethics office is primarily a management function involving policy development, communications, assessing and reviewing vulnerabilities, and assessing and reviewing the success or failure of ethics

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are used, they are used in the context of a complete program that addresses both.

9. *See* Edward Petry, *Six Myths About the Corporate Ethics Office*, ETHIKOS, Mar./Apr. 1998, at 3.

10. *See id.*

11. *See id.*; *Compliance Programs and the U.S. Sentencing Guidelines*, *supra* note 7, at 1:4.

12. *See Compliance Programs and the U.S. Sentencing Guidelines*, *supra* note 7, at 1:4

13. *See id.*

14. *See id*. at 1:6.

initiatives.[15] The most effective ethics offices are those operated as management functions.[16]

The creation, development, and operation of an effective compliance program is truly a team effort that draws from a company's numerous resources. The extensive auditing, monitoring, training, and discipline required of an effective program requires board and high-level management support and the involvement of a company's auditors, safety and quality assurance personnel, human resources professionals, environmental professionals, communications experts, and many others.[17] Just as importantly, it takes the efforts of every employee because it is the employees that must follow the rules and be willing to report misconduct.

2. *Myth: Ethics Offices Focus on Social Responsibility*

Although many ethics offices have some responsibility for their company's social agenda, that is not their primary function.[18] Ethics officers focus most of their efforts on internal organizational development.[19]

3. *Myth: The 1991 Sentencing Guidelines for Organizations are the Chief Motivating Factor for Creating Ethics Offices*

Undoubtedly, the 1991 Sentencing Guidelines ("Guidelines" or "Sentencing Guidelines") have been a catalyst for the creation of a number of business ethics programs.[20] The Guidelines have also shaped many more programs, and have prompted companies to review their policies and practices in light of the Guidelines.[21]

Other factors, however, have also contributed to the establishment of corporate ethics officers.[22] In a 1997 survey conducted by the Ethics Officer Association, one-third of the 153 organizations and businesses surveyed stated that they had an ethics officer prior to 1991.[23] Seventy-six percent stated that they did so to, "ensure commitment to corporate values."[24] Sixty-eight percent also indicated that they wanted to "establish a better corporate culture."[25] Seventy-five percent of the respondents indicated that they were trying to reduce risks to the company due to

15. *See id.* at 1:7.
16. *See id.*
17. *See id.*
18. *See* Petry, *supra* note 9, at 3-4.
19. *See id.*
20. *See id.* at 4.
21. *See id.*
22. *See id.*
23. *See id.*
24. *Id.*
25. *Id.*

employee misconduct.[26] Thirty-six percent mentioned the "general fear of litigation" as a basis for establishing an Ethics Office.[27]

4. *Myth: Ethics Officers Lack Clout*

Employees who believe this myth do so at their own peril. Approximately forty percent of ethics officers report directly to the board of directors, chief executive officer, or company president.[28] Many others report to an executive or senior vice president.[29] In some instances, ethics officers are executive or senior vice presidents.[30]

5. *Myth: The Ethics Office is Corporate Siberia*

Contrary to the above myth, ethics officers are vitally involved with virtually all of a company's major departments.[31] Besides directly interacting with other corporate executives, ethics officers routinely interact with their company's legal, human resources, and auditing and security departments.[32]

6. *Myth: The Ethics Office is the Last Stop Before Retirement*

Ethics offices are not staffed by "short-timers" who are just waiting to retire.[33] The average age of ethics officers is forty-nine.[34] Surveys indicate that seventy-eight percent of ethics officers are under the age of fifty-five.[35] The importance of corporate ethics departments is reflected in the extraordinary growth of the Ethics Officer Association.[36] In the past five years, the Ethics Officer Association's membership has approximately doubled each year.[37] It currently is comprised of over 500 members.[38]

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26. *See id.*
27. *Id.*
28. *See id.* at 7.
29. *See id.* at 3. *See also* Kirk S. Jordan, *Designing and Implementing a Corporate Code of Conduct in the Context of an "Effective" Compliance Program*, *in* CORPORATE COUNSEL'S GUIDE TO THE ORGANIZATIONAL SENTENCING GUIDELINES 7.003-7.004 (William A. Hancock ed., 1995) [hereinafter Jordan] (companies have chosen "an executive vice president, the controller, the chief accounting officer, or the general counsel.").
30. *See* Petry, *supra* note 9, at 3.
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.* at 6-7 (stating that in 1992 the Ethics Officer Association was comprised of 283 members and that membership has doubled each year for the past five years).

B. *Business Scandals and the Creation of Ethics Offices and Corporate Codes of Conduct*

Unfortunately for U.S. businesses and the individuals who lead them, the United States leads the world in criminalizing business misconduct.[39] Something as simple as failing to check the right box on an environmental report can lead to greater criminal consequences than theft.[40] Moreover, catching and punishing criminal conduct and regulatory violations after they happen is no longer good enough. The economic disaster that can be caused by an errant corporation (like the Exxon Valdez oil spill) means that businesses must attempt to identify and correct problems before disaster strikes.[41]

Business and political scandals, extensive media coverage, public reaction to unethical conduct, court decisions, and federal legislation to curb unethical business practices have combined to mandate the creation of ethics departments, especially among Fortune 500 Companies.[42]

1. *Electrical Industry's Antitrust Scandals*

The initial catalyst for corporate compliance programs is found in the electrical industry's antitrust scandal of the early 1960s.[43] During the 1950s, corporations involved in the heavy electrical equipment industry engaged in widespread market sharing, bid rigging, and price fixing.[44] In 1959, the industry was already under investigation when Herbert Vogel, the Tennessee Valley Authority's Chairman, charged a number of large electrical manufacturing companies with submitting illegal bids.[45] The extent of the antitrust violations began to be known when Allis-Chalmers and the Lopp Insulator Company agreed to testify for the government about the conspiracy.[46]

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39. *See* William P. Barr & Gadi Weinreich, *The Science of Compliance US-Style*: *Companies which Ignore US Corporate Sentencing Guidelines Do So at Their Own Risk* (visited May 5, 1999) (website has expired; a hard copy is on file with author) <http://www.shawpittman.com/science.html>.

40. *See id. See also* John D. Copeland, *The Criminalization of Environmental Law: Implications for Agriculture*, 48 OKLA. L. REV. 237, 237 (1995); Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 775, 779 (1991); Earl Devaney, *Criminal Enforcement of Environmental Laws: An EPA Perspective*, TRIAL, Oct. 1992, at 32, 34.

41. *Compliance Programs and the U.S. Sentencing Guidelines*, *supra* note 7, at 1:3.

42. *See id*.

43. *See* Pitt & Groskaufmanis, *supra* note 7, at 1579.

44. *See id.* at 1579-80.

45. *See id.*

46. *See* Richard Austin Smith, *The Incredible Electrical Conspiracy (Part I)*, FORTUNE, Apr. 1961, at 132, 137 [hereinafter Smith, *Conspiracy I*]; Richard Austin Smith, *The Incredible Electrical Conspiracy (Part II)*, FORTUNE, May 1961, at 161, 210-11 [hereinafter Smith, *Conspiracy II*].

The United States' prosecution of the offending electrical companies, as well as many of their executives, resulted in twenty-nine corporations and forty-five individuals entering guilty or nolo contendere pleas to criminal antitrust charges.[47] The pleas resulted in seven of the individuals receiving jail sentences while another twenty-four received suspended jail sentences.[48] The guilty corporations and individuals paid nearly two million dollars in fines, with General Electric paying the largest criminal fine of $437,500.[49]

Unfortunately for General Electric, its involvement in the antitrust scandal represented a failure of its antitrust compliance policy.[50] General Electric's chairman at the time of the scandal, Ralph Cordiner, had emphasized antitrust compliance as a central tenet of his leadership.[51] The company's General Instruction 2.35 provided:

> It has been and is the policy of this Company to conform strictly to the antitrust laws . . . special care should be taken that any proposed action is in conformity with the law as presently interpreted. If there is any doubt as to the legality of any proposed action . . . the advice of the Law Department must be obtained.[52]

General Instruction 2.35 was re-enforced by Directive Policy 20.5, which "went beyond the [antitrust] compliance required by law and blanketed the subject with every conceivable admonition."[53] But, as the presiding judge noted, Directive Policy 20.5 was "observed in its breach rather than in enforcement."[54]

Although General Electric's ineffective code failed as a legal defense, General Electric's prosecution and the case's drama resulted in other businesses developing effective compliance codes.[55] In particular, antitrust compliance codes became commonplace.[56]

2. *Overseas Bribery Scandals*

In 1975, a series of overseas bribery scandals clearly brought into question United States business practices, both abroad and at home.[57] Over $300 million

47. *See* Smith, *Conspiracy I*, *supra* note 46, at 133-34; Smith, *Conspiracy II*, *supra* note 46, at 212.
48. *See* Smith, *Conspiracy I*, *supra* note 46, at 134.
49. *See id.*
50. *See generally* Pitt & Groskaufmanis, *supra* note 7, at 1578-82.
51. *See* Smith, *Conspiracy I*, *supra* note 46, at 135.
52. *Id.* at 135, n.*.
53. *Id.* at 172.
54. *Id.* at 179. Even today, some compliance programs continue to fail as legal defenses. *See infra* Part III.
55. *See* Pitt & Groskaufmanis, *supra* note 7, at 1581.
56. *See id.*
57. *See* Laura E. Longobardi, *Reviewing the Situation: What is to be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 433-34 (1987).

dollars in questionable payments were made to foreign officials by four hundred United States businesses.[58]

The questionable or illegal payments to foreign-officials by U.S. companies caused personal tragedy and international upheaval.[59] United Brands Chief Executive Officer, Eli Black, authorized a $1.25 million bribe in exchange for the Honduran government forestalling an export duty on bananas.[60] In 1975, as Black's bribe was about to become public knowledge, he jumped 44 stories to his death from New York's Pan Am Building.[61]

Members of the U.S. corporate elite, such as Lockheed Aircraft Corporation, Exxon, Mobil, and Gulf Oil Corporation, were involved in the scandal.[62] To prevent interference in its business dealings, Gulf Oil admittedly paid $3 million to the Democratic Republican Party of Korea.[63] Lockheed disclosed payments to foreign officials and political organizations in excess of $22 million.[64] Lockheed's disclosure of $1 million to Netherlands's Prince Bernhardt forced him to relinquish his official functions.[65] Italy's president was forced to resign and U.S. relations with the North Atlantic Treaty Organization ("NATO") were damaged as a result of questionable payments made by Lockheed, Exxon, Mobile, Gulf and other corporations.[66] "The falls of the Tanaka government in Japan, the junta led by General Rene Barrientos in Bolivia, and the administration of President Arellano in Honduras all frequently have been attributed to the disclosures made respectively by Lockheed, Gulf, and United Brands."[67]

As a result of the scandal, Congress passed the Foreign Corrupt Practices Act of 1977 (FCPA).[68] The FCPA establishes legal and ethical guidelines as to how

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58. *See id*; HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 95-640, 95th Cong., 1st Sess. 4 (1977).

59. *See* Longobardi, *supra* note 57, at 434.

60. *See* Eleanor J. Tracy, *How United Brands Survived the Banana War*, FORTUNE, July 1976, at 145, 146.

61. *See id.* at 146.

62. *See generally* SENATE COMM. ON BANKING, HOUS. AND URBAN AFFAIRS, 94TH CONG., REPORT OF THE SEC. AND EXCH. COMM'N ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) (analyzing corporate disclosures that were submitted to the Commission, which are questionable or illegal foreign and domestic payments and practices). *See also* John C. Coffee, *Beyond the Shut-Eyed Century: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response,* 63 VA. L. REV. 1099, 1102-03 (1977).

63. *See* Edward D. Herlihy & Theodore A. Levine, *Corporate Crisis: The Overseas Payment Problems,* 8 LAW & POL'Y INT'L BUS. 547, 551 (1976).

64. *See id.* at 550-51.

65. *See* Longobardi, *supra* note 57, at 433.

66. *See id.*

67. Coffee, *supra* note 62, at 1103 n.7.

68. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 1977 U.S.C.C.A.N. (91 Stat. 1494) 1498 (codified as amended at 15 U.S.C. § 78(a), (m), (dd-1), (dd-2), (ff) (1994)).

United States companies conduct business in foreign countries.[69] In response to the FCPA, many corporations began drafting or reexamining their codes of ethics.[70]

3. *Defense Contract Scandals and the Packard Commission*

During the early 1980s, the *Washington Post* published a number of articles regarding out of control government defense contracts.[71] The series made outrageous prices paid by the Pentagon for spare parts public knowledge, such as $9,600 paid by the Air Force for a 12-cent Allen wrench,[72] $7,400 for a coffee-brewing machine for the C5A cargo plane,[73] and $1,100 for a plastic cap for a stool.[74]

Largely as a result of the defense industry scandals, on July 15, 1985, by Executive Order 12526, President Ronald Reagan established the Blue Ribbon Commission on Defense Management, which was chaired by David Packard.[75] In June of 1986, the so-called Packard Commission presented two reports.[76] The Packard Commission's critical reports on the ethics of the defense industry forced businesses in other industries to examine their own ethics, especially in light of the National Public Opinion Survey that was conducted for the Commission in January of 1986.[77]

The Packard Commission's National Public Opinion Survey results revealed that many Americans believed that defense contractors placed profits above legal and

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69. *See The Impact Of the Foreign Corrupt Practices Act On U.S. Businesses: Hearings Before the Subcomm. on Banking, Hous., and Urban Affairs; Subcomm. on International Finance and Monetary Policy; and Subcomm. on Sec.* 1 (1981) (statement of Donald L. Scantlebury, division director and chief accountant of GAO Accounting and Financial Management Division). Over 60% of surveyed U.S. business leaders contend that the FCPA puts U.S. companies at a competitive disadvantage. *See id.* at 4. Over 30% of the survey's corporate respondents said that the FCPA's provisions had resulted in their company losing business to foreign competitors. *See id.*

70. *See id.* at 3. According to a survey conduct by the U.S. General Accounting Office, the FCPA prompted 98% of the corporate respondents to review their compliance policies and over 60% of the respondents made changes in their policies. *See id.*

71. *See, e.g.*, Helen Dewar, *Senate Votes to Curb Parts Costs*, WASHINGTON POST, Aug. 8, 1984, at A4; Pete Earley, *Sherick Seeks to Plug Pentagon Dike*, WASHINGTON POST, Nov. 26, 1984, at A13; David Hoffman, *Reagan Heads Off a Debate Issue with Ceremony for Whistle Blowers*, WASHINGTON POST, Oct. 6, 1984, at A6 (discussing out of control government defense contracts).

72. *See* Dewar, *supra* note 71.

73. *See* Hoffman, *supra* note 71.

74. *See* Earley, *supra* note 71.

75. *See* Executive. Order No. 12526, 50 Fed. Reg. 29,204 (1985).

76. *See* PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT (1986) [hereinafter PACKARD FINAL REPORT]; PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT: CONDUCT AND ACCOUNTABILITY (1986) [hereinafter PACKARD REPORT ON CONDUCT]. As of May 1985, the commission found that 131 separate investigations were pending against 45 of the Department of Defense's 100 largest contractors. PACKARD FINAL REPORT, *supra* at 75 n.2.

77. *See generally* PACKARD FINAL REPORT, *supra* note 76, at app. L (reporting the results of the National Public Opinion Survey).

ethical responsibilities.[78] According to the survey: (1) it was the belief of fifty percent of Americans that half of the defense budget was lost equally between fraud and waste;[79] (2) anyone involved in government procurement was likely to commit fraud, but defense contractors were especially culpable;[80] (3) severe penalties were overwhelmingly supported for criminal acts;[81] (4) seven out of ten Americans believe that fraud could be reduced by codes of conduct;[82] (5) but approximately 50% believed that contractors would live up to the codes;[83] and (6) four out of five Americans believed that defense contractors should exhibit higher ethical standards than other businesses.[84]

The Packard Commission made numerous recommendations for defense contractors to follow, many of which have now been applied by the courts and the United States Department of Justice ("DOJ") to other industries:[85] (1) review internal policies and procedures to ensure that they support contract compliance;[86] (2) provide a mechanism for employees to report apparent misconduct to senior management, and to protect reporting employees from retaliation;[87] (3) address real or apparent conflicts of interest with active or former government employees, and foster government employees to comply with Department of Defense (DOD) standards of conduct;[88] (4) instruct all employees on policies and procedures;[89] (5) distribute copies of the code of ethics to all employees and new hires;[90] (6) make business conduct standards and typical business situations a regular part or the employees' experiences and performance evaluations;[91] (7) establish systems to monitor compliance with the standards of conduct to include organizational arrangements and internal controls;[92] (8) vest authority and power in an independent committee of the board of directors or other individuals to oversee compliance and to include authority to hire outside experts.[93]

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78. *See id.* at 213.
79. *See id.*
80. *See id.*
81. *See id.* at 224.
82. *See id.*
83. *See id.*
84. *See id.*
85. *See* PACKARD REPORT ON CONDUCT, *supra* note 76, at 10-11.
86. *See id.* at 10.
87. *See id.*
88. *See id.*
89. *See id.* at 11.
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*

4. *Financial Industry Scandals*

Defense contractors and the DOD were not the only entities criticized for poor business ethics during the scandals of the 1980's.[94]

The insider trading scandals of the 1980s shook Wall Street[95] and led to Congress enacting the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA").[96] Public disclosure of the scandal began with the indictment and successful prosecution of investment banker Dennis B. Levine.[97] After Levine, arbitrageur Ivan F. Boesky entered into a $100 million dollar settlement with the Securities Exchange Commission ("SEC") for his insider trading violations.[98] Although Boesky's settlement amount was enormous, it eventually paled in comparison to the SEC's actions against, and settlements with, prominent stock company Drexel Burnham Lambert, Inc., and its undisputed king of "junk-bond dealers," Michael Milken.[99] Drexel Burnham Lambert, Inc. agreed to a $650 million settlement with the SEC as a result of the insider trading activities of Michael Milken and two other traders.[100]

As in the defense industry scandals, Congress investigated and once again determined that a U.S. industry, this time stock brokers-dealers and investment advisors, lacked sufficient ethical and legal standards.[101]

The ITSFEA was passed as a result of Congress's investigation.[102] The Act mandates compliance codes for brokers-dealers and investment advisors.[103] More specifically, they must "establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of (the entity's) business, to prevent the misuse . . . of material, nonpublic information . . . ."[104]

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94. *See* Steven Brill, *The Roaring Eighties*, AM. LAWYER, May 1985, at 1, 10; Rushworth M. Kidder, *Is Society Entering a New 'Age of Ethics'?*, CHRISTIAN SCIENCE MONITOR, Oct. 19, 1987, at 19, 19.

95. *See* George Will, *The Angst of Wall Street*, WASHINGTON POST, Dec. 27, 1987, at C7.

96. *See* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified at 15 U.S.C. §§ 78(c), (o), (t-1), (u), (u-1), (ff), (kk), 80(b-4a) (1994)).

97. *See* SEC v. Levine, Litig. Release No. 11,095, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,717, at 93,481 (May 12, 1986).

98. *See* SEC v. Boesky, Litig. Release No. 11, 288, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,991, at 94,856 (Nov. 14, 1986).

99. *See id.*; SEC v. Drexel Burnham Lambert, Inc. [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94, 474, at 93,030 (June 20, 1989).

100. *See Drexel Burnham Lambert, Inc.* [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94, 474, at 93,030.

101. *See* H.R. REP. NO. 100-910 at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6052. *See also* 134 CONG. REC. H7467 (daily ed. Sept. 13, 1988) (statement of Rep. Markey).

102. *See* 134 CONG. REC. H7467 (daily ed. Sept. 13, 1988) (statement of Rep. Markey).

103. *See* H.R. REP. NO. 100-910 at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6052. *See also* Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78u-1(b)(1)(B); 134 CONG. REC. H7467 (daily ed. Sept. 13, 1988) (statement of Rep. Markey).

104. Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78o(f), 80b-4a (1994).

Under the Act, the failure to implement an effective code of conduct can result in liability if the SEC can show that a "controlling person knowingly or recklessly failed to establish, maintain, or enforce any policy or procedure required under [Section 15(f) of the Exchange Act or Section 204A of the Investment Advisors Act of 1940] and [that the] failure substantially contributed to or permitted the violation."[105]

C. *Unethical Behavior of Employees*

Although it is easy and popular to be critical of the ethical practices of some industries, the major corporations of those industries, as well as the executives that lead those industries, the problem of unethical behavior can extend from the board room down through the corporate employee with the least amount of corporate authority. In 1997, the Ethics Officer Association and the American Society of Chartered Life Underwriters and Chartered Financial Consultants conducted a landmark survey of workplace pressures and the risks involved regarding unethical and illegal business practices.[106] The American Society of Chartered Life Underwriters and Chartered Financial Consultants is headquartered in Bryn Mawr, Pennsylvania and consists of 33,000 insurance and financial services professionals.[107] Members of the association assist individuals with estate planning, retirement, and other financial and business planning.[108]

Five thousand workers representing a cross-section of the working population nationwide were surveyed; 1,324 replied for a response rate of thirty-three percent.[109] The survey's results revealed an extraordinary amount of pressure on workers to engage in unethical or illegal behavior.[110] Even more ominously, the survey revealed that almost one-half of the workers (forty-eight percent) succumbed to the pressure.[111] The results are as follows:

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105. *Id*. § 78u-1(b)(1)(B).

106. *See* AMERICAN SOCIETY OF CHARTERED LIFE UNDERWRITERS & CHARTERED FINANCIAL CONSULTANTS AND ETHICS OFFICER ASSOCIATION, SOURCES AND CONSEQUENCES OF WORKPLACE PRESSURE, INCREASING THE RISK OF UNETHICAL AND ILLEGAL BUSINESS PRACTICES: A LANDMARK STUDY (1997) [hereinafter 1997 LANDMARK STUDY]. The Ethics Officer Association (EOA) was formed in 1992 and is located in Belmont, Mass. *See* The Ethics Officer Ass'n, *General Information* (visited Nov. 17, 2000) <http://www.eoa.org/general.htm>. This association of practicing ethics officers promotes ethical business practices. *See id.* Its membership consists of over 300 members from profit and non-profit organizations around the world. *See* 1997 LANDMARK STUDY, *supra*, at 5.

107. *See* A.M. Best Ratings & Analysis, *Life Insurance Company Rating Services and Business Ethics* (visited Nov. 17, 2000) <http://www.ambest.com/ratings/pulse.htm.

108. *See id.*

109. *See* 1997 LANDMARK STUDY, *supra* note 106, at 4.

110. *See id.* at 2.

111. *See id.*

- The majority of workers (sixty percent) felt a substantial amount of work pressure and more than one out of four (twenty-seven percent) felt a "great deal" of pressure.[112]
- The most commonly cited factors contributed to workplace pressure were "poor leadership," "poor internal communications," "balancing work and family," and "work hours/work load."[113]
- Almost one-half of the respondents (forty-eight percent) reported that, due to pressure, they had engaged in one or more unethical and/or illegal actions during the past year.[114]
- The most frequently cited misbehaviors were cutting corners on quality control (sixteen percent); covering up incidents (fourteen percent); abusing or lying about sick days (eleven percent); lying to customers (nine percent); and putting inappropriate pressure on others (seven percent).[115]

Fortunately, the survey also contained some good news, especially as to the avoidance of unethical behavior.[116] Only fifteen percent of the respondents viewed ethical dilemmas as unavoidable business consequences that could not be reduced.[117] Sixty percent of the respondents expressed the belief that business and ethics can mix and that ethical dilemmas can be reduced.[118]

D. *Ethics Compliance Programs: The Employee's View*

On June 13, 2000, the Ethics Resource Center ("ERC") released its "2000 National Business Ethics Survey."[119] The ERC conducted telephone interviews with 1,500 randomly selected U.S. employees from the for-profit, nonprofit and government sectors.[120] The participating employees represented a cross section of organizational strata, including workers over the age of eighteen years, and those who were employed at least twenty-hours per week.[121]

A similar survey, released May 11, 2000, was conducted by the international accounting firm KPMG and is entitled "2000 Survey Report on Organizational

112. *See id.* at 2, 6.
113. *Id.* at 2, 8-10.
114. *See id.*
115. *See id.* at 12.
116. *See id.*
117. *See id.* at 7.
118. *See id.*
119. *See Business Ethics Movement Has Come Far, But Long Road Lies Ahead, Surveys Reveal,* 8 PREVENTION OF CORPORATE LIAB. (BNA) 41, 41 (June 19, 2000) [hereinafter *Business Ethics Movement Survey*]. The Ethics Resource Center (ERC) is a nonprofit, nonpartisan organization headquartered in Washington, D.C. *See id.*
120. *See id.*
121. *See id.*

Integrity."[122] KPMG's survey elicited responses from 2,390 U.S. workers regarding business integrity and compliance issues.[123]

Both surveys contained bad news and good news as to workplace ethics and concluded that many organizations have not done enough to institute effective ethics and compliance programs.[124] Both surveys also made it clear, however, that effective ethics and compliance programs have positive internal and external benefits.[125]

1. *The Bad News*

According to the results of KPMG's survey, three-fourths of the workers surveyed observed illegal or ethical violations at their places of employment during the preceding twelve months.[126] Thirty-six percent of the employees said they observed discriminatory conduct and thirty-four percent reportedly observed sexual harassment.[127] Other common complaints included environmental breaches, unsafe working conditions, deceptive sales practices, and the mishandling of confidential or proprietary information.[128]

The severity of the employee observations can be gauged by how the survey respondents believed the public would react if the observed misdeeds became publicly known.[129] Almost fifty percent of the employees surveyed stated that they believed their companies could "significantly lose public trust" if the observed misconduct was publicly revealed.[130]

Possibly even more disturbing than the seriousness of the observed violations is that a majority of the survey respondents believed that their CEO and other senior management were ignorant of the unethical and illegal conduct within the company and, even worse, were unapproachable if the employee needed to deliver bad news.[131]

Disturbingly, forty percent of the respondents did not inform their employers of the errant conduct they observed.[132] This failure to report unethical and illegal

122. *See id.* at 43.
123. *See id.*
124. *See id.* at 41, 43.
125. *See id.* at 43.
126. *See id.*
127. *See id.*
128. *See id*.
129. *See id*.
130. *Id.*
131. *Id.* at 42. A survey conducted by ERC five years earlier also resulted in a finding that thirty-one percent of employees had observed workplace misconduct. *See id.* Given the growth of ethics programs, the failure in the reduction of the percentage of unethical or illegal conduct could be viewed as a troubling statistic. However, the figure may also be the result of a greater awareness on the part of employees as to what constitutes unacceptable conduct.
132. *See id.*

conduct is probably directly related to the fact that two-thirds of those surveyed stated that they felt pressured by top management, supervisors, and even co-workers to compromise ethical standards.[133] Furthermore, the employees with the longer tenures felt the most pressure to violate ethical standards.[134]

Obviously, a negative corporate culture eventually takes its toll on employees. Those workers with the most experience will not be the role models a company needs if they are the ones most likely to yield to internal pressures to violate company standards.

ERC's survey also disclosed that one-third of the surveyed employees feared retaliation if they reported misbehavior and the same percentage feared being labeled "snitches" by their co-workers.[135] Many of the surveyed workers also expressed frustration with their organizations when reports of wrongdoing were filed.[136] Two out of five of the survey respondents said they were dissatisfied with how their organizations responded to known ethical and illegal conduct.[137]

2. *The Good News*

The good news revealed by both surveys is that effective ethics and compliance programs do work and that they yield positive results internally and externally.[138] In the past five years, the percentage of organizations that have instituted formal ethics programs has risen from sixty percent to seventy-nine percent.[139] But, as stated by ERC's President "all too many organizations merely 'print, post, and pray.'"[140] As explained elsewhere in this Article, effective ethics and compliance programs must at least meet the requirements of the U.S. Sentencing Guidelines.[141]

In organizations that have effective ethics and compliance programs, the pressure that employees feel to engage in wrongful conduct drops by almost fifty percent.[142] Also, employee observations of wrongdoing drops by nineteen percent while the reporting of wrongdoing increases by twenty percent.[143] Clearly, when ethical values are correctly applied in the workplace, ethical outcomes result.

Employee workplace satisfaction and pride in their organizations are directly related to an ethical culture.[144] In organizations where the employees trusted their

133. *See id.*
134. *See id.*
135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.*
140. *Id.*
141. *See infra* Part III.
142. *See Business Ethics Movement Survey, supra* note 119, at 42.
143. *See id.*
144. *See id.*

organization's ethical commitment, ninety-three percent of the workers surveyed by ERC expressed satisfaction with their organizations.[145] In comparison, only thirty-seven percent of the surveyed employees expressed satisfaction with those organizations where the organization's ethical commitment was rarely or never observed.[146]

In a time when the workforce in the United State tends to be very mobile, an effective ethics and compliance program can aid in retaining good employees.[147] Seventy-nine percent of the workers surveyed by ERC stated that their company's commitment to ethics was important to the employee's desire to continue working for the company.[148] Eighty-nine percent of the workers expressed a sense of loyalty to their organizations because of the organization's ethics.[149]

Employees satisfied with their organization's ethics are also inclined to recommend their company to potential recruits.[150] KPMG's survey revealed that two-thirds of the survey respondents would recommend their company to potential hirees.[151] In comparison, only twenty-one percent of the surveyed workers would recommend their company to potential recruits where the company's ethical commitment was lacking.[152] Furthermore, the stronger the employee's trust is in management's commitment to ethics, the more strongly the employee feels about recommending the company to recruits.[153] According to KPMG's survey, eighty-one percent of employees will recommend their company to potential recruits if an employee believes that management will not authorize improper conduct.[154]

Effective ethics and compliance programs may also have a positive impact on a company's bottom line, beyond the obvious benefits of avoiding or mitigating costly civil actions, criminal fines, and the adverse effects of negative publicity.[155] An effective compliance program can be invaluable in the marketplace where public confidence is a precious commodity.[156] The existence of an ethics code can foster public goodwill in advance of an errant employee's breach of a company's ethical standards.[157] The compliance program becomes even more important as to public opinion after a breach occurs, as its existence and management's follow through on

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145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.* at 43.
149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.* at 43-44.
154. *See id.*
155. *See* Pitt & Groskaufmanis, *supra* note 7, at 1635-36.
156. *See id.* at 1636.
157. *See id.* at 1635-36.

enforcing the code can inspire public confidence in the company's integrity.[158] Any company benefits from the public's perception that it is a law-abiding corporate citizen.[159] Eighty percent of the workers surveyed by KPMG expected customer recommendations of their company because their company's manager would uphold the company's ethical standards.[160] However, only forty percent of workers who doubted their management's commitment to ethics expected customers to recommend their company to others.[161]

III. JUDICIAL RECOGNITION OF CORPORATE COMPLIANCE PROGRAMS

Over the past twenty-five years, corporate codes have proliferated, deterring employee misconduct and insulating corporations from civil and criminal liability for employees' misdeeds.[162] Unfortunately the courts have often refused to recognize that corporate codes provided some protection to corporations for the errant conduct of employees.[163]

In fact, as to civil litigation, corporate codes of conduct and employee manuals have often been used by the courts to impose liability on corporations.[164] For example, in *Yates v. Avco Corp.*,[165] the corporation's policy against sexual harassment was deemed by the court to be evidence that sexual harassment was foreseeable, otherwise there would have been no need for the rule.[166] Other courts have also been quick to use codes and manuals against corporations.[167] Fortunately

158. *See id.*

159. *See id.*

160. *See Business Ethics Movement Survey*, *supra* note 119, at 44.

161. *See id.* In KPMG's survey, the financial services industry and health organizations scored the highest as to providing their employees with ethics training and alerting employees to legal standards. *See id.* Food and beverage makers, retailers, and consumer product manufacturers were the worst performers. *See id.* Also, smaller companies tended to do better in the survey than larger ones. *See id.* at 43. In organizations with fewer than 500 employees, seventy percent of the employees expressed satisfaction with their organization's response to reports of wrongdoing. *See id.* In comparison, only fifty-one percent of employees in larger organizations expressed such satisfaction in their organization's response. *See id.*

162. *See* Pitt & Groskaufmanis, *supra* note 7, at 1602.

163. *See id.* at 1605.

164. *See id.* at 1605-10

165. Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987).

166. *See id.* at 636.

167. *See, e.g.*, Schneider v. D.C. Transit System, Inc., 188 F. Supp. 786, 787 (D.D.C. 1960) ('employer's rule, while not conclusive of the question, constitutes some indication of the care required under the circumstances and may properly be considered by the jury in determining the question of negligence'); Toussant v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) (company's personnel manual formed basis of discharged employee's breach of contract claim); Dickerson v. Reeves, 588 S.W.2d 854, 855-56 (Tex. 1979) (employer's smoking ban did not prevent court from finding that fire caused by employee's smoking was within scope of employment); Reese v. Seaboard Coastline R.R., 360 So. 2d 27, 29 (Fla. Dist. Ct. App. 1978) ('[t]he reason most commonly assigned in support of the theory or doctrine of admissibility is that the employer's rule, while not conclusive of the question, constitutes some indication of the care required under the circumstances, and may properly be

for corporations and other employers, a few courts refused to use corporate codes against well-meaning corporations that attempted to set high standards of behavior for their employees.[168] This has especially been true where an employer's rules set a higher standard of conduct than the law.[169] In *Alvarado v. City of Dodge City,*[170] the court considered whether a merchant's liability for false arrest was dependent upon the State of Kansas' statute as to false arrest or the merchant's own higher standard of how employees should treat suspected thieves.[171] The court held that "a merchant's liability for false arrest should depend on the minimum legal standards established by statute rather than the merchant's own standards. A merchant should not be penalized for establishing higher standards for its employees than the applicable statutory standards."[172]

Companies have also had mixed results in using codes of conduct as affirmative defenses to criminal actions.[173] Prior to 1991, the majority of courts refused to recognize codes of conduct as insulating companies against criminal liability for their employees' misdeeds.[174] A prime example is the case of *United States v. Rockwell Int'l Corp*.[175] Rockwell was fined $5.5 million for illegal pricing activities on government contracts.[176] Rockwell pled guilty to conspiracy to defraud the government, as well as to contempt for double billing on a satellite program.[177] Rockwell unsuccessfully argued that it should be given credit for implementing a "model" compliance program and for discovering and reporting the wrongdoing of its employees.[178] Besides drafting a corporate code of conduct and distributing it to all its employees, Rockwell instituted an ethics training program and an employee hotline so that wrongdoing could be reported.[179]

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considered by the jury in determining the question of negligence.').

168. *See generally* Alvarado v. City of Dodge City, 708 P.2d 174 (Kan. 1985) (holding that employers should not be penalized for requiring higher standards than the applicable statute requires); Jones v. Montgomery Ward & Co., 619 P.2d 907 (Or. Ct. App. 1980) (arguing that allowing employer's manual would have confused jury).

169. *See Alvarado*, 708 P.2d at 185.

170. *Id.*

171. *See id.*

172. *Id.*

173. *See generally* Pitt & Groskaufmanis, *supra* note 7, at 1610-17 (discussing criminal liability and corporate codes).

174. *See id.* at 1612-13.

175. United States v. Rockwell Int'l Corp., No. 88-48(A)-CBM (C.D. Cal. Mar. 6, 1989). S*ee also* Pitt & Groskaufmanis, *supra* note 7, at 1610

176. *See* Pitt & Groskaufmanis, *supra* note 7, at 1610.

177. *See id.* at 1611.

178. *See id.* at 1612.

179. *See id*. at 1612 n.307.

The trial court, however, agreed with the government's negative assessment of Rockwell's ethics program.[180] In its sentencing memorandum, the government contended that:

> The efforts taken by Rockwell to prevent the type of misconduct which occurred here were demonstrably lacking. The few policies that existed . . . addressed the behavior in only the most general terms. Moreover, little effort, if any, was undertaken, to enforce such policies prior to the commission of the offenses. . . . [T]hrough 1984 there was no formal training at the Satellite Division on the Truth in Negotiations Act and Rockwell's obligations to prevent defective pricing.[181]

Only a few courts have been willing to allow companies to raise their compliance programs as a defense to a criminal action.[182] *United States v. Koppers Co. Inc. Derivative Litigation*[183] is one of the better examples of where a company's compliance program was considered in determining a its liability.[184] Koppers, which was accused of antitrust violations, had an antitrust compliance policy.[185] Although the court instructed the jury that the program's existence did not automatically mean that Koppers lacked the necessary intent to violate the antitrust laws, the jury was permitted to consider whether the corporation was diligent in the "promulgation, dissemination, and enforcement of its antitrust compliance program . . . ."[186]

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180. *See id.* at 1612.

181. *Id.* at 1612 n.308. *See also* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) ('[w]e agree with the District Court that Fox's compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree.'); United States v. Automated Med. Lab., Inc., 770 F.2d 399, 407 (4th Cir. 1985); United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir. 1978), *cert. denied*, 437 U.S. 903 (1978).

182. *See* Barry J. Lipson, *A Survey On the Ins and Outs Of Antitrust Compliance,* 51 ANTITRUST L.J. 517, 523-26 (1982).

183. United States v. Koppers Co., 652 F.2d 290 (2d Cir. 1981).

184. *See* Lipson, *supra* note 182, at 523-26.

185. *See* Lipson, *supra* note 182, at 523-26.

186. *Id.* at 524.

> One of the factors, among others, that you may consider in determining the intent imputed to Koppers Company through its [managerial] agents or employees is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary imputed intent. If, however, you find that Koppers Company acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not to impute an agent or employee's intent to the Koppers Company.
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> *Id.* at n.15 (quoting United States v. Koppers Co., Criminal No. 79-85 (D. Conn., New Haven Div.), Jury Instructions (June 26, 1980)).

Ethics and compliance programs, however, are not without their risks. During litigation discovery proceedings, courts have been known to exploit a company's compliance audits and reviews.[187] In a discrimination suit against Lucky Stores, Inc.,[188] notes taken by a store manager during an anti-discrimination training program were used against the company as proof of the company's bids.[189] These so-called "smoking gun" notes were taken during a presentation addressing stereotypes.[190]

IV. UNITED STATES FEDERAL SENTENCING GUIDELINES

On November 1, 1991, the Organizational Sentencing Guidelines ("Guidelines") of the United States Sentencing Commission became effective.[191] The sentencing guidelines are designed to address the problem of sentencing disparity in the federal courts, which has long been a public concern, as well as a concern of the criminal justice community.[192] The Guidelines are designed to ensure fairness in the sentencing process by establishing sanctions proportionate to a crime's severity and by setting similar penalties for similarly situated offenders.[193] The Guidelines attempt to modify organizational behavior by "rewarding," with more lenient sentences, those corporate defenders that, at the time of the offense, had implemented effective programs to prevent and detect violations of the law.[194] Conversely, those organizations without effective Compliance Programs can expect to receive harsh fines and other penalties.[195]

"Chapter Eight of the organizational guidelines apply to federal felonies and Class A misdemeanors committed by organizational offenders."[196] The most common offenses committed by organizations sentenced under the guidelines include fraud, environmental waste discharges, tax violations, money laundering,

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187. *See Epilogue*, *supra* note 8, at 7:6.

188. *See* Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992).

189. *See id.* at 292-94.

190. *See id*. *See also Epilogue*, *supra* note 8, at 7:6-7:7 (citing Amy Stevens, *Anti-Discrimination Training Haunts Employer in Bias Suit*, WALL ST. J., July 31, 1991 at Bl); *Compliance Trainers Beware*, CORPORATE CONDUCT QUARTERLY, Fall 1991, at 11, 12.

191. *See Executive Summary No. 229: The Organizational Sentencing Guidelines, in* CORPORATE COUNSEL'S GUIDE TO THE ORGANIZATIONAL SENTENCING GUIDELINES xi (William A. Hancock ed., 1993) [hereinafter *Executive Summary No. 229*]. The U.S. Sentencing Commission, an independent agency within the judicial branch, promulgated the Guidelines on May 1, 1991. *See* 28 U.S.C. § 991(a) (1994).

192. *See* U.S. SENTENCING COMM'N, 1998 ANNUAL REPORT 1 (1999) [hereinafter 1998 ANNUAL REPORT].

193. *See id.*

194. *See id.* at 43.

195. *See id.*

196. *Id.* at 41. S*ee also* FED. SENTENCING GUIDELINES MANUAL § 8 A.1 (1998).

antitrust violations, and environmental wildlife violations.[197] In 1998, 218 organizations were sentenced under Chapter Eight.[198] Of those sentences, fraud accounted for 32.4% of the cases, illegal environmental discharges 21.1%, tax violations 11.3%, money laundering 7.5%, antitrust 6.1%, and wildlife violations 4.2%.[199] When organizations are found guilty of criminal offenses, individuals that direct, manage, or otherwise work in a position of substantial authority for those organizations may also incur criminal liability for wrongdoing and also come under the sentencing guidelines.[200] In 1998, 452 individuals were sentenced in connection with the same illegal conduct as 141 of the organizations sentenced in that same year.[201] Of those individuals, sixty owned their organizations and eighty-six were officers.[202]

"The organizational guidelines establish fine ranges to deter and punish illegal conduct; require full payment of remedial costs to compensate victims for any harm and the disgorgement of illegal gains; regulate probationary sentences; and implement other statutory penalties such as forfeiture and the assessment of prosecution costs."[203]

The U.S. Sentencing constitutes a watershed development for U.S. corporations in the development and use of corporate compliance programs because for the first time there is a legally recognized definition of what a compliance program should be and a serious commitment made to those companies that adopt effective programs.[204] The official recognition of compliance programs, which would seem to be such an elementary step, has the potential to revolutionize the way this country looks at organizational crime and the methods to prevent it.[205]

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197. *See* 1998 ANNUAL REPORT, *supra* note 192, at 42.

198. *See id.*

199. *See id.*

200. *See id.* at 43.

201. *See id*.

202. *See id*. In 1998, one hundred and eighteen organizations raised their ethics and compliance programs as a defense in their prosecutions. *See* U.S. SENTENCING COMMISSION, 1998 SOURCEBOOK OF FED. SENTENCING STATISTICS 96 (1999). None were found by the courts to be effective. *See id.*

The U.S. Sentencing Commission's recently released 1999 Annual Report and statistics show that two hundred and fifty-five organizations were sentenced under the Sentencing Guidelines for an increase of 15.9%. *See* U.S. SENTENCING COMMISSION, 1999 ANNUAL REPORT 46 (2000). The significant offense categories remained the same. *See id.* Ninety-two organizations raised their compliance programs as a defense. *See* U.S. SENTENCING COMMISSION, 1999 SOURCEBOOK of FED. SENTENCING STATISTICS 98 (2000). Only one program was found to be effective. *See id.*

203. 1998 ANNUAL REPORT, *supra* note 192, at 41. The Sentencing Guidelines permit the imposition of a fine so large that a corporation's very financial existence may be jeopardized, so long as the fine does not hamper the corporations ability to make restitution to its victims. *See id.* at 41-44. *See also* United States v. Eureka Laboratories Inc., 103 F.3d 908, 912-14 (9th Cir. 1996).

204. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2 (1998).

205. *See id.* at ch. 1 pt. A(1), (2).

A. *Methodology of Determining a Fine*

Under the Guidelines, an organization's fine is a function of the severity of its offense and the degree of its culpability.[206]

1. *Base Fine*

The base fine reflects the type and severity of the offense.[207] The base fine is the greatest of: (a) the appropriate fine amount from the Guidelines Table (see following table); (b) the organization's pecuniary gain from the offense; or (c) the pecuniary loss caused by the offense to the extent that the loss was caused intentionally, knowingly, or recklessly.[208] Courts are instructed by the Guidelines to use the table to determine the base fine where calculating pecuniary gain or loss would unduly complicate or prolong the sentencing process.[209]

Offense Level Fine Table[210]

Offense Level	Amount
6 or less	$5,000
7	$7,500
8	$10,000
9	$15,000
10	$20,000
11	$30,000
12	$40,000
13	$60,000
14	$85,000
15	$125,000
16	$175,000
17	$250,000
18	$350,000
19	$500,000
20	$650,000
21	$910,000
22	$1,200,000
23	$1,600,000
24	$2,100,000
25	$2,800,000

206. *See* Gregory J. Wallance, *Corporate Compliance Programs Under the Organizational Sentencing Guidelines*, *in* CORPORATE COMPLIANCE: CAREMARK AND THE GLOBALIZATION OF GOOD CORPORATE CONDUCT 65, 67 (Carol L. Basri et al. eds., 1998).

207. *See id*. at 67; FED. SENTENCING GUIDELINES MANUAL § 8C2.4 (1998).

208. *See* FED. SENTENCING GUIDELINES MANUAL § 8C2.4 (1998).

209. *See id.* at § 8C2.4(c).

210. *Id*. at § 8C2.4(d).

26	$3,700,000
27	$4,800,000
28	$6,300,000
29	$8,100,000
30	$10,500,000
31	$13,500,000
32	$17,500,000
33	$22,000,000
34	$28,500,000
35	$36,000,000
36	$45,000,000
37	$57,500,000
38 or more	$72,500,000

Each offense is assigned a base level offense.[211] The base level can be increased or decreased depending on specific offensive characteristics reflecting the severity of the actual crime.[212]

2. *Culpability Score*

Once the base fine is determined, the court calculates a culpability score.[213] Initially, an organizational defendant is assigned a culpability score of five points, from which subtractions or additions are made.[214] The subtractions or additions depend on: (a) the organization's involvement in, or tolerance of, criminal activity;[215] (b) the organization's prior history of criminal activity;[216] (c) whether a judicial order or injunction was violated during the offense;[217] (d) whether the organization obstructed justice in connection with the offense;[218] (e) the extent of the organization's self-reporting, cooperation and acceptance of responsibility;[219] and (f) the existence of an effective organizational program to prevent and detect illegal acts.[220]

For example, if high-level personnel within the organization participated in or willfully ignored illegal conduct, the judge is to add between one and five points to the Culpability Score, depending upon the size of the organization.[221]

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211. *See id*.
212. *See* Wallance, *supra* note 206, at 68.
213. *See id*.; FED. SENTENCING GUIDELINES MANUAL § 8C2.5(a) (1998).
214. *See id.* FED. SENTENCING GUIDELINES MANUAL § 8C2.5(a) (1998).
215. *See id.* at § 8C2.5(b).
216. *See id.* at § 8C2.5(c).
217. *See id.* at § 8C2.5(d).
218. *See id.* at § 8C2.5(e).
219. *See id.* at § 8C2.5(f).
220. *See id.* at § 8C2.5(g). *See also* Wallance, *supra* note 206, at 68.
221. *See* Wallance, *supra* note 206, at 68; FED. SENTENCING GUIDELINES MANUAL § 8C2.5(b)(1)(A)(i) (1998).

Points must also be added if the instant offense was committed at or near a period of time following the commission of a similar crime or a civil/administrative action based on similar misbehavior.[222] Two points must automatically be added if the organization obstructed justice during the government's investigation, prosecution, or sentencing of those involved in the crime.[223]

In comparison, a sentencing court is to subtract three culpability points if the offense occurred despite an effective program to prevent and detect illegal acts.[224] An additional one to five point reduction is possible if the organization timely reported its misconduct to the government, assisted in the investigation, and accepted blame.[225]

3. *Minimum and Maximum Multipliers*

Once the culpability score has been determined, the court translates the score according to the following minimum and maximum multipliers[226]:

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

The base fine is then multiplied by the minimum and maximum multipliers to obtain the monetary range of the organization's fine.[227] As a general rule, the court must set the fine within the designated range.[228] In deciding on the appropriate fine, the court is able to look at such traditional sentencing factors as protection of

222. *See* Wallance, *supra* note 206, at 68; FED. SENTENCING GUIDELINES MANUAL § 8C2.5(c)(1)-(2) (1998).

223. FED. SENTENCING GUIDELINES MANUAL § 8C2.5(e) (1998).

224. *See id*. at § 8C2.5(f).

225. *See* Wallance, *supra* note 206, at 69; FED. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1)-(3) (1998).

226. FED. SENTENCING GUIDELINES MANUAL § 8C2.6 (1998).

227. *See* Wallance, *supra* note 206, at 69; FED. SENTENCING GUIDELINES MANUAL § 8C2.7(a)-(b) (1998).

228. *See* Wallance, *supra* note 206, at 69; FED. SENTENCING GUIDELINES MANUAL § 8C2.7(a)-(b) (1998).

the public welfare, deterrence, victim vulnerability, non-pecuniary damages caused by the offense, and collateral consequences.[229]

Any doubts about the magnitude of fines that can be imposed under the Sentencing Guidelines were erased with the $340 million fine levied against Daiwa Bank on February 28, 1996 by a Manhattan federal court.[230] Daiwa's fine, which was set in accordance with the Guidelines, is the largest criminal fine in U.S. history thus far.[231]

Daiwa's problems began when the bank received a series of letters from a trader in its New York branch in which the trader confessed to losing more than $1.1 billion in unauthorized, concealed securities trading over an eleven-year period.[232] To cover the loses, the trader sold, without authorization, government bonds that the bank held in custody to cover pension fund accounts.[233]

Daiwa investigated the trader's revelations and confirmed them by early August.[234] It replaced the pension account money with its own funds.[235] However, the bank did not publicly disclose its findings or let the U.S. government know about the situation until late September when it made its scheduled reporting.[236] Unfortunately for Daiwa, its delay resulted in criminal charges against the bank because regulations require banks to file a "Criminal Referral" within thirty days of discovering an employee's offense.[237]

Daiwa had a number of practical reasons for delaying the disclosure until late September.[238] First, it feared that immediate disclosure would adversely affect the bank's stock prices.[239] The bank's leadership reasoned that the later disclosure would allow the bank to write its losses off at one time and would demonstrate Daiwa's continued financial security.[240] Second, Japan's Ministry of Finance, who in early August knew of the losses, wanted a later disclosure in order to avoid adverse consequences on Japan's already unstable financial markets.[241] In order to facilitate the reporting delay, bank executives falsified bank records to conceal the trader's

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229. *See* Wallance, *supra* note 206, at 69; FED. SENTENCING GUIDELINES MANUAL § 8C2.8(a)-(b) (1998). *See also* 18 U.S.C. §§ 3553(a), 3572(A) (1994) (listing additional factors the Commission has determined may be relevant).

230. *See* Jeffrey M. Kaplan, *Why Daiwa Bank Will Pay $340 Million Under the Sentencing Guidelines*, ETHIKOS, May/June 1996, at 1, 1.

231. *See id*.

232. *See id.*

233. *See id*.

234. *See id.*

235. *See id.*

236. *See id*. at 1, 2.

237. *See id*. at 2.

238. *See id.*

239. *See id.*

240. *See id*.

241. *See id*.

losses from internal auditors.[242] United States banking law makes such a falsification a felony.[243]

On September 18, 1995, after meeting with its U.S. lawyers, Daiwa disclosed to U.S. authorities the financial losses and the felonious conduct of its executives in falsifying records.[244] The U.S. government eventually learned that Daiwa had failed in the 1980s to disclose a similar incident, and that the bank had made other misrepresentations to bank regulators in the 1990s.[245]

Assistant U.S. Attorney Reid Figel stated, "[f]rom the perspective of corporate citizenship' the bank's conduct 'was intolerable . . . . Far from establishing a culture of corporate compliance, the management of the bank directed its employees to engage in criminal acts.'"[246]

In addition to other charges, Daiwa also pled guilty to "misprision of felony," which, according to Figel, "only requires proof of knowledge of a crime and efforts to conceal the crime."[247]

B. *Other Remedial Sanctions and Probation*

In addition to the imposition of a fine, the Guidelines state "[a]s a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense."[248] In accordance with the foregoing, the court can compel the organization to: (1) make restitution to the victims; (2) remedy the harm caused by the offense and to take appropriate measures to eliminate or reduce the instant offense will cause future harm; (3) perform community service; and (4) notify the organization's victims of its conviction and sentence, provided the cost of notice does not exceed twenty thousand dollars.[249]

Probation for a term of years is also possible.[250] Furthermore, if the organization had more than fifty employees and did not have an effective compliance program at the time of the offense, the court can order a corporation to develop such

242. *See id.*
243. *See id*.
244. *See id*.
245. *See id*.
246. *Id*. at 2, 3.
247. *Id*. at 3.
248. FED. SENTENCING GUIDELINES MANUAL ch. 8 pt. B Introductory Commentary, at 392 (1998).
249. *See* Wallance, *supra* note 206, at 71; FED. SENTENCING GUIDELINES MANUAL § 8B1.4 (1998) (applying § 5F1.4 (Order to Notice of Victims)).
250. *See* Wallance, *supra* note 206, at 71; FED. SENTENCING GUIDELINES MANUAL § 8D1.1(a)(3) (1998).

a program, submit it to the court for approval, and submit to the court monitoring of the program during the period of probation.[251]

When compliance programs are imposed by judicial decree, companies can even find their business decisions subject to judicial second-guessing.[252] There is no comparison between a corporation placed on probation with a court ordered compliance program and the probation of an individual who is a first time offender.[253]

Since 1991, almost one thousand corporations have had to develop court ordered and approved Ethics and Compliance Programs.[254] Besides Tyson Foods, the following list includes examples of corporations that have had to develop such programs:

DEFENDANT	DATE	AGENCY	TYPE/OFFENSE
Airline Tariff Publishing Co.	11/1/93	DOJ (Antitrust)	Civil (Sherman Act §1)
Alliant/Aerojet-General	2/11/94	DOJ (Antitrust)	Civil (Sherman Act §1)
American Bar Association	6/27/95	DOJ (Antitrust)	Civil (Sherman Act §1)
Applied Telemedia Eng. & Mgt.	12/23/92	FTC	Civil (Consumer Fraud)
Assn. of Retail Travel Agents	11/17/94	DOJ (Antitrust)	Civil (Sherman Act §1)
C.R. Bard	10/14/93	DOJ/FDA	Civil/Criminal (Fraud/Adulterated medical devices)
Caremark	6/16/95	DOJ/HHS	Civil/Criminal(Medicare and Medicaid fraud & abuse)
Classic Care (& affld. hospitals)	12/30/94	DOJ (Antitrust)	Civil (Sherman Act §1)
Conrail	7/12/95	DOJ (Envir. Div.)	Criminal (Clean Water Act)
Consolidated Edison Co.	6/28/95	DOJ/NY DEP	Criminal (EPCRA - Asbestos Release)
Crescent Ship Services	2/14/94	DOJ (Envir. Div.)	Criminal (Clean Water Act)
Denny's	4/2/93	DOJ	Civil (Civil Rights; Public Accommodations)
El Paso Natural Gas	1/26/95	DOJ (Antitrust)	Civil (Sherman Act §1)
Food Lion	8/3/95	DOL	Civil (FLSA)

251. *See* Wallance, *supra* note 206, at 71; FED. SENTENCING GUIDELINES MANUAL § 8D1.4(c)(4) (1998).

252. *See Compliance Programs and the U.S. Sentencing Guidelines*, *supra* note 7, at 1:6.

253. *See id*. at 1:7. As Tyson Foods's compliance officer, I must make quarterly reports to a federal judge, a probation officer, the USDA, and the Office of Independent Counsel (OIC), headed by Donald Smaltz. Since the initiation of its compliance program, Tyson Foods's facilities have experienced over seventy surprise ethics inspections conducted by the USDA and OIC. Government ethics inspectors examine each facility's training records and help line information posters, and also question Tyson team members at random about Tyson's Corporate Code of Conduct. Negative findings by the inspectors can result in a notice of deficiency to the company and could trigger a move to revoke probation. Tyson Foods has successfully weathered every inspection.

254. *See id*.

Greater Bridgeport Ind. Pr. Assn.	1/7/93	DOJ (Antitrust)	Civil (Sherman Act §1)
Grumman Corp.	11/23/93	DOJ	Civil (defense contracting fraud)
Int. Assn. Machinists	4/11/94	DOJ (Antitrust)	Civil (Clayton Act §8)
Louisiana-Pacific Corp.	9/30/93	EPA	Civil (Clean Air Act)
Lucas Aerospace	5/3/94	DOJ	Criminal (defense contracting fraud)
Mass. Allergy Society	2/12/92	DOJ (Antitrust)	Civil (Sherman Act §1)
Morton Plant Health System	7/13/94	DOJ (Antitrust)	Civil (Clayton Act §7)
Nagel Motors	7/5/94	DOJ (Antitrust)	Civil (Sherman Act §1)
National Medical Enterprises	6/29/94	DOJ/HHS	Civil/Criminal(Medicare and Medicaid fraud and abuse)
Norwood Industries	3/1/94	DOJ/EPA	Criminal (Clean Air Act)
Palm Beach Cruises	5/18/94	DOJ (Envir. Div.)	Criminal (Clean Water Act)
Playmobil USA	2/22/95	DOJ (Antitrust)	Civil (Sherman Act §1)
Prudential Securities	10/93 & 10/94	SEC/DOJ	Civil/Criminal (securities fraud)
Sara Lee Corp.	11/4/93	EPA	Civil (EPCRA/CERCLA)
Steinhardt Mgt./Caxton Corp.	1/13/95	DOJ (Antitrust)	Civil (Sherman Act §1)
Summerville National Bank	2/2/94	OCC	Civil (problem assets)
Tri-R-Disposal	7/15/94	DOJ (Antitrust)	Civil (Sherman Act §1)
United Technologies Corp.	1/20/93	DOJ/CT DEP	Civil (CWA, RCRA)
Utah Society for Healthcare	3/25/94	DOJ (Antitrust)	Civil (Sherman Act §1)
W.R. Grace & Co.	9/8/94	DOJ/EPA	Civil (Clean Air Act)[255]

C. *Effective Compliance Programs*

Whether an organization's compliance program is voluntarily developed or developed under court order, it must be "effective."[256] Under the federal sentencing guidelines, an effective compliance program can result in a ninety-five percent reduction in a company's penalty.[257] To achieve the maximum reduction, however, the company must have discovered the violation, turned itself in, cooperated with the prosecution, and had no involvement in the offense by a high-level official.[258] The hallmark of an effective program is the organization's due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.[259]

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255. Kirk S. Jordan & Joseph E. Murphy, *Compliance Programs: What the Government Really Wants*, *in* CORPORATE COMPLIANCE: CAREMARK AND THE GLOBALIZATION OF GOOD CORPORATE CONDUCT 1151, 1193-94 (Carole L. Basri et al. eds., 1998).

256. *See id*. at 1154-55.

257. *See Compliance Programs and the U.S. Sentencing Guidelines*, *supra* note 7, at 1:11.

258. *See id.*

259. *See id*.

A compliance program must consist of more than a statement of good intentions. For example, in *EEOC v. Wal-Mart Stores, Inc.*,[260] the Tenth Circuit Court of Appeals was unimpressed with the Wal-Mart's written anti-discrimination policy.[261] In a ruling against Wal-Mart in a case involving the Americans with Disability Act, the Tenth Circuit held that an employer's "assertion of a generalized policy of equality and respect for the individual does not demonstrate an implemented good faith policy of educating employees on the Act's accommodation and nondiscrimination requirements."[262]

In comparison, in *Kolstad v. American Dental Association*,[263] a case involving the imposition of punitive damages under Title VII of the Civil Rights Act of 1964, the U.S. Supreme Court pointed out the importance of a company's conduct matching its good words.[264] The court held that a company is not vicariously liable for punitive damages under Title VII for its employee's discriminatory conduct if the company made "good faith efforts to comply" with the law.[265]

Regardless of how good a company's compliance program is, violations will occur. This is especially true of large companies.[266] Statistically speaking, a company with fifty thousand to one hundred thousand or more employees will experience some lawbreaking somewhere within the organization.[267]

Consider Tyson Foods. Our company has over sixty-six thousand team members and a workforce that is very mobile.[268] Compare Tyson's situation with a city of the same size and the numerous police officers, judges, and prosecuting attorneys needed to act as a bulwark against criminal conduct in such a city. Some criminal activity will take place in a city of that magnitude and some misdeeds will occur in a large corporation (or virtually any size corporation). However, if a company has enacted an effective ethics and compliance program and exercises due diligence to prevent violations, it may avoid criminal prosecutions when something goes wrong or, at the very least, may find its penalty mitigated.[269]

The Guidelines specify that "at a minimum" an effective program will have the seven characteristics listed below.[270]

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260. EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999).

261. *See id.* at 1248-49.

262. *Id*. at 1249.

263. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).

264. *See id.* at 544.

265. *Id.* at 545.

266. *See Compliance Programs and the U.S. Sentencing Guidelines*, *supra* note 7, at 1:10.

267. *See id.*

268. *See About Tyson* (visited Nov. 19, 2000) <http://www.Tyson.com/corporate/about/today.asp>.

269. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k) (1998). *See also* Michael M. Baylson, *Getting the Demons Into Heaven: A Good Corporate Compliance Program*, CORPORATE CONDUCT QUARTERLY, Winter 1992, at 33, 33.

270. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(1)-(7) (1998).

1. *Establish compliance standards and procedures for employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.*[271]

The corporate code of conduct serves as the foundation upon which a company builds its ethics and compliance program. The corporate code must be much more than a lofty statement of ideals. It must be the company's written statement of adherence to the law and ethical practices in the areas of substantive conduct that affect the business.[272] The code also outlines policies and procedures for reporting and investigating alleged violations and the range of disciplinary measures available against wrongdoers.[273]

An organization needs to adopt a team approach in preparing a corporate compliance code.[274] At a minimum, a typical team would consist of a company's legal, human resources, and internal audit departments.[275] Other possible team members would include representatives from a company's environmental, safety, and purchasing departments.[276] The team should be headed by the compliance officer, and it is advisable to receive assistance from outside counsel.[277]

The drafting team should begin by identifying those substantive areas in which the company faces its greatest criminal and civil exposure.[278] Regardless of the fact that the Organizational Sentencing Guidelines apply only to criminal actions, a properly drafted code should also aid in preventing and detecting civil misconduct.[279]

A company's civil and criminal litigation history can be extremely useful in identifying problem areas.[280] It's extremely important that the team identify those substantive areas in which repeated misconduct has occurred, especially because the recurrence of misconduct can cast doubt on whether a company has taken reasonable steps to prevent such misconduct.[281]

"Benchmarking" is a useful tool in drafting a corporate code.[282] Examining the corporate codes of companies comparable in business activities and size can be invaluable in identifying similar legal and ethical issues.[283] It is important, however,

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271. *See id.* at application notes 3(k)(1).
272. *See id.*
273. *See id.* at application notes 3(k)(6)-(7).
274. *See* Jordan, *supra* note 29, at 7.004.
275. *See id.*
276. *See id*.
277. *See id*.
278. *See id.*
279. *See id*.
280. *See id*.
281. *See id*.
282. *See* Pitt & Groskaufmanis, *supra* note 7, at 1639 n.461.
283. *See id.*

to tailor the code to your company's particular needs.[284] If your company's code drafting team merely adopts another company's corporate code of conduct, the entire process may end up being dismissed by a court as "empty formalism."[285]

The substantive standards contained in a code of conduct will vary among companies. However, all companies should consider the need for including standards covering the following areas: advertising, antitrust and fair competition, bribery and improper payments, company books and records, conflicts of interests, environmental, equal employment opportunity, fraud and misrepresentation, government contracting, international business, political contribution, proprietary information, and securities.[286]

In some instances, separate policies on particular subjects may be needed.[287] Depending on a company's business interests, size, and liability exposure, it may be appropriate to draft policies targeted at certain groups of employees, "such as an antitrust policy distributed to individuals with the authority to set prices."[288]

In drafting a corporate code, it is important to keep in mind for whom the code is being written.[289] The primary audience is the company's employees, because it is they who must follow the code's mandates.[290] A federal or state prosecutor or judge may eventually review the code to assess its effectiveness.[291] Although a company needs legal assistance in drafting a code of conduct, the code should avoid legalese as much as possible.[292] Plain, clear and concise wording is needed.[293] It is important that every company employee, regardless of educational background, understand the code. A code written in plain English is also much easier to translate into other languages for a company that has international interests or otherwise has employees for whom English may not be their first language.

2. *Assign the overall responsibility to oversee compliance to specific high-level officers or executives of the organization*.[294]

Under the U.S. Sentencing Guidelines, the compliance officer must be a member of the organization who falls within the definition of "high-level personnel."[295] The Guidelines define high-level personnel as

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284. *See id*. at 1639.
285. *Id*. at 1639-40.
286. *See* Jordan, *supra* note 29, at 7.005.
287. *See Program Implementation and Operation*, *in* BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY 4:20-4:20a (1993) [hereinafter *Program Implementation*].
288. *Id.*
289. *See id.*
290. *See id*.
291. *See id*.
292. *See* Jordan, *supra* note 29, at 7.005.
293. *See id.*
294. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(2) (1998).
295. *See id.*

> individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.[296]

The requirement of the appointment of high-level personnel to lead a company's ethics program is based on the need for experience and knowledge, and the need for the compliance officer to be able to obtain the support and respect of the company's management and employees.[297] When the compliance officer holds a high-level position within the company, the employees receive a strong message that the company is serious about compliance, "that the program is to be taken seriously, and that it merits respect and attention."[298]

Potential ethics compliance officers from within a company include, but are not limited to, the company's general counsel, chief financial officer, or even a compliance committee.[299] Many companies appoint a full-time compliance officer so that the officer has no competing responsibilities and can be more devoted to the job.[300] Although the Sentencing Guidelines specify that the compliance officer be appointed from within the organization's "high-level personnel," many compliance officers come from outside the organization and are immediately named to a "high-level personnel" position.[301]

In a number of cases, courts have mandated that a company convicted of a criminal offense hire a compliance officer from outside the organization, subject to court approval.[302] When a settlement or plea agreement is reached between an organization and government agency, the agreement usually does not specifically identify the person from outside the organization to be named as compliance officer, but does specify the duties of the position.[303] The forgoing is what happened with Tyson Foods as to my appointment as its compliance officer.[304]

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296. *Id.* at application notes 3(b).

297. *See* Jay N. Fastow, *Step Two of the Sentencing Guidelines: Assign Overall Responsibility to Oversee Compliance to "High-Level Personnel," in* CORPORATE COMPLIANCE: CAREMARK AND THE GLOBALIZATION OF GOOD CORPORATE CONDUCT 301, 306 (Carole L. Basri et al. eds., 1998).

298. *Id*. (citing Zhonette M. Brown & Nancy Carr Lippa, *Organizational Sentencing*, 34 AM. CRIM. L. REV. 841, 851 (1997); Joseph C. Mrazek, Jr., *Organizational Sentencing*, 33 AM. CRIM. L. REV. 1065, 1074 (1996)).

299. *See* Fastow, *supra* note 297, at 310-11.

300. *See id*. at 312.

301. *See id.* at 308-09, n.3.

302. *See id*.

303. *Id*. at 309, n.3 (citing United States v. Norsk Hydro USA Inc., 63 Fed. Reg. 10, 939, 10, 941 (1998); United States v. Tom Paige Catering, Inc., 62 Fed. Reg. 67, 897, 67, 898-99 (1997)).

304. *See supra* Part I.

As previously stated, some organizations have compliance committees.[305] In some companies, the compliance committee operates the compliance program.[306] A compliance committee, however, can serve in a more advisory role to an organization's compliance officer, as is done at Tyson.

The board of directors established the Ethics Compliance Committee (the "Committee") of Tyson Foods on January 13, 1998. The Committee reports directly to the board of directors and is responsible for overseeing Tyson's compliance with the compliance agreement between the company and the USDA. Its members, who are appointed by the board of directors, consist of the following individuals: (1) a partner of the independent auditors of Tyson Foods; (2) the chairman of the Audit Committee of the board of directors; (3) an attorney from outside counsel; and (4) such other members as the chairman of the board of directors deems appropriate. However, no person involved in the activities investigated by the Office of Independent Counsel and disposed of the plea agreement dated December 29, 1997 may serve on the Committee.

Tyson's Ethics Compliance Committee meets at least quarterly with me. The Committee reviews Tyson's compliance with the December 1997 Plea Agreement and critical documents, such as lobbying contracts and the company's contact log that records contact with federal employees, political contributions, and training materials. The Committee performs an invaluable function in advising me and Tyson's Board of Directors on the operation of the ethics and compliance program.

3. *Use due care not to delegate discretionary authority to individuals whom the organization knows, or should know, might engage in illegal activities.*[307]

The third characteristic of an effective ethics and compliance program requires that the organization must use "due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities."[308] In drafting the third characteristic required of an effective compliance program, the U.S. Sentencing Commission was concerned that "organizations might intentionally hire managers known 'to cut legal corners, seeking to benefit from criminal conduct while insulating upper management from culpability for criminal conduct.'"[309]

305. *See* Fastow, *supra* note 297, at 313.

306. *See id.* *See also The Organizational Ethics Committee: Roles and Responsibilities* (visited Dec. 12, 1998) <http://navran.com/Newsletter/94-04/04-94d.html>.

307. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(3) (1998).

308. *Id.*

309. Mary E. Didier & Winthrop M. Swenson, *Thou Shall Not Improperly Delegate Authority–Thoughts on the U.S. Sentencing Commission's "Step Three,"* PREVENTIVE LAW REP., Winter 1995, at 9, 9. The U.S. Sentencing Commission drafted several versions of step three. *See id.* The

By hiring such persons, organizations could hire and delegate substantial discretionary authority to "high producers" while attempting to remain ignorant of any of their unethical or illegal practices.[310] Personnel who, within their scope of authority, possess a substantial measure of discretion in acting on the organization's behalf, such as plant and sales managers, are those who are considered to have substantial discretionary authority.[311]

Pre-employment screening of potential employees is critical to comply with the third characteristic.[312] Relevant information to be taken from an applicant includes not only the applicant's prior employment record, but also information as to any criminal convictions, civil judgments, or ongoing civil proceedings involving the applicant.[313]

Just as importantly, the performance of employees who exercise substantial discretionary authority must be periodically evaluated.[314] If such persons violate an organization's compliance program then any violation must be taken into account in compensating, promoting, demoting, or even retaining such persons.[315]

4. *Take steps to effectively communicate the standards and procedures to all employees and other agents, through training programs and publications.*[316]

Communication of the ethics message may be the single most important element of an ethics and compliance program. The ethics message must be repeatedly communicated through a multi-media approach.

On April 28, 1998 the first ethics training was held at Tyson Foods. The particular program centered on fiduciary obligations and was held specifically for directors, officers, senior managers, consultants, and lobbyists of Tyson Foods.

Commission's first concern was to define the type of employee that an organization should guard against placing in a position of authority. *See id*. at 10. In the Commission's mid-October 1990 draft, step three specified that discretionary authority should not be given to persons that "*had engaged* in prior illegal activities." *Id.* (emphasis added). By early January 1991, the Commission had substituted "with *a propensity to engage* in illegal activities" for the phrase "*had engaged in prior* illegal activities." *Id.* (emphasis added).

By late February 1991, the Commission added a reference to due diligence to step three, which read, "the organization must have used due care not to delegate *significant* discretionary authority to persons whom the organization knew or should have known through a *reasonable exercise of due diligence*, had a propensity to engage in illegal activities." *Id.* (emphasis added). The Commission's late February 1991 draft became the final version of step three except for the substitution of "substantial" for "significant" prior to "discretionary authority." *Id.*

310. *See id*.

311. *See id*. at 11.

312. *See id.* at 13.

313. *See id*.

314. *See id.* at 14.

315. *See id*.

316. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(4) (1998).

With my appointment as Ethics Director in August of 1998, ethics training was immediately formalized for all Tyson team members. Training is required of all Tyson team members on an annual basis. Sessions are held throughout the year at Tyson's world headquarters and at all Tyson facilities. A twenty-five minute general compliance video was distributed to all locations so that remote areas are ensured ethics training.

The Tyson board of directors also receives ethics training. An example of the intensity of the board's training can be found in the hypothetical questions used in the training.[317] As of June 31, 2000, over one hundred training programs had been conducted at Tyson's world headquarters. Each session contains extensive live instruction regarding the Corporate Code of Conduct, Tyson rules and regulations, ways to identify and detect errors or possible illegal acts, methods of reporting such instances, and disciplinary action. Each session involves interaction between the compliance officer and team members wherein hypothetical questions are posed by the compliance officer and team members are required to use knowledge learned in previous training sessions and by reading the Corporate Code of Conduct and Compliance Policy and attending training. Forms created within the Ethics Department must be completed and returned to the Ethics Office by each attendee for accurate record keeping and monitoring purposes.

In January 1999, an additional aspect to training was implemented. The Tyson Management Development Center ("TMDC") in Russellville, Arkansas, created the Tyson Leadership College ("College") in order to better align with Tyson's Next Generation strategic goals and objectives. The College includes a course in Ethics. The Ethics Office provides the Tyson Leadership College with many hypothetical instances and questions in reference to ethical issues that may arise within the company and also provides assistance in understanding ethical violations and possible ways to deal with each situation.

Specialized training programs are held throughout the year for various departments. For example, ethics and compliance training on the Foreign Corrupt Practices Act is held for Tyson international team members, an extensive ethics and compliance program is conducted for Tyson's Food Safety and Quality Assurance Team and ethics and environmental compliance training is mandatory for all Tyson team members responsible for environmental compliance.

At Tyson Foods, we have found that humor is an effective learning tool. Early in our compliance program we developed two cartoon chicken characters to get the ethics message across. The characters, "Tucker" and "Chuckie," are used in company calendars[318] and on colorful ethics posters.[319] In 1999, Tyson Foods received a Certificate of Excellence from the American Advertising Federation for

317. A copy of the review questions can be obtained from the author.

318. *See* Appendix A. Unfortunately, the attached copies are greatly reduced in size and are in black and white, rather than their usual vibrant colors.

319. *See* Appendix B.

the quality of the content and design of the Tyson Ethics' posters. Although humor is important, at Tyson Foods we never forget that ethics is a serious issue. Not all of our posters are humorous, but we do try to be creative and straightforward in our message and reinforce to all Tyson team members that all of us are responsible for living up to our company ethics motto of "Doing What's Right."[320]

5. *Take reasonable steps to achieve compliance with the above standards through, inter alia, monitoring, auditing, and reporting systems that allow employees to disclose criminal activities without fear of retribution.*[321]

Whenever there is misconduct within an organization, there is often someone who not only knows about it but also wants to talk about it.[322] It's always best to have an internal outlet for such employees.[323] It's much better for them to be talking to the compliance officer than first telling their story to the press, government regulators, or a U.S. attorney.[324]

Potential whistle blowers may be auditors, secretaries, retirees, disgruntled ex-employees, or any other employee or company officer who is concerned about wrongdoing within the company.[325] But people will not come forward and share what they know unless they are guaranteed a safe harbor.[326] A help line is an excellent mechanism for establishing a safe harbor where employees can report possible violations, express their concerns, or simply seek clarification of the company's compliance program.[327]

But a help line must be properly designed in order to encourage employees to use it.[328] Key elements include reporting confidentiality, including remaining anonymous if the employee so desires, the ability to bypass an immediate supervisor, and protection from retaliation if the calling employee's identity is known or becomes known to others.[329] It also helps if the call can be placed without financial cost to the employee. A crucial part of the ethics program at Tyson Foods. is its toll-free ethics help line that is monitored twenty-four hours a day. At Tyson Foods, we have incorporated all of the foregoing recommendations necessary to make the help

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320. *See* Appendix C.

321. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(5) (1998).

322. *See* Karl F. Groskaufmanis, *Designing an Effective Overall Compliance Program: Ten Questions Every Company Should Ask*, CORPORATE CONDUCT QUARTERLY, 1994, at 4, 14.

323. *See id.*

324. *See id.*

325. *See* Joseph E. Murphy, *Corporate Compliance Programs: Counsel's Role*, ACCA DOCKET: J. OF THE AM. CORPORATE COUNSEL ASS'N, Fall 1989, at 32, 35.

326. *See id.*

327. *See* Pitt & Groskaufmanis, *supra* note 7, at 1645.

328. *See* Dana H. Freyer & Benjamin B. Klubes, *A Practical Approach to Implementing a Corporate Program for Smaller Companies*, PREVENTIVE L. REP., Winter 1994, at 33, 35.

329. *See id.*

line successful. The help line provides a way for team members to report unethical behavior to the Compliance Officer of Tyson Foods. As of June 30, 2000, over twenty-five hundred Help Line calls had been received by the Ethics Department. From a beginning of only a few calls each month, the help line now averages over one hundred monthly calls. Although many of the calls concern reports of suspected wrongdoing, many are inquires as to the proper course of conduct to stay within Tyson's Corporate Code of Conduct. Posters informing Tyson team members about the Help Line are conveniently placed within all Tyson facilities.[330]

6. *Enforce the organization's standards through appropriate disciplinary mechanisms.*[331]

An important element of due diligence is appropriate disciplinary action when wrongdoing is discovered.[332] The due diligence test is not met by merely stating in the corporate code that wrongdoers may have their employment terminated.[333] An ethics and compliance program without discipline is both ineffectual and hypocritical. Discipline must apply to everyone, from the lowest ranking employee to the company's highest level of senior management, and it must apply not only to actual wrongdoers, but also to those who fail to report a known violation or fail to discover misconduct that reasonably should have been detected.[334]

To ensure fairness in the system, discipline should be proportional to the seriousness of the offense and the level of organizational responsibility of the wrongdoer. Factors to be considered in assessing culpability include:

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330. *See* Appendix D.

331. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(6) (1998).

332. *See generally* Joseph E. Murphy, *Taking a Disciplined Approach to Discipline: Enforcing Compliance Standards*, ETHIKOS Mar./Apr. 2000, at 4, 4-11 (discussing how to enforce a compliance program through discipline).

333. *See id.* at 4.

334. *See id.* at 4, 5.

a. Seriousness of violation–criminal, civil or code of conduct; willful neglect; degree of potential harm
b. Damage caused by violation
c. Level in management–the higher the level, the more severe the penalty
d. Knowing violation (ignorance of the rules is not a defense or mitigating factor, however)
e. Role in the violation, e.g., initiated, assisted, etc.
f. Lying during or otherwise obstructing investigation
g. Pattern of misconduct
h. Retaliation against whistle blowers
i. Prior violations
j. Deliberately or carelessly failing to obtain advice to determine if conduct was permissible
k. Deliberately or carelessly failing to get compliance training
l. Voluntarily reporting violation
m. Cooperation in investigation
n. Isolated, one-time violation.[335]

A company's ethics and compliance program should contain a broad range of disciplinary options, from counseling and training to dismissal or even referral to an appropriate federal or state agency for prosecution.[336] The following list includes progressively stronger disciplinary actions to be applied based on the facts of individual cases:

a. Counseling or re-education/training
b. Apology, reimbursement to injured party(ies)
c. Oral reprimand (no file entry)
d. Written reprimand (entry in personnel file)
e. Transfer or re-assignment
f. Probation (periodic progress reporting to compliance official, legal, etc.)
g. Suspension with pay
h. Suspension with pay (may raise Fair Labor Standards Act questions)
i. Impact on bonus/loss of bonus
j. Salary reduction
k. Ineligibility for promotion
l. Demotion
m. Dismissal
n. Referral to government for prosecution.[337]

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335. *Id.* at 5-6.
336. *See id.* at 6.
337. *Id.*

7. *Take all reasonable steps, following detection of an offense, to respond appropriately to the offense and to prevent further similar offenses.*[338]

Besides taking disciplinary measures against a wrongdoer that are appropriate to the violation, a company must take some additional action to receive full credit under the Sentencing Guidelines.[339] An extremely important step is the "fixing" of the problem which led to, or contributed to, the violation or permitted the violation to go undetected for a period of time.[340]

In some instances, the company's corporate code of conduct may need to be revised or updated. Additional training of employees responsible for compliance with the substantive area in which the violation occurred may be required. Employee duties may need to be examined and, if appropriate, changed. "Fixing the problem" might also include modifications in the company's reporting and investigation procedures. Regardless of what measures may need to be taken, the goal is to minimize the likelihood of a violation's recurrence.

In taking additional action, a company must also consider what to do about government involvement.[341] To obtain the substantial downward adjustment to the company's potential fine under the Sentencing Guidelines the company must:

> report the offense to the appropriate government authorities prior to an imminent threat of disclosure or governmental investigation and within a reasonable prompt time after becoming aware of the offense; cooperate with any subsequent investigation; and accept responsibility for the violation. The more of these requirements the company meets, the greater its potential fine reduction will be. If all of the above requirements are satisfied, the downward adjustment can be substantial.[342]

V. *IN RE CAREMARK INTERNATIONAL INC. DERIVATIVE LITIGATION*

For any Compliance Program to be effective, it must have the support of the corporation's Board of Directors. Unfortunately, some corporate board members have, at least in the past, been willing to accept the perks and honors or board membership without exercising the fiduciary responsibilities of the position.[343] Directors, however, have become litigation targets and have been subjected to multi-million dollar judgments and fines, along with tarnished reputations, for failing to take their board responsibilities seriously.[344] As stated by John Nash, President and

338. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(7) (1998).
339. *See id.*
340. *See Executive Summary No. 229*, *supra* note 191, at xiv.
341. *See id.*
342. *Id*.
343. *See* Victoria M. Wessler, *Corporate Board Membership: Risky Business*, ETHICS & COMPLIANCE STRATEGIES (visited Nov. 19, 2000) <http://www.ethicscompliance.com/news.html>.
344. *See id.*

Chief Executive Officer, National Association of Corporate Directors: "In the past, being a member of a board of directors was an honor. Now, it's also a job carrying with it some substantial personal and professional risks."[345]

The 1996 decision of *In re Caremark International, Inc. Derivative Litigation*,[346] is an important tool to motivate corporate officers and directors to implement effective corporate Compliance Programs. The *Caremark* decision makes it clear that corporate officers and directors can be held personally liable for a corporation's wrongdoing, especially if the board has not created an effective compliance program.[347]

In *Caremark*, a healthcare provider generated a substantial part of its revenues from third-party payments, insurers, and Medicare and Medicaid reimbursement programs.[348] The company became the target of a four year government investigation as to whether Caremark violated federal and state regulations prohibiting healthcare providers from paying kickbacks in exchange for patient referrals.[349]

The investigation resulted in a number of felony indictments.[350] Eventually, Caremark entered a guilty plea and agreed to pay fines and reimbursements totaling $250 million.[351]

At that point, a number of shareholders brought a derivative action against Caremark's Board of Directors for failing to detect illegal employee activities by means of adequate supervision and monitoring.[352] The parties entered into a court approved settlement.[353] Caremark paid the shareholders legal fees and expenses.[354] The Board also adopted remedial measures to improve compliance.[355]

The significance of the Caremark decision lies in the statement of Chancellor William T. Allen:

> I am of the view that a director's obligation includes a duty to attempt in good faith to ensure that a corporate information and reporting system, which the Board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable for losses caused by noncompliance with applicable legal standards.[356]

345. *Id*.
346. *In re* Caremark Int'l Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).
347. *See id.*
348. *See id*. at 961-62.
349. *See id.* at 962.
350. *See id.* at 960-61.
351. *See id.*
352. *See id.* at 961.
353. *See id.*
354. *See id.*
355. *See id.*
356. *Id.* at 970.

Chancellor Allen held that a board's duty to assure compliance is separate and distinct from the board's duty to make prudent decisions under the so-called business judgment rule.[357] He concluded that the board acted properly because there was an effective compliance program in place.[358] In fact, Chancellor Allen stated, "there is a very low probability that it would be determined that the directors of Caremark breached any duty to appropriately monitor and supervise the enterprise."[359]

The Chancellor found that Caremark's management and board were very active in Caremark's structures and programs.[360] During the period of time that Caremark violated the federal Anti-Referred Payments Law, Caremark's board took several steps consistent with an effort to assure compliance.[361] For example, Caremark updated its Guide to Contractual Relationships, which governed its employees in entering into contracts with physicians and hospitals.[362] The board instituted a policy requiring the company's regional officers to approve all such contractual relationships.[363] Also, Caremark had an internal audit policy in place designed to ensure compliance with business and ethics policies.[364] As to the liability of Caremark's Board of Directors for the financial losses caused by the criminal conduct of some employees, the Chancellor held, "the record at this stage does not support the conclusion that the defendants either lacked good faith in the exercise of their monitoring responsibilities or conscientiously permitted a known violation of law by the corporation to occur."[365]

It's important to remember that Chancellor Allen came to his conclusions and findings in *Caremark* while being very much aware of the U.S. Sentencing Guidelines, and that "the Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts."[366]

VI. Conclusion

The DOJ has made it clear that it will aggressively pursue corporate wrongdoing.[367] "Organizations that do not pay attention to ethics programs and practices at work may be putting their organizations at risk for more ethical

357. *See id.*
358. *See id.*
359. *Id.* at 961.
360. *See id*.
361. *See id.* at 963.
362. *See id.* at 962-63.
363. *See id.* at 963.
364. *See id.*
365. *Id.* at 972.
366. *Id.* at 969.
367. *See Remarks of Jamie S. Gorelick*, CORPORATE CONDUCT QUARTERLY, 1996, at 1,2.

misconduct, greater problems detecting misconduct when it occurs, and difficulty attracting and keeping good people."[368]

An effective ethics and compliance program is an important tool of corporate self-governance. A successful program gives a company the latitude to manage its own affairs without extraordinary outside intervention. In a sense, ethics and compliance programs provide a carrot and stick approach to self-governance.[369] "The stick is the punishment prescribed for the crime. The carrots are potential credit toward a reduction in the severity of that penalty, as well as the possibility of avoiding criminal conduct in the first place."[370]

But ethics and compliance programs are actually so much more. When a program places an emphasis on business ethics, the program will also stress such values as honesty, fairness, integrity and concern for ethics. Values become a routine part of business relationships and motivate individuals to behave acceptably.[371] Employees want their companies to do the right thing.[372] For example,

> According to ERC's survey, nine out of ten U.S. workers expect their organizations to do what is right, not just what is profitable. . . . [T]he new survey indicates that employees at organizations that have such formal programs are more apt to report misconduct, are more satisfied with their employer's response to misbehavior that is reported, are more satisfied with the organization overall, and are more likely to feel they are valued by the company.[373]

Ethics compliance programs are also risk management tools that help companies become responsible corporate citizens and achieve their broader goals of profitability and enhanced shareholder value.[374]

But complacency can quickly erode even the best, most state-of-the-art ethics compliance program. Constant vigilance is required to keep a compliance program effective. As stated by Jamie S. Gorelick, Deputy Attorney General of the United States:

> It is important to realize that even when a corporation has designed and established a compliance program, it must constantly guard against complacency in the operation of that program. . . . After you have appointed ethics officers, created written standards of conduct and training programs, scheduled internal audits, designed systems for whistleblowers, and

368. *Business Ethics Movement Survey*, *supra* note 119, at 41 (quoting Michael G. Daigneault, President, Ethics Resource Center).
369. *See Epilogue*, *supra* note 8, at 7:3.
370. *Id.*
371. *See Business Ethics Movement Survey*, *supra* note 119, at 42.
372. *See id.*
373. *Id.* (quoting Michael G. Daigneault, Ethics Resource Center President).
374. *See* Freyer & Klubes, *supra* note 328, at 33.

> published ethics newsletters your most important work lies ahead of you – ensuring that the corporation, from the leadership on down, is actively committed to making these systems work.[375]

At Tyson Foods, we take our ethics and compliance program seriously and have paid particular attention to the Federal Sentencing Guidelines in building our program. The Sentencing Guidelines, however, only provide the skeleton on which an ethics and compliance program is built. It is up to the organization to tailor a program to meet its organization's challenges and to provide flesh, blood, muscle, and life to the program. The Sentencing Guidelines seven elements of an effective program are simply minimum requirements.[376] They are not a safe harbor.[377] Due diligence is the hallmark of any successful ethics and compliance program.[378]

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375. *Remarks of Jamie S. Gorelick*, *supra* note 367, at 5, 16.

376. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k)(1)-(7) (1998). *See also Compliance Program Design*, *in* BNA/ACCA COMPLIANCE MANUAL: PREVENTION OF CORPORATE LIABILITY 3:3 (1993).

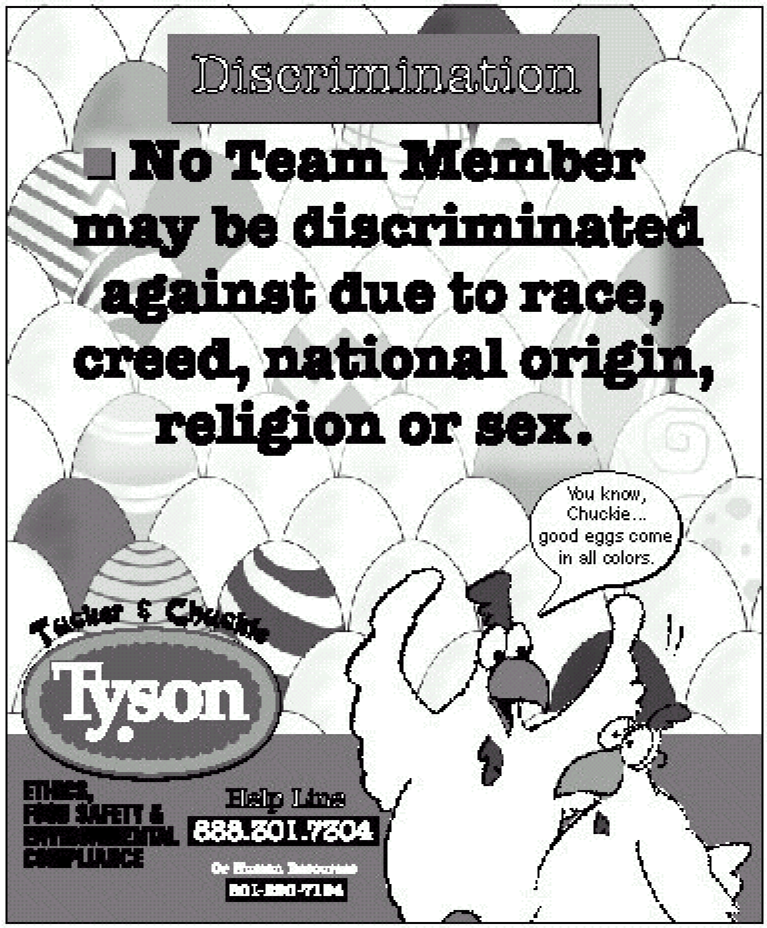
377. *See Compliance Program Design*, *supra* note 376, at 3:3.

378. *See* FED. SENTENCING GUIDELINES MANUAL § 8A1.2, application notes 3(k) (1998). *See also Compliance Program Design*, *supra* note 376, at 3:3.

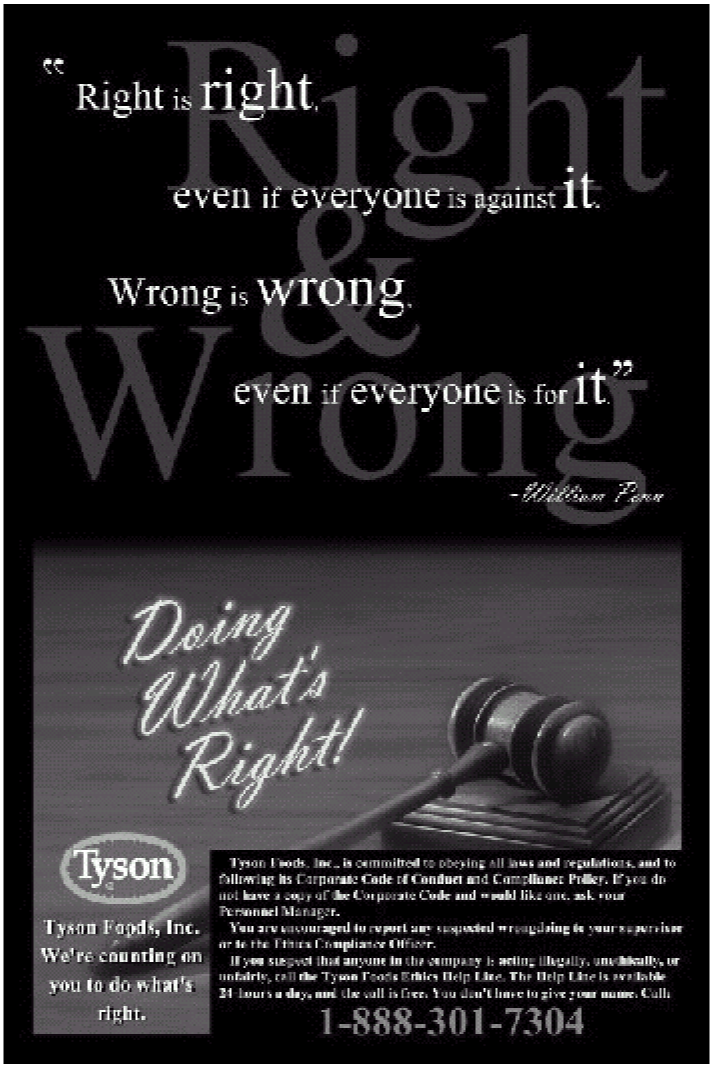
APPENDIX A

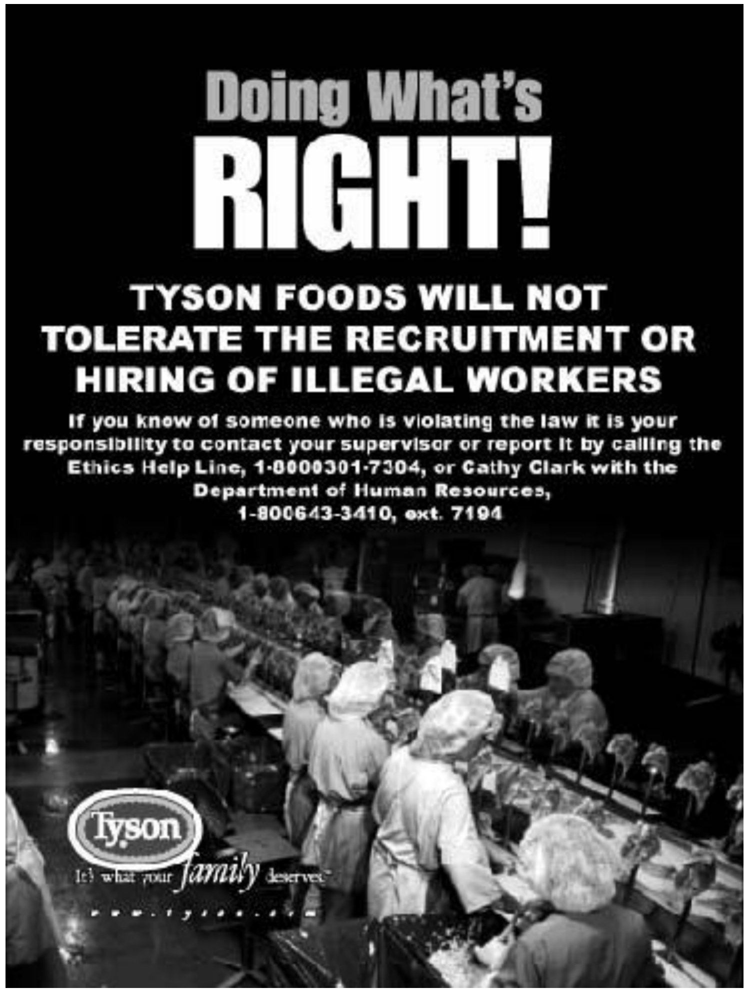

Tucker & Chuckie
August 2000
There's no better high than a natural high.
Sunday
Monday
Tuesday
Wednesday
Thursday
Friday
Saturday
TRIVIA
Help Line: 888.301.7304
Tyson Foods is a Drug Free Environment
ETHICS

APPENDIX B

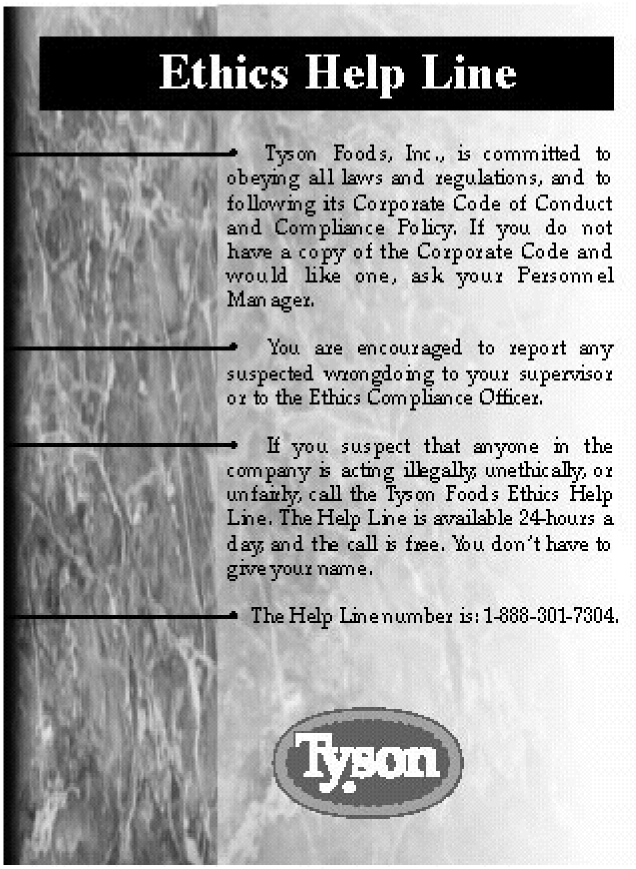

Discrimination
No Team Member may be discriminated against due to race, creed, national origin, religion or sex.
You know, Chuckie... good eggs come in all colors.
Tucker & Chuckie
Tyson
Help Line
888.301.7304

APPENDIX C


"Right is right,
even if everyone is against it.
Wrong is wrong,
even if everyone is for it."
-William Penn
Right & Wrong
Doing What's Right!
Tyson
Tyson Foods, Inc.
We're counting on you to do what's right.
Tyson Foods, Inc., is committed to obeying all laws and regulations, and to following its Corporate Code of Conduct and Compliance Policy. If you do not have a copy of the Corporate Code and would like one, ask your Personnel Manager.
You are encouraged to report any suspected wrongdoing to your supervisor or to the Ethics Compliance Officer.
If you suspect that anyone in the company is acting illegally, unethically, or unfairly, call the Tyson Foods Ethics Help Line. The Help Line is available 24 hours a day, and the call is free. You don't have to give your name. Call:
1-888-301-7304


Doing What's
RIGHT!
TYSON FOODS WILL NOT
TOLERATE THE RECRUITMENT OR
HIRING OF ILLEGAL WORKERS
If you know of someone who is violating the law it is your
responsibility to contact your supervisor or report it by calling the
Ethics Help Line, 1-8000301-7304, or Cathy Clark with the
Department of Human Resources,
1-800643-3410, ext. 7194
Tyson
It's what your family deserves

APPENDIX D


Ethics Help Line
• Tyson Foods, Inc., is committed to obeying all laws and regulations, and to following its Corporate Code of Conduct and Compliance Policy. If you do not have a copy of the Corporate Code and would like one, ask your Personnel Manager.
• You are encouraged to report any suspected wrongdoing to your supervisor or to the Ethics Compliance Officer.
• If you suspect that anyone in the company is acting illegally, unethically, or unfairly, call the Tyson Foods Ethics Help Line. The Help Line is available 24-hours a day, and the call is free. You don't have to give your name.
• The Help Line number is: 1-888-301-7304.
Tyson