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Teaching Compliance

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INTRODUCTION

Compliance is a growing field of practice across multiple areas of law. Increasingly companies put compliance risk among the most important corporate governance issues facing them.[1] Moreover, as "JD plus"[2] jobs proliferate, the demand for hiring both at the entry level and for former students currently in practice who are experienced in the compliance field will continue to grow. The growth in compliance jobs comes at a time in shifting demand for legal jobs for law school graduates. Traditional entry level jobs at large law firms, which were the staple of on campus recruiting before 2007, have not returned to pre-2007 levels even with the end of the recession.[3] Technological changes,[4] greater in-house hiring,[5] and increased efficiencies[6] have reduced demand for large law firms,[7] which were the traditional training ground for in-depth legal and soft skills.

Law schools have responded to the demand shift in entry level hiring with a supply side response—classes in compliance. In some cases, law

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1. Deloitte & Compliance Week, *In Focus: Compliance Trends Survey* (May 2014), http://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us_aers_dcrs_deloitte_compliance_week_compliance_survey_2014_05142014.pdf.

2. These jobs do not require a JD but JDs offer an advantage for such jobs. They may include jobs in investment banks, management consulting, accounting firms, among others.

3. William D. Henderson, *From Big Law to Lean Law*, 3 INT'L REV. L. & ECON. (2013) (explaining the shift in demand).

4. Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ L. REV. 1169 (2011).

5. Interview with Heather Fine, Managing Director, Major, Lindsey & Africa (Mar. 24, 2014), http://www.mlaglobal.com/community/thought-leadership/hiring-and-compensation-trends-for-in-house ("As a general matter, there appears to be an increase in hiring of in-house counsel as companies are building their legal departments.").

6. *See generally* RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES (2010) (discussing the market trend of efficiencies gained in the working of the legal profession). Efficiencies may take the form of process improvements, fee structures other than billable hours, improvements in project management, and better utilization of data analytics.

7. *Value-Based Fees, Use of Legal Operations Function Help Companies Drive Time and Cost Savings*, ASS'N OF CORP. COUNSEL (May 19, 2015), http://www.acc.com/aboutacc/newsroom/accinthenews/inhouseblogaccrecognizesvaluechampions.cfm ("General counsel are using detailed data analysis to shape their law departments and applying technology and value-based fees (VBFs) to create solutions to expensive areas like discovery and litigation, the Association of Corporate Counsel (ACC) announced at its 2015 ACC Value Champions press briefing today.").

schools have set up compliance certificates or degrees in areas such as health care[8] and business law.[9] There is now even a casebook devoted to compliance.[10] Yet, with all of these efforts at creating opportunities for careers in compliance, many programs and classes in compliance are nothing other than dressed up versions of classes in white collar crime or regulation or lectures on latest case developments that one might find in a continuing legal education program. These courses do not focus on the substantive areas of practice needs with the highest demand for compliance (in-house legal and JD plus jobs) and do not teach the analytical skills necessary to succeed in such jobs. Nor do these courses focus on the special context within which compliance operates—ideally independent of the "business" but always a part of it.[11] Essentially, law schools have misdiagnosed the demand side—it is not merely the particular type of class (compliance) but also the substance of such classes with the type of quality offering necessary to maximize student needs short term (entry level hiring) and long term (preparation for ever-shifting analytically complex practice challenges).[12]

This Essay suggests an alternative approach to teaching compliance—one that focuses on the design and implementation of compliance programs. The Essay explores the determinants of why teaching compliance is important, the pitfalls of current approaches, and the types of teaching innovations that sophisticated compliance practice requires. First, it explains what compliance is. Then, it explains the basis for the current economic drivers of the increased focus on compliance by firms. Next, it identifies the drivers of illegality before explaining how law school and in-house compliance training might be better structured in

8. *Healthcare Compliance Certification Programs*, SETON HALL UNIV. SCH. OF L., http://law.shu.edu/compliance/health/ (last visited Oct. 29, 2015); *Health Care Compliance Programs*, CLEV.-MARSHALL C. OF L., https://www.law.csuohio.edu/programs/certificates/healthcarecompliance (last visited Oct. 29, 2015); *Graduate Certificate in Healthcare Compliance*, DREXEL UNIV. SCH. OF L., http://www.drexel.com/online-degrees/law-degrees/cert-hc-comp/index.aspx (last visited Oct. 29, 2015).

9. *Online Master of Jurisprudence in Corporate and Business Law*, WIDENER UNIV. SCH. OF L., http://delawarelaw.widener.edu/prospective-students/compliance-programs/mj-in-corporate-business-law/ (last visited Oct. 29, 2015).

10. GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE (2014).

11. Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009); *see also* Lubomir P. Litov et al., *Lawyers and Fools: Lawyer-Directors in Public Corporations*, 102 GEO. L.J. 413 (2014) (providing a similar focus on the internal tensions within financial firms).

12. On this trend generally by law schools, see Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649 (2011) (critiquing the current practice of legal education). Competition across multiple dimensions is not unique to legal education. This is also true in the area of health care provision, where there is competition across both cost and quality. *See e.g.*, Martin Gaynor et al., *The Industrial Organization of Health Care Markets*, 53 J. ECON. LIT. 235 (2015); Roger D. Blair & D. Daniel Sokol, *Quality Enhancing Merger Efficiencies*, 100 IOWA L. REV. 1969 (2015).

both analytical approach and substance. Finally, the Essay concludes with some thoughts about issues in compliance in which courses might want to place greater emphasis.

I. WHAT IS COMPLIANCE?

Reducing compliance risk is a significant driver of corporate behavior. This is a function of a number of factors including responses to compliance related scandals,[13] increased government enforcement,[14] and increased awareness of how compliance impacts business performance in both day to day operations[15] and as a consequence of mergers and acquisitions[16] in what is an increasingly complex global regulatory system.[17]

Compliance, however, means different things to different people within a company based on factors such as the industry sector and the particular level of actors within a firm. For some, compliance relates to only board level issues.[18] For others, it relates to senior managers,[19] mid-level managers,[20] or employees.[21] Compliance risk may be a function of issues that any company faces[22] (e.g., Sarbanes Oxley,[23] Dodd-Frank,[24]

13. Natasha Burns & Simi Kedia, *The Impact of Performance-Based Compensation on Misreporting*, 79 J. FIN. ECON. 35 (2006); Xioyun Yu, *Securities Fraud and Corporate Finance: Recent Developments*, 34 MANAGERIAL & DECISION ECON. 439 (2013).

14. Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1 (2014); BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

15. Shannon W. Anderson et al., *Why firms seek ISO certification: regulatory compliance or competitive advantage*?, 8 PROD. & OPERATIONS MGMT. 28 (1999); Anne Riley & D. Daniel Sokol, *Rethinking Compliance*, 3 J. ANTITRUST ENFORCEMENT 31 (2015).

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

17. Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT'L. L. REV. 961 (2014); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011).

18. Lawrence A. Cunningham, *Rediscovering Board Expertise: Legal Implications of the Empirical Literature*, 77 U. CIN. L. REV. 465 (2008); Ran Duchin et al., *When Are Outside Directors Effective?* 96 J. FIN. ECON. 195 (2010); Olubunmi Faleye et al., *The Costs of Intense Board Monitoring*, 101 J. FIN. ECON. 160 (2011).

19. Anup Agrawal & Sahiba Chadha, *Corporate Governance and Accounting Scandals*, 48 J. L. & ECON. 371 (2005).

20. D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785 (2014).

21. Ariana Levinson, *Workplace Privacy and Monitoring: The Quest for Balanced Interests*, 59 CLEV. ST. L. REV. 377 (2011).

22. EXPLAINING COMPLIANCE (Christine Parker & Vibke Nielsen, eds., 2011).

23. John C. Coates & Suraj Srinivasan, *SOX After Ten Years: A Multidisciplinary Review*, 28 ACCT. HORIZONS 627 (2014).

24. Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779 (2011).

antitrust,[25] Foreign Corrupt Practices Act (FCPA),[26] data privacy,[27] insider trading,[28] auditing,[29] and tax[30]) or sector specific issues (e.g., financial services,[31] health care[32]). Because of the different meanings of compliance, it is important to identify the high risk areas for a company in order to best understand how to teach compliance and develop a compliance class or training program that may cover different issues depending on the emphasis of the level of person within the organization or the particular industry.

These different meanings to compliance create a rather formidable task in writing on how to teach compliance. In some ways, the richness of the particular type of compliance explains the difficulty in teaching a class on it effectively. However, much like with various types of compliance, there are certain "best practices" to teaching compliance whether in the classroom or within complex domestic or global companies.

II. REASONS SHAPING THE INCREASED FOCUS ON COMPLIANCE

There are strong incentives for companies to move to a robust pro-compliance program.[33] Below is an outline of reasons at both firm and individual levels that create incentives for investment in compliance and creation of a pro-compliant culture across firms. Additionally, increased penalties for non-compliance create more pressure for firms to comply.

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25. *Antitrust Corporate Governance and Compliance*, *in* 2 OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol, eds., 2014) [hereinafter OXFORD HANDBOOK]; GLOBAL ANTITRUST COMPLIANCE HANDBOOK (D. Daniel Sokol et al., eds.2015).

26. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781 (2013).

27. Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PENN. L. REV. 373 (2014).

28. Anup Agrawal & Tommy Cooper, *Insider Trading Before Accounting Scandals*, 34 J. CORP. FIN. 169 (2015).

29. Lawrence A. Cunningham, *Facilitating Auditing's New Early Warning System: Control Disclosure, Auditor Liability, and Safe Harbors*, 55 HASTINGS L.J. 1449 (2004).

30. WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT (Joel Slemrod, ed., 1992).

31. CLAIRE HILL & RICHARD M. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT (2015).

32. LARS NOAH, NOAH'S LAW, MEDICINE AND MEDICAL TECHNOLOGY: CASES AND MATERIALS (3d ed. 2012).

33. *See generally*, Déborah Philippe & Rodolphe Durand, *The Impact of Norm-Conforming Behaviors On Firm Reputation*, 32 STRAT. MGMT. J. 969 (2011); Jodi Short & Michael W. Toffel, *Making Self-Regulation More than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN SCI. QUART. 361 (2010); Sokol, *Policing the Firm*, *supra* note 20.

A. Firm Level

1. Negative Stock Returns

A number of empirical studies suggest that effective corporate governance positively impacts stock returns.[34] Similarly, poor corporate governance and compliance may be linked to negative stock returns.[35] This lower stock price provides information about the relative state of a firm and its governance. A lower stock price puts pressure on the firm to change its management because of the market for corporate control.[36]

2. Financial Penalties

Corporate wrongdoing may lead to the imposition of financial penalties by government enforcers. The theoretical basis for the penalties is based on an optimal deterrence model.[37] Over time, the severity of financial penalties has increased for companies in areas such as antitrust,[38] securities law,[39] and catastrophic accidents.[40] Significant financial penalties may create a negative impact on a firm's stock price.

3. Private Damages Suits

Compliance problems expose firms not merely to government action

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34. Paul A. Gompers et al., *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107 (2003); Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 421 (2005); La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

35. Ying Cao et al., *Company reputation and the cost of equity capital*, 20 REV. ACCT. STUD. 42 (2015); Litov et al., *Lawyers and Fools*, *supra* note 11.

36. Henry G. Manne, Mergers and the Market for Corporate Control, 73 J. POL. ECON. 110 (1965); JONATHAN MACEY, CORPORATE GOVERNANCE 119 (2008); Daniel R Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1264 (1982). Issues of corporate control impact not merely fully publicly owned firms but partially privatized state owned enterprises as well. *See* Gongmeng Chen et al., *Control transfers, privatization, and corporate performance: Efficiency gains in China's listed companies*, 41 J. FIN. & QUANTITATIVE ANALYSIS 161 (2008); Hamdi Ben Nasr et al., *The Political Determinants of the Cost of Equity: Evidence from Newly Privatized Firms*, 50 J. ACCOUNTING RESEARCH 605 (2012); D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 BYU L. REV. 1713 (2009).

37. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

38. Vivek Ghosal & D. Daniel Sokol, *The Evolution of U.S. Cartel Enforcement*, 57 J.L. & ECON. S51 (2014).

39. David Walker, *Unpacking Backdating: Economic Analysis and Observations on the Stock Option Scandal*, 87 B.U. L. REV. 561 (2007).

40. *See* Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 33, 71-72 (2012) (showing the multi-billion dollar financial consequences from negative stock returns and direct liability resulting from British Petroleum's Deepwater Horizon accident in the Gulf of Mexico).

but to follow-on private suits.[41] A significant literature exists on the merits of private lawsuits.[42] Regardless of the merits of private enforcement, these suits are costly from a company perspective. The cost is not merely because of the financial costs to the company as a result of settlement, as these cases often settle,[43] but also because boards and managers are being distracted from their day to day jobs due to litigation activities such as depositions and document requests. The fear of lengthy depositions also may chill lawful risk-taking by firms, which may chill incentives to innovate and grow the firm.[44]

4. Reputational Effects

The decrease in stock returns beyond merely the cost of the penalty and a return to the competitive level of the stock that reflects lawful financial reporting serves as the basis for a traditional analysis of the cost of wrongdoing.[45] However, depending on the type of compliance issue, there may be a reputational penalty that impacts the stock price.[46] Professor Ed Iacobucci explains that "wrongs often signal something undesirable about the wrongdoer's type, which costs the wrongdoer trading opportunities going forward."[47] The loss of reputation may affect

41. William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 38 (1975). Whether or not private rights are socially optimal is not clear. In the securities area, see e.g., Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996) ("[P]ayments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up."); Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 621 (1985) ("[T]he higher the payoff from suit; the higher the payoff, the more people will spend investigating and bringing suits.").

42. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002); James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737 (2003); Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163 (1986); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675 (2010); Landes & Posner, *supra* note 41; A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1562 (2006); James D. Cox et al., *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893 (2005).

43. A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Deterrent Effects of Settlements and Trials*, 8 INT'L REV. L. & ECON. 109 (1988).

44. D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012).

45. *Antitrust Corporate Governance and Compliance*, OXFORD HANDBOOK, *supra* note 25.

46. Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581 (2008); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear for Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993); Deborah L. Murphy et al., *Understanding the Penalties Associated with Corporate Misconduct: An Empirical Examination of Earnings and Risk*, 44 J. FIN. & QUANTITATIVE ANALYSIS 55, 82-83 (2009).

47. Edward M. Iacobucci, *On the Interaction between Legal and Reputational Sanctions*, 43 J.

a firm with regard to customers, suppliers, or others.[48] A reputational penalty also may lead to shaming of senior executives or boards of directors.[49] For managers, the potential reputational effects of non-compliance create incentives for these managers to run a firm more effectively to preserve or even enhance the value of their own reputation.[50]

B. Individual Level

Well-functioning compliance programs need to emphasize both the positive and negative incentives for compliance. At the individual level, two major negative factors suggest a greater incentive for compliance. The first is incarceration.[51] The second is financial penalties.[52] Both types of penalties lend themselves to classroom instruction.[53] An additional concern for more senior people within a firm to comply is debarment. Individuals may be barred from serving as directors or officers of a public company or from the securities industry as a whole.[54]

On the positive side, the need for compliance can be reinforced with an appeal to ethics—being compliant is ethical.[55] There also are individual positive incentives for compliance in terms of allowing individuals who are compliant to reap financial rewards without the worry of clawback due to illegal gains.

LEGAL STUD. 189 (2014).

48. Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489 (1999); Min Zhang et al., *Do Suppliers Applaud Corporate Social Performance?*, 121 J. BUS. ETHICS 543 (2014).

49. Alexander Dyck & Luigi Zingales, *The Corporate Governance Role of the Media*, *in* THE RIGHT TO TELL: THE ROLE OF THE MASS MEDIA IN ECONOMIC DEVELOPMENT 107, 109, 122 (2002); Jonathan Macey, *Delaware: Home of the World's Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131, 1134 (2005) ("[Directors] do not like to be made the object of public scorn and ridicule.").

50. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. OF POL. ECON. 288, 292 (1980).

51. Jonathan M. Karpoff et al., *The Consequences to Managers for Financial Misrepresentation*, 88 J. FIN. ECON. 193 (2008); Ghosal & Sokol, *supra* note 38.

52. Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 138 (1985) (explaining how managers may risk their reputations "if the immediate gains are large enough and if they cannot be required to disgorge their ill gotten gains.").

53. Eugene F. Soltes, *A Letter from Prison*, HARV. BUS. SCH. CASE 110-045 (Dec. 2009, rev. Mar. 2011), http://www.hbs.edu/faculty/Pages/item.aspx?num=38193 (on file with the author).

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

55. Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961 (2012) (providing a literature review).

C. Compliance is Global

Because of global supply chains[56] and the expansion of U.S. businesses to new markets,[57] compliance has become a global phenomenon. Firms must be concerned not merely with their own compliance but that of their suppliers and agents. One high profile example of global compliance risk involves Apple's supplier Foxconn. Foxconn Technology Group is a Taiwanese company with factories in China. Foxconn's China operations have had a number of negative workplace condition related stories appear in the global press after multiple employee suicides and a factory explosion in China.[58] Even though Apple was not directly responsible for these workplace problems, it faced significant criticism.[59]

D. The Rise of Corporate Social Responsibility (CSR)

Corporate Social Responsibility (CSR) is an area of growing importance to corporate life. CSR initiatives have led to an increased level of scrutiny on the compliance function within a corporation.[60] The increased emphasis on CSR for companies and their boards will increase the demand for CSR related compliance training and increase the supply of such training due to increased expenditures for CSR related compliance. Whereas in the past many companies only paid lip service to CSR, increasingly CSR compliance has become accepted in many firms.

Furthermore, the literature on the empirical economics of CSR is growing.[61] Increasingly, CSR initiatives seem to be correlated to increased shareholder value.[62] This trend has developed for a number of

56. Jennifer Blackhurst et al., *An Empirically Derived Framework of Global Supply Resiliency*, 32 J. BUS. LOGISTICS 374 (2011).

57. Ricardo Flores et al., *How Well Do Supranational Regional Grouping Schemes Fit International Business Research Models?*, 44 J. INT'L BUS. STUDIES 451 (2013).

58. *Foxconn factory explosion in China kills three*, BBC (May 20, 2011), http://www.bbc.com/news/business-13476800.

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

60. *See* OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (Andrew Crane et al., eds., 2009) (providing multiple definitions of CSR).

61. Markus Kitzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LIT. 51 (2012) (providing a literature review).

62. Joshua D. Margolis et al., *Does it Pay to be Good . . . and Does it Matter? A Meta-Analysis of the Relationship Between Corporate Social and Financial Performance*, http://poseidon01.ssrn.com/delivery.php?ID=108065093065089082005122067077030067032037017041086025023086008065083084064103014030057099100122006004105115085006007077120067116038000015045102080099074095087120007016053064115115075102079009112083073123099068016112105108081105090066118097105088096&EXT=pdf (unpublished manuscript).

reasons: employee hiring and retention,[63] customer awareness,[64] and customer demands.[65] In addition, CSR related expenditures are being linked to improved financial performance because of the signaling value that CSR expenditures provide regarding credible corporate reporting of activities[66] or reputational capital.[67]

The increased attention of corporate governance, compliance, and CSR requires additional emphasis on CSR issues in compliance classes. Business schools have rolled out a number of CSR related courses and often include CSR within a larger ethics course. Law schools lag behind business schools in their ability to identify where and how much to incorporate CSR in to law school curricula. Currently, it appears no law school curriculum in a compliance class presently spends significant time addressing CSR.[68] It is likely that this will change largely as a response to business realities.

III. LAW SCHOOLS DO NOT UNDERSTAND COMPLIANCE

If compliance is a growth area in law school education based on increased demand in the legal profession, it remains unclear whether law schools understand what teaching compliance is about. Even fifteen years ago, the compliance function often was considered to be a backwater for legal practice, staffed by non-lawyers or by lawyers not in the more prestigious legal department. In some cases, compliance reported to legal. This has changed, but law schools—precisely because of the historical discounting of compliance work—are ill equipped to meet the challenges of the new compliance reality.

Compliance training and practice is about risk definition, assessment, and the management of risk. This requires identification of risk and *ex ante* preventative action. Nobel Prize winner Jean Tirole identifies this sort of compliance as active monitoring.[69] He distinguishes active monitoring from retrospective monitoring, which he describes as passive

63. Daniel W. Greening & Daniel B. Turban, *Corporate Social Performance as a Competitive Advantage in Attracting a Quality Workforce*, 3 BUS. SOC. 254 (2000); Samuel Bowles et al., *Incentive-Enhancing Preferences: Personality, Behavior, and Earnings*, 91 AMER. ECON. REV. 155 (2001).

64. Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, 59 MGMT. SCI. 1045 (2013).

65. Charles J. Fombrun, *Building corporate reputation through CSR initiatives: evolving standards*, 8 CORP. REPUTATION REV. 7 (2005); Charles J. Fombrun & Mark Shanley, *What's in a Name? Reputation Building and Corporate Strategy*, 33 ACAD. MGMT. J. 233 (1990).

66. Thomas Lys et al., *Signaling through corporate accountability reporting*, 60 J. ACCOUNTING & ECON. 56 (2015).

67. Paul C. Godfrey, *The Relationship between Corporate Philanthropy and Shareholder Wealth: A Risk Management Perspective*, 30 ACAD. MGMT. REV. 783 (2005).

68. This observation is based on the compliance syllabi that the author has seen.

69. Jean Tirole, *Corporate Governance*, 69 ECONOMETRICA 1, 9 (2001).

monitoring.[70]

Active monitoring requires a sense of the costs of non-compliance,[71] the current state of both public and private enforcement and how compliance goals across regulators in the United States (and abroad) may lead to problems of a labyrinth of overlapping and at times contradictory enforcement goals and requirements for a given firm. Adding to this difficulty for compliance programs is the increasing quantification of risk as well as pressures to make the spending on compliance efficient. This is due to the fact that multiple distinct units within a company (board committees (often audit), general counsel, CFO, among others) may be involved in compliance.

To solve regulatory complexity issues in an in-house setting, and for outside law firms to add value in compliance risk identification, assessment, and mitigation, students need to develop new skills. These skills should include empirical methods in finance and accounting, data analytics, and understanding of organizational behavior. They also should include skills in risk assessment based on an analysis of company and industry trends and anomalies as well as testing of various compliance and risk protocols. An integrated educational approach also requires the use of case studies to contextualize compliance problems and provide fact patterns to grapple through issues that involve a misalignment of incentives within the firm, asymmetries in information, breakdowns in organizational design, and psychological factors that might impact individual behavior. These issues and approaches are not integrated into the structure of most law school compliance classes. The University of Florida currently incorporates such approaches in its global compliance class that I teach. In addition, it offers a review of compliance materials that in-house lawyers use to offer insight into how to distill legal concerns into a form that non-lawyers can digest. Some of these documents, such as codes of conduct, are often available on company websites. Actual business documents help students better understand how workplace outputs look different for lawyer and non-lawyer audiences.

A. The Traditional Case Method is Less Effective for a Compliance Class

The traditional law school class uses a casebook as the primary source.

70. *Id.*

71. Karl S. Okamoto & Douglas O. Edwards, *Risk Taking*, 32 CARDOZO L. REV. 159 (2010). The problem is simple—if a compliance officer says "yes," the outcome of that decision, whether good or bad, will be known. If she says "no," the outcome will never be known. That means that, all other things being equal, compliance officers have an incentive to say no. They can't be second-guessed. The problem is that when "no" is the right answer, and the resulting investigation or penalty is avoided, there is no real way to attribute the absence of cost to the compliance officer's advice.

The contents of a casebook are relatively straightforward: excerpts from cases with some introductory commentary on a specific topic and occasional statutory language. Occasionally, case books also include short hypotheticals and review questions. Whether or not traditional casebooks work pedagogically in traditional doctrinal classes is open to debate.[72]

Whatever the general merits of law school casebooks, they seem to be ill suited to teach compliance effectively. This is in part due to the legacy of law schools teaching cases and letting employers teach skills specific to a job. This educational approach does not work for teaching students about complex businesses issues. As Professor Robert Rhee explains, "[t]he curricula of most law schools are not well-suited to train lawyers for advising corporate clients in a sophisticated practice from the get-go, much less pursuing a career in business."[73] The lack of core courses in law school to prepare students for sophisticated practice, particularly in an area of complexity at the level of compliance, is even more critical.[74] Yet, many law school students lack the tools in business to better understand the impact of regulation on firm and individual behavior.[75]

The regulatory landscape across areas of compliance remains unsettled. In some areas, regulation and enforcement priorities lead to rapid changes that cannot easily be incorporated into a law school casebook. Other than a general overview of a particular type of issue, a better way of teaching would be to use business school case studies as core reading.[76] This

72. *See generally* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

73. Robert J. Rhee, *Specialization in Law and Business: A Proposal for a J.D./'M.B.L.' Curriculum*, 17 CHAP. L. REV. 37, 37 (2013); Lawrence A. Cunningham, *Sharing Accounting's Burden: Business Lawyers In Enron's Dark Shadows*, 57 BUS. LAW. 1421 (2002).

74. One might even suggest that most schools lack the curricula because most faculty have never advised corporate clients or been engaged in a sophisticated practice. The traditional path of 3-4 years as a large law firm associate does not often mean skill in "advising clients," not because the experience is not valuable, but because rarely does the CEO, board, or general counsel look to a fourth year associate for meaningful advice. Unless faculty regularly consult or are active in the practitioner and policy groups in which they interact with practitioners at high levels, this limits the toolset of many law faculty.

75. Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 IOWA J. CORP. L. 363, 383 (2009) ("A thorough accounting treatment should be required in any business law curriculum. Indeed, any serious business law student would be well advised to take an independent introductory financial accounting course. If there was any doubt, the accounting scandals of Enron and WorldCom and the passage of the Sarbanes-Oxley Act resolved the matter.").

76. *See The Harvard Business School Case Method*, HARV. BUS. SCH., http://www.hbs.edu/mba/academic-experience/Pages/the-hbs-case-method.aspx (last visited Oct. 14, 2015). ("When students are presented with a case, they place themselves in the role of the decision maker as they read through the situation and identify the problem they are faced with. The next step is to perform the necessary analysis—examining the causes and considering alternative courses of actions to come to a set of recommendations. To get the most out of cases, students read and reflect on the case, and then meet in learning teams before class to "warm up" and discuss their findings with other classmates. In class—under the questioning and guidance of the professor—students probe underlying issues, compare different alternatives, and finally, suggest courses of action in light of the organization's objectives.").

allows for the development of critical thinking skills based on richly detailed case studies regarding a particular compliance topic with many pages of exhibits of financials for a company or other supporting documents.[77] Further, compliance requires lawyers to better understand how businesspeople approach issues where legal certainty often is not a given. In addition, such studies show lawyers to how to be effective in providing guidance to stop behavior that is too risky. Ultimately, students need to understand how businesspeople think and how to use some of the same tools that business schools use but with a heavier legal framing to allow law school students to better understand the thought process of people who are in the business unit.[78] Prime case studies include Enron[79] and Satyam[80] on accounting fraud and Siemens on anti-bribery issues,[81] among others.

B. The Proactive Compliance Skillset is Important but Under Emphasized in Traditional Compliance Classes

After exploring syllabi for compliance classes across a number of law schools, it becomes clear that without requiring pre-requisites, except perhaps corporations, these classes do not emphasize the importance of understanding the language of businesses or the issues and motivations of individuals and firms. Nor do these classes seem to require an understanding of business strategy. Further, much of the compliance function requires some basic understanding of accounting, finance, and economics. Unless there are a series of pre-requisites for the class, a compliance class needs to include an understanding of these core concepts and integrate these concepts into each subsequent class's discussion. The

77. *See* Michelle M. Harner & Robert J. Rhee, *Deal Deconstruction, Case Studies, and Case Simulations: Toward Practice Readiness with New Pedagogies in Teaching Business and Transactional Law*, 3 AM. U. BUS. L. REV. 81, 92 (2014) ("The differences between the Langdellian case method and the business school case method are stark. In the business school case method, there is no starting point analysis done by an expert, such as a lawyer or a judge, to criticize, deconstruct, or evaluate. There are only facts and data, and often the problem or issue is not even explicitly stated."); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 603 (2007) ("The archetypical 'case"' at a business school consists of much more information, and a much more open-ended situation, than the appellate cases used in law schools. They are taught by teachers asking different questions, often in classes as large as law school classes.").

78. Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 IOWA J. CORP. L. 363, 363 (2009). (Law schools should "teach a little more business and a little less law.").

79. Malcolm S. Salter, *Innovation Corrupted: The Rise and Fall of Enron (A) and (B)*, HARV. BUS. SCH. (2004), https://cb.hbsp.harvard.edu/cbmp/product/905048-PDF-ENG.

80. Ajai Gaur & Nisha Kohli, *Governance Failure at Satyam*, HARV. BUS. SCH. (2011), https://cb.hbsp.harvard.edu/cbmp/product/W11095-PDF-ENG.

81. Paul M. Healy & Djordjija Petkoski, *Fighting Corruption at Siemens*, HARV. BUS. SCH. (2012), https://cb.hbsp.harvard.edu/cbmp/product/112702-HTM-ENG.

failure of existing syllabi to incorporate active compliance issues and integrate these issues within a broader curriculum limits the effectiveness of such compliance programs.

1. Incentives and Organizational Design

Organizational design and incentives within the firm help to shape firm outcomes. As such, understanding these issues and responding to them to create more effective incentives and organizational structures aid in creating a more effective set of compliance tools.[82]

Organizations are complex[83] and what works at one level of an organization may not work at another level of the same organization due to issues of complexity and organizational design.[84] Understanding this complexity is important as the design of a firm impacts behavior within the firm. A firm's environment and the amount of individual discretion affect decision-making for the entire organization and may constrain the decision-making of individuals within it. Understanding organizational structure and incentives may illuminate how to better structure closer-to-optimal corporate compliance to police against compliance violations.[85] Day to day compliance is, in fact, the primary responsibility of the business unit heads rather than a compliance officer. The compliance function is only there to assist the operation of the business, but because compliance officers do not have direct reporting-line authority over the businesses, they should not be the ones saddled with the responsibility.

A core part of the literature in both economics and finance is the concept of agency costs.[86] Within a firm, the agent may have incentives that differ from those of management. Firms work to reduce this misalignment through improved monitoring. There are, however, limits

82. *See generally* Simone M. Sepe & Charles K. Whitehead, *Paying for Risks: Bankers, Compensation, and Competition* (Cornell Law Faculty Working Papers, Paper No. 114), http://scholarship.law.cornell.edu/clsops_papers/114.

83. Lauren B. Edelman & Marc C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997); Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOCIOLOGY 548, 556 (1981); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975).

84. Frank R. Dobbin et al., *The Expansion of Due Process in Organizations, in* INSTITUTIONAL PATTERNS AND ORGANIZATIONS (Lynne G. Zucker, ed., 1988); James N. Baron et al., *War and Peace: The Evolution of Modern Personnel Administration in U.S. Industry*, 92 AM. SOC. REV. 350 (1986); Lynn G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880-1935*, 28 ADMIN. SCI. Q. 22 (1983); Neil Fligstein, *The Spread of the Multidivisional Form Among Large Firms, 1919-1979*, 50 AM. SOC. REV. 377 (1985).

85. Sydney Finkelstein & Donald C. Hambrick, *Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion*, 35 ADMIN. SCI. Q. 484 (1990).

86. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 327–28 (1976).

to significant monitoring of agents. Too much monitoring reduces the ability of agents to perform their jobs and might chill legal risk taking.[87] Such risk taking may serve to benefit the firm. Therefore, effective compliance mitigates risk while it maintains freedom for the firm to undertake its business objectives.[88]

Incentives within an organization matter to the design and implementation of a compliance program just as organizational design may contribute to compliance risk. Understanding the incentives within organizations and their institutional structures may identify ways to create and promote a pro-compliance culture within a company.[89]

Teaching about organizational design issues helps promote compliance by individuals within the company with legal and regulatory requirements.[90] Complexity within a firm may increase agency costs, which in turn may lead to increased deviation from a pro-compliance culture.[91] These higher agency costs, in turn, may serve to increase the

87. Because each firm is uniquely situated from the standpoint of effective compliance, corporation law only sets a low floor for holding managers liable under corporation law due to failure to monitor. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996) (ruling that only "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system—will establish the lack of good faith that is a necessary condition to liability" and explaining that a failure of the duty to monitor is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."). *See also* Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963) (stating that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists"). *See also* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (reinterpreting the Caremark duty as a loyalty duty and requiring a showing "that the directors knew that they were not discharging their fiduciary obligations."). For an analysis of Stone, see Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769 (2007).

88. The Committee of Sponsoring Organizations of the Treadway Commission 2013 Report outlines seventeen principles of effective internal controls: CONTROL ENVIRONMENT 1. Demonstrates commitment to integrity and ethical values 2. Exercises oversight responsibility 3. Establishes structure, authority, and responsibility 4. Demonstrates commitment to competence 5. Enforces accountability RISK ASSESSMENT 6. Specifies suitable objectives 7. Identifies and analyzes risk 8. Assesses fraud risk 9. Identifies and analyzes significant change CONTROL ACTIVITIES 10. Selects and develops control activities 11. Selects and develops general controls over technology 12. Deploys through policies and procedures INFORMATION & COMMUNICATION 13. Uses relevant information 14. Communicates internally 15. Communicates externally MONITORING 16. Conducts ongoing and/or separate evaluations 17. Evaluates and communicates deficiencies. *COSO Framework's 17 Principles of Effective Internal Control*, WEAVER (Dec. 30, 2013), http://weaver.com/blog/coso-framework%E2%80%99s-17-principles-effective-internal-control.

89. Trust within an organization also matters. *See* Lawrence A. Cunningham, *Berkshire's Disintermediation: Buffett's New Managerial Model*, 50 WAKE FOREST L. REV. 509 (2015).

90. Sydney Finkelstein & Donald C. Hambrick, *Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion*, 35 ADMIN. SCI. Q. 484 (1990).

91. R. Preston McAfee & John McMillan, *Organizational Diseconomies of Scale*, 4 J. ECON. & MGMT. STRAT. 399 (1995); J. Myles Shaver & John M. Mezias, *Diseconomies of Managing in Acquisitions: Evidence from Civil Lawsuits*, 20 ORG. SCI. 206 (2009).

probability of illegal and unethical activity within a firm.[92]

Part of the implementation of compliance programs is the inclusion of top management. An effective compliance culture requires the support of top management.[93] If top management shows an active and sincere embrace of compliance activities, this will change firm culture to one that is more pro-compliant. Further, implementation requires fairness in implementation. Such fairness serves a legitimating function for employees.[94] This leads to better monitoring through improved reporting of potential wrongdoing and advice regarding whether or not behavior that merely is ambiguous creates legal risk.[95] When employees feel that the firm's culture is legitimate,[96] this increases the credibility of a compliance program as its legitimacy will encourage employees to better report suspected wrongdoing.[97] In other words, compliance that is only cosmetic in nature does not lead to better compliance.[98]

Pro-compliant behavior needs more than just words.[99] When firms take pro-compliant ethical values seriously, illegal behavior that can be observed shows a reduction in the total number of cases reported, but whether this reduces illegal behavior overall is not clear.[100] One anecdote provides a telling example—the code of conduct at Enron was "state of the art" for its time. However, the unethical and non-compliant norms at Enron were pervasive within the company. Further, the unethical norms

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92. Marie A. McKendall & John A. Wagner, III, *Motive, Opportunity, Choice, and Corporate Illegality*, 8 ORG. SCI. 624 (1997).

93. Sydney Finkelstein & Donald C. Hambrick, *Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion*, 35 ADMIN. SCI. Q. 484 (1990); Gary R. Weaver et al., *Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures, and Corporate Ethics Practices*, 42 ACAD. MGMT. J. 539 (1999).

94. Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 139 (1999).

95. Howard Bergman & D Daniel Sokol, *The Air Cargo Cartel: Lessons for Compliance*, *in* ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 301 (Caron Beaton-Wells & Christopher Tran, eds., 2015).

96. Tom R. Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 35 (2008); Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACADEMY MGMT. J. 1143 (2005); Gary R. Weaver, *Encouraging ethics in organizations: A review of some key research findings*, 51 AM. CRIM. L. REV. 293 (2014).

97. Treviño et al., *supra* note 94. *See also* INT'L CHAMBER OF COM., THE ICC ANTITRUST COMPLIANCE TOOLKIT: PRACTICAL ANTITRUST COMPLIANCE TOOLS FOR SMES AND LARGER COMPANIES 4 (2013) ("The key to any successful compliance program, whether it relates to antitrust or another topic, is to reach the stage where the behavior required under the program is an indistinguishable part of your company culture.").

98. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491–92 (2003); Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 106 (2002).

99. Treviño et al., *supra* note 94, at 149.

100. Gary R. Weaver & Linda Klebe Treviño, C*ompliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 327-32 (1999).

were a function of the norm created by top management at Enron.[101] Unethical corporate culture as a whole creates greater compliance risk.[102] The same is true in particular for top management.[103]

Implementation of compliance programs should be part of teaching compliance. Too often teaching compliance focuses on compliance failures rather than on active compliance. Similarly, implementation should incorporate ethical decision-making into both teaching and practice of compliance.[104]

2. Ensuring the program has the right elements

a. Risk Analysis (Identifying and Minimizing Legal Risk)

Risk analysis plays a critical role in compliance planning and training. It creates a methodology to understand and plan for compliance risk, creates more effective monitoring for the board and management of compliance issues, and allows for testing of compliance controls within a company to improve compliance processes, protocols, and procedures. Simple risk matrixes can be used to explore these issues in class and include specific hypotheticals of behavior for the class to put within the risk matrix.

Companies have different compliance risks based on numerous factors. For example, the structure of executive compensation may lead to potential risk for compliance because of the nature of the incentives.[105] If incentives are not properly aligned, agents might inflate earnings because of the potential short term payout to them.[106] This seems to be particularly true with excessive option related financial compensation to top executives or managers.[107]

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101. BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2004).

102. BARBARA LEY TOFFLER, FINAL ACCOUNTING: AMBITION, GREED, AND THE FALL OF ARTHUR ANDERSEN (2004); Lynne L. Dallas, *A Preliminary Inquiry Into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1 (2003); Milton C. Regan, *AALS Annual Meeting Article: Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (007).

103 James E. Hunton et al., *The Relationship between Perceived Tone at the Top and Earnings Quality*, 28 Contemporary Accounting Research 1190 (2011).

104. Lynne S. Payne, *Managing for Organizational Integrity*, 72 HARV. BUS. REV. 106 (1994).

105. Sharon Hannes & Avraham Tabbach, *Agency Costs and Misrepresentation in Leveraged Firms*, 40 IOWA J. CORP. L. 99 (2014); Shane A. Johnson et al., *Managerial Incentives and Corporate Fraud: The Sources of Incentives Matter*, 13 REV. FIN. 115 (2009); Ling Peng & Ailsa Röell, *Executive Pay and Shareholder Litigation*, 12 REV. FIN. 141, 143 (2008); Sepe & Whitehead, *supra* note 82.

106. David J. Denis et al., *Is There a Dark Side to Incentive Compensation?*, 12 J. CORP. FIN. 467, 468 (2006)

107. *See* Sharon Hannes, *Compensating for Executive Compensation: The Case for Gatekeeper Incentive Pay*, 98 CAL. L. REV. 385 (2010).

Classes can explore how to identify risk and various risk assessment methodologies and processes that are tailored to the specific types and levels of compliance and compliance risk within a firm. This means teaching that there are different compliance risks and training needs at different levels within an organization based upon function, level, probability of risk, and the impact of compliance issues within the firm. Risk factors that may drive illegal behavior should also be taught. The Organisation for Economic Co-operation and Development (OECD) describes these factors to include a lack of commitment by management,[108] legal uncertainty,[109] employee error,[110] misalignment of incentives,[111] and rogue employees.[112]

b. Mitigation

One critical thing to teach in the classroom setting is that the creation of a well-functioning and robust compliance program does not mean that the compliance program will be fool-proof. Complex global organizations have many moving parts. Part of teaching includes identifying legal regimes that have understood that a corporate misdeed does not necessarily mean that the compliance program does not work.[113] For example, the United States Sentencing Guidelines provide that proper oversight of a compliance program will be taken into account for sentencing, which explains the importance of top management's oversight on compliance issues: "The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics

108. *Promoting Compliance with Competition Law 2011*, ORG. FOR ECON. CO-OPERATION & DEV. (2011), http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

109. John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) ("Although some areas have too many detailed rules that do not reflect current production processes, other areas are dangerously under-regulated, with no standard to direct industry behavior.").

110. For a discussion on employee error in the context of organizational processes, see DIANE VAUGHN, CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR (1985.

111. Shane A. Johnson et al., *Managerial Incentives and Corporate Fraud: The Sources of Incentives Matter*, 13 REV. FIN. 115 (2009); Sharon Hannes, *Managers vs. Regulation: Post-Enron Regulation and the Great Recession*, 3 HARV. BUS. L. REV. 279 (2013); Jap Efendi et al., *Why Do Corporate Managers Misstate Financial Statements? The Role of Option Compensation and Other Factors*, 85 J. FIN. ECON. 667 (2007); Giancarlo Spagnolo, *Managerial Incentives and Collusive Behavior*, 49 EUR. ECON. REV. 1501 (2005).

112. *See* Krawiec, *supra* note 98.

113. *See generally* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

program."[114] Similarly, both the U.S. and UK governments have explained the importance of allocating "adequate" resources to the compliance function, which in the UK operates as a defense.[115] In the case of the U.S. Sentencing Guidelines, this includes a discussion of the following language and its implications. The U.S. Sentencing Guidelines make such a distinction clear:

> (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation—Organizations), an organization shall—
>
> (1) exercise due diligence to prevent and detect criminal conduct; and
>
> (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
>
> Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. *The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct*."[116]

Classes should spend some time working through the importance of the Sentencing Guidelines because of the assumptions that the Guidelines use about compliance. The Sentencing Guides articulate seven steps to an effective compliance program.[117] These can be used in class as a springboard to discuss effective compliance programs that have led to penalty mitigation in real world settings. An example of this is the compliance program efforts made by Morgan Stanley that led to prosecution of an individual, but not the firm, for an FCPA violation. Classes should include a discussion of the press release of the case, which details the Department of Justice's decision not to prosecute Morgan Stanley:

> "This defendant [the individual rogue employee] used a

114. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(A) (U.S. Sentencing Comm'n (2014)).

115. *See* The United Kingdom Bribery Act 2010 c. 23, § 7. *See also A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. DEP'T OF JUST. & U.S. SEC. & EXCHANGE COMM'N, http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf (last visited Nov. 25, 2015).

116. U.S. SENTENCING GUIDELINES § 8B2.1(b)(2)(A) (U.S. Sentencing Comm'n 2011) (emphasis added).

117. *Id.*

> web of deceit to thwart Morgan Stanley's efforts to maintain adequate controls designed to prevent corruption. Despite years of training, he circumvented those controls for personal enrichment. We take seriously our role in detecting and prosecuting efforts to evade those controls," said U.S. Attorney Lynch . . . .
>
> According to court documents, Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners.[118]

This example builds the case for firms to invest in pro-active compliance because of the potential cost savings of financial and reputational penalties as well as the imposition of corporate monitors as part of a deferred prosecution or non-prosecution agreement.[119]

Another DOJ press release, this time in the antitrust area, offers compliance classes an important example of how a firm can create a credible compliance program to receive a lower sentence for a violation after it previously received penalties for non-compliance. Put differently,

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118. OFF. OF PUB. AFF., *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA*, DEP'T OF JUST. (Apr. 25, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-534.html.

119. GARRETT, *supra* note 14 (addressing corporate monitors).

a firm can learn how to make compliance more effective after it has been through a compliance problem. An illustrative example of this is Barclays plea bargain in the Forex cartel, following its collusion in the Libor cartel. In the Libor cartel, the plea agreement for Barclays regarding its wrongdoing in price fixing and manipulation of Libor[120] cost the firm $455 million in financial penalties. Further, within a few days of the press release of its settlement with DOJ, its CEO resigned under significant pressure and media scrutiny.[121] This was not to be the only time that Barclays would be caught within an antitrust context for violating the law. However, what changed was Barclays response to compliance. After its penalties in the Libor cartel, Barclays instituted a robust compliance program. The implementation of a robust compliance program at Barclays after the Libor antitrust collusion violation saved Barclays considerably because of a subsequent cartel case. On May 20, 2015, five major investment banks pleaded guilty for collusion in the foreign currency exchange (Forex) spot market.[122] The credit for the compliance program appears in a single line in the Barclays plea agreement: "The parties further agree that Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. §§ 3553(a), 3572(a), in considering, among other factors, the substantial improvements to the defendant's compliance and remediation program to prevent recurrence of the charged offense."[123] None of the other investment banks received this credit.

These examples help students to contextualize the benefits of compliance programs and to help them to make arguments to potential clients (or to their superiors within an in-house setting) about the benefits of resource allocation for compliance programs.

IV CONCLUSION

Compliance is a growing field in both legal education and practice. Overall, whether compliance teaching is geared towards students or individuals within a company, greater care and nuance must be taken in undertaking compliance teaching and training to reflect the inter-disciplinary and proactive elements of the creation of robust and effective compliance programs. Increasingly, this means that lawyers and law

120. Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from LIBOR for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. 10 (2012).

121. Liam Vaughan & Ambereen Choudhury, *Barclays CEO Quits After Record Libor-Rigging Fine*, BLOOMBERG NEWS (July 3, 2012), http://www.bloomberg.com/bw/articles/2012-07-03/barclays-ceo-quits-after-record-libor-rigging-fine.

122. OFF. OF PUB. AFF., *Five Major Banks Agree to Parent-Level Guilty Pleas*, DEP'T OF JUST. (May 20, 2015), http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

123. Plea agreement on file with the author.

professors need to incorporate insights from other disciplines in their teaching to use more case studies.