

Compliance & Ethics Professional

December
2016



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org



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Dangerous weaknesses in compliance & ethics programs

When the Sentencing Guidelines were adopted in 1991, it was recognized that this was an experiment. It is still an ongoing experiment, and like any experiment, there is a need to monitor results and react.



Murphy

While compliance and ethics programs are playing an important part in preventing organizational misconduct, there remain gaps in this effort where improvement is needed. What should be the focus of government in providing incentives and recommendations for companies to improve their programs? Based on years of working in this area, these are the points I believe most need attention:

1. Not addressing company executives as the highest risk in the company. Companies tend to believe the big risk is the “rogue” employee out in the field, but the cases point to the top people—setting the tone, covering up violations, and even directly breaking the law.

2. Chief ethics and compliance officers being underpowered, disconnected from decision making, and not independent. We have made progress toward Compliance 2.0, but CECOs still do not have the power, position, and independence to stand up to the top dogs in tests of strength.

3. Not recognizing the power of incentives. Incentives have been included in the Sentencing Guidelines since 2004, but people are still reluctant to recognize just how important incentives are. Why do companies use incentives? Because they really drive behavior. Why do

you need to use incentives in the compliance program? Because they drive behavior.

4. Relying on trust as a control. Yes, we need to inspire people, but there remain a percentage of employees who will do wrong if they can. Trust is OK, but you also need verification.

5. Being distracted by clichés, buzz words, and other bright shiny objects. There are lots of useful insights out there, but we also need to keep focused on our jobs. So, for example, “culture trumps compliance” sounds slick, but the Sentencing Guidelines standards, smartly applied, tell us how to get there. Don’t be distracted.

6. Shopping the Sentencing Guidelines. The famous “seven” elements (closer to 20 when separated out) are not options; they are minimum steps. Read each one, and recognize each part is important. The guidelines do not say “Pick the ones you like best.” You need to use them all.

I have developed these points further in an upcoming article, Joseph E. Murphy, “Policies in conflict: Undermining corporate self-policing,” 69 Rutgers U.L. Rev. 2 (forthcoming 2017), draft available at <http://ssrn.com/abstract=2827324>.

This is not to say that these six are all that matters. There are certainly many ways that programs can be improved. But these six can dangerously undercut the development of effective compliance and ethics programs and lead to serious violations. *

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