

## PUBLICATION PENDING

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### COMPLIANCE & ETHICS AS A PROFESSION – IN THE PUBLIC INTEREST

Joseph Murphy, Director of Public Policy  
Society of Corporate Compliance and Ethics

#### I. Introduction

The field of compliance and ethics (C&E) is fairly described as a relatively new development. Compared to other areas of professional practice such as law and medicine, its pedigree is of recent vintage. There are many who would date it from the introduction of the US Organizational Sentencing Guidelines<sup>1</sup> in 1991 (Sentencing Guidelines), although elements of the field predate that milestone.

Since the promulgation of the Sentencing Guidelines, many other standards and guidances for effective organizational compliance programs have been published. These include the Joint DOJ/SEC Resource Guide to the U.S. Foreign Corrupt Practices Act,<sup>2</sup> and outside the U.S., the OECD Good Practice Guidance for Internal Controls, Ethics and Compliance,<sup>3</sup> the UK Sentencing Council Fraud, Bribery and Money Laundering: Corporate Offenders Definitive Guideline,<sup>4</sup> the UK Ministry of Justice Bribery Act 2010 Guidance<sup>5</sup>, the Competition Commission of India Competition Compliance Programme for Enterprises,<sup>6</sup> and the Canadian Competition Bureau's Corporate Compliance Programs Bulletin<sup>7</sup> – to name just a few. All of these sets of guidelines and standards, in response to an ever-expanding patchwork of laws and regulations on compliance, have brought more and more C&E practitioners into the field. The expansion of related law and guidance has added complexity and richness to C&E as a discipline and has contributed to its evolution into a vibrant, dynamic and multifaceted profession.

Along with the exponential growth of compliance and ethics as a profession, a wide spectrum of specialties and sub-specialties has evolved in response to the needs of specific industries and risk areas, such as privacy in the health care arena, or anti-money laundering in financial services. But some basic generalizations are instructive as we analyze this new profession.

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<sup>1</sup> U.S.S.G. section 8B2.1.

<sup>2</sup> US Department of Justice and US Securities and Exchange Commission, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act (Nov. 14, 2012), <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>

<sup>3</sup> <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>

<sup>4</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Fraud\\_Definitive\\_Guideline\\_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Definitive_Guideline_(web).pdf)

<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181762/bribery-act-2010-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf)

<sup>6</sup> [http://www.cci.gov.in/images/media/Advocacy/comp\\_compliance\\_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00](http://www.cci.gov.in/images/media/Advocacy/comp_compliance_pro.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00)

<sup>7</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html>

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The history of compliance and ethics logically parallels the growth in importance of large organizations in modern society. The field is about the prevention and detection of misconduct within organizations. It is also strikingly multidisciplinary. In order to control the conduct of large organizations and the multitude of employees and agents they may encompass, a broad range of management tools is required. But the field is not just the mechanical application of management tools; it also comes with an important mission. Its focus is to protect not just the organization, but society in general from the enormous harm that large organizations can inflict. Thus, C&E is a field with a mission.

Accompanying these historic developments are questions about the best way for C&E to proceed, not only as an effective function within organizations, but also as a professional discipline. Who should be doing the work? Who should have ultimate C&E responsibility in the organization? What are the respective responsibilities of the Board, management and the chief compliance officer? Are there fundamental principles in C&E, or is it a freewheeling exercise where each organization re-invents approaches? What role should government be playing? And related to all of these questions, what should the compliance field, and those who practice within it, be doing to further develop it as a new, evolving profession?

## II. What Is This Field and Who Is in It?

As noted above, the field of compliance and ethics deals with methods within organizations to prevent and detect misconduct. This includes addressing all forms of illegal conduct attributable to the organization. This list is quite long, from antitrust to employment discrimination to environmental violations. The field also encompasses the prevention and detection of unethical conduct, beyond what is prescribed by law. In part, this reflects the recognition that any organization that is accustomed to cutting corners and engaging in sharp practices will also eventually run afoul of the law.

To achieve these objectives, the practitioners of C&E apply fundamental management principles used more broadly to achieve results in organizations. In the past there have been those who misperceived the field as being limited to policies, such as codes of conduct, and training. But for a compliance and ethics program to have any meaningful effect, it is necessary to use *all* the management techniques, tools and processes that organizations use when they want to achieve an important objective.

The model template for a compliance and ethics program is set out in the US Organizational Sentencing Guidelines,<sup>8</sup> widely followed as the most comprehensive framework for developing an effective compliance program. While there are a number of other guides and standards on compliance programs as discussed above, the Sentencing Guidelines are the broadest in terms of scope, covering all types of violations, and incorporating a good mix of management steps to empower a meaningful compliance

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<sup>8</sup> U.S.S.G. section 8B2.1.

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program. These steps include risk assessment, management responsibility, the setting of standards, imposition of internal controls, care in giving people responsibility, effective communications, meaningful discipline, appropriate incentives, audits and monitoring, evaluation of the compliance program, and mechanisms for people to raise compliance issues, and for investigating violations.

As would be expected given this range of steps, the types of positions in the C&E field are also broad and multidisciplinary. At the apex would be the chief ethics and compliance officer (CECO), responsible for the design and management of the program. There also need to be people with the ability to handle training, communications, audits, investigations, discipline, incentives, risk and program assessment, information technology and various other functions.

What draws all of this together, however, is the common mission and ethical positioning. The mission of C&E practitioners is to prevent and detect misconduct by the organization and all those acting for it. While practitioners in this field have an employer, they also have a singular duty to protect the public, operating in an environment where they may be the first to know of incipient harm. Unlike others in the organization, this is not a sidelight of their job; this is their entire job.

### **III. What Is Meant by C&E as a “Profession”?**

Given the new and evolving nature of this field, some ask: is it, or should it be, a profession? Here we will examine briefly the general characteristics of a profession, and the progress of the compliance and ethics field against these criteria.

Perhaps the most distinctive aspect of the field, and a key characteristic of any profession, is its nexus to the public interest. The focus on preventing organizational crime and other violations goes to the core of public concerns. Those who practice in the C&E field have a duty well beyond the four walls of their employer. While there is certainly a duty to one’s employer to advance its interests, the duty to prevent and detect misconduct is not just part of this field; it is the reason – as noted in the Sentencing Guidelines- that it exists.

Professions are also noted for their specialized knowledge and training. Over the last 20+ years, the modern compliance and ethics field has developed a broad spectrum of specialized skills, knowledge and practices necessary to discharge the evolving mandate to detect and prevent corporate misconduct. These skills and practices include necessary management elements – the ability to motivate people and to explain the rules, knowledge of how to conduct investigations and audits, and ability to measure and monitor progress against goals, to name a few. But the field also has its own prescriptive standards, as first embodied and codified by the Sentencing Guidelines. Different jurisdictions and different enforcement agencies provide additional guidance, and practitioners need to understand and master these.

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The development of the specialized mandate, knowledge, and skills in the field is also reflected in the establishment of several professional organizations supporting the training and sharing of best practices by C&E practitioners, including the Society of Corporate Compliance and Ethics, the Ethics and Compliance Officer Association, and the Australasian Compliance Institute<sup>9</sup>, and also industry specific groups such as the Health Care Compliance Association and the Securities Industry and Financial Markets Association. In a somewhat related vein, an increasing number of colleges, universities<sup>10</sup> and graduate schools have developed courses and, in some cases, degree programs, in the field of compliance and ethics.

Parallel to the development of the field's specific mandate, knowledge and skills has been a strong momentum for an independent compliance function that is elevated and empowered within the organization. Although historically many companies tended to subordinate their compliance and ethics departments within the general counsel's office, elevating the CECO to executive status, and to serving as an independent voice in the C-Suite, has become an increasingly prevalent trend.<sup>11</sup>

Apart from the growing stature of the CECO, the codified body of compliance standards, and the emergence of multiple professional societies in C&E, there have also been several other developments that signify the evolution of the C&E field toward professional status. For example, the ethical dimension of the field is also becoming more standardized, in a way that demands mastery by those entering the field. Again, formal standards around a central body of knowledge and practice are a core element of any profession. With regard to ethical standards for those practicing in the C&E field, the Code of Professional Ethics promulgated by the Society of Corporate Compliance and Ethics provides detailed rules and commentary that give important guidance for those operating in the field.<sup>12</sup>

Professions also are identified with autonomy and a shared experience. In no field is autonomy more important for the benefit of society than it is in C&E. A compliance and ethics practitioner works in organizations surrounded by hundreds or thousands of colleagues. These colleagues are all part of the "team," with a goal to advance the

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<sup>9</sup> Subsequently redesignated the "GRC Institute."

<sup>10</sup> For example, The New England College of Business offers a Masters Degree in Business Ethics and Compliance, <http://www.necb.edu/master-of-science-in-business-ethics-and-compliance-online.cfm> and the University of St. Thomas School of Law in Minnesota, MN offers a Masters and LL.M degree in Organizational Compliance and Ethics <http://www.stthomas.edu/law/compliance/>.

<sup>11</sup> While the debate on the positioning and independence of compliance continues, at least one recent study suggests that compliance programs led by individuals reporting to the CEO, the Board, or an independent Board committee – instead of to the general counsel – are significantly more effective. LRN 2014 Ethics and Compliance Program Effectiveness Report <http://pages.lrn.com/the-2014-ethics-and-compliance-program-effectiveness-report>

<sup>12</sup> Code of Professional Ethics for Compliance and Ethics Professionals, <http://corporatecompliance.org/Resources/View/smid/940/ArticleID/675.aspx>

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organization's interests. The compliance and ethics person, by contrast, is ethically compelled to stand up to the group and the team. While others may go along with the team, or may be allowed simply to give advice and leave the decisions to the team, a compliance and ethics person does not have that option. Rather, he or she must use whatever steps are necessary to prevent misconduct.<sup>13</sup> This is an enormously difficult role, and it calls for the person to stand independent and autonomous.

The other half of this separateness is that it creates a shared experience among all those dedicated to the compliance and ethics mission. When their corporate teammates may scorn them for being the only ones not going along with the plan, the compliance and ethics person can reach out and network with other peers who have experienced this same resistance. The professional associations supporting C&E practitioners provide a wide range of opportunities for facilitating this shared experience via best practice sharing and networking. More recently, a vibrant and evolving panoply of social media outlets has added exponentially to this process.

Professions are also associated with self-regulation. They set standards for their members and then require their members to adhere to those standards. They also require practitioners to demonstrate a high level of competence to enter and remain in the field. Members of the profession band together to develop and administer the standards, and to provide a system for promoting professionalism.

In the compliance and ethics field this process has been developing. The Society of Corporate Compliance and Ethics has developed a strong Code of Professional Ethics for Compliance and Ethics Professionals. It has also gone through the long and detailed process to develop a certification system.<sup>14</sup> Today, those in the field can obtain the status of Certified Compliance and Ethics Professional through meeting the educational requirements and then satisfactorily completing an exam. For example, as of this writing, there are approximately 7,000 practitioners with this and related C&E certifications.<sup>15</sup>

One remaining issue in the professionalization of C&E, however, is the role of the government in the process. In order for a membership organization to police its members' competence and ethical performance, it is necessary to consider the role of government. Without government support, it is highly problematical for any membership organization to impose sanctions against those pursuing their careers. The risks in the legal environment are enormous, and without the government playing a role, the membership organization has little if any power to impose meaningful sanctions. A remaining issue, then, is whether there is a role for the government in supporting

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<sup>13</sup> Code of Professional Ethics for Compliance and Ethics Professionals, R 1.2  
<http://corporatecompliance.org/Resources/View/smid/940/ArticleID/675.aspx>

<sup>14</sup> <http://www.compliancecertification.org/AboutCCB/EarningCCBaccreditation/Programaccreditation.aspx>

<sup>15</sup> The Compliance Certification Board of the SCCE/HCCA currently offers seven types of certification to compliance professionals  
<http://www.compliancecertification.org/CCEP/CertifiedComplianceEthicsProfessional.aspx>

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professional certification in C&E, and providing protection for those called upon to police the field.<sup>16</sup>

### IV. The Public Interest and the Need for Professionalism

In the fields that have traditionally been considered professions, there is certainly a public interest in their status. In medicine, for example, the average citizen cannot be expected to understand the intricacies of the medical field, yet the health of the population is clearly a matter of public interest. Yes, most medicine may be mundane, but all citizens face the prospect of medical emergencies where they are at the mercy of the medical practitioner. Thus, the public wants to be sure of the quality and integrity of the providers.

Similarly in the practice of law, most of the services may be routine, but the chance that one may face a legal tribunal or a powerful prosecutor leads society to value a system that ensures the integrity, competence and loyalty of the legal profession.

In this light, consider the remarkable role of the compliance and ethics practitioner. The C&E person spends his or her entire day working to prevent conduct that by definition imperils the public. Picture the compliance person in a pharmaceutical company, for example. While one rogue doctor might harm dozens or possibly hundreds of individuals, one rogue pharmaceutical product could hurt millions of people around the world. Picture the compliance person working in a chemical company. One bad lawyer might cause innocent individuals to lose cases or be unfairly incarcerated, but one bad control system could lead to a disaster like Bhopal.

The defining point here is the degree of potential harm that can come from organizational misconduct, and the demonstrated inability of the state to do anything more than come in after the disaster and try to allocate blame. One of the most important elements of modern society is the growth of large organizations. In a world where markets now span the globe, businesses operate on a massive scale. But it is not only industry where this occurs. Universities, governments, charities, and other non-governmental organizations – all have become larger and more pervasive.<sup>17</sup>

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<sup>16</sup> Obviously and by analogy to established professions including law and medicine, government is often involved in backing those professions through a formal licensing framework, thereby ensuring substantial professional autonomy and self-governance, but also with a formal disciplinary acknowledgment of public responsibility, as well as for standard setting and enforcement. It is an open question whether, or in what manner, these sorts of professional licensing models can or should apply, in the context of C&E as an emerging professional discipline.

<sup>17</sup> For example, the Rutgers Center for Government Compliance and Ethics (where the author serves as Chairman of the Advisory Board) has as its mission the encouragement of compliance and ethics programs as an element of public governance at the federal, state, and local levels in the United States and worldwide through a variety of activities including research, education, networking, and thought leadership. <http://rcgce.camlaw.rutgers.edu>

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With this increase in size and scope has come an increased ability to impact society. The degree of potential harm from such large organizations is striking. Unfortunately, equally noteworthy is the inability of any organization outside of such large entities to control their conduct. Even a casual observer must be impressed by the steady parade of stories of significant organizational crime and misconduct. While each major business crime is followed by stories of investigations, outrage and public fulminations, the denouement is typically the simple transfer of funds from large companies to large governments, and the occasional sacrifice of a few employees in a public trial. But none of this process seems to interdict the crime before the harm is done.

The one exception to this process is the development of a strong internal force to stop corporate crime and misconduct before the harm is done. This is the essential role of compliance and ethics practitioners within the organization. Yet these practitioners are potentially in the most vulnerable position imaginable – always outnumbered by peers who are well into the groupthink that leads to organizational misadventures. The compliance and ethics person is called upon to stand up for a public that often does not even know the person exists. Given this circumstance, a strong, even compelling, argument exists that the compliance and ethics practitioner has a greater need to be considered a profession than do many of the other established professions.

If the compliance and ethics person is to be the bulwark against so many dangerous forms of misconduct and entrenched power structures, then there needs to be more than a fond hope that this he or she can play this role in an effective way. There is urgent need for this essential position to be strengthened in meaningful ways. Placing these practitioners in the role of professionals is a major step along this path.

### **V. How a Strong Professional Ethical Standard Can Help**

Among the most important sources of support a compliance and ethics practitioner can have is a strong and specific code of professional ethics. This is especially important in a corporate environment where loyalty is highly prized, and failure to go along with the corporate team is considered suspect. When an employee is empowered to refuse to conform to the corporate group's demands, because of a specific mandate from his or her profession, this can be a powerful event.

For example, in the corporate world the usual rule is that one's boss makes the final call on things. So if a compliance person says a certain course violates the company's code of conduct, but the boss nevertheless wants to do it (and the lawyers advise it is not illegal), what does the compliance person do? Under SCCE's code of ethics there is no ambiguity. The compliance person must take whatever steps are necessary to prevent the violation. This is not merely a requirement to give competent advice; it is a call for

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action. When the boss says, “enough, I have decided,” the compliance person then has no option; the person must escalate the matter, all the way to the board of directors.<sup>18</sup>

If a compliance practitioner is asked to conduct an investigation as a result of a whistleblower’s allegations, but is told not to go too far and not to bother certain managers who are too busy to be interrupted, the compliance practitioner again has no choice.<sup>19</sup> He or she must insist on conducting a diligent investigation consistent with professional standards. If this is not permitted, then the compliance and ethics person must advise the board, including details relating to the circumstances.<sup>20</sup>

In the corporate world, one can express opinions, but usually when the boss says “march,” the only questions left are “how far and how fast.” The compliance and ethics person, though, is charged with a duty that history has shown few if any in the corporate world have been willing or able to do. When the answer should be “no,” the compliance and ethics person must say “no.” Without the power that comes from being a professional, in today’s environment the compliance and ethics practitioner is simply being set up to fail.

### VI. Going Forward

What can we do going forward to further support the development of the compliance and ethics profession? Those of us in the C&E field can pay more attention to developing a common ethical code such as the SCCE Code of Professional Ethics. This includes:

- Making it part of employment contracts
- Making it part of position descriptions
- Incorporating it into company compliance and ethics programs, e.g., in board resolutions and policies on the program
- Referring to it whenever it covers issues we are addressing in our work
- Including it in our writings and presentations when dealing with our field

We must also promote the professionalization of the field. For example, companies can specify that professional certification, like the CCEP, is a job preference or requirement when hiring for positions in compliance and ethics. Professionalism is supported when compliance officers are recruited and hired based upon their professional qualifications

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<sup>18</sup> Code of Professional Ethics for Compliance and Ethics Professionals, R 1.2, R 1.4  
<http://corporatecompliance.org/Resources/View/smid/940/ArticleID/675.aspx>

<sup>19</sup> Compare with the report by the Pulitzer Prize winning New York Times author David Barstow in the Wal-Mart Mexican bribery case, that investigators were criticized by the CEO for being too “aggressive.”  
[http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all&_r=0)

<sup>20</sup> Code of Professional Ethics for Compliance and Ethics Professionals, R 3.1 & Commentary  
<http://corporatecompliance.org/Resources/View/smid/940/ArticleID/675.aspx>



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and experience in compliance and ethics, and not based upon flashy credentials in other fields like litigation and enforcement.

We in the compliance and ethics profession should also take charge of defining our own field and its requirements. Gone are the days when others who have never practiced in the field should be speaking for, or defining, the profession. This may have been more routine in the early stages of the field, but 20+ years of robust, in-depth practice and experience have elevated the profession from the back office to the C-Suite, with the maturity to define its own future.

The profession should also continue to develop and scrutinize educational and training opportunities for compliance and ethics practitioners. For instance, as colleges, universities and graduate schools develop formal curricula in response to the demand for skilled professionals, the field should advise and have input into those efforts, to ensure that relevant skills and knowledge reflecting practical experience are incorporated.

Much thought is being given these days to the protection of whistleblowers, usually meaning those who object to illegal activity. But the OECD Working Group on Bribery very quietly hit a point that few have yet noticed. In the OECD's Good Practice Guidance on compliance programs, the provision on preventing retaliation included the following:

11. effective measures for:

. . . .  
ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, *not willing to violate professional standards or ethics* under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, *willing to report breaches of the law or professional standards or ethics* occurring within the company, in good faith and on reasonable grounds; . . . (emphasis added)<sup>21</sup>

Protection should also be offered for those who stand by their professional standards as well. Companies could readily modify their codes of conduct and compliance program standards to prohibit retaliation against those unwilling to violate professional standards, including the standards for compliance and ethics professionals. Governments, in turn, could apply this same standard for laws and regulations providing protection against retaliation.

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<sup>21</sup> OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II, <http://www.oecd.org/dataoecd/11/40/44176910.pdf>

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The government could strengthen compliance and ethics programs by joining the effort to professionalize the field. When monitors are appointed and compliance programs are required as part of case resolutions, governments can indicate their preference for professional status in monitors, compliance officers, etc., and especially by requiring conformity to a tough professional code like that used by the SCCE.

Finally, there is the issue of professional accountability. There is value in having a system for holding professionals accountable for their conduct, based on the professional code of ethics. For this to happen there should be support from the state, so that the profession can do this effectively. At least some form of immunity would be appropriate if members of the profession are to take on this often-onerous task.

The development of the compliance and ethics field as a profession is new and evolving. As is likely the case for any new idea, there is ongoing opposition from those with vested interests in the current system

But the public's interest in preventing the great harm organizations can and do cause needs to be paramount. Those courageous individuals charged with this high-tension and often perilous task need more than platitudes to achieve their objective. If society is to ask these individuals to stand up to the force of determined power in organizations, then it needs to equip them to do the job.

Those in the compliance and ethics field have shown great resolve in forming and driving their profession. And that profession is rapidly expanding and responding to the needs of organizations. But there is more work to be done to further develop the field.

It is not every day we witness the birth of a new profession. The development of the compliance and ethics profession is undeniably critical to the public interest and requires the support and attention of government, policymakers, the academic community, and all other stakeholders with an interest in strong and effective self-governance programs in organizations.