Global Corporations in a World of Local Market Specifics: How to Create a 'Glocal' Identity of Compliance

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EDITORIAL

GLOBAL CORPORATIONS IN A WORLD OF LOCAL MARKET SPECIFICS

How to Create a 'Glocal' Identity of Compliance

It is our great pleasure to introduce you to the inaugural edition of Compliance Elliance Journal, also known as CEJ. This project has been a labor of love over the past year and we are excited to publish some thought-provoking works.

But before we present the pieces, we would like to introduce CEJ and share our vision. We initially began our collaboration through our academic work in developing cross-cultural educational programs. Along the way, we realized that we shared a mutual interest, research, and scholarship in the area of compliance and ethics. Correspondingly, we decided that an open-access journal would be a fitting way to expand our vision of making the global compliance dialogue more easily accessible. It is our sincere wish to create an atmosphere encouraging the exchange of ideas between business and legal practitioners, academics, and students from around the world while also creating a platform to combine practical solutions to problems facing the compliance industry with scientific findings.

Keeping our goal in mind, we developed CEJ over discussions in-person in both Germany and sunny Miami, as well as virtually. In many ways, our collaboration is indicative of the present and future of doing business: thinking global with an eye towards innovation. For this reason, we thought it was fitting to choose "Global Corporations in a World of Local Market Specifics: How to Create a 'Glocal' Identity of Compliance" as the theme of CEJ's inaugural edition. The articles that follow all address similar issues of the role globality plays in today's compliance environment.

Our first set of articles deal with managing compliance risks in a globalized market place. It begins with Peter Kurer's piece called "Legal and Compliance Risk in a Global World: Nemesis or Catharsis?" Kurer starts with an analysis of the globalized world as a "risk society" and links the compliance debate with the public demands for a highly regulated and legally controlled market. He then offers suggestions for how business leaders should develop strategies to address this. The journal then turns to another increasingly important risk in our technologically connected world: reputation risk. In his book review, John Giraudo analyzes Andrea Bonime-Blanc's important and highly recognized *Reputation Risk Handbook: Surviving and Thriving in the Age of Hyper-Transparency*. This book is essentially about how managers and other business leaders can develop effective strategies for understanding and managing reputation risk.

Then we turn to risks that global companies face and that are at the heart of this edition's topic: glocalization. In his piece entitled "Compliance: the New International Law," Theodore Banks provides a succinct overview of various domestic and international regulations that constitute what one could call the international law of compliance. This is followed by "GSK in China: A New Dawn in the International Fight Against Corruption" by Thomas Fox who provides a summary of the GlaxoSmithKline corruption case from China and shows how compliance fails under the conditions of globalization. He also develops recommendations for how businesses can best protect themselves from encountering similar situations. "Ten Ethics-Based Questions for U.S. Companies Seeking to do Business in Cuba" by Marcia Narine surveys the ethics issues facing U.S.-based multinationals that wish to do business in Cuba now that it is opening up to U.S. business interests. In addition, she poses some thought provoking questions that businesses may encounter in the rapidly changing Cuban marketplace.

We then offer a preview of what will be the theme of our second edition appearing in winter 2016: "Ambiguous Legal Issues in Internal Investigations and Audits." Correspondingly, Folker Bittmann contributes an in-depth article called "Internal Investigations Under German Law" that deals with internal investigations and the effects of national legislation. Taking into account his vast experience as a prosecutor of white-collar crime, he demonstrates how German laws affect internal investigations of companies and how prosecutors and internal investigators work together (or not) during an investigation of alleged wrongdoing.

Finally, we close our very first edition with a piece exhibiting the importance of collaboration in compliance and in teaching tomorrow's compliance professionals how to grapple with the multifaceted problems posed by today's compliance and ethics challenges which are exceedingly complex because they are both global and local – and, as Amir Dhillon's piece on LWOW X Compliance makes clear – require a glocal solution that best comes from a collaboration across industries, disciplines, and countries.

We are very honored to be presenting these intriguing pieces in our inaugural edition. It is our sincere hope that the issues raised spark dialogue across borders and we encourage the ongoing participation of business and legal practitioners, academics, and students in this project.

With our best regards,

Michele DeStefano & Dr. Hendrik Schneider
Founders and Content Curators of CEJ

MICHELE DESTEFANO

Michele DeStefano is the founder and director of LawWithoutWalls, a Professor at the University of Miami School of Law, and a Visiting Professor at Harvard Law School. Recently recognized by the American Bar Association (ABA) as a Legal Rebel, Michele researches and writes about the growing intersections between law, business, and legal innovation. She presents regularly at law firms, corporations, law schools, and legal organizations on Innovation, Teaming, Collaboration, Compliance and Ethics, Technology and Education, and Litigation Funding. In addition to teaching courses on the Changing Legal Profession, Entrepreneurship, and Ethics at Harvard Law School and the University of Miami, she is Guest Faculty in Harvard Law School's Executive Education program. Michele received her J.D., magna cum laude, from Harvard Law School and her B.A. from Dartmouth College.

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LEGAL AND COMPLIANCE RISK IN A GLOBAL WORLD: NEMESIS OR CATHARSIS?

Peter Kurer

AUTHOR

Peter Kurer is a partner with the private equity firm BLR. He studied law and political science at the University of Zurich and the University of Chicago, and started his professional career with the international law firm Baker & McKenzie, where he became a partner in 1985. In 1990, Peter Kurer was a founding partner of the Zurich law firm Homburger, where he headed the corporate law practice group. He specialized in M&A and corporate law and also served on a number of boards of public and private companies. In 2001, Peter Kurer joined UBS as general counsel and member of the group executive board. He served as chairman of the bank during the crisis of 2008–2009 and then retired. He also is chairman of Swiss book publisher Kein & Aber, sits on a number of boards and acts as an independent adviser. Peter Kurer writes and speaks frequently on M&A topics, corporate governance issues, and legal and compliance risk management. His new book, Legal and Compliance Risk: a Strategic Response to a Rising Threat for Global Business, was published by Oxford University Press in February 2015.

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I. INTRODUCTION

Legal and compliance risks are the most serious threat to the smooth operation of global business. Every day, we read headline news about huge fines, investigations, prosecutions, massive litigation, and other legal evil hitting the icons of global finance and global industry. Since the banking and finance crisis, banks and other financial institutions have paid more than USD 230bn in terms of fines to a number of governments, an amount which equals the regulatory capital of four to five really large global banks. The financial industry often dominates the public debate but breathtaking legal hits are by no means an exclusivity of the banks. In the wake of the dot-com crisis, a number of big corporations simply disappeared in a cauldron of legal issues, and the once mighty and shiny accounting firm Arthur Andersen followed them mainly because it mishandled its document retention policy. Also, after the bursting of the dot-com bubble, and other than in the banking crisis, many high ranking executives went to jail, and a number of them with de facto life terms. Apart from these cases, arguably, the largest materialization of legal risk might be the Deepwater Horizon disaster of BP in the Gulf of Mexico. BP recently reached an USD 18.7 billion settlement with a number of US federal, state, and local authorities over this oil spill. This brought the total liability of BP for it to USD 54 billion, and this number will still increase over the months and years to come. The legal fall-out of the Deepwater Horizon disaster almost broke the neck of one of the strongest companies in the world and bears witness to the simple fact that legal issues might not only bring vulnerable and fragile banks to their knees but also rock-solid oil companies.

Events like these have left a lasting impression on the minds of senior business leaders and impact the way they think. To put it in the simplest terms: senior business executives see now legal, compliance, and regulatory risk as the most serious threat and uncertainty in their entrepreneurial activities. This has been proven by much empirical data. A research study published by Accenture in the year 2013 showed that global companies see legal risks as the number 1 external pressure on their operations; moreover, regulatory risks were the third most often mentioned risk class.[1] These results are supported by a number of other surveys undertaken, e.g., by PA Analysis, BLP, and others.[2] We can safely conclude that legal, compliance, regulatory, liability, and related risks now outweigh the classical business risks such as economic, technological, or environmental uncertainties. Thus, often, these risks are the modern time *nemesis* for global companies.

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1 Accenture, 'Risk Management for an Era of Greater Uncertainty', Accenture 2013 Global Risk Management Study, http://www.accenture.com/microsites/risk-management-research/2013/ Pages/home.aspx , p 9.

2 Michel Syrett and Marion Devine, Managing Uncertainty (London: Economist & Profile Books, 2012) pp 13f; Berwin Leighton Paisner, 'Legal Risks Benchmarking Survey' (11 October 2013), http://www.blplaw.com/expert-legal-insights/articles/legal-risk-benchmarking-report/, p 2.

But have these companies learnt how to bring this emotional threat up to the level of *catharsis* where they could experience relief from it, allowing them to get confidence that they understand these risks and can reasonably manage them. The simple answer is, no: Whilst company executives in the above mentioned surveys see a high exposure in terms of legal risks they are not convinced that they master these risks. A study by the English law firm BLP concluded that legal risk is poorly understood outside of the general counsel's office; only 25 per cent of chief executives and company directors actually said that they have a clear understanding of these risks.[3] Also, in a related way, research undertaken by leading behavioral economists shows that boards and senior managers hold too optimistic views on the level of compliance within their organizations.[4]

Thus, we are confronted with a paradox: whilst legal and compliance risks epitomize the modern nemesis for global companies these companies are a far cry from catharsis. Obviously, as we know, most global businesses invest huge efforts and capital into the management of legal and compliance risks. Many companies have achieved a high level of competence in this space. But even those who are good in these matters remain haunted by legal issues.

I believe that this paradox needs a strategic response which goes much beyond of what is discussed amongst lawyers, compliance specialists, and many other experts. This strategic response has many facets. I have discussed them in depth in my recent book on managing legal and compliance risk.[5] I will summarize a few of my views in the following paragraphs.

II. ROOT CAUSES

Every strategy starts with knowing the root causes of a problem. This simple requirement is often overlooked even by those who hold responsibility to advise on, and mitigate, legal risk. They sometimes hold surprisingly naive views of what makes the legal world complicated. I recently talked to a well-versed lawyer who educated me that legal risk has mainly increased because there are more and more new laws and rules. Is this an answer or only a superficial description of the phenomenon itself? Similarly, politicians, regulators, the media, or even some academics often reduce compliance failures to the concept of misbehaving, an understanding that everything would be fine if only the boards and senior managers would be more ethical, less greedy, and better in how the set the tone and culture at the top.

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3 Berwin Leighton Paisner, 'Legal Risks Benchmarking Survey' (11 October 2013), http://www.blplaw.com/expert-legal-insights/articles/legal-risk-benchmarking-report/, pp 1 and 6.

4 See Peter Kurer, Legal and Compliance Risk (Oxford: Oxford University Press, 2015), p 247.

5 Peter Kurer, Legal and Compliance Risk (Oxford: Oxford University Press, 2015).

As a matter of fact, the answer is much more complex than just more laws or a lack of ethics of businesspeople. In reality, there are huge sociological, technological, and economic changes in our world behind the rise of legal risks in recent decades. The main root cause of the astonishing increase of legal risk for global companies lies in globalization – or rather the technological changes and inventions which have enabled and driven the remarkable push of globalization as we have seen it in the last thirty years. First came the reduction in transportation and communication costs by the invention of container shipping and satellite transmission, then the internet, the World Wide Web, Windows, and the exponential growth of computing power enabling Big Data and the Cloud, and finally the concept of remote computing and control. These and other technologies, which did not exist when my generation went to university, have created a world that Tom Friedman ably called a "Flat World".[6] Nowadays, big companies do not only trade with remote places (which they did since ancient times); they invent in one place and produce in another; they sell products by a mouse-click around the globe; they produce one part of a product in one place, another in a other place. The new emerging global company works and operates everywhere.

There is a very simple problem attached to all of this: many legal systems will govern any kind of activity of a global company in parallel. We call this legal pluralism and some observers rightly say that this has gone far beyond a battle of different legal rules and reached a situation which one might call legal postmodernism – describing a world where the rational concept of law is deconstructed much like a building made by Richard Gehry or a novel written by Alain Robbe-Grillet.[7] This is a world where the law has become an amorphous and entropic system, where one is often hit by its force by pure happenstance.

The operation of this globalization chaos is reinforced – and multiplied – by a number of other factors:

- Our world is a completely transparent one by now - thanks to ever present electronic and social media, a hyperactive blogosphere scandalizing every global misdeed within minutes, and Big Data, as well as through such regulatory developments like the establishment of the true and fair accounting standards, disclosure and self-reporting requirements. The public eye sees now everything. Global businesses cannot hide anywhere, and they cannot hide anything.
- The world witnesses a growth of multi-pluralism and multi-culturalism. Due to globalization, migration and the laws of total transparency, people and ideas move easily. This has an effect on the legal and political system in many ways: handshakes and natural trust do not count anymore, mistrust is pervasive, doc-

6 Thomas L Friedman, The World is Flat (New York: Farrar, Straus and Giroux, 2005).

7 See Sionaidh Douglas-Scott, Law after Modernity (Oxford and Portland: Hart Publishing, 2013).

umentation gets more extensive and expensive, new laws are created to please minorities, NGO ask for *social responsibility* favors for the benefit of their clients, and prosecutors and even judges often react to public sentiments or based on their own cultural values rather than they would apply the law in an unbiased way.

- In many ways, the world has become a *Risk Society*.[8] It can be better understood in terms of risk allocation than in terms of wealth distribution. In this Risk Society people have become very sensitive to risks which, amongst others, are created by global business such as nuclear power plants, oil spills, or financial instability. They ask for, and get, more regulation and legal control of business.

As a result of all this, the quality of the relationship between law and governments has changed in many ways. We all have been raised in concepts of rules of law, due process, and separation of powers. But in many quarters of the world these concepts are not accepted or acknowledged. China and many other emerging market countries do not know a rule of law in the way it defined the development of the West since the times of the Magna Carta. But, upon a closer look, subtle but substantial changes have taken place in the old world, too. Take the USA: Less and less people really believe that the rule of law and due process are still the defining concept of the USA when it handles legal cases against global companies. Many people reckon now that the USA uses, or abuses, the might of its legal systems to impose its will on the rest of the world. The Economist recently has called the US justice system an extortion racket.[9] But is Europe any better? The EU behaves like a government but often does not adhere to such basic governance principle as separation of power or due process. In antitrust cases, e.g., the Commission is rule maker, regulator, prosecutor, and judge all in one.

In a similar vein, prosecutors and regulators around the globe are now much more powerful than they were a few decades ago. In the first phases of globalization, national authorities and governments had difficulties to get their arms around the corporate colossus which so easily wandered form one jurisdiction to the other and could arbitrage amongst them. The many crises and scandals with which global business was embroiled and an increasing negative public sentiment against big business has strengthened the backs of national governments and their enforcement arms. Also, regulators and prosecutors now cooperate much better amongst themselves around the globe. And they have learnt to apply ways and means which go considerably beyond the standards of traditional investigation and prosecution. They use the public forum rather than the tradi-

8 See Ulrich Beck, Risikogesellschaft, 21st edn (Frankfurt am Main: Suhrkamp, 2012, originally published in 1986).

9 The Economist, 5 July and 30 August 2014.

tional courts to indict and blame companies; they bully them into settlements and deferred prosecution agreements rather than to seek a fair trial; and they reach across their geographic boundaries and no longer limit their activities to their own jurisdiction.

III. FROM BUREAUCRAZY TO STRATEGY

Global businesses face a huge challenge to manage and control legal risks but have not yet learnt how to react to it. The traditional approach to controlling these risks was to leave the management of legal issues to lawyers. Lawyers are an able and well-trained profession. They are specialists in knowing the rules and laws. They can draft legal documents and contracts which reduce and hedge legal risk in advance. When the risks materialize, they will represent the company in a court and before agencies to mitigate the fallout of the risks. But lawyers also have a number of shortcomings. They are normally not strategic thinkers (beyond the strategy in a particular case) and mostly limit their activities to a specific case or transaction. They do not analyze and assess risks in a long-term view and with the purpose to reduce these risks sustainably. Also, they are rarely trained in managing holistic processes which are needed to bring a huge organization in compliance with the million of rules which apply to it around the globe.

Since about 25 years, there is a growing belief within global companies that traditional lawyering is not sufficient to cope with the big challenge of being a good corporate citizen in a global world. As a consequence, companies rely more and more on a second sort of experts to manage the legal risks, speak the compliance managers or officers. These compliance officers have a mission to manage and control these legal risks in a very different way than the lawyers do. Lawyers advise on applicable rules, represent clients, write contracts, and manage legal cases. By contrast, compliance officers watch over – and control – adherence to legal, regulatory, and ethical rules. They run processes and technologies which are designed to improve the compliant behavior of an organization.

The activities of lawyers and compliance officers will often overlap or operate alongside each other, but in many ways they are also different: First, in one way compliance risks are more narrow than legal risks because legal risks dwell in an unlimited space (i.e., may emanate from any legal or contractual rule), while compliance risks mean a limited universe of clearly defined risks such as, for example, specific regulations for the financial industry or pharmaceutical companies, or specific laws such as antitrust laws or anti-bribery laws. Second, and reversely, compliance risks go beyond legal risks in the sense that they might involve the breach of rules which are not strictly speaking 'legal'– such as codes of conduct, ethical requirements, or even certain contractual obligations. Finally, compliance officers often are lawyers by training, too. But frequently, and increasingly so, they have a different background such as management, operational risk, finance, technology, or forensic analytics.

Most global companies take legal and compliance risk very serious. As a consequence, most of them have built huge legal departments and employ an armada of outside coun-

sel. Moreover, they run big compliance programs and have established substantial compliance departments. First the general counsels and now increasingly also the chief compliance officers have reached the level of the most senior officers within their companies with direct access to both CEO and the board of directors. As if this were not yet sufficient, a row of other experts and advisors join the ranks of those who manage and control legal and compliance risks: internal controllers add legal issues to their control activities, internal auditors check on adherence to legal requirements, HR experts specialize in compliance training, and communication specialists learn to make compliance values known to the staff. And we see in many companies a growing number of operational risk managers identifying and assessing legal risks, ethic managers overseeing the code of conducts and other ethical matters, and legal project managers who manage large legal cases without being lawyers.

There are now so many processes, operations, techniques, specialists, experts, and advisors in the space of legal and compliance matters that many companies perceive a need of an additional process, speak the convergence or integration process. This is certainly necessary but at the same time the whole convergence discussion shows without mercy that the traditional approach of managing legal risk has come to its limits. In essence, the traditional approach consists in adding ever more and different specialists to legal and compliance activities and in piling one process on the other. This creates huge bureaucracies, makes all these busy experts and advisors happy, and soothes the many worries of the senior managers. But is this really in the best interest of global business? Is it up to the challenge of a rising tide of legal and compliance risk? I do not think so. I rather reckon that it is time to take a very different approach which I call the strategic management of legal and compliance risk.

IV. A ROADMAP TO LEGAL RISK MANAGEMENT

The strategic approach to the management of legal and compliance risks rests on three pillars:

The first one is the notion that managing these risks must not be left to the experts but rather should be steered from the very top of an organization, the senior management and the board. Business people are often more than happy to leave risk matters to the experts; they prefer to work on the opportunity side of the business. Discussing a new company logo, conquering a new country, building an additional plant appeal more to board members than awkward and embarrassing risk issues. A strategic approach to legal and compliance risk management will start with breaking this behavioral bias of leaving risk issues to experts and advisors.

The second notion is that companies should define the legal and compliance risk management as a core management process which engages all elements of the company, pretty much like a business planning, strategy, or product development process does. A company might push this process even to an extent where it gets a distinctive capability

of it and sets it apart from its competitors.

The third notion is that companies should, as they do in other fields, use specific tools to develop and support the process of legal and compliance risk management. In my book, I have presented a number of such tools which interrelate with each other. The top tool is a simple model which I called the Roadmap to Legal Risk Management.[10] The key idea behind the Roadmap is that the company, and this means its strategic and highest governance bodies, should go through a process which consists of seven steps: (1) understanding the roots, (2) defining a strategy, (3) setting the risk governance, (4) implementing processes and operations, (4) sourcing experts and advisors, (5) using technology, (7) influencing behavior of staff.

I have talked above a bit about the first of these seven elements, i.e. the root causes, but with the Roadmap I suggested that this discussion should go beyond these general observations and address the specific internal and external risk drivers of a company. I will in the following talk on the challenge of setting a strategy and I will add a few remarks on the rising importance of technology and nudging people into proper behavior. I will leave apart here the three other elements of the Roadmap since risk governance, operations, and processes, as well as sourcing experts and advisors, follow the more traditional lines of managing these risks and will be known and understood by the readers of this special interest publication.

V. DEFINING THE STRATEGY

Each company should have a defined strategy of how it copes with the rising legal and compliance risks. Setting this strategy is a task for the highest bodies within a company – that is the board and the chief executive. It must not be left to lower echelons, even not the general counsel or the chief compliance officer who should act as the main advisors, experts, and managers but who should not be the end of the road and the final authority in these matters. There is a very simple reason behind this: a board or a chief executive who identifies the main legal risks facing the company in a clear and unambiguous way can do more for reducing these risks than a whole armada of lawyers or compliance officers. It can decide:

- not to go into a jurisdiction which is rife with corruption;
- to withdraw a product which is prone to fail;
- to stop a business activity where people must cut corners to be successful;
- to create a culture which helps to be compliant; and
- to build an open information space where misdeeds or impending misdeeds are quickly identified and corrected.

[10] Peter Kurer, Legal and Compliance Risk (Oxford: Oxford University Press, 2015), pp 9f.

To add colors to this: we all know that certain countries are more corrupt than others and we have quite reliable data on them by the work of Transparency International and others. Nonetheless, global companies often are active in these countries without compelling need. Here, it might sometimes be helpful to withdraw from one or the other of these countries and forego a (mostly tiny) part of the profits for the benefit of considerable risk reduction. Very similar considerations apply to the product or operational areas. I will come back to culture and values but we can say that creating an appropriate legal and compliance culture is now a key element of what the strategic level of a company should work on.

A board and a chief executive officer should go through a very systematic process for defining and redefining the strategy of legal and compliance risk management. It should make the risks visible, understand the drivers behind them, assess them in terms of monetary value, and make the necessary decisions as outlined above. Then, in a second step, it should clearly communicate its decisions and targets and make appropriate arrangements for risk mitigation. Finally it should control them and establish appropriate and efficient feedback and reporting systems.

VI. CUTTING EDGE: TECHNOLOGY AND NUDGING BEHAVIOUR

Many managers but also experts like lawyers or compliance officers share two common traits: they have a very high belief and trust in their own activities and do not see that increasingly they can be replaced by technology. And they are very cerebral and believe that a problem is solved when it is intellectually understood and addressed; in this way they think that something is under control when a proper policy is written, a code of conduct is sufficiently communicated, or training has been made and certified; they naively believe that the behavior of their staff follows their rational thinking. These two traits are a fallacy and a trap and often stand in the way of efficient and effective risk management. Rather, whoever wants to be cutting edge in legal and compliance risk control should think long and hard on technology and people behavior; they are the new frontier in this space.

We have all witnessed a significant technological development in our generation. Thirty years ago, cars were a matter of mechanical engineering, radio and television were the only electronic media, the ticker was the exclusive transmittal of instant written communication, and books were the main carrier of data for lawyers. These times are gone. Cars are now more about electronics than engineering, present-day communication goes now through many different channels beyond the traditional ones, like the internet, social media, or Skype. In the same way, technology is becoming ever more important in

legal, compliance, and risk management activities.[11] Most legal and compliance departments will now use technology in areas such as information gathering and analytics; document and data handling, including automatic production of complex legal documents; operational management systems; mobile computing and communication; e-learning and e-training; as well as reporting.

But all this is not the end of it. We are in the middle of another technological revolution. Big Data, Artificial Intelligence, the Cloud, and Fintech will make great contributions to how legal and compliance issues will be managed in the future. Embracing these technologies will reduce costs and increase both efficiency and impact of risk management efforts. Despite all this, in the real life lawyers and legal risk managers do not yet use these technologies to their fullest extent. Traditional behavior and resistance to something that will ultimately make many professionals redundant stand as a roadblock to development.

After technology, influencing employee behavior is the second cutting edge technique in legal and compliance risk management. The banking crisis has made it apparent that employee conduct, or to put it more directly, misbehaving by employees, is a major source of legal risk and compliance breaches. Consequently, there is a lot of debate about establishing a proper company culture, setting the right tone at the top of the company, and managing staff conduct. There is, however, a very basic problem attached to this: we know a lot about the law, compliance requirements, management techniques, or even technology. By contrast, we know very little about human behavior. Fortunately, the events around the banking crisis has caused a lot of empirical research into these matters by noted behavioral economists and psychologists like Dan Ariely, Ernst Fehr, Daniel Kahneman, Richard Thaler, and others. These scientist do empirical research into such matters as how do people come to the right decisions, how can I design a solid decision architecture, under what conditions will people misbehave, or how can I mold staff into self-correcting improper behavior.

Some of this research has resulted in very concrete proposals for improving compliance management. Consulting company FehrAdvice has developed a compliance survey method which is much more reliable than the traditional methods.[12] Research done by Dan Ariely and others has made apparent that people will make more honest decisions when they have to sign a simple commitment like a professional oath or the ten commandments.[13] Any manager and legal risk expert who want to be serious about compli-

[11] See Richard Susskind, Tomorrow's Lawyers (Oxford: Oxford University Press, 2013).

[12] Peter Kurer, Legal and Compliance Risk (Oxford: Oxford University Press, 2015), pp 244-247.

[13] See Dan Ariely, Predictably Irrational, revised and expanded edn, international edn (New York: HarperCollins, 2010, originally published in 2008, in a different format, by HarperCollins), pp 282-91.

ance should be familiar with the principal results of these studies. And there is, indeed, an emerging generation of younger managers who follow these approaches. I know of one CEO who manages his company around seven well defined values, calls himself chief of culture, has given to every employee a luggage label which lists the seven values, and asks his employees to open every internal presentation on a very short note why she or he would like to talk on one of the seven values. This CEO never had any major compliance issue though he heads a major operation active in more than 60 countries.

VII. CONCLUSION

As any glance on the daily headlines proves, global companies face increasing legal and compliance risks. Senior leaders now think that there is no other class of risks which exceeds the legal and compliance uncertainties. At the same time, however, these business leaders do not believe that they really understand these risks and how to handle them. They leave the management of them happily to experts like lawyers, compliance officers, risk managers, auditors, internal controllers, and others. And these experts happily take responsibility because they live on it. I have argued that this approach stands in the way of an efficient and effective management of the risks. We live in a world which is very different by now than what it was thirty years ago, prior to the great push of globalization. This new global world is full of legal threats, traps, and cracks, all creating present and imminent danger to the smooth operation of global companies. Therefore, what is needed is a much more strategic approach to these risk matters. Boards and CEO have to take control; they have to understand and perceive the nature of these risks and what is behind them; they have to give a strategic response on the level of business planning and new business approvals; and they have to create an open and honest culture around this.

It is not good for the global society when the biggest and most important companies of this world are seen as almost at war with governments. It is not good when public sentiment against big business becomes so negative that regulators and prosecutors are induced to intervene in the most drastic way, often much beyond what a sober and realistic assessment of a legal failure would really warrant. It is not good for society when the justice system is perceived as an extortion racket. And it is not good when the trust in the rule of law and due process is on decline. Business leaders, however, cannot do very much about excesses on the side of politics and policy makers. But they can do one thing: they can manage legal and compliance risks better than many of them do now. They can manage these risks smarter and with a much more strategic and cultural thrust. Business leaders who engage themselves in this way make a huge contribution to the legal culture in a global world which presently appears to be so void of it.

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BOOK REVIEW

THE REPUTATION RISK HANDBOOK

Surviving and Thriving in the Age of Hyper-Transparency

Andrea Bonime-Blanc, Do Sustainability Books, Oxford 2014,
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Reviewed by John P. Giraudo

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Reputation risk management is not the same as crisis management planning. If you have to wait, it is already too late. Andreas Bonime-Blanc makes this point clear with numerous real world examples in her short, lively, practical guide to reputation risk management. She has given the book the sub-title of being a road map for "Surviving and Thriving in the Age of Hyper-Transparency". And so it is. The author in the very first paragraph tells us she is not writing a scholarly book. She says "[t]his is not that [kind of] book. This Handbook is about providing organizational practitioners—managers, executives and directors—with context, content and tools to accomplish two core strategic objectives: understanding and managing reputation risk and transforming risk into value."[1] There is something to be said for pursuing practical goals, however much this reviewer hopes the author will eventually write the more scholarly book. Reputation risk suffers from being too little understood. We would do well to study its causes and effects more closely. This little book makes a serious contribution to the debate, but the problems of risk management are too complex for a little book. We will have to wait for a more serious study from Ms Bonime-Blanc.

Nonetheless, her practical advice is not bad. And this book provides it in spades. If you missed the compliance crises in the newspapers, you can read the stories about them here[2]: Apple/Foxcom (labor and human rights risks); Sewol Ferry Sinking in South Korea (safety risk); Target (theft of customer information); BP Horizon (oil spill and environmental risk); General Motors (safety switch miss-design-and product liability risk); GSK and Wal-Mart (bribery risk); HSBC, RBS, Barclays, (interest rate fixing and employee risk); UBS and Deutsche Bank (tax evasion and fraud risk); BNP Paribas (evasion of sanctions and regulatory risk). To these we can add the news stories of a few years ago made famous by the names of Enron, Tyco, World Com, Arthur Anderson and Lehman Brothers. And the ongoing risks faced today by such companies as UBER (business model risk), Sony Pictures (cybersecurity risk) and News Corp (phone hacking risk) and by the sports organization FIFA (bribery risk). With such daily challenges it might seem better for a CEO not to get out of bed in the morning. More than one must get cold feet at board meetings. Regrettably, life is not risk free. The key is to focus on the big risks. But what are they?

A recent Deloitte survey of 300 C-suite executives at global companies at least identifies what is on their minds. By wide margins, the survey shows that the top three risks facing multi-national companies (in the minds of those who run them) are ethics, cybercrime

1 Andrea Bonime-Blanc, *The Reputation Handbook: Surviving in the Age of Hyper-Transparency* 17 (2014).

2 *Id.* at 24, 26-28, 30-31, 45-47.

and product liability.[3] More interestingly still, more than 39 % ranked their organizations "average" or "below average" in assessing these risks, while only 19 % gave themselves an "A".[4] Based on this survey, Ms. Bonime-Blanc has found a receptive audience for her *Reputation Risk Handbook*.

The challenge is to get past the truism—made famous by Warren Buffet—that "[i]t takes 20 years to build a reputation, and five minutes to lose it."

There is no doubt that we live in an era in which transparency is measured by the speed of Twitter, as was sadly learned by IAC, a global media company, when its vice president Justine Saco tweeted "I am going to Africa. Hope I don't get Aids. Just kidding. I am white." [5] She was fired en-route to her destination. Or by KFC (Kentucky Fried Chicken) with the now viral social media rumors started by a competitor alleging KFC serves eight legged chickens (not true).[6] This is the result of modern technology making communication both instantaneous and ubiquitous. Unfortunately, we cannot turn back the clock to a slower age, even if we would like to. The more important question, however, is whether we can live as naked organizations. The risks to a global enterprise (financial, legal, political, physical/natural etc.) will always be there. What is different now is that organizations are transparent about these risks because there are no secrets in this increasingly globalized world. Everyone (including regulators, WikiLeaks, Edward Snowdon among others) knows what you are doing or they can find out without too much effort. The challenge is thus how to meet old and new risks to reputation in an utterly transparent world.

Here Ms. Bonime-Blanc offers us a tool-kit from the front lines. She explains that "as the CEO of and founder of a strategic global governance, integrity, reputation and advisory firm, I have seen a full 360 degrees of reputation risk several times over."[7] With such experiences in mind, Ms. Bonime-Blanc is able to provide us with a framework for identifying and analyzing corporate risk. It reads like a course description for a class titled Risk Management 101:[8] create a formal risk assessment process; conduct risk assessments

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3 Deloitte, *2014 global survey on reputation risk: Reputation@Risk* (Oct. 2014), *available at* http://www2.deloitte.com/global/en/pages/governance-risk-and-compliance/articles/reputation-at-risk.html.

4 *Id.* at 10.

5 Bonime-Blanc, *supra* note 1, at 48.

6 Ben Dipietro, *Crisis of the Week: KFC Fights 8-legged Chicken Rumors*, Wall Street Journal: Risk and Compliance (June 15, 2015 at 11:36 AM ET), http://blogs.wsj.com/riskandcompliance/2015/06/15/crisis-of-the-week-kfc-fights-8-legged-chicken-rumors/.

7 Bonime-Blanc, *supra* note 1, at 18.

8 Bonime-Blanc, *supra* note 1, at 84-92.

and monitoring; review organizational structures and redeploy human resources to weak areas; tackle risks as cross-functional problems in matrixed organizations; educate the business unit managers on key risks; prepare public relations plans; set out clear and objective policies for employees to follow; provide training; encourage a speak-up culture; review post-crisis event responses; improve strategic and business plan integration; ensure board oversight; and pay close attention to industry benchmarking.

While it is hard to discern what to make out of this lengthy menu, Ms. Bonime-Blanc's most valuable suggestion, however, is in calling for organizations to establish and empower a high level individual within an organization as its Chief Integrity and Reputation Officer (CIRRO). This person "would act as the executive in charge of a holistic strategic approach to these issues, their coordination and relationship to entity strategy, reporting to both the CEO and the board. The CIRRO would serve as the chair of a global integrity, risk and reputation committee where all manner of related issues would be handled and in-house experts would periodically coordinate policy tactics and strategy on these issues."[9] It is a tall order for a mere human.

In some ways, the *Reputation Risk Handbook* sometimes appears to be talking past us. Is there really more of a problem here than meets the eye? At one level, the professional risk community has missed reputation risk in its entirety. In 2004, the Committee of Sponsoring organizations of the Treadway Commission (COSO), a group of USA accountants and financial executives issued guidelines for internal controls that established enterprise risk management (ERM) as an important and valuable risk analysis tool. Although the ERM process is now widely used in most large corporations, and the COSO analytical framework covers every imaginable risk, the guidelines do not contain a single word about reputation risk. What seems to be missing is not the deeply held belief that reputation risk exists—this is evidenced by the Deloitte survey of senior business executives—but the lack of a way to think about it in a structured manner: in other words, how to accurately identify and quantify reputation risk. Here is where Ms. Bonime-Blanc needs to write the scholarly book she eschewed at the outset for a more pragmatic approach. But this is not her failure alone, but the failure of the larger legal and compliance community. As Eccles, Newquist and Schatz wrote in a 2007 *Harvard Business Review* article titled: *Reputation and its Risks*—"reputation is a matter of perception."[10] Indeed, it is in the eye of the beholder as well.

The goal of any strategic effort to address reputation risk must necessarily identify the perception/reality gap and close it.[11] This means that any framework for identifying

9 Bonime-Blanc, *supra* note 1, at 74-75.

10 Robert G. Eccles et al., *Reputation and Its Risks*, HARVARD BUSINESS REVIEW 104 (2007)

11 *Id.* at 104-105.

reputation risk must measure its perception among the organization's stakeholders, *e.g.*, employees, shareholders, executives, customers, suppliers, the media, civil society, government regulators, the public at large etc, and must monitor how it changes.[12] Beliefs change. As a consequence, a company's reputation is not fixed in time, but is always shifting. It must therefore be monitored. In fact, a companies' reputation must be measured rigorously through surveys, public opinion polls and focus groups.[13] There is no better way to find out what people are saying about your company than by doing a Google search. And, of course, what can be measured can be evaluated. Simply because you find nothing bad online about your company does not mean your company has a good reputation—it may have none at all. Corporate executives should ask themselves whether their own perception of their organization matches reality. If not, then something should be done about it. This is not an exercise in "spin control".[14] We must first "mind the gap" and then close it so that a company's perception and reality are the same. While this is not an easy task, it is a critical one.

The writers mentioned above from the *Harvard Business Review* also echo Ms Bonime-Blanc's call to put one person in charge of assessing and evaluating reality, identifying and closing gaps, and monitoring changing beliefs and expectations.[15] They have found that coordination is often poor in large, global organizations because the CEO has not assigned this responsibility to a specific person. Modern CEOs have too many responsibilities to take on this added burden. Therefore, if there is any single lesson to be learned from the *Reputation Risk Handbook* reviewed here it is that a company's reputation is too valuable to be left unprotected. It requires constant vigilance. It needs a full-time guardian. And unless that guardianship is mandated a company's reputation may well get lost.

12 *Id.* at 105-107.

13 *Id.* at 107-112.

14 *Id.* at 108-114.

15 *Id.* at 112-114.

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COMPLIANCE: THE NEW INTERNATIONAL LAW

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The United Nations Global Compact recently celebrated its 15th Anniversary. The areas of its coverage – human rights, labor, environment and corruption – may not seem to be exceptional subjects these days. But, for compliance professionals, the Compact is significant as one of the indicators that compliance has now become more than a principle of business operation or just an aspect of national laws; it has also become part of the regime of international law. For every business operation today, compliance is not just a matter of adhering to local laws, but a necessity of following international principles.

Traditionally, international law was that set of rules (some would say a loose set at best) that governed the relations between states; private parties need not apply. But there has been an acceptance of international principles regarding people, which often involved businesses. Think about the growing acceptance in the 19th Century that slavery was wrong, which impacted both individual human rights and the way business operated (i.e., slave traders and businesses that relied on slaves). The trend can be seen with the establishment of the International Labor Organization, and with the 1948 Universal Declaration of Human Rights. International law was becoming something more than rules about borders set in 1648.

The Organization for Economic Cooperation and Development (OECD) adopted the Declaration on International Investment and Multinational Enterprises in 1976, and most recently updated it in 2011. This is "a policy commitment by adhering governments to provide an open and transparent environment for international investment and to encourage the positive contribution multinational enterprises can make to economic and social progress."[1] As part of the Declaration, the OECD established its Guidelines for Multinational Enterprises. These are "recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from adhering countries. Observance of the Guidelines is supported by a unique implementation mechanism: adhering governments - through their network of National Contact Points - are responsible for promoting the Guidelines and helping to resolve issues that arise under the specific instances procedures."[2] The OECD recognizes that in order to promote economic development in every country, proper standards of responsible business conduct are necessary. Where there are no limits on what businesses did with regard to environmental protection, corruption, consumer protection, and corporate governance, development would be frustrated and people would suffer. Accordingly, the OECD Guidelines recommend a number of principles that business should follow, including the following:

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1 OECD, Declaration and Decisions on International Investment and Multinational Enterprises, *available at* http://mneguidelines.oecd.org/oecddeclarationanddecisions.htm (last visited Jul. 21, 2015).

2 OECD, 2011 Guidelines for Multinational Enterprises, *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf (last visited Jul. 21, 2015).

- Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
- Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programmes.
- Refrain from discriminatory or disciplinary action against workers who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.
- Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts of matters covered by the Guidelines, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
- In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.
- Abstain from any improper involvement in local political activities.

Over the same period, the OECD recognized the corrosive effect that bribery has on economic development. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business transactions went into effect in 1999.[3] The OECD followed this in 2009 with Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which were aimed at the signatories of the OECD treaty, and included guidance on the importance of compliance and ethics programs.

At least part of this trend is due to some recognition of self-interest: both companies and countries function better in an environment of ethical conduct. But it also reflects a shared set of values. As Joan Dubinsky, United Nations Chief Ethics Officer has written in *Global Ethics & Integrity Benchmarks*:

> Global values, including integrity, can be found in all religions, texts on more philosophy down through the ages, and in the UN Universal Declaration of Human Rights and all resulting rights-related conventions and

[3] *See* J. Murphy, *Have the "Global Sentencing Guidelines" Arrived?*, Society of Corporate Compliance and Ethics (Oct. 2011) http://www.corporatecompliance.org/Portals/1/PDF/Resources/complimentary/5271_0_OECD-Murphy%20Report.pdf.

> principles. Though there is significant 'play' in how global values (such as integrity) can be defined . . . There is little doubt that what unites us as human beings is this ethical dimension. Different cultures, nations, and societies may differ about how to prioritize specific moral values. Nevertheless, all human societies accept that a set of global values exists and that these values tend to unite – rather than divide – us.[4]

Fifteen years ago, these universal principles were reflected in the United Nations Global Compact,[5] to which there are more than 12,000 signatories in 170 countries. The Compact has ten principles in four categories, as follows:

Human Rights Businesses should:

> Principle 1: Support and respect the protection of internationally proclaimed human rights; and
> Principle 2: Make sure that they are not complicit in human rights abuses.

Labour Standards Businesses should uphold:

> Principle 3: the freedom of association and the effective recognition of the right to collective bargaining;
> Principle 4: the elimination of all forms of forced and compulsory labour;
> Principle 5: the effective abolition of child labour; and
> Principle 6: the elimination of discrimination in employment and occupation.

Environment Businesses should:

> Principle 7: support a precautionary approach to environmental challenges;
> Principle 8: undertake initiatives to promote environmental responsibility; and
> Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

> Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

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4 Joan Elise Dubinsky & Alan Richter, *The Global Ethics & Integrity Benchmarks*, Policy Innovations (Mar. 11, 2009), http://www.policyinnovations.org/ideas/innovations/data/000088.

5 United Nations Global Compact, *available at* https://www.unglobalcompact.org/what-is-gc (last visited Jul. 21, 2015).

At the same time as this global development was taking place, individual countries were also establishing standards for corporate compliance. While there were certain areas of disagreement (such as whether encouragement of anonymous reporting of wrongdoing was a good idea), the amount of similarity between the programs is remarkable.

In the United States, the Federal Sentencing Guidelines[6] established guidelines for how organizations can demonstrate that they used due diligence to promote a culture of compliance and ethics by:

- Establishing standards and procedures based on risk;
- Having knowledgeable management, with board oversight;
- Using senior officers to direct the compliance program, with sufficient resources to do it right;
- Having procedures in place not to senior employees likely to violate the law;
- Conducting effective, practical training of board members, management, other employees, and agents, based on their roles and responsibilities;
- Making sure that there is an anonymous, confidential method to report wrongdoing;
- Establishing a system for auditing and periodic evaluation of the compliance program;
- Creating a system and incentives and discipline connected to compliance;
- Responding appropriately to violations; and
- Conducting periodic risk assessments and adjusting the program accordingly.

Australia established a Standard on Compliance Programs, AS 3806-2006,[7] which has similar requirements:

- Commitment
  - Commitment by the governing body and senior management to effective compliance that permeates the whole organization.
  - The compliance policy is aligned to the organization's strategy and business objectives, and is endorsed by the governing body.
  - Appropriate resources are allocated to develop, implement, maintain, and improve the compliance program.

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6 United States Sentencing Commission (USSC), *Guidelines Manual* (Nov. 1, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf.

7 The International Standards Organization (ISO), also has a standard for Compliance Management Systems, ISO/PC 271, and it is similar to the Australian and other standards. However, ISO, rather than promoting the widespread distribution of its standards, bizarrely makes its standards very expensive, so it will not be reprinted here.

    - The governing body and senior management endorse the objectives and strategy of the compliance program.
    - Compliance obligations are identified and assessed.
- Implementation
    - Responsibility for compliance outcomes is clearly articulated and assigned.
    - Competence and training needs are identified and addressed to enable employees to fulfil their compliance obligations.
    - Behaviours that create and support compliance programs are encouraged, and behaviours that compromise compliance are not tolerated.
    - Controls are in place to manage the identified compliance obligations and achieve desired behaviours.
- Monitoring and measuring
    - Performance of the compliance program is monitored, measured, and reported on.
    - The organization is able to demonstrate its compliance program through both documentation and practice.
- Continual improvement
    - The compliance program is regularly reviewed and continually improved.

In competition law (antitrust), there has been a growing acceptance of certain basic rules, such collusion among competitors is bad. Principles that were once confined to North America and Europe are now a common feature of almost every national law.[8] The International Chamber of Commerce has released an Antitrust Compliance Toolkit[9] that provides guidance on the key aspects of antitrust compliance, with 11 chapters as follows:

1. Compliance embedded as company culture and policy
2. Compliance organization and resources
3. Risk identification and assessment
4. Antitrust compliance know-how
5. Antitrust concerns-handling systems
6. Handling internal investigations
7. Disciplinary action
8. Antitrust due diligence
9. Antitrust compliance certification
10. Compliance incentives
11. Monitoring and continuous improvement

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8 *See* T. Banks & J. Murphy, *The International Law of Antitrust Compliance*, 40 DENVER J. INT'L. L. & POLICY 368 (2012).

9 ICC Antitrust Compliance Toolkit, *available at* http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/ (last visited Jul. 21, 2015).

In Canada, the Competition Bureau in June 2015 released a Bulletin on Corporate Compliance Programs,[10] the section headings of which again show a very familiar structure:

2 The Importance of Compliance . . .

4 Basic Requirements for a Credible and Effective Corporate Compliance Program
- 4.1 Management Involvement and Support
- 4.2 Risk-based Corporate Compliance Assessment
- 4.3 Corporate Compliance Policies and Procedures
- 4.4 Training and Education
- 4.5 Monitoring, Verification and Reporting Mechanisms
- 4.6 Consistent Disciplinary Procedures and Incentives for Compliance
- 4.7 Compliance Program Evaluation

Similarly, in anticorruption compliance, more countries are adopting similar rules. In Brazil, implementation of the Clean Companies Act[11] also contained compliance guidance:

- Adoption of compliance program may be mitigating factor;
- Program must be risk-based;
- Establish internal controls;
- Consider size of the company, structure and industry, jurisdiction, and interaction with government entities;
- Tone at the top, and the importance of gaining the commitment of upper management;
- Establishing standards and codes of ethics and conduct for employees, managers, and third-party vendors;
- Providing channels for the reporting of irregularities;
- Conducting training at appropriate intervals;
- Arranging specific procedures intended to prevent fraud and corruption in the context of bidding for government contracts;
- Adequate due diligence in mergers, acquisitions, corporate restructurings and in dealings with third parties;

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10 Bulletin on Corporate Compliance Programs, *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf (last visited Jul. 21, 2015).

11 For a copy of the original language version, *see* Brazilian Clean Company Act 2014, Business Anti-Corruption Portal, *available at* http://www.business-anti-corruption.com/resources/compliance-quick-guides/brazil.aspx (last visited Jul. 21, 2015).

- Providing the Chief Compliance Officer the needed independence and authority to oversee the program;
- Establishing disciplinary measures for violations.

What this shows is that there is a large consensus about both the subjects of compliance programs and the methodology to achieve compliance. Much of the local enforcement is based on international conduct, such as bribery of government officials or money laundering. And the enforcement is not limited to conduct that occurs within national borders. The U.S. has been particularly aggressive in prosecution of companies for violations of the Foreign Corrupt Practices Act[12] or the Sherman Act, even if the specific conduct occurred outside of the United States. The U.K Bribery Act[13] basically reaches any type of bribery (not limited to bribery of government officials) conducted by any company that does business in the U.K.

Companies that do business in more than one country are supporters of these global standards. First, it is more efficient for a company to have a global standard of conduct than to have different rules in every country. Second, where global companies compete with local companies, or companies based on other countries, they want everyone to play by the same rules. US companies have long complained about being subject to a higher standard of conduct than was imposed on their competitors, particularly with regard to the FCPA. Third, executives of those companies are starting to be more concerned about personal liability. So, it is in their own self-interest (not to mention the company's business interest) to adhere to international standards of conduct.

Finally, it should be noted that regardless of cultural differences about things like gifts and bribes, certain aspects of human nature are the same everywhere. People want (and deserve) respect. Employees everywhere want to be proud of their company, and they will work harder when they are. In contrast, a company that fails to follow accepted standards of compliance and ethics may escape liability in the short term, but eventually will pay the price.

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12 U.S. Department of Justice, *Foreign Corrupt Practices Act (FCPA)*, http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (last visited Jul. 21, 2015).

13 Bribery Act 2010, *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf (last visited Jul. 21, 2015).

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GSK IN CHINA

A New Dawn in the Fight Against International Corruption

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I. BACKGROUND

In late June, 2013 the international anti-corruption community literally exploded when the Chinese government announced that it had found evidence that the UK pharmaceutical giant GlaxoSmithKline PLC (GSK) was involved in bribery and corruption of Chinese doctors. We are not just talking about nickel and dime stuff but over $500 million in illegal payments were alleged to have been made by the company's China business unit over a several year period. But the thing that made this matter stand out for the anti-corruption compliance community was how public the allegations, company statement and counter-statements were. Never had we seen such a spectacle played out in the international press.

For those not familiar with the allegations, they were well-reported in the international press. Kathrin Hille and John Aglionby[1] reported that "China has accused GlaxoSmithKline of being at the centre of a "huge" scheme to raise drug prices in three of the country's biggest cities and said the UK-based drugmaker's staff had confessed to bribing government officials and doctors. China's Ministry of Public Security said a probe in Changsha, Shanghai and Zhengzhou found that GSK had tried to generate sales and raise drug prices by bribing government officials, pharmaceutical industry associations and foundations, hospitals and doctors." They reported that some of the techniques used included the issuance of "fake VAT receipts and used travel agents to issue fake documents to gain cash, according to the ministry. Some executives had also taken advantage of their positions to take kickbacks from organising conferences and projects." Further, "There are many suspects, the illegal behaviour continued over a long time and its scale is huge," the ministry said."

Laurie Burkitt and Chris Matthews[2] reported on a televised interview of Liang Hong, the GSK China Vice President and Operations Manager, where he "described for viewers of China Central Television how staffers would allegedly organize conferences that never happened and divert the money to bribe government officials, hospitals and medical personnel to get them to use Glaxo's products." He was quoted as saying, "Dealing with some government departments requires some money that couldn't be claimed normally under company expenses." Burkitt and Matthews said that "The broadcast follows detailed allegations by China's Ministry of Public Security on Monday accusing Glaxo of using travel agencies as vehicles to bribe hospitals, officials and medical person-

1 Kathrin Hille & John Aglionby, *China accuses GlaxoSmithKline of bribing officials over prices*, Financial Times (Jul. 11, 2013), http://www.ft.com/intl/cms/s/0/cc61926e-e9f3-11e2-b2f4-00144feabdco.html#axzz3cT52tZKR.

2 Laurie Burkitt & Christopher M. Matthews, *China Steps Up Pressure on Glaxo*, Wall Street Journal (Jul. 16, 2013), Drops Hammer on Glaxo", http://www.wsj.com/articles/SB10001424127887323664204578609773610319236.

nel to sell more drugs at inflated prices. Officials also alleged the travel agencies offered what the officials called sexual bribes to Glaxo executives to keep company business."

These findings flew in the face of the company's own internal investigation into allegations of bribery and corruption brought by a whistleblower. Hille and Aglionby reported that "GSK said it had conducted an internal four-month investigation after a tip-off that staff had bribed doctors to issue prescriptions for its drugs. The internal inquiry found no evidence of wrongdoing, it said." Indeed after the release of information from the Chinese government, which GSK said was the first it had heard of the investigation, it released a statement quoted in the FT article, which stated ""We continuously monitor our businesses to ensure they meet our strict compliance procedures – we have done this in China and found no evidence of bribery or corruption of doctors or government officials. However, if evidence of such activity is provided we will act swiftly on it," the company said."

In another FT article, Hook and Jack entitled "*GSK is test case in China's rules laboratory*", noted that GSK had received information from an internal whistleblower back in January. The company investigated claims of bribery and corruption and publicly announced that the company had found no such evidence of "bribery or corruption in relation to our sales and marketing...in China". Further, the company claimed it was unaware of any allegations of bribery of doctors to prescribe its drugs until there was a public announcement by China's Public Security Ministry.

The bad news continued to be reported in the international press through July and up until early August, 2013 when the Chinese government ceased making its almost daily announcements about the matter and GSK had relatively little to say about the case for the remainder of the year. But in mid-2014, more information began to come out regarding more specific allegations of GSK's misconduct in China, allegations about corruption issues in other countries and the anonymous whistleblower and internal investigation. All of this culminated in a secret one-day trial in August, 2014 where GSK was convicted of corruption in China and receiving a (Chinese) record fine of approximately $491MM.

This article will bring the GSK corruption scandal up to date, detail the facts, information and allegations that continued to dribble out over the past year and end with the GSK conviction for corruption. I will also present some of the lessons which a compliance practitioner may take away from this matter to use in the review, implementation and enhancement of a *best practices* compliance program going forward. We pick up the story in May, 2014...

GSK Prosecution Timeline (2014)

May	UK Serious Fraud Office and U.S. Department of Justice announce they have opened separate investigations against GSK.
May	Chinese authorities accuse GSK China Country Manager Mark Reilly of orchestrating China bribery scheme.
June	Allegations of GSK bribery in Syria, Iraq, Poland and Greece surface. GSK China unit employees bring claims that were forced by management to pay bribes and told to lie to investigators.
July	It is revealed that GSK was sent a 'sex tape' of China country manager and his girlfriend by same anonymous whistleblower who made allegations of bribery.
July	Trial of Humphreys and wife is announced.
August 8	One-day trial held for Humphreys and wife. Both convicted.
September 18	GSK pleads guilty in secret one-day trial. Fined $491MM.

II. GSK FACES A BAD DAY AT BLACK ROCK

You know it is going to be a rainy day when your employees line up to testify against your company in an ongoing investigation for bribery and corruption. But those rainy day sighs can move up to a *Bad Day at Black Rock* level when these same employees publicly announce that the company they work for owes them for the creation of fraudulent invoices used by a business unit to fund bribery and corruption which violates not only the FCPA and the UK Bribery Act but also domestic Chinese anti-corruption laws. This happened to GSK when it was announced that certain current employees in its China operation were petitioning the company to reimburse them for bribes they were ordered to pay by their superiors.

It was reported[3] "the UK pharmaceutical company at the centre of a Chinese corruption

3 Leslie Hook & Andrew Jack, *GSK is test case in China's rules laboratory*, Financial Times (Jul. 15, 2013), http://www.ft.com/intl/cms/s/0/59b1a76a-ed5c-11e2-8d7c-00144feabdc0.html#axzz3cT52tZKR.

scandal, is facing protests from junior employees who say the company is refusing to reimburse them for bribes they were ordered to pay by their superiors." While my initial thought was that these Chinese employees had quite a bit of 'cheek' in raising this claim. Moreover, "some Chinese sales staff are complaining that GSK has denied bonuses, threatened dismissal or refused to reimburse them for bribes they say were sanctioned by their superiors to boost the company's drug sales. In some cases, managers instructed them to purchase fake receipts that were used to cover up bribes paid in cash or gifts to doctors and hospitals, according to salesmen interviewed by the Financial Times."

The article went on to highlight just how some of these fake invoices, used to gain funds from the corporate headquarters to facilitate bribery and corruption, were generated. "In some instances, managers disguised their involvement by using their personal email address to instruct staff to pay bribes and by ordering junior staff to claim on their personal expense accounts – even if the bribe was actually paid out by the manager – according to these people." Last March, a group of current GSK employees sent a letter to the company that said, in part, ""All the expenses were approved by the company," the group wrote in a letter to management. "The expenses were paid with our own money, and although the receipts were not compliant, it was our managers who told us to buy the fake receipts," said one former GSK salesman."

The article quoted that GSK said, "We have zero tolerance for unethical or illegal behaviour and anyone who conducts such behaviour has no place in our company. We believe the vast majority of our employees uphold our values and we welcome employees speaking up if they have concerns." Talk about a 'Speak Up' culture. Probably not exactly what GSK had in mind when it invited employees to raise their concerns.

However, as damning as this is, and it would certainly appear to be quite damning, was the following revelation, regarding witness prep during GSK's internal investigation. The article noted, "Some staff were warned not to implicate their supervisors, according to a former salesman: "Our manager approached each person before they were questioned and asked them not to mention his name. He even prepared a story for them to tell the investigator.""

Dissecting all of the above, it would appear that GSK has several real problems on several fronts. The first is that there appears to have been clear China business unit management participation in the bribery and corruption scheme. While it is still not clear whether the corporate home office was involved in the scheme, simply knew of it or choose to bury its collective head in the sand as to what was going on in China, if your in-country business unit management is involved, it is not too many steps to the corporate home office. Conversely, the question might be that if this fraud against the corporate home office was so open and obvious, why did the corporate office not detect it going forward?

Yet the real issue for the corporate office may be the information about employees being

coached to hide evidence during the investigation. If such activity was limited to the 'managers' in the Chinese business units only, what does it say about a corporate office, which allows such witness intimidation? Think that is an investigation *best practice*? However, if the corporate office was involved in any way in such witness intimidation, it will bode extremely poorly in the eyes of the regulators, the UK SFO, which has opened an investigation into the GSK matter and probably the DOJ as well, since GSK is still subject to the Corporate Integrity Agreement it signed back in July of 2012; when it pled guilty and paid *$3 billion* to resolve fraud allegations. Think witness tampering or hiding of evidence might garner the attention of the DOJ for a company already under the equivalent of a Deferred Prosecution Agreement (DPA)?

III. THE SEX TAPE

Rebecca Evans[4] reported "A covert sex tape involving a senior executive and his Chinese lover was the trigger for a major investigation into corruption at British drugs giant GlaxoSmith-Kline, it was revealed yesterday. The video of married Mark Reilly and his girlfriend was filmed by secret camera and emailed anonymously to board members of the pharmaceutical firm. It led to an investigation that has rocked the £76billion company – which stands accused of bribing doctors and other health officials in China with £320million of gifts, including sexual favours from prostitutes, to persuade them to prescribe its drugs."

This sex tape, along with allegations of bribery and corruption, were sent to GSK Board members, including CEO Sir Andrew Witty in March 2013 by someone with the email address "*GSK Whistleblower*". Evans reported that two additional emails "making serious fraud allegations" were sent as well, one in January and one in May. Laurie Burkitt[5] reported that "The British drug maker regarded the video—apparently shot without the executive's knowledge—as a breach of security, the person said." Evans reported that in addition to this security breach, GSK believed the sex tape to be a "threat or blackmail attempt".

One of GSK's responses was to hire the firm ChinaWhys Co., to investigate the matter. The firm's principals, former journalist Peter Humphrey and Yu Yingzeng, a naturalized US citizen, were not able to determine who placed the video camera in Reilly's Shanghai

4 Rebecca Evans, *How a secret sex tape plunged British drugs giant Glaxo in a £90million bribery probe*, MailOnline (Jun. 30, 2014), http://www.dailymail.co.uk/news/article-2673963/How-secret-sex-tape-plunged-British-drugs-giant-Glaxo-90million-bribery-probe.html.

5 Laurie Burkitt, *Sex Video of GlaxoSmithKline China Executive Led to Hiring of Private Sleuths*, Wall Street Journal, (Jun. 29, 2014), http://www.wsj.com/articles/sex-video-of-glaxo-china-executive-led-to-hiring-of-private-sleuths-1404070620.

apartment, who shot the video or who sent it to GSK executives. However Evans reported "But a few months after starting to investigate Miss Shi, Mr Humphrey was arrested along with his wife Yu Yingzeng, a US citizen and daughter of one of China's most eminent atomic weapons scientists. According to Evans, Mr Humphrey's arrest and detention in July was at around the same time that China began a police probe into GSK's alleged bribery. And, unfortunately for Humphrey and his wife, they were arrested last August for allegedly breaking of Chinese laws relating to information privacy.

In addition to the investigation into the provenance of the sex tape and its sender, GSK had also engaged in an internal investigation into the substantive allegations of bribery brought forward by the "*GSK Whistleblower*" in emails to the GSK Board in January and May, 2013. As reported by Evans, "The emails laid out a series of sales and marketing practices described as 'pervasive corruption'." Unfortunately for the company, GSK "found 'no specific evidence' to substantiate the claims. However, the accusations are virtually identical to the charges laid by police against Mr Reilly and 45 other suspects. Britain's Serious Fraud Office announced it would investigate the company's 'commercial practices'."

'Honey-pots' and 'Sparrow-nests' are well known terms for anyone who has read cold war tales of espionage between the former Soviet Union and the US. However, the Reilly sex-tape and the GSK bribery scandal would seem to be an entirely different can of worms. Hannah Beech[6] wrote that in China, "Surveillance - or the threat of surveillance — is a constant in China. As a journalist, I may be more interesting to the powers that be than some other foreigners here. But other expat friends who've been followed, hacked or otherwise tracked in China include diplomats, NGO staff and businesspeople. Also, artists and academics." Such surveillance includes having "email auto-forwarding mysteriously activated or to be tailed by a black Audi while on assignment in the Chinese countryside."

It does seem incredible at this point that any serious internal investigation could fail to turn up any of the evidence that the Chinese government has been able to develop against GSK. This points to the absolute importance of your internal investigations. Although the GSK investigation was focused in China, the same is true in the US, particularly for a US listed company subject to Dodd-Frank. Further, we must invoke that well-known British author George Orwell for reminding you that in some countries Big Brother really is watching you. And finally, you may not be paranoid as people really may be watching you and filming your most intimate acts.

6 Hannah Beech, *What the GSK Sex Tape Says About Surveillance in China*, Time (Jun. 30, 2014), http://time.com/2939471/china-sex-videos-surveillance-glaxosmithkline-mark-reilly.

IV. INTERNATIONAL RIPPLES FROM THE CHINESE CORRUPTION INVESTIGATIONS

The effects of the GSK bribery scandal have expanded far beyond the geographic limits of China. Lucy Hornby[7] wrote about some of the ripple effects of the GSK corruption investigation. Her basic thesis was set out in the first line of her piece, "Never before have China's domestic politics had such ramifications for global business." She wrote about two tangible examples of what she termed the "ripple effects" of the Chinese anti-corruption investigation, which began in earnest last summer with the revelations of corruption by GSK.

Hornby reported that the stock price for the Canadian company, Athabasca Oil Corporation, "the partner company for major Chinese investments in Canadian oil sands – fell 13 per cent this week. It is down 24 per cent since the beginning of April, when Athabasca announced PetroChina, a listed unit of CNPC, would buy the 40 per cent of the Dover oil sands project that it did not already own. Since then, two executives from PetroChina's Canadian operations have fallen prey to the corruption purge – and the C$1.32bn (US$1.23bn) transfer payment has not been made." But these ripples have also reached the British breakfast table as Chinese authorities announced they were investigating the owner of the company that makes the breakfast staple Weetabix.

Business ventures in other countries such as Cambodia and Australia have been put off due to the Chinese corruption investigation. This has been because of both corrupt payments made to Chinese officials and in some cases corrupt payments alleged to have been made by Chinese officials. For instance in Cambodia a project that was mired in such problems that the primary funding partner, The World Bank, had suspended funding has now run into such problems that Standard Chartered may lose up to $250MM in funding which it provided. Further, Hornby reported that "In Australia last year, a A$1.4bn bid for Sundance Resources – which had proposed a $A5bn iron ore mine on the border of Cameroon and the Republic of Congo – collapsed after high-flying Chinese entrepreneur Liu Han abruptly vanished. Mr Liu had built his mining business by cultivating ties with Mr Zhou while the latter governed southwestern Sichuan province. He was sentenced to death in May for organised crime. His defence was that he was carrying out orders for unnamed "leaders"."

Things are particularly difficult at PetroChina, a major investor in Canadian oil sands, because, as Hornby noted, "dozens of senior executives have been detained or questioned in the past year. Many, including the head of its Indonesian business, played key

7 Lucy Hornby, *China corruption probe reaches western breakfast tables*, Financial Times (Jul. 31, 2014), http://www.ft.com/intl/cms/s/0/517911de-17d4-11e4-a82d-00144feabdc0.html#axzz3cT52tZKR.

roles in its international projects." However Hornby believes that "capital expenditure commitments by state-owned enterprises are likely to be honoured as the investigation continues, because China's large and growing economy has a fundamental need for resources."

Another large Chinese energy concern CNPC has also been hard hit by the corruption scandal. Attached, as a diagram, to Hornby's article is a graphic that shows the extent of the company's investments of the past 10 years or so. The graphic also notes that the company "has been hardest hit by the ongoing corruption purge, with dozens of senior executives detained or questioned." The chart below shows the "ripple effects" of CNPC investment.

Country	Investment Amount
Kazakhstan	$12.7bn
Peru	$2.6bn
Turkmenistan	$1.2bn
Scotland	$1bn
Ecuador	$0.7bn
Australia	$4.1bn
Canada	$3.3bn
Syria	$0.6bn
Mozambique	$4.2bn

Hornby's article touched on another area, which has significance for the FCPA practitioner, that begs the question of whether a state-owned enterprise is an instrumentality or in any other way covered by the FCPA? She wrote that "the unusually public nature of this corruption investigation has given outsiders a clearer insight into the way money and power have become entwined, and influence dealmaking, in today's China." She quoted Luke Patey, for the following, ""For years, Chinese national oil companies have fought hard against the label that they are political instruments of the Chinese government and Communist party. That political nature is now on full display.""

Hornby's article demonstrates not only the pervasive nature of Chinese corruption but also how many countries such corruption may have effected. It also dispels those FCPA naysayers who argue that the law brings a competitive disadvantage to US companies. Many of these Chinese investments are now on hold with no hope of completion or even funding because of the domestic turmoil inside China over corruption. Companies and countries want a reliable business partner, starting with one which does not engage in bribery and corruption to obtain a contract and then onto a company which fulfills its contractual obligations. Think about that as a selling point the next time you are overseas.

V. HUMPHREY AND WIFE CONVICTED

When it was announced in July, 2014 that Peter William Humphrey, a 58-year-old British national, and his wife, Yu Yingzeng, a 61-year-old American, would go on trial on charges of illegally purchasing personal information about Chinese nationals would go on trial, on August 8, 2014, Shanghai's No. 1 Intermediate People's Court, the trial was originally scheduled to be closed to the public. However later in July, Chinese officials announced that the trial would be 'open' although the degree of openness is not completely clear.

Further the couple's son, Harvey Humphrey, was allowed visited his parents in their detention center in Pudong, Shanghai, for the first time since their arrest. The visit came after some fierce lobbying by the US and UK consulates. Carly Heflan[8] reported that their son said, "They didn't quite believe I was coming. They were quite overwhelmed. My mum was shocked. My dad held himself together," the younger Humphrey told the paper. "It's a bit unusual for the Chinese to do this. I feel something has changed in the Chinese approach to my parents." Son Harvey had written to the GSK's Chief Executive Officer (CEO) Sir Andrew Witte last December to "take a few minutes to raise my father's case" during a visit to the country, he told the FT, "I understand everything is complicated in China but it seems my parents are paying a big price".

In that one-day trial Peter Humphreys and his wife Ms. Yu, were convicted of illegally purchasing information on Chinese citizens. Gabriel Wildau and Andrew Ward[9] reported that husband Humphreys received a two and a half year jail term which was "just short of the three-year maximum". James T. Areddy and Laurie Burkitt[10] reported that he was also ordered to pay a fine of approximately $32,500 and will be deported from the country when his jail term is completed. Wife Yingzeng received a two year jail term and was ordered to pay a fine of approximately $23,000 but will be allowed to remain in the country after her sentence is completed. Both announced after the trial that they would not appeal their sentences.

8 Carly Helfand, *GSK private eyes' son allowed first visit to parents in China jail as trial nears*, FiercePharma (Aug. 4, 2014), http://www.fiercepharma.com/story/gsk-private-eyes-son-allowed-first-visit-parents-china-jail-trial-nears/2014-08-04.

9 Gabriel Wildau & Andrew Ward, *China court sentences GSK investigator*, Financial Times (Aug. 8, 2014), http://www.ft.com/intl/cms/s/0/af4b76dc-1ecb-11e4-ad93-00144feabdc0.html#axzz3cT52tZKR.

10 James T. Areddy & Laurie Burkitt, *China Convicts Two Foreign GSK Investigators*, Wall Street Journal (Aug. 8, 2014), http://www.wsj.com/articles/china-trial-of-british-american-investigators-begins-1407469079.

David Barboza[11] reported that the couple "acknowledged that from 2009 to 2013, they obtained about 250 pieces of private information about individuals, including government-issued identity documents, entry and exit travel records and mobile phone records, all apparently in violation of China's privacy laws." According to the NYT article, wife Yu claimed that she did not know her actions where illegal and was quoted as saying, "We did not know obtaining these pieces of information was illegal in China. If I had known I would have destroyed the evidence." According to the WSJ, the privacy law which was the basis of the conviction, was enacted in 2009 "to make it illegal to handle certain personal medical records and telephone records" but that the law itself "remains vague" on what precisely might constitute violation.

From the court statements, however, it did appear that the couple had trafficked in personal information. As reported by the WSJ, "In separate responses over more than 10 hours, Mr. Humphreys and Ms. Yu denied that their firm trafficked in personal information, saying they had hired others to obtain personal data when clients requested it." From the documents presented by the prosecution, it would seem clear that the couple had obtained my items which were more personal in nature. They were alleged by prosecutors to have "used hidden cameras to gather information as well as government records on identification numbers, family members, real-estate holdings, vehicle owner, telephone logs and travel records."

Recognizing the verdicts under Chinese laws are usually predetermined and the entire trials are scripted affairs, there is, nonetheless, important information communicated to the outside world by this trial. First and foremost is, as reported in the NYT article is a "chilling effect on companies that engage in due diligence work for global companies, many of whom believe the couple may have been unfairly targeted." The WSJ article went further quoting Geoffrey Sant for the following, "It impacts all attempts to do business between the U.S. and China because it will be very challenging to verify the accuracy of company or personal financial information." In other words, things just got a lot tougher to perform, what most companies would expect to be a minimum level of due diligence.

Second is the time frame noted in the court statements as to the time of the violations, from 2009 to 2013. Many had assumed that Humphreys and Yingzeng's arrests related to their investigation work on behalf of the GSK, which was trying to determine who had filmed a sex tape of the company's head of Chinese operations, which was then provided to the company via an anonymous whistleblower. This would seem to beg the question of whether the couple would have been prosecuted if they not engaged in or

11 David Barboza, *In China, British Investigator Hired by Glaxo, and Wife, Sentenced to Prison*, The New York Times (Aug. 8, 2014), http://www.nytimes.com/2014/08/09/business/international/in-china-british-investigator-hired-by-glaxo-and-his-wife-are-sentenced-to-prison.html?_r=0.

accepted the GSK assignment.

VI. GSK CONVICTED

"GSK plc sincerely apologises to the Chinese patients, doctors and hospitals, and the Chinese Government and the Chinese people."

With those words, GSK was convicted in a secret trial in a court in the Hunan province of China for bribery and corruption related to its Chinese business unit. The amount of the fine was approximately $491MM. This fine was the largest levied on a western company for bribery and corruption in China. Moreover, if it had been in the United States for a violation of the FCPA, it would have come in as the third highest fine of all-time, behind those of Siemens and Halliburton. Andrew Ward and Patti Waldmeir[12] noted that the fine is "equal to the Rmb 3bn in bribers that Chinese investigators said had been paid by GSK."

While it is not entirely clear how long the trial lasted, it appeared that it was in the same range as the one-day trial given to Peter Humphrey and his wife last month, when they were both found guilty for violating China's privacy laws. Keith Bradsher and Chris Buckley[13] reported, "Chinese authorities accused Glaxo of bribing hospitals and doctors, channeling illicit kickbacks through travel agencies and pharmaceutical industry associations — a scheme that brought the company higher drug prices and illegal revenue of more than $150 million. In a rare move, authorities also prosecuted the foreign-born executive who ran Glaxo's Chinese unit." Moreover, GSK China's country manager, Mark Reilly and four other in-country executives were each convicted with potential sentences of up to four years in prison. The NYT noted, "the sentences were suspended, allowing the defendants to avoid incarceration if they stay out of trouble, according to Xinhua. The verdict indicated that Mr. Reilly could be promptly deported. The report said they had pleaded guilty and would not appeal."

Grace Zhu and Fanfan Wang[14] detailed the five GSK executives, their crimes and sentences:

12 Andrew Ward & Patti Waldmeir, *GSK to pay £297m fine for Chinese bribes*, Financial Times (Sept. 19, 2014), http://www.ft.com/cms/s/0/dea9811e-3fd5-11e4-936b-00144feabdc0.html.

13 Keith Bradsher & Chris Buckley, *China Fines GlaxoSmithKline Nearly $500 Million in Bribery Case*, New York Times (Sept. 19, 2014), http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html.

14 Grace Zhu & Fanfan Wang, *Meet the Glaxo Executives Convicted in China*, Wall Street Journal (Sept. 19, 2014), http://blogs.wsj.com/chinarealtime/2014/09/19/meet-the-glaxo-executives-convicted-in-china.

- Mark Reilly: GSK's former China chief. He was sentenced to prison for three years with a four-year suspension. He was also the victim of an illicit recording of he and his girlfriend with the sex tape delivered to GSK management in London.
- Zhang Guowei: GSK China's former HR Director, who was sentenced to three years in prison with a three-year suspension. Chinese state media said he admitted that the company has used many bribery schemes to ensure the sales of high price drugs to Chinese consumers.
- Liang Hong: Former GSK China's vice president and operations manager. He was sentenced to two years in prison with a three-year suspension. On Chinese state-controlled television he said he gave bribes to government officials, hospital administrators and doctors via travel agencies to pave the way for drug sales.
- Zhao Hongyan: GSK China's former legal-affairs director. Ms. Zhao was sentenced to two years in prison with a two-year suspension. On state-controlled television Ms. Zhao said she destroyed evidence relating to bribery to avoid punishment.
- Huang Hong: Huang was a GSK China's business-development manager. She was sentenced three years in prison with a four-year suspension. The WSJ article reported that she was accused of giving and taking bribes; and informed Chinese officials that GSK China used funds labeled for public relations uses to maintain relationships with "major clients," who she said were hospital administrators.

The suspension of the sentences was highly significant. The FT article quoted from the trial court that the sentences had resulted directly because "they confessed the facts truthfully and were considered to have given themselves up." The WSJ article reported that the court also took into account that GSK China country manager Mark Reilly had "voluntarily returned to China, assisted in the investigation and confessed...and had "truthfully recounted the crimes of his employer." Also they were in stark contrast to the three-year and two-year sentences handed down to Humphreys and his wife respectively last month. There was no word from GSK, however, on whether it would terminate some or all of the convicted executives.

GSK itself made several interesting statements about the bribery allegations and conclusions of the trial court. The FT article quoted CEO Sir Andrew Witty, for the following, "Reaching a conclusion in the investigation of our Chinese Business is important, but this has been a deeply disappointing matter for GSK. We have and will continue to learn from this. GSK has been in China for close to a hundred years, and we remain fully committed to the country and its people." The company went further in statements. In addition to the quote above, GSK was quoted in the NYT article as saying, "that it 'fully accepts the facts and evidence of the investigation, and the verdict of the Chinese judicial authorities.'" The FT article added further clarification when it said that GSK "had 'cooperated fully with the authorities and has taken steps to comprehensively rectify the

issues identified at the operations of GSK China.'"

These statements of contrition are quite a distance from the place where GSK started last summer when the bribery allegations broke when the company tried to use the 'rogue employee(s)' defense, when it said that the bribery and corruption involved only a "few rogue Chinese-born employees" that were "outside our systems of controls" Oops.

The NYT reported that GSK also said, "that the court, the Changsha Intermediate People's Court, had found the company guilty only of bribing nongovernmental personnel." This is significant because the bribery of a government official (defined as such in China and not under the FCPA) is a much more serious crime in China. The British Embassy in China also weighed in, at least slightly, with the following statement, "We note the verdict in this case. We have continually called for a just conclusion in the case in accordance with Chinese law. It would be wrong to comment while the case remains open to appeal."

VII. THE VERDICT

Did GSK obtain a negotiated settlement with the Chinese government when it was announced that the company pled guilty to bribery and corruption and was fined almost $500MM by a Chinese court? Further, what lessons can be drawn from the GSK matter for companies operating in China and the compliance practitioner going forward?

The first lesson to draw is that the Chinese government will focus more on companies than on individuals. Andrew Ward, Patti Waldmeir and Caroline Binham[15] quoted Mak Yuen Teen, a corporate governance expert at the National University of Singapore for the following, "By handing suspended sentences rather than jail terms to Mark Reilly, GSK's former head of China, and four of his top lieutenants, the court in Hunan province was holding the company more accountable than the individuals."

However other commentators said, "GSK got off more lightly than expected for bribing doctors to prescribe its drugs." The article went on to note, "People close to the situation denied that the outcome amounted to a negotiated settlement. But Bing Shaowen, a Chinese pharmaceuticals analyst, said it was likely that GSK made commitments on research and development investment and drug pricing to avoid more draconian treat-

15 Andrew Ward et al., *GSK closes a chapter with £300m fine but story likely to run on*, Financial Times (Sept. 19, 2014), http://www.ft.com/cms/s/0/575426c6-3ffb-11e4-936b-00144feabdc0.html.

ment. Andrew Ward, Patti Waldmeir and Caroline Binham[16] cited Dan Roules, an anti-corruption expert at the Shanghai firm Squire Sanders, who said that he had expected the penalty to be harsher. Roules was quoted as saying "The fact that GSK co-operated with the authorities would have made a difference." The article went on to say that Roules "pointed to GSK's statement on Friday pledging to become "a model for reform in China's healthcare industry" by "supporting China's scientific development" and increasing access to its products "through pricing flexibility"."

What about reputational damage leading to a drop in the value of stock? The market had an interesting take on the GSK conviction, it yawned. Moreover, as noted in the FT Lex Column "The stock market was never bothered. The shares moved little when the investigation, and then the fine, were disclosed." Why did the market have such a reaction? The Lex Column said that one of the reasons might be that the "China may be too small to matter much for now" to the company.

Another lesson is one that Matt Kelly[17] wrote about in the context of US National Football League scandals around criminal actions of football players, when he said that a company must align its "core values with its core priorities." GSK moved towards doing that throughout the last year, during the investigation into the bribery and corruption scandal in China. Although CEO, Sir Andrew Witty, has been a champion for ethical reform in both the company and greater pharmaceutical industry, the FT reporters noted that the China corruption scandal, coupled with "smaller-scale corruption allegations in the Middle East and Poland, has raised fresh questions about ethical standards and compliance." If Witty wants to move GSK forward, he must strive to align the company's business priorities with his (and the company's) stated ethical values.

Which brings us to some of the successes that GSK has created in the wake of the bribery and corruption scandal. These successes are instructive for the compliance practitioner because they present concrete steps that the compliance practitioner can do to help facilitate such change. As reported by Katie Thomas[18] one change that GSK has instituted is that it will no longer pay doctors to promote its products and will stop tying compensation of sales representatives to the number of prescriptions doctors write, which were two common pharmaceutical sales practices that have been criticized as troublesome conflicts of interest. While this practice has gone on for many, many years

16 *Id.*

17 Matt Kelly, *The NFL's True Problem: Misplaced Priorities Trumping Ethics & Compliance*, Compliance Week (Sept. 15, 2014), https://www.complianceweek.com/blogs/the-big-picture/the-nfl's-true-problem-misplaced-priorities-trumping-ethics-compliance#.VXWEfGDOVCM.

18 Katie Thomas, *Glaxo Says It Will Stop Paying Doctors to Promote Drugs*, New York Times (Dec. 16, 2013), http://www.nytimes.com/2013/12/17/business/glaxo-says-it-will-stop-paying-doctors-to-promote-drugs.html?_r=1.

it had been prohibited in the United States through a pharmaceutical industry-imposed ethics code but is still used in other countries outside the US.

In addition to this ban on paying doctors to speak favorably about its products at conferences, GSK will also change its compensation structure so that it will no longer compensate sales representatives based on the number of prescriptions that physicians write, a standard practice that some have said pushed pharmaceutical sales officials to inappropriately promote drugs to doctors. Now GSK pays its sales representatives based on their technical knowledge, the quality of service they provided to clients to improve patient care, and the company's business performance.

In addition to the obvious conflict of interest, which apparently is an industry wide conflict of interest because multiple companies have engaged in these tactics, there is also clearly the opportunity for abuse leading to allegations of illegal bribery and corruption. Indeed one of the key bribery schemes alleged to have been used by GSK in China was to pay doctors, hospital administrators and other government officials, bonuses based upon the amount of GSK pharmaceutical products, which they may have prescribed to patients. But with this new program in place, perhaps GSK may have "removed the incentive to do anything inappropriate."

This new compensation and marketing program by GSK demonstrates that companies can make substantive changes in compensation, which promote not only better compliance but also promote better business relationships. A company spokesman interviewed the NYT piece noted that the changes GSK will make abroad had already been made in the US and because of these changes, "the experience in the United states had been positive and had improved relationships with doctors and medical institutions."

In addition to these changes in compensation and marketing, Ward/Waldmeir/Binham, reported that GSK announced it would strive to be "a model for reform in China's healthcare industry" by "supporting China's scientific development" and increasing access to its products "through pricing flexibility". They further stated "Rival companies will now be watching nervously to see whether more enforcement action takes place in a sector where inducements for prescribing drugs have long been an important source of income for poorly paid Chinese medics," which is probably not going to be a return the wild west of bribery and corruption that occurred over the past few years in China. Bing Shaowen was quoted as saying that the GSK matter "is a very historic case for the Chinese pharmaceutical industry. It means that strict compliance will become the routine and the previous drug marketing and sales methods must be abolished." But the company still faces real work to rebuild its reputation in China. Moreover, it still faces legal scrutiny for its conduct in the UK under the Bribery Act and the US under the FCPA.

VIII. WHAT CAN YOU DO WHEN RISKS CHANGE IN A THIRD PARTY RELATIONSHIP

James T. Areddy and Laurie Burkitt[19] explored some of the problems brought about by the investigators convictions. They quoted Manuel Maisog, chief China representative for the law firm Hunton & Williams LLP, who summed up the problem regarding background due diligence investigations as "How can I do that in China?" Maisog went on to say, "The verdict created new uncertainties for doing business in China since the case hinged on the couple's admissions that they purchased personal information about Chinese citizens on behalf of clients. Companies in China may need to adjust how they assess future merger partners, supplier proposals or whether employees are involved in bribery."

What does this mean for a company which desired to engage in business in China, through some type of third party relationship, from a sales representative to distributor to a joint venture? What if you cannot get such information? How can you still have a *best practices* compliance program around third parties representatives if you cannot get information such as ultimate beneficial ownership? At a compliance conference event, I put that question to a Department of Justice representative. Paraphrasing his response, he said that companies still need to ask the question in a due diligence questionnaire or other format. What if a third party refuses to answer, citing some national law against disclosure? His response was that a company needs to very closely weigh the risk of doing business with a party that refuses to identify its ownership.

A company must know who it is doing business with, for a wide variety of reasons. The current situation in China and even the convictions of Humphrey and Yu do not change this basic premise. You can *ask* the question. If a party does not want to disclose its ownership, you should consider this in any business relationship going forward.

The Humphrey and Yu conviction do not prevent you from asking the question about ownership. Their convictions mean that you may not be able to *verify* that information through what many people thought was publicly available information, at least publicly available in the west. I was struck by one line in the Areddy and Burkitt article, "It's not just that the tactical business practices need to change; it's the mind set" quoting again from Maisog.

The management of third parties under the FCPA is broken down into five steps:

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[19] James T. Areddy & Laurie Burkitt, *Chinese Case Lays Business Tripwires*, Wall Street Journal (Aug. 13, 2014), http://www.wsj.com/news/articles/SB10001424052702304905204580087453643918286.

- Business Justification and Business Sponsor;
- Questionnaire to Third Party;
- Due Diligence on Third Party;
- Compliance Terms and Conditions, including payment terms; and
- Management and Oversight of Third Parties After Contract Signing.

The due diligence step is but one of these five. Further due diligence is performed in large part to verify the information that you receive back from a proposed third party. So what if you can longer use avenues previously open to you in markets such as China? Perhaps there are other ways to manage this issue. Areddy and Burkitt also interviewed Jerry Ling, a partner at Jones Day, for the following "companies will need to analyze Chinese accounting documents themselves and conduct more in-person interviews with anyone they want to know more about in China."

Ling's point dovetails directly into the remarks from the DOJ representative. There is nothing about the Chinese law, or any other country's law, which prevents you from asking some basic questions that are found in the Step 2 Questionnaire cited above. You can always ask who the owners of a company are, whether they are direct or beneficial. You can always ask if a company, its owners or its senior management have been involved in any incidents involving bribery and corruption and you can always ask if the company has a Code of Conduct and/or compliance program and whether its owners or senior management are aware of the FCPA and have had training on it.

Assuming the company will answer your questionnaire, the difficulty you may find yourself in now is verifying the information that you receive. In Ronald Reagan parlance, you may trust but you may not be able to verify it. Ling said in the WSJ article that "The challenge now for clients is that it's hard to get good information."

However, due diligence is but one step in the management of any third party in a FCPA compliance program. Just as when risk goes up and you increase your management around that risk, the situation is similar in here. Putting it another way, if you cannot obtain private information such as personal identification numbers during the due diligence process, you can put greater management around the other steps that you can take. Further, there has been nothing reported which would suggest that publicly filed corporate licenses or other information that might show ownership can no longer be accessed. Court records and public media searches also seem to still be available.

But what if you simply cannot determine if the information you are provided regarding ownership is accurate or even truthful? You can still work to manage the relationship through your commercial terms by setting your commission or other pay rates at a reasonable amount of scale. If you are dealing with a commissioned sales representative, you can probably manage this area of the relationship by setting the commission in the range of 5%. You can also manage the relationship by reviewing invoices to make sure there is an adequate description of the services provided so that they justify whatever

compensation the third party is entitled to receive under the contract. You may also want to schedule such a third party for an audit ahead of other parties to help ensure adherence to your compliance terms and conditions.

There may be times when you cannot verify the true or ultimate beneficial owner of a third party. That does not have to be the end of the analysis. If that situation arises, you may want to see if there are other risk mitigation tools at your disposal. Put another way, if such a red flag arises, can it be cleared? Can it be managed? If your company is looking a major deal for multi-millions and your agent will receive a six or seven figure commission, the risk of not knowing with certainty may be too great because in such a case, an unknown owner could be a government official who has awarded the contract. But if your agent receives a considerably smaller commission and hence there is a considerably small amount of money to constitute a bribe, you may be able to manage that risk through a close and effective relationship management process.

IX. COMPLIANCE LESSONS LEARNED FROM GSK IN CHINA

A. Integrating Your Risk Assessment

One of the things that a compliance program must have is the flexibility to respond to changing events on the ground. Just as the GSK corruption scandal in China brought attention to domestic prosecutions of corruption in China, these very public events should bring the attention of your compliance team. A compliance program needed to be nimble in order to respond to such events in far-flung places. Risks change and they must be evaluated on a regular basis or in response to new facts on the ground, such as those which are present in China.

There may also be more than anti-corruption risk at play in any given situation. If a company only looks at one type of risk, such as anti-corruption, rather than others such as export control or anti-money laundering (AML) it can lead to the concept of what is called the "functional trap" of labeling and compartmentalizing risk. Robert Kaplan and Annette Mikes[20] declare that good risk discussions must be integrative in order for risk interaction to be evaluated. If not, a business "can be derailed by a combination of small events that reinforce one another in unanticipated ways."

The authors posit that it is difficult for companies to accurately and adequately discuss risk for a variety of reasons. One of these reasons is the aforementioned silo effect which can lead to a lack of discussion by a wide group regarding a number of risks, for example

[20] Robert S. Kaplan & Anette Mikes, *Managing Risks: A New Framework*, Harvard Business Review (Jun. 2014), https://hbr.org/2012/06/managing-risks-a-new-framework.

compliance risk; reputational risk; brand risk; credit risk; human resources risk are but a few of the types of risks mentioned in their article. The authors believe that one of the ways to knock down these silos when it comes to a more complete management of risk is to "anchor their discussions in strategic planning, one integrative process that most well-run companies already have" in place.

The authors cautioned that beyond simply introducing a systematic process for identifying and mitigating key risks, companies should also employ a risk oversight structure. The authors discussed the experience of the Indian IT company, Infosys, which uses a dual structure. It consists of a central team that identifies general strategy risks and then establishes central policy, together with a specialized, decentralized functional team. This second team designs and monitors policies and controls in consultation with local business units. These decentralized teams have the authority and expertise to respond to changes in the company's risk profile coupled with the nimbleness and agility of being in the field to deal with smaller issues before they become larger problems for the central team back in the corporate office.

I believe that the current political turmoil in China provides an example of the diversity your compliance program and risk assessment must maintain. Just as it is important to perform due diligence on third party representatives, before execution of an appropriate contract, the real work is in managing the relationship. In risk management, you must identify and assess the risk but the real work begins in managing the risk. This is where the rubber meets the road.

B. Board Oversight and Tone in the Middle

What are some of the lessons to be learned from GSK in China regarding the role of a company's Board of Directors and 'tone in the middle'? While we have not heard from the GSK Board on this case, it has become clear that the GSK Board was aware of both the anonymous whistleblower allegations and the release of the tape of the GSK China Country Manager and his girlfriend. One of the lessons learned from the GSK scandal is that a Board must absolutely take a more active oversight role not only when specific allegations of bribery and corruption are brought forward but also when companies are operating in high risk environments. Clearly this will be a major task for incoming Board Chairman, Sir Philip Hamilton, who will join the Board this coming January and will become the Chairman, later in the year when a successor is found for his current position as Chairman at the Royal Bank of Scotland.

Eric Zwisler and Dean Yoost[21] noted that as "Boards are ultimately responsible for risk oversight" any Board of a company with operations in China "needs to have a clear understanding of its duties and responsibilities under the FCPA and other international laws, such as the U.K. Bribery Act". Why should China be on the radar of Boards? The authors reported, "20 percent of FCPA enforcement actions in the past five years have involved business conduct in China. The reputational and economic ramifications of misinterpreting these duties and responsibilities can have a long-lasting impact on the economic and reputation of the company."

The authors understand that corruption can be endemic in China. They wrote, "Local organizations in China are exceedingly adept at appearing compliant while hiding unacceptable business practices. The board should be aware that a well-crafted compliance program must be complemented with a thorough understanding of frontline business practices and constant auditing of actual practices, not just documentation." Further, "the management cadence of monitoring and auditing should be visible to the board." All of the foregoing would certainly apply to GSK and its China operations.

Moreover, the FCPA Guidance[22] makes clear that resources and their allocation are an important part of any *best practices* compliance program. So if that risk is perceived to be high in a country such as China, the Board should follow the prescription in the Guidance, which states "the amount of resources devoted to compliance will depend on the company's size, complexity, industry, geographical reach, and risks associated with the business. In assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business."

To help achieve these goals, the authors suggested a list of questions that they believe every director should ask about a company's business in China.

- How is "tone at the top" established and communicated?
- How are business practice risks assessed?
- Are effective standards, policies and procedures in place to address these risks?
- What procedures are in place to identify and mitigate fraud, theft, and corruption?
- What local training is conducted on business practices and is it effective?

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21 Eric V. Zwisler & Dean A. Yoost, *Corruption in China and Elsewhere Demands Board Oversight*, National Association of Corporate Directors Directorship (Jul. 23, 2013), https://www.nacdonline.org/Magazine/Article.cfm?ItemNumber=9642.

22 Criminal Division of the U.S. Department of Justice & the Enforcement Division oft he U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practice Act*, *available at* http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

- Are incentives provided to promote the correct behaviors?
- How is the detection of improper behavior monitored and audited?
- How is the effectiveness of the compliance program reviewed and initiated?
- If a problem is identified, how is an independent and thorough investigation assured?

Third parties generally present the most risk under a FCPA compliance program and are believed (at least anecdotally) to comprise over 90 percent of reported FCPA cases, which subsequently involve the use of third-party intermediaries such as agents or consultants. But this is broader than simply third party agents because any business opportunity in China will require some type of business relationship.

One of the major failings of the GSK Board was that it apparently did not understand the actual business practices that the company was engaging in through its China business unit. While $500MM may not have been a material monetary figure for the Board to consider; the payment of such an amount to any third party or group of third parties, such as Chinese travel agencies, should have been raised to the Board. All of this leads me to believe that the GSK Board was not sufficiently engaged. While one might think a company which had received a $3bn fine and was under a Corporate Integrity Agreement for its marketing sins might have sufficient Board attention; perhaps legal marketing had greater Board scrutiny than doing business in compliance with the FCPA or UK Bribery Act. The Board certainly did not seem to understand the potential financial and reputational impact of a bribery and corruption matter arising in China. Perhaps they do now but, for the rest of us, I think the clear lesson to be learned is that a Board must increase oversight of its China operations from the anti-corruption perspective.

GSK CEO Sir Andrew Witty has certainly tried to say all of the right things during the GSK imbroglio on China. But did that message really get down into to the troops at GSK China? Moreover, did that message even get to middle management, such as the GSK leadership in China? Apparently not so, one of the lessons learned is moving the Olympian Pronouncements of Sir Andrew down to lower levels on his company. Just how important is "Tone at the Top"? Conversely, what does it say to middle management when upper management practices the age-old parental line of "Don't do as I do; Do as I say"? Kirk O. Hanson[23] listed eight specific actions that top executives could engage in which demonstrate a company's and their personnel's commitment to ethics and compliance. The actions he listed were:

[23] Kirk Hanson, *Ethics and the Middle Manager: Creating "Tone in The Middle",* Santa Clara University, Markkula Center for Ethics (May 2008), http://www.scu.edu/ethics/practicing/focusareas/business/middle-managers.html.

- Top executives must themselves exhibit all the "tone at the top" behaviors, including acting ethically, talking frequently about the organization's values and ethics, and supporting the organization's and individual employee's adherence to the values.
- Top executives must explicitly ask middle managers what dilemmas arise in implementing the ethical commitments of the organization in the work of that group.
- Top executives must give general guidance about how values apply to those specific dilemmas.
- Top executives must explicitly delegate resolution of those dilemmas to the middle managers.
- Top executives must make it clear to middle managers that their ethical performance is being watched as closely as their financial performance.
- Top executives must make ethical competence and commitment of middle managers a part of their performance evaluation.
- The organization must provide opportunities for middle managers to work with peers on resolving the hard cases.
- Top executives must be available to the middle managers to discuss/coach/resolve the hardest cases.

What about at the bottom, as in remember those China unit employees who claimed they were owed bonuses because their bosses had *instructed* them to pay bribes? Well if your management instructs you to pay bribes that is a very different problem. But if your company's issue is how to move the message of compliance down to the bottom, Dawn Lomer[24], wrote that that the unofficial message which a company sends to its employees "is just as powerful - if not more powerful - than any messages carried in the code of conduct." Lomer suggested that a company use "unofficial channels" by which your company can convey and communicate its message regarding doing business in an ethical manner and "influence employee behavior across the board." Her suggestions were:

- *Reward for Integrity* - Lomer writes that the key is to reward employees for doing business in an ethical manner and that such an action "sends a powerful message without saying a word."
- *The three-second ethics rule* - It is important that senior management not only consistently drives home the message of doing business ethically but they should communicate that message in a short, clear values statement.

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[24] Dawn Lomer, *An ethical corporate culture goes beyond the code*, Compliance and Ethics Professional 35 (Jan./Feb. 2012), *available at* http://www.corporatecompliance.org/Portals/1/PDF/Resources/Compliance_Ethics_Professional/0112/CEP_0112_Lomer.pdf.

- *Environmental cues* - Simply the idea that a company is providing oversight on doing business ethically can be enough to modify employee behavior.
- *Control the images* - It is not all about winning but conducting business, as it should be done.
- *Align Messages* - you should think about the totality of the messages that your company is sending out to its employees regarding doing business and make sure that all these messages are aligned in a way that makes clear your ethical corporate culture clear.

The GSK case will be in the public eye for many months to come. Both the UK SFO and US authorities have open investigations into the company. Just as the five counterpoint singing or the rooftop symphonic dance scene to the song *America* demonstrates the best of that art form; you can draw lessons from GSK's miss-steps in China now for implementing or enhancing your anti-corruption compliance program going forward now.

C. Internal Investigations

One of the clear lessons from the GSK matter is that serious allegations of bribery and corruption require a serious corporate response. Not, as GSK did in their best Inspector Clouseau imitation, failing to find the nose on their face. I was particularly focused on GSK's response to at least two separate reports from an anonymous whistleblower (brilliantly monikered as *GSK Whistleblower)* of allegations of bribery and corruption going on in the company's China business unit.

Further, and more nefariously, is GSK's documented treatment of and history with internal whistleblowers. One can certainly remember GSK whistleblower Cheryl Eckard. Graeme Wearden[25] reported that Eckard was fired by the company "after repeatedly complaining to GSK's management that some drugs made at Cidra were being produced in a non-sterile environment, that the factory's water system was contaminated with micro-organisms, and that other medicines were being made in the wrong doses." She later was awarded $96MM as her share of the settlement of a Federal Claims Act whistleblower lawsuit. Eckard was quoted as saying, "It's difficult to survive this financially, emotionally, you lose all your friends, because all your friends are people you have at work. You really do have to understand that it's a very difficult process but very well worth it." So to think that GSK may simply have been SHOCKED, SHOCKED, that allegations of corruption were brought by an internal whistleblower may well be within

[25] Graeme Wearden, *GlaxoSmithKline whistleblower awarded $96m payout*, The Guardian, (Oct. 27, 2010), http://www.theguardian.com/business/2010/oct/27/glaxosmithkline-whistleblower-awarded-96m-payout.

the realm of accurate.

There would have seemed to have been plenty of evidence to let the company know that something askance was going on in its Chinese operations. The international press was certainly able to make that connection early on in the scandal. Kathrin Hille and John Aglionby[26], reported "GSK said it had conducted an internal four-month investigation after a tip-off that staff had bribed doctors to issue prescriptions for its drugs. The internal inquiry found no evidence of wrongdoing, it said." Indeed after the release of information from the Chinese government, GSK said it was the first it had heard of the investigation. In a prepared statement, quoted in the FT, GSK said ""We continuously monitor our businesses to ensure they meet our strict compliance procedures – we have done this in China and found no evidence of bribery or corruption of doctors or government officials." However, if evidence of such activity is provided we will act swiftly on it."

Laurie Burkitt[27] wrote that "Emails and documents reviewed by the Journal discuss a marketing strategy for Botox that targeted 48 doctors and planned to reward them with either a percentage of the cash value of the prescription or educational credits, based on the number of prescriptions the doctors made. The strategy was called "Vasily," borrowing its name from Vasily Zaytsev, the noted Russian sniper during World War II, according to a 2013 PowerPoint presentation reviewed by the Journal." Burkitt reported in her article that "A Glaxo spokesman has said the company probed the Vasily program and "[the] investigation has found that while the proposal didn't contain anything untoward, the program was never implemented."" From my experience, if you have a bribery scheme that has its own code name, even if you never implemented that scheme, it probably means that the propensity for such is pervasive throughout the system.

I have often written about the need for a company to have an investigative protocol in place so that it is not making up its process in the face of a crisis. However the GSK matter does not appear to be that situation. It would not have mattered what investigation protocol that GSK followed, it would seem they were determined not to find any evidence of bribery and corruption in their China business unit. So the situation is more likely that GSK should have brought in a competent investigation expert law firm to head up their investigation in the face of this anonymous whistleblower's allegations.

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26 Hille & Aglionby, *supra* note 2.

27 Laurie Burkitt, *Chinese Officials Find Evidence GlaxoSmithKline Workers Bribed Doctors, Hospitals*, Wall Street Journal (Jul. 11, 2013), http://www.wsj.com/articles/SB10001424127887324694904578598772902807846.

James McGrath and David Hildebrandt[28] discussed the use of *specialized* outside counsel to lead an independent internal investigation as compliance and ethics *best practices.* This is based upon the US Sentencing Guidelines, under which a scoring system is utilized to determine what a final sentence should be for a criminal act. Factors taken into account include the type of offense involved and the severity of the said offense, as well as the harm produced. Additional points are either added or subtracted for mitigating factors. One of the mitigating factors can be whether an organization had an effective compliance and ethics program. McGrath and Hildebrandt argue that a company must have a robust internal investigation.

McGrath and Hildebrandt take this analysis a step further in urging that a company, when faced with an issue such as an alleged FCPA violation, should engage *specialized* counsel to perform the investigation. There were three reasons for this suggestion. The first is that the DOJ would look towards the independence and impartiality of such investigations as one of its factors in favor of declining or deferring enforcement. If in-house counsel were heading up the investigation, the DOJ might well deem the investigative results "less than trustworthy".

Matthew Goldstein and Barry Meier[29] wrote about the need for independence from the company being investigated in an article the NYT about the General Motors (GM) internal investigation. They quoted William McLucas, a partner at WilmerHale, who said, "If you are a firm that is generating substantial fees from a prospective corporate client, you may be able to come in and do a bang-up inquiry. But the perception is always going to be there; maybe you pulled your punches because there is a business relationship." This is because if "companies want credibility with prosecutors and investors, it is generally not wise to use their regular law firms for internal inquiries." Another expert, Charles Elson, a professor of finance at the University of Delaware who specializes in corporate governance, agreed adding, "I would not have done it because of the optics. Public perception can be affected by using regular outside counsel.""

Adam G. Safwat, a former deputy chief of the fraud section in the Justice Department, said that the key is "Prosecutors expect an internal investigation to be an honest assessment of a company's misdeeds or faults, "What you want to avoid is doing something that will make the prosecutor question the quality of integrity of the internal investigation."" Also quoted was Internal Investigations Blog editor, Jim McGrath who said, "A shrewd law firm that gets out in front of scandal can use that to its advantage in negotiating with authorities to lower penalties and sanctions. There is a great incentive to fer-

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28 McGrath & Hildebrandt, *Risks and Rewards of an Independent Investigation*, ACC Docket 29, no. 8 at 38 (Oct. 2010).

29 Matthew Goldstein & Barry Meier, *As Scandal Unfolds, G.M Calls the Lawyers*, New York Times (Mar. 15, 2014), http://www.nytimes.com/2014/03/16/business/general-motors-calls-the-lawyers.html.

ret out information so they can spin it."

D. Internal Controls, Auditing and Monitoring

There are valuable lessons to be drawn from GSK's miss-steps in China around internal controls, auditing and monitoring an anti-corruption compliance program. One of the questions that GSK will have to face during the next few years of bribery and corruption investigations is how an allegedly massive bribery and corruption scheme occurred in its Chinese operations? The numbers went upwards of $500MM, which coincidentally was the amount of the fine levied by the Chinese court on GSK. It is not as if the Chinese medical market was not well known for its propensity towards corruption, as prosecutions of the FCPA are littered with the names of US companies which came to corruption grief in China. GSK itself seemed to be aware of the corruption risks in China. Ben Hirschler[30] reported that the company had "more compliance officers in China than in any country bar the United States". Further, the company conducted "up to 20 internal audits in China a year, including an extensive 4-month probe earlier in 2013." GSK even had PricewaterhouseCoopers (PwC) as its outside auditor in China. Nevertheless, he noted, "GSK bosses were blindsided by police allegations of massive corruption involving travel agencies used to funnel bribes to doctors and officials."

1. Internal Controls

Where were the appropriate internal controls? You might think that a company as large as GSK and one that had gone through the ringer of a prior DOJ investigation resulting in charges for off-label marketing and an attendant Corporate Integrity Agreement might have such controls in place. It was not as if the types of bribery schemes in China were not well known. Jamil Anderlini and Tom Mitchell[31] wrote about the 'nuts and bolts' of how bribery occurs in the health care industry in China. The authors quoted Shaun Rein, a Shanghai-based consultant for the following "This is a systemic problem and foreign pharmaceutical companies are in a conundrum. If they want to grow in China they have to give bribes. It's not a choice because officials in health ministry, hospital administrators and doctors demand it."

Their article discussed the two primary methods of paying bribes in China: the *direct incentives* and *indirect incentives* method. Anderlini and Mitchell reported, "The 2012 annual reports of half a dozen listed Chinese pharmaceutical companies reveal the com-

30 Ben Hirschler, *How GlaxoSmithKline missed red flags in China*, Reuters (Jul. 19, 2013), http://www.reuters.com/article/2013/07/19/us-gsk-china-redflags-idUSBRE96I0L420130719.

31 Jamil Anderlini & Tom Mitchell, *Bribery built into the fabric of Chinese healthcare system*, Financial Times (Jul. 24, 2013), http://www.ft.com/cms/s/0/9b8979e2-f45f-11e2-a62e-00144feabdc0.html.

panies paid out enormous sums in "sales expenses", including travel costs and fees for sales meetings, marketing "business development" and "other expenses". Most of the largest expenses were "travel costs or meeting fees and the expenses of the companies' sales teams were, in every case, several multiples of the net profits each company earned last year.""

It would be reasonable to expect that internal controls over gifts would be designed to ensure that all gifts satisfy the required criteria, as defined and interpreted in Company policies. It should fall to a Compliance Officer to finalize and approve a definition of permissible and non-permissible gifts, travel and entertainment and internal controls will follow from such definition or criteria set by the company. These criteria would include the amount of the spend, localized down into increased risk such the higher risk recognized in China. Within this context, noted internal controls expert Henry Mixon has suggested the following specific controls. (1) Is the correct level of person approving the payment / reimbursement? (2) Are there specific controls (and signoffs) that the gift had proper business purpose? (3) Are the controls regarding gifts sufficiently preventative, rather than relying on detect controls? (4) If controls are not followed, is that failure detected?

2. Auditing

Following Mixon's point 4 above, what can or should be a company's response if one country's gifts, travel and entertainment expenses were kept 'off the books'? This is where internal audit or outside auditors are critical. Hirschler quoted an un-named source for the following, ""You'd look at invoices and expenses, and it would all look legitimate," said a senior executive at one top accountancy firm. The problem with fraud - if it is good fraud - is it is well hidden, and when there is collusion high up then it is very difficult to detect."" Jeremy Gordon, director of China Business Services was quoted as saying "There is a disconnect between the global decision makers and the guys running things on the ground. It's about initially identifying red flags and then searching for specifics."

There are legitimate reasons to hold medical conferences, such as to make physicians aware of products and the latest advances in medicine, however, this legitimate purpose can easily be corrupted. Hirschler quoted Paul Gillis, author of the China Accounting Blog, for the following "Travel agencies are used like ATMs in China to distribute out illegal payments. Any company that does not have their internal audit department all over travel agency spending is negligent." Based on this, GSK's auditors should have looked more closely on marketing expenses and more particularly, the monies spent on travel agencies. Hirschler wrote, "They [un-named auditing experts] say that one red flag was the number of checks being written to travel agencies for sending doctors to medical conferences, although this may have been blurred by the fact that CME accounts for a huge part of drug industry marketing."

Another issue for auditing is materiality. If GSK's internal auditors had not been trained that there is no materiality standard under the FCPA, they may have simply skipped past a large number of payments made that were under a company's governance procedure for elevated review of expenses. Further, if more than one auditor was involved with more than one travel agency, they may not have been able to connect the dots regarding the totality of payments made to one travel agency.

3. Ongoing Monitoring

A final lesson is monitoring. As Stephen Martin often says, many compliance practitioners confuse auditing with monitoring. Monitoring is a commitment to reviewing and detecting compliance programs in real time and then reacting quickly to remediate them. A primary goal of monitoring is to identify and address gaps in your program on a regular and consistent basis. Auditing is a more limited review that targets a specific business component, region, or market sector during a particular timeframe in order to uncover and/or evaluate certain risks.

Here I want to focus on two types of ongoing monitoring. The first is relationship monitoring, performed through software products. Internal GSK emails showed the company's China sales staff were instructed by local managers to use their personal email addresses to discuss marketing strategies related to Botox. Such software imports and analyzes communications data, like email, IM, telephony and SMTP log files from systems such as Microsoft Exchange Servers and Lotus Notes. The software then leverages social network analysis and behavioral science algorithms to analyze this communications data. These interactions are used to uncover and display the networks that exist within companies and between the employees of companies. Additionally, relationships between employees and external parties such as private webmail users, competitors and other parties can be uncovered.

The second type of monitoring is transaction monitoring. Generally speaking, transaction monitoring involves review of large amounts of data. The analysis can be compared against an established norm which is derived either against a businesses' own standard or an accepted industry standard. If a payment, distribution or other financial payment made is outside an established norm, thus creating a red flag that can be tagged for further investigation.

GSK's failure in these three areas now seems self-evident. However, the company's foibles can be useful for the compliance practitioner in assessing where their company might be in these same areas. Moreover, as within any anti-corruption enforcement action, you can bet your bottom dollar that the regulators will be assessing *best practices* going forward based upon some or all of GSK's miss-steps going forward.

X. WHAT DOES IT ALL MEAN? CHINA AND THE INTERNATIONAL FIGHT AGAINST CORRUPTION

GSK may well be a watershed in the global fight against bribery and corruption. Behavior and conduct, which was illegal under Chinese law but previously tolerated and even accepted by Chinese government officials, quickly became a quagmire that the company was caught in when charges of corruption were leveled against them last year. Many westerners were skeptical about the claims made against GSK and its head of China operations, Mark Reilly. That is one of the problems in paying bribes to government officials; it is always illegal under domestic law. David Pilling[32] said "Multinationals are discovering that there is only one thing worse than operating in a country where corruption is rampant: operating in one where corruption was once rampant – but is no longer tolerated."

When it began, it was not it clear why China's Communist Party Chief Xi Jinping began his anti-corruption push. Some speculated that it was an attack on western companies for more political reasons that economic reasons. Others took the opposite tack that the storm, which broke with the bribery and corruption investigation of GSK, was China's attack on western companies to either hide or help fix problems endemic to the Chinese economic system. My take is that his campaign has a different purpose but incorporates both political and economic reasons. That purpose is that Xi has recognized something that the US government officials and most particularly the DOJ have been preaching for some time. That is, the insidiousness of corruption and its negative effects on an economic system.

Xi and China have realized that corruption is a drain on the Chinese economic system. Publications as diverse as the Brookings Institute to the WSJ have noted that one of the reasons for the anti-corruption campaign is to restore the Chinese public's faith in the ruling Communist Party. Bob Ward[33] said, "China's anticorruption drive began in late 2012 as a way to cleanse the ruling Communist Party and convince ordinary Chinese that the system isn't rigged against them. Investigators are targeting some of China's most powerful officials and disciplining tens of thousands of lower-echelon officials who party investigators contend got used to padding their salaries." Cheng Li and Ryan McElveen, writing online for Brookings, in an article entitled "Debunking Misconceptions About Xi Jinping's Anti-Corruption Campaign", wrote, "If there were ever any doubts that Xi could restore faith in a party that had lost trust among the Chinese public, many of those doubts have been dispelled by the steady drumbeat of dismissals of

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32 David Pilling, *Why corruption is a messy business*, Financial Times (Sept. 24, 2014, 5:13 PM), http://www.ft.com/cms/s/0/598aa4dc-426d-11e4-9818-00144feabdc0.html.

33 Bob Ward, *The Risks in China's Push to Root Out Wrong*, Wall Street Journal, Oct. 6, 2014.

high-ranking officials since he took office."

But the economic reasons behind the anti-corruption campaign are equally important. One of the more interesting articulations came from one disgraced former Chinese government official, who was one of the earliest senior officials to be charged with corruption. James T. Areddy[34] wrote about the trial of Liu Tienan, the "former head of the National Energy Administration and senior director in the National Development Reform Commission" who had been arrested in May 2013. His trial finally came around in September 2014. At his trial he made some rather extraordinary statements. Areddy wrote that "Liu testified that reducing official power is key to curbing corruption: "The major point, which is based on my own experience, is to give the market a great deal of power to make decisions."" But Liu did not end there, "as he explained his view that China's state bureaucracies are too powerful and entrepreneurs are too weak. "Approvals should be developed in a system, rather by an individual's actions. This would help prevent abuse of power for personal self-interest.""

Whether or not Liu thought those statements up on himself, a smart defense lawyer suggested he make them to reduce his sentence, or the Chinese government told him to say it as his role in the well-known show trials of the Chinese justice system; it really does not matter. That is one of the most incredible statements I have ever heard of coming out of anything close to an official Chinese statement or proceeding. Think about it; first Liu is saying that the Adam Smith's 'invisible hand' of the market should be governing market decisions. Next, he speaks against the arbitrary nature in China for entrepreneurs in giving approval about how businesses can expand and grow in China. This arbitrary process should be replaced with objective criteria. It is almost if Lui is channeling his inner FCPA Professor when he speaks against artificial barriers to market entry. Finally, Liu attacks the small-mindedness of bureaucratic mentality in their use of power for self-interest.

There have already been demonstrated economic benefits to China's anti-corruption campaign. In September, Bloomberg reported that China's fight against bribery and corruption could boost economic growth, generating an additional $70 billion for the budget, in summarizing economists' forecasts. An article in the online publication Position and Promotions, reported that the bribery "could trigger a 0.1-0.5 percent increase in the world's second-biggest economy, equivalent to $70 billion dollars." This crackdown should also be welcomed by western companies, as "it could also benefit foreign companies operating on the Chinese market, who have experienced the negative effects of the omnipresent palm-greasing, according to Joerg Wuttke, president of European Chamber of Commerce in China." He was further quoted as saying, "It takes the stress

[34] James T. Areddy, *Chinese Ex-Official Admits to Corruption*, Wall Street Journal (Sept. 24, 2014), http://www.wsj.com/articles/chinese-ex-official-admits-bribery-in-high-profile-trial-1411562471.

away. You're not afraid that somebody gets an order because he found a better champagne or something like that. It's not Singapore yet, but it's a very positive development".

As we close this phase of GSK's saga, I think some time for reflection is appropriate. For the compliance practitioner there have been many specific lessons to be learned from GSK's missteps. However I think the clearest lesson is that the only real hope that a company has into today's world is an effective, best practices anti-corruption compliance program. Whether it is designed to help a company comply with the FCPA, UK Bribery Act or other anti-corruption legislation, it really does not matter. It is the only, and I mean only, chance your company will have when an issue in some far-flung part of the world splashes your company's name across the world's press.

But there may also be cause for celebration to those who have long preached against the evils of corruption, whether it is for economic reasons or for those who view the fight against anti-corruption as a part of the fight against terrorism. For if China is attacking domestic corruption, I believe that will lead other countries to do so as well. So while GSK may well suffer going forward, the fight against global bribery and corruption may just have moved a few feet forward.

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TEN ETHICS-BASED QUESTIONS FOR U.S. COMPANIES SEEKING TO DO BUSINESS IN CUBA

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[1] This is the first in a series of articles that will discuss corporate governance, compliance, and ethical challenges for US-based multinationals that wish to do business in Cuba. It is adapted in part from three blog posts on the Business Law Professor Blog. This essay will address values-based ethics codes. Future articles will address compliance challenges such as bribery and whistleblower protection, and whether foreign direct investment will spur human rights reform or perpetuate the status quo.

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I. INTRODUCTION

On December 17, 2014, President Barack Obama began the process of thawing the ice-cold relationship with Cuba by allowing additional travel to the island and relaxing some of the rules on doing business there. Full diplomatic relations were restored in July 2015, and a bank in Florida announced shortly thereafter that it would conduct business with Cuban banks. Nonetheless, as of the time of this writing, the 56-year embargo is still in force largely because of Cuba's human rights record and the nearly seven billion dollars worth of claims for confiscated property. Even so, US companies are rushing to the island to be the first to stake their claims when they are able to conduct business legally. After all, before the Communist revolution and the confiscation of property US persons and businesses owned or controlled 80% of the island's resources. When the embargo is lifted, US companies will compete with the EU and Canadian companies that have been there for decades, but what ethical challenges will US companies face? Cuba is one of five remaining Communist countries in the world, and US companies already do business in three of the others—the People's Republic of China. Laos, and the Socialist Republic of South Viet Nam. What makes Cuba different? How can and will companies reconcile a values-based code of ethics with the realities of the Cuban marketplace?

II. LIVING AND DOING BUSINESS IN CUBA

Cuba, an island the size of the state of Ohio, has a population of eleven million people and lies 90 miles south of the United States. On first glance, the island would appear to be an ideal trading partner for the United States. However, the average Cuban earns only $25-$45 USD per month, and 86% of people work for the government in some form (although the government is now allowing more private businesses). Only 5% of the country has reliable access to the internet or a mobile phone and the government controls access to the internet.[2] By one estimate, the Cuban military or its officers has it hands in 60%-70% of economy, 40% of foreign exchange revenues, and 20% of workers due to its control over sugar and cigar production, import-export, IT, communications, and civil aviation.[3]

Although Cuba sits on the United Nations Human Rights Council and has signed a

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2 U.S. Dep't of State, Human Rights and Labor, Cuba 2014 Human Rights Report 14 (2014), http://www.state.gov/documents/organization/236892.pdf.

3 James Bruno, *How Obama's Cuba Deal is strengthening its Military*, PoliticoMagazine, (Mar. 17, 2015), http://www.politico.com/magazine/story/2015/03/cuba-relations-obama-revolutionary-forces-far-116158.html#.Vcg54flViko.

number of treaties and covenants,[4] Cuba's human rights record is a particular source of ire for many opponents of lifting the US embargo. Since 1996, the European Union has also conditioned full economic relations with Cuba on that islands progress toward human rights reform under the "Common Position," although the EU has announced steps to begin normalizing relations.[5] Currently, Cuba ranks 169 out of 180 countries on the World Press Freedom Index.[6] Human Rights Watch recorded over 7,000 arbitrary detentions in 2014[7] and Amnesty International's 2015 report on Cuba noted that the government continues to restrict freedom of assembly, association, movement, and expression.[8] Many observers have also raised concerns about the lack of rule of law and the minimal infrastructure necessary to conduct business.[9] The US State Department observed recently that civil and other courts lack procedural safeguards.[10]

Although Cuba announced a new foreign investment law in 2014[11], most companies will still be forced to partner with the Cuban government in order to conduct business in the country because the full foreign capital companies are almost never approved by the government. Indeed most of the European and Canadian companies doing business in Cuba are in joint ventures with the Cuban government.[12] Those doing business in Cuba must recognize that their practices at home and even in other host nations will not

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4 UNITED NATIONS HUMAN RIGHTS, *Current Membership of the HRC*, http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx (last visited Aug. 9, 2015).

5 EUROPEAN PARLIAMENTARY RESEARCH SERV., *A New Phase in EU-Cuba Relations* (June 25, 2014), http://epthinktank.eu/2014/06/25/a-new-phase-in-eu-cuba-relations/; EUROPEAN UNION EXTERNAL ACTION, *EU Relations with Cuba*, http://eeas.europa.eu/cuba/index_en.htm (last visited Aug 9, 2015).

6 REPORTERS WITHOUT BORDERS, *World Press Freedom Index 2015*, https://index.rsf.org/#!/ (last visited Aug. 9, 2015).

7 HUMAN RIGHTS Watch, *World Report 2015: Cuba*, https://www.hrw.org/world-report/2015/country-chapters/cuba (last visted Aug. 9, 2015).

8 AMNESTY INTERNATION, AMNESTY INTERNATIONAL REPORT 2014/15 (2015), https://www.amnesty.org/en/countries/americas/cuba/report-cuba/.

9 *See Business in Cuba*, CUBA BUSINESS REPORT, http://www.cubabusinessreport.com/category/business-in-cuba/ (last visited Aug. 9, 2015); *see also* Frank Calzon, *Investing in Cuba can be a risky business*, MIAMI-HERALD, (Jan. 29, 2015); Gail Degeorge, David Tweed & Christopher Donville, *A Cuba Reality Check, From Golf Course to Myanmar Towers*, BLOOMBERG BUSINESS, (Dec. 22, 2014, 12:01 AM), http://www.bloomberg.com/news/articles/2014-12-22/a-cuba-reality-check-from-golf-course-to-myanmar-towers

10 Cuba 2014 Human Rights Report, *supra* note 3, at 10-12.

11 Daniel Trotta, *Cuba approves law aimed at attracting foreign investment*, REUTERS, (Mar. 29, 2014, 3:53 PM), http://www.reuters.com/article/2014/03/29/us-cuba-investment-idUSBREA2SoEJ20140329; Raul J. Valdes-Fauli, *What Does the New Cuban Foreign Investment Act Mean*, FoxRothchild, (July 2014), http://www.foxrothschild.com/publications/what-does-the-new-cuban-foreign-investment-act-mean/.

12 http://ctp.iccas.miami.edu/CubaBrief/Cuba%20Brief-LaborConditionsinCuba.pdf at 2; http://www.ft.com/cms/s/0/eb663b9a-a7b3-11e4-8e78-00144feab7de.html#axzz3iKhPDTFA

apply in Cuba. For example, foreign companies employing Cuban workers cannot legally pay them directly. Instead, they must pay a company controlled by the Cuban government in the home currency, and the Cuban worker receives payment in the Cuban peso, which has a much lower value.[13] In fact, the average Cuban employee receives only 8% of the employer's desired wage due to a law that allows the Cuban government to keep 92% of wages paid for foreign firms.[14] Cuban employees are not permitted to strike or to collectively bargain for their rights.[15] No laws protect people with disabilities in the workplace, although the law prohibits discrimination on the basis of sexual orientation and gender identity. Afro-Cubans have reported significant discrimination in encounters with police, government, and in employment.[16]

III. CURRENT U.S. BARRIERS TO DOING BUSINESS WITH CUBA

With few exceptions, US companies and persons currently cannot legally do business in Cuba without a license from the Treasury Department.[17] Notwithstanding the steady stream of new licenses granted of late, the embargo remains in place until it is lifted by the United States Congress.[18]

Notably, the US government has not been consistent in its business dealings with authoritarian or socialist regimes. Although the State Department has criticized this authoritarian government's human rights record,[19]China, another communist authoritarian country is the US' third largest trading partner.[20] The US lifted its trade embargo

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13 U. OF MIAMI, INST. FOR CUBAN AND CUBAN-AMERICAN STUDIES (ICCAS), The Plight of Cuban Workers: Rights Violations by the Cuban Government and Foreign Investors (Nov. 2012), http://ctp.iccas.miami.edu/CubaBrief/Cuba%20Brief-LaborConditionsinCuba.pdf

14 Onaisys Fonticoba, *Nuevas disposiciones sobre pago a trabajadores vinculados con la inversión extranjera* (Dec. 15, 2014, 21:12:18), http://www.granma.cu/cuba/2014-12-15/nuevas-disposiciones-sobre-pago-a-trabajadores-vinculados-con-la-inversion-extranjera. (noting "The payment will now be agreed to with businesses possessing foreign capital taking into consideration the salaries issued to workers in jobs of similar complexity in entities in the same area or sector of our geographic area, the salary scale that is applied in the country (as a reference point) and some additional payments for the corresponding law.")

15 ICCAS, *supra* note 14.

16 Cuba 2014 Human Rights Report, *supra* note 3, at 26-27.

17 *See* U.S DEP'T OF THE TREASURY, RESOURCE CENTER, CUBA SANCTIONS, http://www.treasury.gov/resource-center/sanctions/Programs/pages/cuba.aspx (last visited Aug. 9, 2015).

18 *See* Cuban Assets Control Regulations (CACR), 31 C.F.R. pt. 515.

19 U.S. DEP'T OF STATE, HUMAN RIGHTS AND LABOR, CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 2014 HUMAN RIGHTS REPORT 52-53 (2014), http://www.state.gov/documents/organization/236644.pdf.

20 The US-China Business Council (USCBC), US State Exports to China (2005-2014), https://www.uschina.org/reports/us-exports/national

with Viet Nam twenty years ago and major US companies now operate there, including Coca Cola, Proctor and Gamble, GE, and IBM[21] notwithstanding the fact that, the State Department has leveled some of the same human rights criticisms against Viet Nam as it has against Cuba.[22] The communist government of Laos did not fare much better in a recent human rights report,[23] but the US government actively promotes investment in that country.[24]

Cuba, however, is different in the eyes of some legislators. In addition to its human rights record, opponents of restoring full ties with the nation point to the nearly $7 billion USD ($1.8 billion plus interest at the time) of claims from confiscated property.[25] The United States Congress held hearings in July 2015 to address property rights in Cuba[26] and it is likely that Congress will not lift the embargo until there is some path to resolution on the confiscation claims.[27]

Despite all of the barriers, a number of US companies are eager to do business in Cuba. Assuming that they can do so legally, can they do so ethically? At the end of this essay, I have ten questions for some of the US companies that have recently announced that they are exploring business in Cuba.

IV. CAN A U.S. COMPANY ETHICALLY DO BUSINESS IN CUBA?

Approximately 79% of US employees work for an organization with a written code of

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21 *See US Firms See Vietnam Investments* Skyrocket, US – ASEAN BUS. COUNCIL, INC. (JUNE 18, 2015), https://www.usasean.org/council-in-the-news/2015/06/18/us-firms-see-vietnam-investments-skyrocket.

22 *See generally* U.S. DEP'T OF STATE, HUMAN RIGHTS AND LABOR, VIETNAM 2014 HUMAN RIGHTS REPORT (2014) http://www.state.gov/documents/organization/236702.pdf.

23 *See generally* U.S. DEP'T OF STATE, HUMAN RIGHTS AND LABOR, LAOS 2014 HUMAN RIGHTS REPORT (2014) http://www.state.gov/documents/organization/236664.pdf.

24 *See Doing Business in Lao PDR*, EMBASSY OF THE UNITED STATES, http://laos.usembassy.gov/doing-business-local.html (last visited Aug. 9, 2015).

25 *See Certified Cuban Claims*, http://www.certifiedcubanclaims.org/faqs.htm. *See also* Alan Gomez, *Americans have new hopes to reclaim property seized by Cuba 50 years ago,* USA TODAY (JULY 30, 2015, 7:44 PM), http://www.usatoday.com/story/news/world/2015/07/30/cuba-opening-property-claims/30784849/ (noting that the U.S. Justice Department established a Foreign Claims Settlement Commission for American citizens and companies whose properties were confiscated which approved 5,913 claims worth roughly $7 billion today).

26 *See* Jeff Duncan, *Chairman of the Subcommittee on the Western Hemisphere, House Foreign Affairs Committee, Subcommittee Chairman Duncan Opening Statement at Hearing on Future of Property Rights in Cuba,* YOUTUBE (June 18, 2015), https://www.youtube.com/watch?v=IUQ6tt2Wdus.

27 *See* MARK P. SULLIVAN, CONG. RESEARCH SERV. REP., CUBA: ISSUES FOR THE 114TH CONGRESS 51–59 (2015), *available at* http://www.fas.org/sgp/crs/row/R43926.pdf.

conduct or ethics.[28] This essay will focus on values-based ethical codes, and it is important to make the distinction between these and compliance-based codes of conduct. According to ethics expert Frank Bucaro:

> These two codes are often confused as being the same thing and yet there are distinct differences.
>
> 1. A code of conduct has as its primary focus behavior. A code of ethics has as its primary focus *values as a basis for behavior*. (Emphasis added).
> 2. A code of conduct is primarily a result of compliance dictates and is a reactive approach for appropriate behavior. A code of ethics is always a proactive approach to provide values based reasons for good behavior.
> 3. A code of conduct is a "letter of the law" activity. A code of ethics is a "spirit of the law" activity.
> 4. The process of creating a code of conduct is a "top down" process. A code of ethics should be an [sic] collaborative participatory activity.
> 5. A code of conduct, being an offshoot of the compliance program, is a result continual compliance training. A code of ethics is the result of an organization that understands, that in addition of a code of conduct or in place of a code of conduct, values are the pivotal foundation by which good behavior is the result of personal choice.
> 6. There is more of a monetary investment in the development of a code conduct than in the development and implementation of a code of ethics.
> 7. A code of conduct is easier to develop because it is based on law and therefore less critical thinking is needed because the goal is compliant behavior. A code of ethics takes more time, more discernment, and more transparency to identify those values by which all will live by in the workplace.

Can both be compatible? Yes. Are they the same? Absolutely not.

One scholar who argues that convergence between the codes is inevitable defines the difference between a values-based code and a "compliance code" as follows:

> A typical example of a values-based code would be a list of the values that are commonly shared in an organization, and a set of principles that provide some guidance for decision-making. The specified values can be very diverse and express the goals that are important to the users of the code, the preferred means to achieve these ends, and the underlying motivations driving the enterprise. The fundamental feature of a values-based code is that it provides broad guidance for decision-making as opposed to explicitly stating the "correct" or "incorrect" deci-

[28] *See* LRN, THE IMPACT OF CODES OF CONDUCT ON CORPORATE CULTURE 4 (2006), http://www.ethics.org/files/u5/LRNImpactofCodesofConduct.pdf.

> sion. As a consequence, values-based approaches are flexible and could, potentially, be useful in situations that are not anticipated at the time when the code is written – a key difference to compliance codes discussed below.
>
> A typical example of a compliance-based code would be a list of rules and limits that need to be respected by all users. Ideally, this list would provide guidance in all commonly encountered moral dilemmas, for example in situations of conflict-of-interest. The fundamental feature of a compliance code is the clarity and specificity by which it provides guidance. Compliance codes can be understood as "soft law" – rules that ought to be followed. Unlike law itself, these rules will not be enforced by the judicial system. Still, they can have force if, for example, compliance is a requirement for employment, membership, grant applications, and so forth. Further, such codes provide a good basis for performance measurement and audit – a key benefit from an outcome-oriented perspective, and a key difference from values-based codes.[29]

Many companies do in fact collapse the two concepts into one document. The flexibility inhere in a values-based code may be particularly useful for companies operating in Cuba.

A number of companies that have publicly announced possible Cuba ventures have a code outlining their core values. Google, a company that also faced criticism[30] for operating in China in past years, has offered to assist the Cuban government in building the Internet infrastructure of Cuba. This could be a critical step in opening the island up to new views and democratic ideals—if the government does not continue to censor and monitor the Internet. But will this assistance mesh with the company's values? Google's code states in part:

> **Privacy, Security and Freedom of Expression**
> Always remember that we are asking users to trust us with their personal information. Preserving that trust requires that each of us respect and protect the privacy and security of that information. Our security procedures strictly limit access to and use of users' personal information, and require that each of us take measures to protect user data from unauthorized access. Know your responsibilities under these procedures, and collect, use, and access user personal information only as authorized by our security policies, our Privacy Policies and ap-

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29 *See* Marc Saner, *Ethics Codes Revisited: A New Focus on Outcomes*, INSTITUTE ON GOVERNANCE POLICY BRIEF no. 20 (June 1, 2004), http://ssrn.com/abstract=1555814.

30 *See* Neal Ungerleider, *The Human Rights Violations of Google, Microsoft, and Yahoo*, FASTCOMPANY (APR. 20, 2012, 10:00AM), http://www.fastcoexist.com/1679720/the-human-rights-violations-of-google-microsoft-and-yahoo.

plicable data protection laws.

> *Google is committed to advancing privacy and freedom of expression for our users around the world. Where user privacy and freedom of expression face government challenges, we seek to implement internationally recognized standards that respect those rights as we develop products, do business in diverse markets, and respond to government requests to access user information or remove user content.* (Emphasis added).

Carnival Cruise lines has announced "social impact" trips[31] to Cuba beginning in 2016. That company's Business Partners Code of Business Conduct and Ethics[32] has a specific human rights section, which has values that may be incompatible with the current Cuban labor system. The code instructs:

> Labor and Human Rights- Carnival and its business partners must know and comply with applicable employment laws and support human rights for all people. Carnival and its business partners must comply with the legal employment age in each country where they operate. Carnival and its business partners must not use any form of forced, bonded, indentured or prison labor. Carnival and its business partners must be committed to a workplace free of all forms of harassment. Carnival and its business partners must not illegally discriminate against employees for any reason... We expect our business partners to adopt and incorporate these commitments into their own organizations.

Apple, which can now sell products in Cuba after the lifting of specific restrictions has spent a great deal of time burnishing its human rights reputation after allegations of inhumane working conditions in China several years ago. Its Supplier Code of Conduct has more than a page outlining its expectations for labor and human rights.[33] Perhaps conveniently if it plans to operate in Cuba, its freedom of association policy has a loop-

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31 *See* Gene Sloan, *Cruise giant Carnival Corp. to launch sailings to Cuba*, USA TODAY (JULY 7, 2015, 5:33 PM), http://www.usatoday.com/story/cruiselog/2015/07/07/carnival-cruise-fathom-cuba/29805319/; *see also* FATHOM, http://www.fathom.org/cuba/ (last visited Aug. 9, 2015) (advertising these sponsored cruises). "The true value of your Fathom voyage to Cuba will be to connect to the heritage of Cuba though an immersive program that encourages cultural, artistic, faith-based, and humanitarian exchanges between American and Cuban citizens. Purpose driven travelers will immerse, learn, and flourish. The opportunities are many, and so are the possibilities. And your presence on this journey will help you understand the power of story, as well as encouraging the Cuban people to share their stories more completely with the world." *Id.*

32 *See* CARNIVAL CORPORATION & PLC, BUSINESS PARTNER CODE OF CONDUCT AND ETHICS 4 (April 2014), http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjUzMzIzfENoaWxkSUQ9LTF8VHlwZToz&t=1.

33 *See* APPLE SUPPLIER CODE OF CONDUCT, (Jan. 2014), https://www.apple.com/supplier-responsibility/pdf/Apple_Supplier_Code_of_Conduct.pdf.

hole:

> Freedom of Association and Collective Bargaining
> *As legally permitted*, Supplier shall freely allow workers to associate with others, form, and join (or refrain from joining) organizations of their choice, and bargain collectively, without interference, discrimination, retaliation, or harassment. In the absence of formal representation, Supplier shall ensure that workers have a mechanism to report grievances and that facilitates open communication between management and workers. (emphasis added)

Jet Blue touts its five values of Safety, Caring, Integrity, Fun, and Passion in its code.[34] But there is no mention of human rights in their code, nor in the barebones ethic code of Netflix,[35] another company entering Cuba. AirBnB, which boasts 2,000 listings in Cuba notwithstanding the fact that most hosts don't have Internet access, doesn't even have a code of ethics. Instead, it has a responsible hosting page.[36] The lack of specific value statements regarding core human rights may inure to these companies' benefits.

In addition to the varying types of code of conduct or ethics, a number of companies have signed on to the UN Global Compact; the world's largest corporate social responsibility initiative. In January of 1999, U.N. Secretary General, Kofi Annan asked a corporate audience at the annual World Economic Forum in Davos to "initiate a global compact of shared values and principles, which will give a human face to the global market."[37] The Global Compact focuses on ten principles related to human rights, labor, the environment, and anti-corruption.[38] 12,000 companies in over 170 countries serve as the signatories. The Compact requires those signatories to report on their progress on these principles, and companies operating in Cuba may have a special burden.

Others companies have re-drafted their codes based in part on the U.N. Guiding Princi-

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34 *See* JETBLUE AIRWAYS CORPORATION CODE OF BUSINESS CONDUCT 5 (Sept. 2014), http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9ODkxNjR8Q2hpbGRJRDotMXxUeXBlPTM=&t=1.

35 *See Code of Ethics*, NETFLIX, http://ir.netflix.com/documentdisplay.cfm?DocumentID=73 (last visited Aug. 10, 2015).

36 *See* AIRBNB, https://www.airbnb.com/help/responsible-hosting (last visited Aug. 10, 2015).

37 *See* Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999).

38 *See* U.N. SECRETARY-GENERAL, REPORT OF THE SECRETARY-GENERAL ON THE WORK OF THE ORGANIZATION, ¶ 46, U.N. Doc. A/61/1 (Aug. 16, 2006); *see also* U.N. Global Compact, T*he Ten Principles of the UN Global Compact*, UNGLOBALCOMPACT.ORG, https://www.unglobalcompact.org/what-is-gc/mission/principles.

ples on Business and Human Rights.[39] The principles, which were unanimously adopted by the UN Human Rights Council in 2011, operationalize a "protect, respect, and remedy" framework, which indicates that: (i) states have a duty to protect against human rights abuses by third parties, including businesses; (ii) businesses have a responsibility to comply with applicable laws and respect human rights; and (iii) victims of human rights abuses should have access to judicial and non-judicial grievance mechanisms from both the state and businesses.[40] These principles have added additional pressure to ensure that companies proceed not only legally, but ethically in host states with poor human rights records.

V. QUESTIONS FOR U.S.-BASED MULTINATIONALS ENTERING CUBA

With this backdrop in mind and assuming for the sake of this Essay that operating in Cuba were legal, what should companies entering Cuba consider from an ethical perspective?

1. What ethical issues can arise when doing business with state-owned enterprises or the military? As previously stated, unless the Cuban government changes its stance, approval of full foreign capital companies is not likely, and thus US companies, like their European counterparts, will be business partners with the Cuban government or military officers. Will these state-owned enterprises have the same value system or feel the need to adopt a US corporate code of ethics?
2. If the US company has a speak-up culture, where employees are encouraged to bring forward instances of known or suspected misconduct, will Cuban employees of US companies in joint ventures with the government feel comfortable being open with their views?
3. On a related note, if employees do not feel comfortable speaking up and they live in a country where communication has been monitored by the government, will they ever use whistleblower or other anonymous complaint mechanisms? US companies subject to the Sarbanes-Oxley or Dodd-Frank laws must ensure that anonymous reporting mechanisms are in place.
4. Are there any lessons to be learned from doing business in other Communist countries or in host states with similar or worse human rights regimes?

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39 *See* U.N. Human Rights Office of the High Comm'r, The Guiding Principles on Business and Human Rights; Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. HR/PUB/11/04 (2011).

40 See *Company policy statements on human rights*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, http://business-humanrights.org/en/company-policy-statements-on-human-rights (last visited August 8, 2015).

5. If the company has a universal code of ethics, is that enough, or does the code have to change to operate in a country that does not embody the same core values such as freedom of association, freedom of assembly, and nondiscrimination in the workplace?
6. Can and should the universal code of ethics change if the local law does not provide for certain protections? If so, how will the company enforce those protections?
7. How will local managers respond to ethical rules imposed on them from a foreign company? How will the Cuban government in a joint venture with a US company respond?
8. What level of due diligence should a company like AirBnB or other hospitality companies conduct if there is a possibility, or even probability that they will be utilizing confiscated property to make a profit? If it is legal to use those properties according to the Cuban government, does not that mean that it is ethical to avoid due diligence on the property's true ownership?
9. How will US companies address the wage issues in Cuba, where the worker will only receive a small fraction of what is paid? Will US companies face pressure from unions or consumers for adhering to the Cuban law on wages?
10. Does a US company have an ethical duty to avoid doing business in Cuba until the situation is better for workers and their potential Cuban customers or should US companies try to improve living and working conditions for Cubans by entering the marketplace?

I pose these ten questions for compliance and ethics officers, board members, socially responsible investors, and other stakeholders to consider as companies rush into Cuba. These questions also pose compliance challenges, which I will address in a separate article. I do not believe that operating in Cuba is per se unethical, although many opponents of renewed US-Cuba relations do. But before entering into any country, not just Cuba, I contend that companies must ask themselves whether the business opportunity comports with its core values. Companies must grapple with the question that their codes of conduct often ask their employees: even if it is legal, is it ethical?

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INTERNAL INVESTIGATIONS UNDER GERMAN LAW

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I. CLASSIFICATION

There is no law in Germany that regulates internal investigations. Perhaps more correctly stated: there is no single specific law because there are indeed numerous statutory provisions applicable to internal investigations that must be observed. Nevertheless, these provisions are not combined into a single code. It would not be so bad if the relevant statutory provisions were systematically organized, but because they are not, it is essential to understand which respective rules could potentially be applied, in which ways they relate to each other and to other rules, and finally, what specific content is contained in the applicable standards.

Starting at the top of the hierarchy of norms is a view towards the constitution. Our *Grundgesetz*, often referred to in English as the Basic Law, permits all persons to do what they want so long as it is not expressly forbidden. Despite the flood of normative standards, there is no provision that prohibits curiosity. Anybody can investigate, whether it is a private detective, journalist, captain of industry, or even lawyer.[1] The state does not hold a monopoly over investigations.[2] Therefore, internal investigations are legal.[3] However, this does not mean that everybody can exercise all conceivable means without limits and arbitrarily use all information.[4]

II. SEPARATION BETWEEN INTERNAL INVESTIGATIONS AND OFFICIAL LEGAL PROCEEDINGS

A. Differences

Looking at internal investigations as the repressive arm of compliance, then private investigations also tread similarly on the side of the state: specifically, judicial investigations and the classic investigation procedure of the prosecutor's office. But this is nothing special or new. In Germany, the principle of party presentation applies in civil proceedings, limiting also in proceedings before labor courts. Here, the law requires that the

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1 Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht No. 15/24 & 25 (Achenbach et al. eds., 4th ed. 2015); Bockemühl, *in* FS Beulke 647 (2015).

2 Minoggio, *in* Wirtschaftsstrafrecht in der Praxis No. 18/74 (Böttger ed., 2nd ed. 2015); *see also* Wehnert, StraFo 2012, 253 (254); Knierim, *in* Internal Investigations No. 15/157 (Knierem et al. eds., 2013); priority of state investigations, but no monopoly, *see also* Moosmayer, *in* Criminal Compliance § 34 B, No. 74. (Rotsch ed., 2015).

3 Theile, *Internal Investigations & Selbstbelastung*, StV 381 (2011); Rotsch, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 1/4/60; *see also* Nestler, *in* Internal Investigations, *supra* note 2, at No. 1/18; *see also* Rotsch, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 1/4/49.

4 *See* Salvenmoser & Schreier, *supra* note 1, at No. 15/40; for the admissibility and limits of state prosecution investigative activities after indictment, *see* Engländer & Zimmermann, FS Beulke 669 (2015).

party and acting lawyer present the facts of the case. However, this is only possible if the relevant facts are presented. Given the procedural obligation to truth and completeness found under Section 138 of the Code of Civil Procedure, nobody is allowed to simply declare what is favorable to his or her side, but must at least ensure the essentiality of the circumstances identified. Because the accused/defendant can turn to experts and interview potential witnesses on his or her own, so too should the defense lawyer exercise this right.[5] Nothing different applies to plaintiffs and their counsel. This is harmless as long as neither objective nor subjective manipulation of evidence arises. Internal investigators classify themselves in this manner[6] and they can come from inland or abroad.[7]

According to Article 92 of the Basic Law, judicial power is exclusively vested in judges. Sentencing is also reserved to judges. However, the existence of an investigation separate from the judiciary is not forbidden. The tasks of collecting evidence, clarifying facts, and deciding whether there should be a criminal case are the responsibility of the judiciary and are delegated according to constitutional categories to the Second Authority (administration) and public prosecutor's office (including their police investigators).[8] The judiciary holds a monopoly over prosecution.[9] Law enforcement by private investigators is fundamentally different from legal authorities because of the special intervention rights conferred on the state (e.g. search, seizure, surveillance of telecommunications, and compelling witnesses). In internal investigations, the information gained depends on whether, for example, the respondent was voluntarily questioned and the custodian of certain documents made them readily available. This applies even in cases where there is a legal duty to testify or surrender items.[10] While a refusal may violate legal obligations (e.g. corporate or labor law), this can only be overcome through recourse to the courts

5 BGH, Urt. v. 10.2.2000 – 4 StR 616/99, No. 15 = BGHSt 46, 1; Wimmer, *in* FS Imme Roxin, 537, 539.

6 For an understanding of the term, *see* Salvenmoser & Schreier, *supra* note 1, at No. 15/13.

7 Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC: Legitimer Baustein des globalisierten Wirtschaftsstrafverfahrens oder rechtswidriges Parallelverfahren zur Strafprozeßordnung? – Eine Problemskizze*, StV 41, 41-42 (2009). Therein lies no circumvention of the provisions on international legal assistance in criminal matters because the private investigations are not carried out directly in a criminal procedure. *See also* Wastl et al., NStZ 68, 71 (2009); *see also* Rosen, BB 230 (2009); albeit contradictory, *see* Wehnert, NJW 1190-1191 (2009); Wehnert, FS Egon Müller 729; *Wybitul*, BB 606 (2009); for the situation in the U.S. *see* Behrens, RIW 22, 27 (2009); Mengel & Ulrich, NZA 240 (2006).

8 Detailing the prosecutor's position, *see* Carsten & Rautenberg, Die Geschichte der Staatsanwaltschaft in Deutschland bis zur Gegenwart 358, 503 (2d ed. 2012).

9 Exception: private action, §374 and the following, StPO (Code of Criminal Procedure).

10 Kirmes, WiJ 150 (2013). His demand for a legal basis for internal investigations may be a professional legal appeal to increase the quality of authority. But private investigators are carriers, not addressees, of fundamental rights. They would need an (expanding?) legal basis only for their actions for the purpose of transmitting intervention powers: but who would want that?

because there is no right to self-help in this area,[11] as this is instead limited to other issues.

Another crucial difference: in contrast to the justice department, internal investigators take on a party role.[12] Of course, prosecutors and judges have their own self-interests. However, their official actions should not be based on these interests. They are required to scrutinize circumstances that might potentially show criminal relevance without respect to the person involved and to legally evaluate the facts. In this sense, they must make their decisions in a neutral manner. This applies already at the outset of the investigation. The Code of Criminal Procedure also sets the necessary criteria for admission, including a clarification of coercive measures, as well as providing restrictions such as the conditions and scope of their permissible use. By contrast, internal investigators act under the mandate granted to them and are inevitably directed by a specific interest.[13] This applies even if the assignment is to gather information, regardless of its content, thereby gathering insights about operations and persons affected therefrom.[14] The legal obligation of internal investigators to fulfill this goal extends only so far as the mandate and may therefore be limited or terminated at any time.[15] In fact, an unlimited mandate often overlaps with the task of the state investigative authorities.[16]

Even then, there can be no talk of parallelism considering the disparity of legal goals and the resources available for investigation. Only the justice department is subject to the obligation to respect the rights of everybody involved. They must comply meticulously with the procedural provisions. This becomes apparent in the obligations for instructing both witnesses and the accused. In civil and labor proceedings, there is an obligation to warn about rights, but this is only for the court. This does not extend to pretrial depositions made in private. These are subject to absolutely no previous duty to inform of rights.[17] The Federal Bar Association[18] recommends that its members (i.e. lawyers) make

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11 Ex. § 229 BGB (German Civil Code).

12 Gädigk, *in* Internal Investigations, *supra* note 2, at No. 18/20 & 27; FS Uwe H. Schneider 701, 706; Wehnert, StraFo 253-254 (2012); compare to Kort, FS Günther H. Roth 407 (2011).

13 Wehnert, StraFo 253-254 (2012); *see also* Knauer, ZWH 41, 47 (2012).

14 Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 18/78 (rightly emphasizing the need for an objective clarification); *see also* Knauer, ZWH 81, 83 (2012).

15 Golombek, WiJ 162, 166 (2012)(correctly stressing that there is no duty to large scale internal investigations provided that appropriate resolution of the facts are guaranteed within the investigation); *see also* Knauer, ZWH 41, 47 (2012); Knierim, FS Volk 247; Reichert & Ott, ZIP 2173-2174 (2009); Potinecke &Block, *in* Internal Investigations, *supra* note 2, at No. 2, 157; for ad hoc measures upon notification of grievances, *see* Idler & Waeber, *in* Internal Investigations, *supra* note 2, at ch. 20.

16 There is no duty to bring charges as a result of internal investigations. *See* Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at Rn. 18/2; Knauer, ZWH 41, 44 (2012); Kremer, FS Uwe H. Schneider 701, 713; Rübenstahl & Skoupil, WiJ 177 (2012).

17 Salvenmoser &Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/174.

the interviewees aware of their rights at the very beginning. This expresses the aspirational goal of fairness. However, this is not binding from the outset on any other internal investigator such as an auditor, as it is not covering an official state duty. So what must the internal investigator warn about? It cannot be the mandatory criminal procedural warnings, precisely because, as will be shown below,[19] the respondents are legally obliged under labor and corporate law to disclose information, so they are not granted a right to remain silent.

All of this speaks by no means against an internal investigation,[20] but rather to the significant differences when compared to criminal procedure.[21] This has consequences. It is a matter of *different* procedures. Rules and goals are in no way uniform and therefore automatically identical. The approach by both bodies is legally separate and independent of each other.[22] To the extent that a legal obligation to perform an internal investigation exists,[23] whether as a result of corporate law or from Section 130[24] of the Act on Regulatory Offenses, the affected company must fulfill this duty. It does not matter if an additional criminal or civil investigation is conducted or not. The same is true vice versa. To meet the statutory requirements, the prosecution takes up an investigation and the regulatory offense authority must decide upon their intervention after due consideration. Each authority must therefore carry out its own duties, regardless of whether

18 *See* explanatory notes BRAK, Stellungnahme 2010/35, zum Unternehmensanwalt im Strafrecht, *available at* http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2010/november/stellungnahme-der-brak-2010-35.pdf (Nov. 2010).

19 *See* Section III, A.

20 For considerable skepticism, *see* Greeve, StraFo 89 (2013); Nieto Martin, *in* Compliance & Strafrecht 51 (Kuhlen et al. eds. 2013).

21 Knauer, ZWH 41, 47 (2012); Momsen & Grützner, DB 1792 (2011).

22 Knauer, ZWH 41, 47, 81 (2012); Gädigk, *in* Internal Investigations, *supra* note 2, at 18/5 and 44; Kremer, FS Uwe H. Schneider 701; Bung, ZStW 125 (2013); Theile, FS Kühne 489, 498 (2013).

23 Bock, Criminal Compliance 441 (2011); Knauer, ZWH 41, 46 (2012); Potinecke & Block, *in* Internal Investigations, *supra* note 2, at No. 2/4; Grützner, *in* Wirtschaftsstrafrecht No. 4/46 (Momsen & Grützner eds., 2013); Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/36; Golombek, WiJ 162, 164 (2012)(emphasizing that the legal basis for the organizational duties of a manager are not found in Section 130 of the Act on Regulatory Offences, but rather in corporate law); *see also* Kindler, FS Günther H. Roth 367; Kindler, *in* Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion 1 (Rotsch ed., 2012); Knierem, *in* Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion 77, 91 (Rotsch ed., 2012); Kuhlen, *in* Compliance & Strafrecht, *supra* note 20, at 11; Moosmayer, *in* Criminal Compliance, *supra* note 2, at No. 68; Reichert & Ott, ZIP 2173, 2174 (2009); Knierem, *in* Handbuch des Wirtschafts- und Steuerstrafrechts No. 5/114 (Wabnitz & Janovski eds., 4th ed. 2014); against the prevailing opinion, *see* Reichert & Ott, ZIP 2173, 2176 (2009); Golombek, WiJ 162, 167 (2012)(with regard to whether the clarification has a margin of discretion); *see also* Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 6; Knauer, ZWH 81, 82 (2012); Kudlich & Wittig, ZWH 253, 303 (2013).

24 Concerning limited influence on organizational duties in the Group, OLG München, StraFo 82 (2015).

the other authorities are likewise doing so or not. The only basis for their own actions is the relevant regulations for their office.

As it would be disallowed, an authority abstains from referencing an inquiry of its own activities led by the other side, and it rules out at face value the insights that were gained in the process because they were discovered through different standards and in pursuit of different purposes and interests. It is thus necessary in each respective case to accurately clarify what significance is inherent in the other process.

The duty of neutrality and the variety of goals and rules preclude a judicial privatization of law enforcement.[25] Whether such a process would be sensible at all and how it would be legally and technically implemented remains an open question. In any event, only legislators are allowed to limit the hitherto unrestricted prosecutorial compulsion to investigate, for example, in cases of internal investigations. Also, the justice administration may not prevent criminal justice from having reference to the admissibility of internal investigations from their own inquiries. A statutory clause that leads to the subsidiarity of the state in relation to private investigations cannot be easily inserted into prosecution law.

The mixing of private and criminal investigations would also be deemed inappropriate because it is the task of the criminal justice system to pursue any offenses committed during the course of internal investigations. Violations of both the Privacy Act and other general criminal offenses (ex. Sections 201, 201a, and 240 of the Criminal Code) may be associated with private monitoring of mail correspondence, conversations, or sanitary facilities. Compliance is wielded for its part.[26] Prosecutors could hardly investigate at ease due to the obvious dangers that accompany their inquiry.

B. Existing Opportunities for Cooperation

1. Prosecutor's Duty to Preserve Evidence

An unlimited demand of independent procedure control corresponds to neither a ban

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25 *Gädigk*, *in* Internal Investigations, *supra* note 2, at No. 18/20 & 46; Jahn, ZWH 1, 6 (2013)(from the perspective of the defense, highlighting the ambivalence of such a partial privatization); Regarding search and seizure in the absence of cooperation, *see* BGH, Beschl. v. 23.1.2014 – KRB 48/13 = NZKart 2014, 236.

26 Bock, *supra* note 23, at 476; Wybitul, *in* Internal Investigations, *supra* note 2, at Ch. 11; Mengel, *in* Internal Investigations, *supra* note 2, at Ch. 13; Brockhaus, *in* Internal Investigations, *supra* note 2, at Ch. 26; Kuhlen, *in* Compliance & Strafrecht, *supra* note 20, at 22 & 24; Kuhlen & Maschmann, *in* Compliance & Strafrecht, *supra* note 20, at 85; Kuhlen & Sahan, *in* Compliance & Strafrecht, *supra* note 20, at 171; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/193; Knierem, *in* Handbuch des Wirtschafts- und Steuerstrafrechts *supra* note 23, at No. 5/134 & 4/412; Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at 15/41; Rotsch, ZStW 125, 481 (2013).

on mutual consideration nor a coordinated approach.[27] Both are permitted, albeit only within limits. Clear rules of the game are still lacking.

The obligation to consider cooperation with the prosecutor's office and to make an informed decision originates from the general duty of care that management possesses.[28] There is, however, no absolute requirement to cooperate with prosecutors under all circumstances.[29]

Despite an ongoing internal investigation, prosecutors must not only carry out their own duty to investigate, but they must also fulfill their role as so-called leader of the process.[30] Thus, nobody other than the prosecutor decides what is required for clearing up any suspicion of an alleged offense. The prosecution fulfills its obligation in a dutiful manner only when it is led by the need for best possible findings.[31] This necessity cannot be shaken off. Exactly how the prosecutor is supposed to satisfy its task in a particular case is not described in detail and is not always the same for all similar cases. The investigating authorities have flexibility in determining the responsibility of the prosecutor, while also taking account of the individual circumstances of the case.

Although the judiciary must be consciously aware that the objectivity of internal investigations is not always self-evident and therefore requires professional distance and special protection of the interests of individuals accused, it would be inappropriate to hold a complete institutional distrust of internal investigations and of the people who ordered or carried them out. The head of the legal department of a defense company found no suspicion against the company with an internal corruption investigation. However, the Federal Constitutional Court might decide this yet.[32] The circumstances of the specific case are also relevant. If suspicion is directed against the Chief Executive Officer, then a cooperative approach will rarely be appropriate at the beginning of the investigation. Where it involves a question of self-enrichment of a senior employee be-

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27 For reasons in favor of a cooperation from the perspective of a company, *see* Knierim, FS Volk, 247, 256; Knierem, *in* Internal Investigations, *supra* note 2, at No. 15/185; Kremer, FS Uwe H. Schneider 701; Wehnert, StraFo 253, 254 (2012). For the perspective of a prosecutor, *see* Gädigk, *in* Internal Investigations, *supra* note 2, at No. 18/20 & 44; For questions of corruption, *see* Hoven, WiJ 28 (2014).

28 Kremer, FS Uwe H. Schneider 701, 704.

29 Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 69; Golombek, WiJ 162, 169 (2012); Knauer, ZWH 41, 44, 48 (2012); Potinecke & Block, *in* Internal Investigations, *supra* note 2, at No. 2/184; Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/192; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/65, 142 & 4/458.

30 Wimmer, FS Imme Roxin 537, 551. *See also* BGH, Beschl. v. 23.1.2014 – KRB 48/13 = NZKart 2014, 236; Gädigk, *in* Internal Investigations, *supra* note 2, at Ch. 18.

31 Jahn, GA 588 (2014).

32 Such as in the case, BVerfG v. 13.3.2014 – 2 BvR 974/12 = NJW 2014, 1650.

low the highest level of leadership, then there is quite often a greater harmony between the interests of business and criminal justice.

There are inevitably points of contact between large companies and the public prosecutors that are responsible for them. Criminal offenses against such a company and resulting from it are fairly common. If a certain trust has developed as a result of cooperation[33] in previous cases (such an arrangement makes sense for compliance officers in large companies),[34] it would still be naïve to put only this officer on a case. Nevertheless, it can be appropriate for the compliance officer to make an effort in the voluntary disclosure of information and documents.

However, this is not mandatory. The public prosecutor is further authorized to take immediate action, despite prior good experiences, by utilizing measures to preserve evidence, provided that there are sufficient substantive grounds. A belligerent initial demeanor is ruled out under such circumstances from the outset.

Safeguarding the possibility of clarifying suspicion must be the guiding principle for the public prosecutor's actions in each case. It is often imperative to take possession of essential evidence. This includes both electronic data of the company concerned (per backup copy), as well as all relevant documents (the most important in original form, others as a photocopy, perhaps also drafts and different versions). It is generally possible for only the public prosecutor to review the results of existing or later initiated internal investigations for whatever the case may be.

The public prosecutor's approach is further influenced by whether internal investigations are already under way when the initial suspicion is raised and the extent to which they have progressed. It may be opportune to inquire about this if a sufficient foundation of trust has been established. If the internal investigations are coming to an end or were already completed, the public prosecutor can make its own actions dependent on whether the present investigation results are made accessible promptly, completely, and under permission of review from the company. Potential irregularities, inconsistencies, gaps, or biases can be shown during examination of the disclosed material. Responses to inquiries and demands to submit further documents demonstrate how seriously the company considers the entire process.

The prosecution must pursue any remaining doubts. They must not destroy the peaceful atmosphere that has been developed in their relationship, although the affected company will not greet the use of criminal procedural means of coercion with approval.

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33 For cooperation outside concrete procedures, *see* Kremer, FS Uwe H. Schneider 701, 712.

34 Kremer, FS Uwe H. Schneider 701, 714.

Moreover, they should exhaust the investigative measures provided under the Code of Criminal Procedure only with serious and practically necessary reason.

If the public prosecutor refrained from finding out from the affected company whether internal investigations were conducted because of a particular set of circumstances, then it expresses an existing mistrust that is indeed quite normal, provided there are objective reasons for this. In such a situation (as in any normal case), clarifications may be required of things that are not yet readily revealed in pending investigations. Whether prosecution must subsequently use coercive actions or whether the incoming information makes it much more possible to cooperatively approach the company depends on the progress of the discovery process. Along these lines, the company's behavior is also a crucial factor in determining the prosecution's further actions in the case. The leeway here is not only restricted to the dualism of cooperating trust versus coercive use, but also extends to steps such as a possible coordination of internal and criminal procedural investigations.

2. Evidence Abroad

Cooperation with the company and its internal investigators is most effective for the public prosecutor when the necessary evidence is not readily available for state authorities. That is often the case when documents or servers are located abroad. Even if it can be expected that the country in question would provide legal assistance, this seldom happens within a short period of time. In the stage between knowledge of suspicion and gaining the ability to obtain evidence across borders, the abstract opportunity exists for the company's employees to destroy or manipulate relevant information without good intention. This means that it is practically impossible to ensure the reliability of evidence. In light of this, it is usually appropriate to accept the declared willingness of voluntary production. The following inevitable examination of the probative value does not constitute any special peculiarity of voluntarily produced evidence.

3. Taking Evidence from Large Companies

It is not just the realm of evidence from abroad that provides far-reaching opportunities for cooperation. Relevant information from a large company is often found concentrated in a particular location. To gather all of this information at once is hardly possible. This leaves room for suppression of evidence. There is often no fear of additional substantial hindrance of the investigation of facts if the public prosecutor initially offers the company the opportunity to submit evidence. With such wholehearted disclosure, it acquires the chance to avoid the disadvantages associated with a potential intensive

search for evidence.[35]

If there is evidence of further substantial and relevant material despite the voluntary surrender of documents, the prosecutor must pursue this in a manner dictated by the circumstances. This might be extremely unpleasant for the company, such as what Deutsche Bank experienced in the winter of 2012-2013: according to reports in the daily press,[36] they only produced selected documents associated with an investigation of tax evasion in the context of the trading of carbon certificates. As a result, the justice department launched a full-blown search operation by utilizing a large contingent of police officers through the deployment of a helicopter and also through the underground parking garage.

The prosecution is free to coordinate its own approach to the company and to the investigators engaged, provided that it deems the exploration for truth as secure. Under this condition, the prosecution is authorized to defer all or part of its own investigations. The prosecution may allow precedence to the internal investigation, but only under its own securing of the evidence and if it remains in constant close contact with the company. Required preservation of evidence nevertheless continues without delay, regardless of whether it is in inaccessible locations for the company. If the internal investigators lead the prosecution to such sources, this demonstrates their interest and seriousness in cooperating.

The problem of quantity is not greater in comparison to investigations led solely by public prosecutors. To the contrary, relief can occur because company-based personnel or internal investigators turn over documents or they answer questions so comprehensively that the prosecutor can more quickly develop the connections needed for a case.

4. Prosecution's Instructions to Postpone Internal Investigations

According to Moosmayer,[37] the criminal justice department has the right to stop the internal investigation, at least temporarily. However, a legal basis for such an arrangement is not clearly evident. It is not expressly included in Section 258 of the Criminal Code. Adequate social contacts are not themselves suitable factual actions, even in the

35 BGH, Beschl. v. 23.1.2014 – KRB 48/13 = NZKart 2014, 236.

36 E.g. DPA*, Deutsche Bank: der kriminelle Handel mit CO2-Zertifikaten*, Zeit Online, Dec. 13, 2012 at 2:05 pm, http://www.zeit.de/wirtschaft/2012-12/deutsche-bank-umsatzsteuerbetrug.

37 Moosmayer, *in* Criminal Compliance, *supra* note 2, at No. 34 B/74 (note: Moosmayer is head of the compliance department of Siemens, Munich); *See also* Knierem, *in* Internal Investigations, *supra* note 2, at No. 15/167.

event of thwarting success.[38] This is particularly true for legally necessary actions. Internal investigations at least tend to be by-the-book matters. Leading them is commonly the core legal obligation of the company. However, they deserve no unrestricted priority,[39] even before the uptake of public prosecutorial investigations. It is foreseeable that only the use of the prosecutor's investigative powers promises the clarification of suspicions, as the company's requirement to resolve facts is often possible only through engagement of the prosecution. It is therefore logical, of course, not to endanger the success of the full investigation through its own actions and this may require pausing the internal investigation. Even if its continuation may be permissible, one might still deny the reliability of the investigation if it is evident that the evidence gathered was influenced or defeated in any shape or form. One might see an obstruction of justice if an internal investigation continues to be carried out alone and against the wishes of the public prosecutor. In specific cases, this continuation of the internal investigation might be done solely for public relations purposes.

If the company does not wish to endanger an existing or desired relationship of professional trust through a confrontation with the prosecutor, it will therefore not ignore the prosecutor's request to pause the internal investigation. In most cases, this will be a temporary demand and/or be limited to certain areas. If it is assumed that the accused does not know the suspicions levied against them, then it is in the mutual interest of the company and the law enforcement agencies to allow initial access to the public prosecutor. It may be appropriate to suspend internal investigations if surprise evidence-taking actions are foreseen outside the company.

To avoid unnecessary legal disadvantages,[40] the company will express its interest and the prosecutor may submit its request in writing after waiting for the internal investigations. They will comply with this without having to pronounce a ban (although the company would prefer this). It is in its own interests for the company to record in writing the considerations affecting its decision and immediately send this to the prosecutor. In the event of an actual pause for possible liability and/or protection against unfair dismissal of an employee or member of the board, the company thus creates tangible proof that its actions were guided by the pursuit of the best possible investigation. That should be sufficient to protect against any legal harm, especially since the statutory time limit for termination (Section 626 German Civil Code) begins to run only after knowledge of the allegations and prosecutorial actions hold their own further clarification measures and are more reliable. Even in the case of the continuation of its own investigation, the com-

38 Fischer, StGB, 62nd ed. 2015, § 258 StGB No. 7.

39 Knierem, *in* Handbuch des Wirtschafts- und Steuerstrafrechts, *supra* note 23, at No. 5/117.

40 *Moosmayer*, *in* Criminal Compliance, *supra* note 2, at No. 34 B/75; *see also* Rotsch, Criminal Compliance vor den Aufgaben der Zukunft 3, 16 (2013).

pany should immediately disclose this to the prosecutor and detail the underlying reasons because such openness brings everything into accord.

5. Postponement of Prosecutorial Investigations

If it appears that the search for truth is guaranteed, the public prosecutor must not only take the internal investigation into consideration, but must also set out the legal basis for discontinuation. As a state body, it is bound by the prohibition on excessiveness. Therefore, it may only resort to coercion if this is necessary to fulfill its tasks. An accuracy check does not take place in view of the principle of free design of the investigation. Leeway is not given for free to the public prosecutor, but is only granted after its obligatory professional judgment is met. Whether or not it is complying with the limits set out by law is judicially verifiable all the way up to the Constitutional Court. The established doctrine comes from fundamental rights and is further developed out of documentation and justification obligations.[41] It represents an effective filter from keeping the investigative authorities away from using illegal coercive measures because it is unnecessary to employ. This legal compulsion to a proportionate approach is supported in fact by legal resources. Even if there is just a temporary passiveness in the interest of clarification, it is legal for a public prosecutor to await the outcome of an internal investigation.

6. Testing Probative Value of an Internal Investigation's Findings

Reports, evidence submitted, and other findings of internal investigations are subject to the prosecution's own careful review. Their intensity is variable. It is necessary to at least have a conclusiveness test and a clarification of whether the results are consistent with other findings. This control is needed even when the accused has confessed because it might be possible that this was a false confession and/or a scapegoat was given so as to hide the real culprits. Here, there must be no deviations from procedures unrelated to internal investigations: in each case, the prosecutor must make its own preliminary assessment. The hypothesis must then withstand any confrontation with all respective findings. Each bit of information is comprehensively assessed and placed in the context of other findings. The point at which the hypothesis solidifies to a sufficient ground for suspicion varies in each individual case. It is essential that the conceptual meaning of the given evidence remain. However, the circumstances of their collection and the handling of those involved in the allegations of the proceedings plays a significant role.

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[41] For evidence supporting the search, *see* Schmitt, StPO No. 3 & 5 (Meyer-Goßner & Schmitt eds., 58th ed. 2015); The German Constitutional Court stresses the importance of documentation, especially in the following judgments: 19.3.2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 = BVerfGE 133, 168, in particular No. 80 & 114.

III. ESSENTIAL QUESTIONS OF LAW

A. Duty to Give Evidence

Whether employees in Germany are required to testify to private investigators in accordance with German law depends on the circumstances. In the case of employees, it is usually German labor law that applies,[42] while company law is generally relevant for members of the representative and supervising bodies. For the most part, the results of both branches of law do not differ.

1. Duty to Give Information based on an Employment Contract

The employment contract, constituting a special form of a service contract (Section 611 of the Civil Code), requires a mutual exchange of information.[43] If one side requires information that the other side has, there is a valid claim to be informed so long as the party that knows the information can easily share it.[44] If this information can be found elsewhere (ex. through third parties or resulting from the content of documents), then the party lacks sufficient need to obtain this information from the other party.[45] The legal basis for disclosure requirements is found in Sections 611 and 241, Paragraph 2 of the Civil Code, and possibly in conjunction with Section 242 of the Civil Code.[46] Their scope varies and is at the widest with executive powers.[47] For business transactions, Section 675, Paragraph 1 of the Civil Code provides specific additional information, as well as Sections 662 and 666 of the Civil Code.[48] This provision standardizes the duty of the representative to communicate required information. Outside of labor law, company law also leads to comparable results. Refusal[49] to supply information can lead to a com-

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42 Consideration of the participation rights of the works council is irrelevant to the topic treated here. There will thus be no discussion of the collective labor law.

43 Greeve, StraFo 89, 94 (2013); Thüsing, § 611 BGB No. 242 (Henssler et al. eds.); Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/41; Rödiger, *Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von Mitarbeitergeständnissen* 258 (2012); Wehnert, Strafo, 253, 256 (2012).

44 BAG, Urt. v. 18.1.1996 – 6 AZR 314/95 = NZA 1997, 41; BAG, Urt. v. 7.9.1995 – 8 AZR 828/93 = NZA 1996, 637; Thüsing, § 611 BGB No. 242 (Henssler et al. eds.).

45 Imme Roxin, StV 116 (2012).

46 Wastl et al., NStZ 68, 70 (2009).

47 BAG, Urt. v. 13.3.1964 – 1 AZR 100/63 = AP Nr. 32 zu § 611 BGB Haftung des Arbeitnehmers; Göpfert et al., NJW 1703, 1706 (2008).

48 Göpfert et al., NJW 1703, 1705 (2008); Momsen & Grützner, DB 1792, 1795 (2011); Thüsing, § 611 BGB No. 242 (Henssler et al. eds.); Wastl et al., NStZ 68, 70 (2009); Wybitul, BB 606, 610 (2009).

49 For possible labor law consequences, *see* Göpfert et al., NJW 1703, 1706 (2008).

plaint at a labor or other ordinary court.[50] This is enforceable through setting a fine or detention, pursuant to Section 888, Paragraph 1 of the Code of Civil Procedure.[51] In addition, claims for damages can be made.[52]

2. No Exception for Risk of Self-Incrimination

There is no duty to one's own self-incrimination[53] or to the disclosure of facts that could lead to termination.[54] According to case law, the obligation to disclose information refers to the context of necessity,[55] but also at its own professional misconduct or even criminal actions.[56] Companies partially try to facilitate the fulfillment of their obligation to provide information to those affected. Amnesty programs speak of a waiver of repression.[57] It is important to note that this does not extend to the prosecution. Responsibility for this lies only with the prosecutor's office. This is especially true as far as the principle of legality goes.[58] Its breach is allowed to the prosecutor only in exceptional circumstances and within legally permitted limits, but never to third parties.

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50 Wastl et al., NStZ 68, 73 (2009). Not quite conclusively advocating the labor court's jurisdiction for the legal protection of an employee against an action initiated by a foreign public authority. Apart from the fact that the administrative courts would prefer to have jurisdiction, it lacks the need for legal protection: The official action itself encroaches on nobody's rights and private investigators do not exercise official action therefrom. On the other hand, labor courts are quite interested in the right of the employee to non- or limited disclosure of information on behalf of the employer and therefore also by the privately mandated investigators.

51 The enforcement ban of Sec. 888, Para. 3 of the Code of Civil Procedure only applies to the main duty, i.e. for the work performance as such.

52 BAG, Urt. v. 21.11.2000 – 3 AZR 13/00 = NZA 2002 (claims for damages relating to the lack of information about entitlement to benefits).

53 BGH, Urt. v. 23.2.1989 – IX ZR 236/86 = NJW-RR 1989, 614 (615).

54 BAG, Urt. v. 7.9.1995 – 8 AZR 828/93 = NZA 1996, 637; *see also* Göpfert et al., NJW 1703, 1708 (2008).

55 Imme Roxin, StV 116 (2012); Knauer, ZWH 81, 85 (2012).

56 BGH, Urt. v. 30.4.1964 – VII ZR 156/62 = AP Nr. 11 zu § 242 BGB Auskunftspflicht (zu § 260 BGB); BAG, Urt. v. 27.9.1988 – 3 AZR 59/87 = NZA 1989, 467; VG Frankfurt, Beschl. v. 28.8.2000 – 23 L 1642/00 (V) = HessVGRspr 2001, 51; Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 132; Greeve, StraFo 89, 95 (2013); Momsen & Grützner, DB 1792, 1795 (2011); Rödiger, *supra* note 43, at 294; Wehnert, StraFo 253, 256 (2012); Wimmer, FS Imme Roxin 537, 540; Bung, ZStW 125, 536, 548 (2013); Imme Roxin, StV 116, 121 (2012); Tscherwinka, FS Imme Roxin 521; Wastl et al., NStZ 68, 70 (2009); Böhm, WM 1923 (2009); Zerbes, ZStW 125, 551, 559 (2013); Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/174; Mengel, *in* Internal Investigations, *supra* note 2, at No. 13/37; Beckemper, *in* Internal Investigations, *supra* note 2, at 15/245; Rieble, ZIP 1273 (2003).

57 Göpfert et al., NJW 1703, 1704 (2008); Knauer, ZWH 81, 84 (2012); Potinecke & Block, *in* Internal Investigations, *supra* note 2, at No. 2/168; Leisner, *in* Internal Investigations, *supra* note 2, at Ch. 9; Mengel, *in* Internal Investigations, *supra* note 2, at No. 13/65; Wastl et al., NStZ 68, 71 (2009).

58 That is indisputable. *See* Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 130; Kremer, FS Uwe H. Schneider 701, 708; Grützner, *in in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/404.

The broad duty to disclose information to the company is not only questioned in labor law, but it must also resist fundamental concerns: much literature, that is also the viewpoint of many young scholars, focuses on each conceivable interest of criminal justice relating to the findings of internal investigations and concludes with a forward displacement of criminal procedural protection standards in labor law. However, the extent of such transfers varies. The asserted commitments of the company to law enforcement purposes are established.[59] Labor law is thus partially regarded as substantive criminal procedure law.

The need for any transfers of any criminal procedural rules protecting the accused to labor law stands and falls with the validity of the starting point of the discussion. In this regard, it is held that the function to assist criminal investigations is not the only motivation that leads to the performance of an internal investigation. Whoever bases his or her argument on this aspect alone is diminishing the problem. As already mentioned, the duty of launching an internal investigation was originally rooted in civil and corporate law obligations. The company is also subject to an obligation to shape its activities so that criminal offenses are avoided at all costs. This obligation is already legally secure. Management must provide proper organization. If they violate this duty, they fulfill Section 130 of the Act on Regulatory Offences. The violation is also attributed to the company itself, in addition to punishment in accordance with Section 30 of the Act on Regulatory Offences. In the case of a causal occurring violation of a legally protected interest, the principal's liability in criminal law comes into play.[60] In addition, the company has to consider whether it is entitled to liability claims. If that is the case and these claims are recoverable, then it must enforce them. Otherwise, the members of its competent bodies are committing a criminal breach of trust. It is therefore in the overriding interests of the company and its own institutions to recognize and enforce vulnerabilities and any possible liability claims: in general, that means to carry out internal investigations.

Cooperation with the public prosecutor's office is seen as a side effect and certainly changes nothing regarding the existence of its own obligations of the company and institutions. If the relationship between a criminal procedural approach and internal investigations is designed in a manner such as what has been stated above, it may be an obligation of the company to not seriously disclose information for investigative purposes.

It would be naïve to assume that no such attempts are made (by all accounts, at least in the U.S. too). That does not force into question fundamental German legal decisions

59 Zerbes, ZStW 125 (2013)(very engaging as well as one-sided); Anders, wistra 329 (2014)(differentiating and reducing the actual approach of the prosecutorial action); similarly, *see also* Greco & Caracas, NStZ 7 (2015).

60 For an expert and precise summary, *see* Roxin, FS Beulke 239 (2015).

such as the difference between labor and criminal law. Where the cooperation between prosecutors and companies purposefully or even inevitably leads to the devaluation of the criminal procedural rights of the employees, then this of course cannot enjoy the protection of the legal system.[61]

The company can determine (in accordance with Section 241, Paragraph 2 or Section 242 of the Civil Code)[62] to which individual or board it will give information. Conceivable possibilities are the executive body, one of its members, the immediate supervisor, or the internally competent department, such as the compliance department, as well as external private investigators. The scope of the information disclosure shall be determined in each individual case. If the information is sufficient, then the claim is limited.

One of the prevailing opinions (concerning labor- and company law obligations to disclose) is revealed in a study from the University of Konstanz,[63] which found that the practice of refraining from taking statements (often self-incriminating) is enforced with the available legal means of coercion. However, no normative meaning can be attributed to this finding.[64] The reserved use of coercive measures should be based on the notion that legal process promises no quick and usually only doubtful success. The practice of criminal justice is not influenced by the compulsion of witness testimony, but one would think that this might be the case due to legal reasons or the normative constraints of the relevant provisions.

3. Multiple Parties

If the obligation to disclose information in the context of an internal investigation were to involve more than one person, then this naturally leads to the question of whether the duty to disclose information also extends to the names of the additional people involved. The respective legitimate interest of the company is essential. It is therefore important to determine if it is sufficient to present the facts as such (ex. in terms of obstruction, whether a bribe payment was procured) so that it requires no further knowledge by other individual parties. If the company wants to separate itself from employees involved in illegal transactions or if it wants to request damages, then the obligation to disclose information extends (at least in serious cases) to the names of those involved and to the content of their contributions.

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61 For possible solutions *de lege lata*, see below number 2.

62 Göpfert et al., NJW 1703, 1706 (2008).

63 Theile, ZIS 378 (2013); *see also* Theile, FS Kühne 489, 490, 497 (2013).

64 Theile, ZIS 378, 382 (2013).

B. Utilization in Investigatory and Criminal Proceedings

In investigations and criminal proceedings, the accused[65] may remain silent (*nemo tenetur se ipsum accusare*). This naturally also applies to employees and members of different bodies within the company. According to Section 55 of the Code of Criminal Procedure, a witness may refuse to provide information in parallel criminal proceedings against another person accused of the same facts if this testimony might come back to harm the witness. The same is true in a civil proceeding (Section 384, Number 2 Code of Civil Procedure) and also in a labor court proceeding (Section 46, Paragraph 2, Sentence 1 Labor Court Act).[66] This right to remain silent would be virtually non-existent if private investigators were to use duly effected statements against the employee or board member that were produced through questioning or reading aloud of protocols drafted by them.

1. Solving the Conflict Based on the Principles of the Common Debtor Decision

a. Comparability of the Situations

The exclusion of evidence improperly obtained[67] could follow from a well-known insolvency decision of the Constitutional Court, hereinafter referred to as the common debtor decision.[68] Consequently, the constitutionally guaranteed right against self-incrimination only applies in investigations and criminal proceedings.[69] By contrast, an obligation to give information is constitutionally unobjectionable in other areas of law (ex. insolvency law). However, the enforceable and unlimited obligation to give information corresponds to a constitutional but dispensable prohibition on the utilization of evidence received in an investigation and criminal proceeding against the respondent.

b. Fairness Principle

It is disputed whether the conflict between an obligation to a truthful disclosure to the company and the criminal procedural right to remain silent can be solved on the basis of the principles of the common debtor decision. A difference is that the obligation to

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65 For individual defense, *see* Litzka, WiJ 79 (2012).

66 Diller, DB 313 (2004)(questioning how and whether an employee must support his employer during proceedings through disclosure, handing over tax documents, or appearing in court).

67 Salvenmoser & Schreier, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 15/69 (dealing with the utilization of information illegally obtained during the course of an internal investigation and confirming a limited prohibition).

68 BVerfG, Beschl. v. 13.1.1981 – 1 BvR 116/77 = BVerfGE 56, 37 ff.; Mayer, StRR 124 (2015).

69 Rogall, FS Beulke 973 (2015); Wastl et al., NStZ 68, 70 (2009).

disclose information under the Insolvency Statute finds its legal basis in public procedure law, while private law applies between the employer and employee. In particular Knauer[70] and Momsen/Grützner[71] reject the application of the principles enunciated in the common debtor decision and they find justification for their solution in the fair trial principle. But before resorting to a general principle, there is an attempt to develop a legally certain solution from the written law.

c. Fundamental Rights Binding only for Official Actions

The relationship between private individuals does not constitute a legal vacuum. It is defined by rules that, although partially modifiable, are designed to be stringent. These rules not only obtain legal binding nature on account of their own personal capacity, but first on account of their official state recognition (respectively, through legislation). Whether a private entity will want to agree on something is solely a matter for the parties involved. If they have chosen to do so, state law applies insofar as they have not legitimately waived it. This is at least relevant for the "how" of legally binding relationships between private parties. The authority of state regulation flows from the constitution and the content is not free from obligations: even the freedom of the legislator finds itself limited by its requirement to preserve fundamental rights. In the field of civil law, they apply a protective function. Although this leaves vast space, that does not change the fact that the state must recognize the legal situation between private parties in a constitutionally sound manner. Even under private law, the right to request information is based not only on an autonomous interest, but also to a considerable degree on official state action.

Additionally, a claim (governed by public law) to information in an insolvency proceeding is inconceivable without private action: there is no crisis without private sector activity. An insolvency proceeding primarily serves no public policy purpose, but is led by the interest of creditors. Momsen and Grützner[72] consider only the enforcement. In this respect, it is true that the state merely provides the tools at its disposal, as the legal relationship continues to concern private parties. However, this says nothing about the role of the state in the existence of privately binding relationships: just as it is the state that is permitted to make substantive law binding, it is also up to the state to determine the conditions for the enforcement of this substantive law. The assertion that state help will not change anything concerning the private nature of the legal relationship between employer and employee is thus equally true as the conclusion drawn by Momsen and

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70 Knauer, ZWH 81, 86 (2012); Knauer &Gaul, NStZ 192 (2013).

71 Momsen & Grützner, DB 1792, 1796 (2011); Momsen, *in* Criminal Compliance, *supra* note 2, at No. 34B/30 &39.

72 Momsen & Grützner, DB 2011, 1792 (1795).

Grützner. The difference between the information under the Insolvency Statute and according to the employment contract is only in the different amount (qualitative and possibly also quantitative) of private cause. Consequently, a structural difference that would preclude the transfer of principles from the common debtor decision does not exist.

This alone does not exclude any other potential significant differences. The courts have dealt with similar tensions in other circumstances. In each civil proceeding, the parties have the obligation to be truthful (Section 138, Paragraph 1 of the Code of Civil Procedure). With respect to insurance, the insured person must also provide truthful information. If he or she fails to do so, then he or she faces punishment for fraud. However, there is no evidence exclusionary rule for insurance and civil records.[73] What is a sustainable and accessible generalization of classification criterion?

d. Duties and Obligations

Procedural law distinguishes between enforceable obligations and mere procedural burdens.[74] Substantively, there is a parallel to duties on the one hand and obligations on the other hand. Duties are binding and their fulfillment is enforceable. However, the addressee of a procedural burden or substantive obligation can choose between fulfillment or acquiescence of the legal disadvantages that befall him or her. Indeed, the duty to be truthful is not available as such in a civil proceeding. The parties are in control: the private plaintiff is not required to instigate a trial, and the respondent is not required to defend.

A respondent does not have to defend against a claim for issuing information. He or she cannot ensure a right to silence. On the contrary, the substantive claim is precisely focused on the issuance of information: a duty that is documented in the court decision as an enforceable duty to express oneself truthfully. The following relates to employees and board members with respect to internal investigations: insofar as they are obliged to provide information, they lack the freedom to decide whether they want to testify or remain silent. The refusal is unlawful; the statement can be compelled by means of state enforcement. Accordingly, one can also find criteria regarding the duty to testify in the common debtor decision: there is a lack of freedom to decide in this specific situation.[75] It exists neither for the debtor in insolvency proceedings nor with a duty to disclose information according to substantive civil law. The legal consequence is therefore con-

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73 Not clear, OLG Celle, Urt. v. 16.2.1982 – 1 Ss 605/81 = wistra 1982, 120.

74 ZPO No. 56 (Musielak ed.); *see also* MüKo/ZPO No. 32 (Rauscher ed.).

75 BGH, Beschl. v. 15.12.1989 – 2 StR 167/89, Rn. 14 f. = BGHSt 36, 328 ff; Böhm, WM 1913 (2009) , 1913; Wastl et al., NStZ 68, 71 (2009); Schlothauer, FS Gerhard Fezer 267.

gruent: the duty to private disclosure therefore corresponds to a criminal procedural evidence exclusionary rule.[76]

e. Scope of the Prohibition on Utilization

Although the ban on utilization is affirmed, there is little said about its scope. It goes without saying that it applies only with respect to correct information because untrue statements are never based on the fulfillment of a duty.[77] The same applies to information beyond the legal duty. False and voluntary information are freely usable in criminal procedure.[78]

f. Prohibition on Utilization

The further limits of utilization correspond to the rules laid down in the common debtor decision: the conviction of the respondent must not be directly based on their dutiful statements, which means that an indirect use of such information is allowed at one's own risk. However, the Basic Law does not stipulate indirect usability, but leaves the legislators free to decide whether or not to institute a further restriction. As a result of this possibility, the legislators have created Section 97, Paragraph 1, Sentence 3 of the Insolvency Statute. By contrast, there is no such provision for internal investigations. Thus, only the constitutional minimum applies. For this reason, law enforcement is not denied the opportunity to include statements made within the realm of an internal investigation when proceeding with a further investigation against the person who initially made the statement. Indeed, the independent evidence collected in the state investigation may form the basis of the conviction.[79] In Germany, there is thus no ban on using evidence resulting from the so-called fruit of the poisonous tree.

g. Validity Only for One's Own Statements

The scope of the utilization ban in the case of multiple parties is to be determined in

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76 ArbG Saarlouis, Urt. v. 19.10.1983 – 1 Ca 493/83 = ZIP 1984, 364; Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 144; Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/41; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/429; Momsen, *in* Criminal Compliance, *supra* note 2, at No. 34 B/30; LAG Rheinland-Pfalz, Urt. v. 7.9.2004 – 11 Sa 2018/03, No. 73; Bauer, StraFo 488 (2012); Gädigk, *in* Internal Investigations, *supra* note 2, at No. 18/29; Raum, StraFo 395, 397 (2012); Wimmer, FS Imme Roxin 537, 542; Rosen, BB 230, 231 (2009).

77 Verfassungsgerichtshof des Freistaates Sachsen, Beschl. v. 15.11.2013 – Vf. 89-IV-12.

78 § 97, Para. 1, Pg. 3 InsO; Bittmann & Rudolph, wistra 81 (2001).

79 Böhm, WM 1913 (2009); Rotsch, *in* Handbuch Wirtschaftsstrafrecht, *supra* note 1, at No. 1/4/61; Rödiger, *supra* note 43, at 304; Wastl et al., NStZ 68, 73 (2009); Wehnert, StraFo 253, 257 (2012); Greco & Caracas, NStZ 7, 15 (2015); Stam, StV 130, 133 (2015); Rogall, FS Beulke 973, 978-980 (2015).

each instance: in proceedings against the respondent, it extends to the parts of the information dealing with the role of third parties if this, as in most cases, can allow conclusions at the expense of the respondents.[80] The situation is different in proceedings against an additional party. In this respect, it is not about *self*-incrimination. Therefore, such a personal evidentiary ban can only operate with the result that it does not apply in proceedings against a third party. If separate proceedings are initiated, this means that one's own personal statements are unusable. Statements of others that were made during the course of internal investigations are also unusable when they themselves are imputed to the person who made the self-incriminating statement. The exclusionary rule has therefore only a relative and very limited benefit. If there is a recognized need for expansion, then this is only for the legislator to change.

C. Seizure

1. Seizure and Freedom from Seizure

There is no provision that expressly deals with the ability to seize documents that have originated during the course of the internal investigation. It must therefore be decided in accordance with general provisions. It depends initially on who led the internal investigation. If the right to refuse to give evidence does not extend to this person, then the documents are fully capable of being seized. Documents from inquiries made by company employees (ex. internal auditors, compliance department, in-house lawyers) can be easily seized. The same applies to investigations from a specialized company (ex. a forensic firm). If an accounting firm is commissioned, the following are conceivable: a right to refuse to give evidence according to Section 53, Paragraph 1, Number 3 of the Code of Criminal Procedure and subsequently the seizure protection pursuant to Section 97, Paragraph 1 of the Code of Criminal Procedure. However, this protection extends only to information and documents that were revealed to them in their professional capacity as auditors. It applies to business inspections, in particular financial statements,[81] but not for internal investigations (unless they fall under protected activities in such a way that it makes it impossible to separate the sources). Compiled business records, as well as protocols of statements (interviews) and interim- and final reports drawn up by investigators are capable of seizure even if they were procured from abroad.

The situation is more nuanced if a lawyer led the investigation. Because an internal investigation does not concern a non-professional action, then Section 97, Paragraph 1 of the Code of Criminal Procedure applies. This provision extends only to documents in

80 Senge, KK-StPO, § 55 StPO No. 10; Ignor & Bertheau, § 55 StPO No. 11, & 16; Schmitt, *supra* note 41, at § 55 StPO No. 7; Rogall, SK-StPO, § 55 No. 27.

81 OLG Nürnberg, NJW 690 (2010), No. 13, in reference to Sec. 2, Para. 1 WiPrO.

the custody of the person who holds the right of refusal (Section 97, Paragraph 2, Sentence 1 of the Code of Criminal Procedure) and so it does not apply to documents stored in the company itself or easily accessible to the company. In addition, the attorney-client privilege (also referred to as legal professional privilege) exists solely between the lawyer and company as such.[82] Employees of the company are not included within the scope of this protection. Accordingly, only the company can waive the confidentiality existing with the lawyer. Therefore, in proceedings against natural persons, documents that are voluntarily surrendered by the company or are confiscated from the company are generally usable and are not exempt from seizure.

2. Limited Protection of Legal Entities

Whether that also applies if proceedings are initiated against the company itself (Section 30 of the Act on Regulatory Offences) or it is a third party recipient of items that were possibly gained from criminal actions (Section 73, Paragraph 3 of the Criminal Code), there is doubt in the literature[83] and there are parallels drawn to defense documents that are also exempt from seizure when they are not in possession of the defense (Section 148, Paragraph 1 of the Code of Criminal Procedure).[84] The term *defense* documents is not only procedural, but it is materially defined with the consequence of a pre-effect before the initiation of an internal investigation.[85]

For the latter opinion and also for the absolute protection of defense documents, there are good reasons[86] for a concrete attorney-client relationship between counsel and a natural person. Such a far-reaching scope of privilege is not always justified due to differences between a natural person and legal entity. Human dignity and the general right to personality are only attributable to natural persons. Therefore, legal entities do not enjoy constitutionally protected rights including the right against self-incrimination and a corresponding right to remain silent.[87] Such a general right is not found in ordinary law. Section 444, Paragraph 2 of the Code of Criminal Procedure provides for formal

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82 Schmitt, *supra* note 41, at § 53, No. 16 & § 97 No. 10b StPO.

83 Ballo, NZWiSt 46 (2013); Minoggio, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 49; Jahn & Kirsch, NZWiSt 28 (2013); Momsen & Grützner, DB 1792, 1796 (2011); Greeve, StraFo 89, 93 (2013).

84 Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/42; Rütters & A. Schneider, GA 160, 164 (2014); Schmitt, *supra* note 41, at § 148 StPO No. 8.

85 LG Gießen, Beschl. v. 25.6.2012 – 7 Qs 100/12 = wistra 2012, 409 f.; Greeve, StraFo 89, 95 (2013); Jahn & Kirsch, NZWiSt 28 (2013); Jahn, ZWH 1, 3, 5 (2013).

86 Whether they can convince is another question. The distinction between preparing the defense on the one hand and participation (aid or subsequent favoring) on the other hand will be precisely defined.

87 BVerfG, Beschl. v. 26.2.1997 – 1 BvR 2172/96, Rn. 85 = BVerfGE 95, 220; Fink, wistra 457 (2014); Bung, ZStW 125, 536, 349 (2013).

additional involvement (as well as the equality of the recovery and forfeiture parties, Sections 442, Paragraph 1 and Section 433 Paragraph 1 of the Code of Criminal Procedure) with a defendant of equal protective effect, including for documents intended for defense against the threat of additional parties, but only first in the main trial stage.[88] Exactly which rights they are due in preceding stages of the trial is left open to determination. Here, protection against seizure (if this protection is possessed at all) is limited to documents in custody of the lawyer pursuant to Section 97 of the Code of Criminal Procedure.

Indeed, the legislature is free to increase the protection of Section 433, Paragraph 1 of the Code of Criminal Procedure to an investigation procedure. It can nevertheless be argued that criminal procedural means of coercion may be used against the later additional party so that a defensive need cannot consequently be denied. The expansion of statutory seizure prohibitions is given to case law in light of its effect on the quest for truth and only in compelling and exceptional cases. Something similar does not exist in relation to the seizure of documents from internal investigations, as the Basic Law does not even grant a right to remain silent to companies.

The measures of forfeiture and recovery are not connected with a value judgment. Forfeiture is similar to the civil law institution of unjust enrichment. The prosecution must not only secure the forfeiture, which additionally serves the adverse party, but also the sources of information and evidence for its order. Since this has a privileged right of access pursuant to Section 406e of the Code of Criminal Procedure, then prohibiting the seizure of such company-owned documents would not work.

Although there is no ethical value judgment against implementing a corporate fine, intent or at the very least negligence is required to impose such a fine according to Section 10 of the Act on Regulatory Offences. In the case of Section 30 of the Act on Regulatory Offences, the company is not accused of its own "guilt", but rather is attributed the inappropriate conduct of a specific representative. That expands the latitude of the legislature following Article 19, Paragraph 3 of the Basic Law. Section 433, Paragraph 1 of the Code of Criminal Procedure does not exceed this. The restriction made therein does not represent a drafting error. Rather, it represents a conscious decision by the legislature, as is also evident elsewhere. Section 81a, Paragraph 1 of the Act Against Restraints of Competition normalized an obligation to cooperate in actions relating to cartel offenses, albeit only in relation to the principles of assessment of the legal consequences.

Therefore, a reference point for the protection of the company from the seizure of documents originating in an internal investigation cannot be found in either constitutional

88 Jahn & Kirsch, *in* Criminal Compliance, *supra* note 2, at No. 33/107; Rütters & Schneider, GA 160, 162 (2014).

or regular statutory law. As a result, nothing else applies for subsequent procedural stages due to the limited protection of legal entities.

3. Documents in Legal Custody

Particularly controversial is the question of whether documents may be seized in a proceeding against a legal entity if those documents originated from a lawyer involved in an internal investigation. To this end, Section 97, Paragraph 1, Numbers 1 and 2 of the Code of Criminal Procedure are useful, as they limit the ability to seize documents in relation to communication arising from the attorney-client relationship. However, the wording of Section 97, Paragraph 1, Number 3 of the Code of Criminal Procedure does not have this restriction. It is simply not possible to derive an unlimited seizure protection for all materials passed on to a lawyer.[89] The very wording does not suggest an *argumentum e contrario* because it is linked with the term "other" in Section 97, Paragraph 1, Number 2 of the Code of Criminal Procedure and builds on a provision that expressly limits the protection to information whose source is the accused. Protection extending beyond Section 97, Paragraph 1, Numbers 1 and 2 would be surprising if attached to Section 97, Paragraph 1, Number 3: the objects appearing under Section 97, Paragraph 1, Numbers 1 and 2 are much more clearly in need of confidentiality as the unnamed objects found under Section 97, Paragraph 1, Number 3. However, it cannot be concluded that the protection of written communication and records is determined solely by Section 97, Paragraph 1, Numbers 1 and 2, as both provisions would lose any application from an expanding interpretation of Section 97, Paragraph 1, Number 3. It cannot be assumed that the legislature wanted to set up two never relevant rules or even overlooked their redundancy. Accordingly, it follows that in proceedings against natural persons there is no freedom from seizure under Section 97, Paragraph 1 when documents from an internal investigation are in the hands of a corporate lawyer.[90]

The freedom from seizure could result from the new Section 160a, Paragraph 1, Sentence 1 of the Code of Criminal Procedure (in force since 2011), which includes all lawyers rather than just defense lawyers[91] and prohibits investigative measures directed against them. However, Section 160a, Paragraph 5 of the Code of Criminal Procedure states that Section 97 remains unaffected. The meaning of this provision does not reveal itself solely from the wording.

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89 Jahn & Kirsch, StV 151 (2011); Jahn, ZIS 453 (2011); Zerbes, ZStW 125, 551, 562 (2013); Erb, FS Kühne 171, 178, 184 (2013).

90 LG Hamburg, Beschl. v. 15.10.2010 – 608 Qs 18/10 = wistra 192 (2011); Greeve, StraFo 89, 95 (2013); *Bock* & *Gerhold*, *in* Internal Investigations, *supra* note 2, at No. 5/31; Grützner, *in* Wirtschaftsstrafrecht, *supra* note 23, at No. 4/432; Rödiger, *supra* note 43, at 315.

91 BVerfG, StraFo 2015, 61; LG Augsburg, Beschl. v. 2.4.2014 – 8 Ks 401 Js 139206/13, BeckRS 14588 (2014); Gutmann, FD-StrafR 362412 (2014).

Indeed, the grammatical interpretation permits the assumption that both provisions are valid side-by-side.[92] Such an interpretation would occur even without a provision like Section 160a, Paragraph 5 of the Code of Criminal Procedure, whose regulatory content is limited to a purely declaratory or clarifying function. To that effect, the limiting interpretation leads one to believe that Section 160a, Paragraph 5 leaves untouched the seizure prohibition of Section 97,[93] reduces only its scope, and does not attach any nature of a demand. Contributing to legal clarity is an important and sometimes only task of a legal provision. But first there is the presumption that the legislature did not want to regulate with content. From a methodological perspective, this can be described as an important precept. The given presumption is refuted only if every attempt to interpret a provision in terms of meaningful regulatory content fails. The final interpretation would result in the adoption of a purely clarifying meaning.

To regard Section 160a, Paragraph 5 of the Code of Criminal Procedure as a mere declaratory norm would perhaps be plausible, but would require a clarification. If so, the legislature could explain certain terms of Section 97 for further application (for example, the admissibility of the seizure where suspicion arises regarding complicity) and also determine which other variants of Section 97 are withdrawn under Section 160a. Unfortunately, the legislature has not yet done this in terms of the entire Section 97. This full reference speaks in favor of a defined understanding of Section 160a, Paragraph 5 as determining Section 97 as an exception from Section 160a, Paragraph 1, Sentence 1: the freedom from seizure of documents from a lawyer is therefore directed to continue only in accordance with Section 97 of the Code of Criminal Procedure.[94] Correspondingly, messages, records, and other items arising from the attorney-client relationship are protected to the lawyer. Findings from internal investigations do not originate from the defense or other mandate of individual defendants.

After receipt of the release statement from the company, the lawyer that took over the internal investigation is obliged to give testimony or surrender items in proceedings against an employee or board member (Section 95 Code of Criminal Procedure). Relevant documents may be confiscated from the lawyer if necessary. Consequently, Sec-

92 Sahan, *in* Criminal Compliance vor den Aufgaben der Zukunft, *supra* note 40, at 133, 142; LG Mannheim, Beschl. v. 3.7.2012 – 24 Qs 1 und 2/12 = wistra 400 (2012); de Lind van Wijngaarden & Egler, NJW 3549 (2013); Schuster, NZWiSt 431 (2012); Ballo, NZWiSt 46 (2013); Greeve, StraFo 89, 95 (2013).

93 Bock & Gerhold, *in* Internal Investigations, *supra* note 2, at No. 5/68.

94 Bauer, StraFo 488 (2012); Erb, FS Kühne 171, 175 (2013); Gädigk, *in* Internal Investigations, *supra* note 2, at 18/31; Schmitt, *supra* note 41, at § 97 No. 10b & § 160a StPO No. 17; Wimmer, FS Imme Roxin 537, 545; Zerbes, ZStW 125, 551, 563 (2013); *Minoggio*, *in* Wirtschaftsstrafrecht in der Praxis, *supra* note 2, at No. 60; Knauer, ZWH 81, 88 (2012); Beckemper, *in* Internal Investigations, *supra* note 2, at No. 15/257; Mark, ZWH 311, 312 (2012); Raum, StraFo 395, 399 (2012).

tions 97 and 160a, Paragraph 5 of the Code of Criminal Procedure support the principle that a law firm has no shelter for delicate evidence.

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LAWWITHOUTWALLS: REVOLUTION THROUGH EDUCATION

Reforming the Legal Industry from its Roots

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AUTHOR

Amir S. Dhillon was a student on the inaugural LWOW X program in 2014 and later became the first LWOW Jim Ferraro Intern. Amir's active participation and experiences as a student and intern in LWOW X led him to Axiom, where he works as the Lawyer Development Coordinator in the London office. Most recently, Amir has become the first ever Alumni Officer for LWOW and is excited for his third year involved with the program. In his spare time, Amir enjoys writing and playing music (especially Heavy Metal), hobby photography and his never-ending quest for the ultimate burger (and cocktail). He can be contacted at amir.dhillon@axiomlaw.com.

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I. INTRODUCTION

In the wake of every other industry, the legal industry is finally adapting to the quickening waves of change, wrought by globalization and technological advancement on an unprecedented scale. Archetypal, risk-averse lawyers are coming to, as it becomes more evident that whilst technological capabilities and prowess are swelling, the world itself appears to be shrinking. Not too long ago, "globalization" was at the tip of every tongue, as the ultimate harbinger of change. Now we speak of a "glocal" world, where globalization is not an idea to be discussed, but an integral part of the environment in which we live.

II. A PLATFORM FOR INNOVATION AND EDUCATION

LawWithoutWalls (LWOW)[1] re-engineers legal education, transforming it on a molecular level. Students learn to work across time zones, become fluent in the technological means required to excel in a glocal legal market and ultimately, reinvigorate their skillsets through creating "Projects of Worth" – implementable business solutions to issues plaguing the legal industry. Students (under the mentorship of thought leaders across a range of industries) will design, create, market and refine their Projects of Worth until they present them to their peers at the ConPosium - the final event of the LWOW calendar, where all student teams present their final Projects of Worth to the LWOW community. This allows students to develop and cultivate a deep knowledge of business skills and the business of law.

LWOW is split into three distinct programs. In LWOW Original, students meet at the start (KickOff) and the end (ConPosium) of the program; presenting in-person, after working together on their projects online during the time between the KickOff and ConPosium events. In LWOW X[2] and LWOW X Compliance[3] (which is specifically geared towards compliance topics, issues, and solutions), the students undertake the entire programs virtually. This represents an honest simulation of the future of glocal collaboration; conducting and coordinating project management, development and implementation from across the globe – both simultaneously and in real time. Students on these programs must therefore deliver their final presentation (to their fellow stu-

1 LawWithoutWalls, a part virtual collaboration of over 750 professionals, was founded by Michele DeStefano at the University of Miami in 2010 and now includes over 30 law and business schools from around the world. For further information, *see* http://www.lawwithoutwalls.org.

2 LWOW X is an all-virtual variation of the successful LawWithoutWalls program.

3 LWOW X Compliance is an offshoot of a combination of LawWithoutWalls and a successful virtual pilot, Compliance Elliance, which was founded by Dr. Hendrik Schneider from the University of Leipzig in conjunction with the University of Miami School of Law. Similar to LWOW X, the entire program of LWOW X Compliance is offered virtually.

dents, academics and industry leaders from across the world) online using Adobe Connect – an interactive virtual tool that allows students to present live on webcam, with the aid of videos, audio and a slide deck. Furthermore, their contemporaries and mentors can contribute comments and questions during the presentation; a live, unprecedented and wholly unique approach to legal education and business presentations.

III. LAWWITHOUTWALLS AS AN EDUCATIONAL NECESSITY

As an academically rigorous career, the importance of updating legal education in line with the transformation of the legal world cannot be underestimated. Ultimately, the disconnect that many feel exists between academic education and the practical application of knowledge has only widened. This gap now presents itself as a chasm; a void in which tomorrow's lawyers are often left without a torch or a map; denied of the skills required to navigate (and most importantly effect) the changes tomorrow's industry must undergo. This includes project management, marketing, market research, writing a business plan and the other myriad of skills that can only be forged in the fire of conceiving, developing and pitching a business idea to a group of elite, globally recognized academics, investors, entrepreneurs and the like.

IV. GLOCAL COMPLIANCE ISSUES IN #LWOW2015

This year, students on both LWOW Original and LWOW X Compliance had to battle with one rather poignant, gripping and relevant topic: "In a Glocal World, How do Corporations Reduce the Dark Zone of Unknown Corporate Misconduct?"

A. LWOW Original: WhiteHatters

Creators:
Vincent Beyer (IHEID University)
Alexandra Marshakova (Bucerius Law School)
David O'Donovan (University College Dublin)

Mentors:
Academic Mentor: Moray McLaren (IE Business/Redstone Consultants)
Practitioner Mentor: Joanne Canning (Eversheds)
Corporate Mentor: Duncan Watson (Deutsche Bank)
Entrepreneur Mentor: Darren Mee (Novus Modo Consulting)
Alumni Advisor: Giorgia Linardi (IHEID)

WhiteHatters aim was to increase cyber security, whilst building awareness of the dangers posed by targeted phishing attacks. WhiteHatters aimed to achieve this through deconstruction learning and simulation. Whilst this idea in principle appears worthwhile, the presentation itself proved to all LWOW attendees how urgent the need for

WhiteHatters' Project of Worth was. A masterful cocktail of deceit, context and ingenuity (in equal measures), the group revealed they had sent a (benign) phishing email to the entire LWOW community regarding food options for the post-ConPosium event. Deliberately littered with red flags, such as incorrectly spelt names and being sent from a fake, slightly altered email address, almost all students and mentors responded to the email as predicted; by clicking the link in the email and providing their information on the webpage that followed. WhiteHatters thereby demonstrated the unnerving ease with which cyber security can be undermined, and how easily regulations, the need for their compliance and thus their effectiveness may be circumvented given the cloak of anonymity cyberspace creates. When such regulations may fail us, the final line of defense is each individual – who, as shown by WhiteHatters' experiment – currently requires significant upskilling in order to be capable of providing themselves with any meaningful protection from phishing and other cyber attacks. Ultimately, the team had proven the effectiveness of their Project of Worth, the simulation and deconstruction learning it entailed and it's necessity long before they'd even started their presentation.

B. LWOW X Compliance: NomNomNom

Creators:
Ruan Min (Peking University School of Transnational Law)
Christina Straub (University of Leipzig)

Mentors:
Academic Mentor: Rick Williamson (Miami Law)
Innovation Mentor: Mark Graffagnini (Graffagnini & Associates)
Lawyer/Compliance Mentor: Chris Callahan (Farmer & Associates)
Alumni Advisor: Alessandra Ionata (U of Montréal)

NomNomNom was a duo of two students from vastly different backgrounds – neither of whom were native English speakers. In spite of this, NomNomNom delivered a clear and striking presentation based around a deceptively simple idea – an app to provide Chinese consumers with information about fast food restaurants, their dishes, suppliers and the ingredients used. The Chinese context provided an additional dimension and unique counterpoint to this Project of Worth. Given a spate of recent high-profile scandals regarding grave failures to adhere with food quality standards and regulations in China, the Project of Worth was positioned to the most suitable target market possible. Recent failures in maintaining food quality standards include the powdered milk scandal, resulting in the death of six infants, or the Husi Food scandal, which revealed that various multinational corporations such as McDonalds were purchasing expired meat from suppliers that was wholly unfit for human consumption. Therefore this Project of Worth addressed a critical and topical need for its target market of fast food consumers. One cannot underestimate the importance of ensuring food quality standards are complied with, and the Chinese market in particular has become all too aware of this. Similar to WhiteHatters, this Project of Worth provided their target market with the means to

protect themselves in light of regulatory failings to safeguard consumers in one of (if not the most vital) area of consumer protection; the maintenance of food quality and safety standards.

V. CONCLUSION

The stark contrast between two Projects of Worth born of the same topic exemplifies how diverse the LWOW community is and how much room exists for innovation in not only the legal industry, but across the business world. This becomes especially prevalent with the increasing utilization of technology, its permeation in everyday life and the ease with which such technology can be harnessed for almost any purpose – whether for deception and trickery or knowledge and awareness. Finally, LWOW underscores the capabilities of the bright minds that will enlighten the legal industry in years to come; who will steer the legal profession from its pre-Susskind antiquation towards desperately needed efficiency, efficacy and ethically conscious evolution.