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I. ORIGINATION OF COMPLIANCE PROGRAMS

Although the original incidence of compliance programs in U.S. business is somewhat murky, it is probably safe to say that the more formal programs began in the 1940s, following the Second World War and the emergence of the corporate community as a major player in U.S. industry. As corporations increased in size and complexity, they recognized the need to organize methods of internal policing, especially in view of the threats from external state and federal regulatory authorities.

In the earliest days of formal compliance programs, antitrust law was probably the centerpiece of all compliance programs. Antitrust law reached its most heightened form of enforcement and complexity following the Second World War and the growth of large corporations in concentrated industries. Although antitrust law was preeminent, the programs usually also contained provisions concerning conflict of interests and securities law sections regarding insider trading.

These early programs pale in comparison to today's elaborate and well-developed company-wide activities. In most instances the antitrust attorney constituted the sole arbiter and was often the circuit rider to various parts of the corporation, especially those in industries prone to antitrust exposure, such as concentrated industries.

Following the enactment of the Sherman[1] and Clayton Acts,[2] an increasing body of antitrust law developed and the sophisticated lawyers

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within the Justice Department, and elsewhere, became driving forces for self-policing by the corporate community. In addition, the securities law process and development following the passage of the Securities Acts[3] became a close second in interest and exposure for corporate America.

These early programs were often limited in scope, contained perhaps half a dozen pages of explanation and were usually administered solely by the corporation's legal department and commonly by one attorney within the department. The actual development of the compliance program's text was usually accomplished in conjunction with the human resources department and distribution was supervised by internal audit. Senior management rarely involved themselves with the compliance program, as compared to today's environment, in which senior management participation is required by various codes and sentencing guideline programs that followed with the increasing regulatory surveillance of the corporate community.

In the past, the program's text was revised from time-to-time and disseminated to the entire corporate body and accounted for by internal audit. The results were usually reported to the Chairman of the corporation's Board of Directors and also, as part of or following an Audit Committee meeting hearing. Today, these programs would be considered rudimentary because now the programs are often overviewed by a Public Affairs Committee, an Audit Committee and once a year, by the Board itself.

As the rewrites of the compliance programs developed, the compliance program incorporated new provisions as new laws were enacted, bearing on the operations of corporations in America. The most notable of these new laws were the environmental laws,[4] the anti-boycott rules,[5] export controls[6] and the Foreign Corrupt Practices Act (FCPA).[7]

Though the FCPA is only a small portion of the coverage of corporate compliance programs, this perspective will focus on the FCPA and, to a certain extent, on other collateral impact statutes, such as securities and internal revenue laws. It will not delve into related statutes, such as the overseas reach of antitrust laws.

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[1] 15 U.S.C. §§ 1-7 (1994).

[2] 15 U.S.C. §§ 12-27 (1994).

[3] Securities Act of 1933, 15 U.S.C. § 77a (1994); Securities Exchange Act of 1934, 15 U.S.C. § 78a (1994).

[4] Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 (1994); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1994).

[5] 50 U.S.C. § 2407 (1994).

[6] 50 U.S.C. § 2404 (1994).

[7] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, *as amended by* Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15. U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)).

II. CONTINUED EVOLUTION OF COMPLIANCE PROGRAMS

In the 1980s, a new program dramatically changed the scope and style of compliance programs. This new program, the Defense Industry Initiative on Business Ethics and Conduct (Defense Industry Initiative),[8] developed out of the so-called "Ill Wind" investigation at the Department of Defense. The Ill Wind investigation was a wide-ranging examination of relationships between defense contractors and Defense Department officials, which arose out of suspicious financial arrangements between the two and resulted in some indictments. Then Deputy Security of Defense Vance Packard suggested that the defense industry adopt its own regulations in order to police itself. The CEO of General Electric, Jack Welch, organized the Defense Industry Initiative to a certain extent in reaction to the indictments of some five General Electric executives resulting from the Pentagon investigation. Developed in 1986, the Defense Industry Initiative was a direct result of the President's Blue Ribbon Committee on Defense Management (the Packard Commission). In it, defense contractors developed a self-policing code of conduct with regard to contracting activities with the Department of Defense.

The most important new ingredient added to compliance programs by the Defense Industry Initiative was the concept of voluntary disclosure, or for a corporation to turn itself in case of fault, in order to satisfy the government's need for assurance of self-policing. This self-confession or voluntary disclosure program became an add-on provision to previous compliance programs dealing with the FCPA and other overseas reaching statutes, creating internal dilemmas on the issue of Fifth Amendment protections. Under voluntary disclosure, corporations were expected to "turn themselves in," including turning in employees. Hence, some corporations adopted "little Miranda" warnings to inform employees of their rights against self-discrimination. Under the Defense Industry Initiative, compliance programs, including those dealing with the FCPA, took on a fully institutional nature and actual career positions developed within companies for compliance purposes. Vice presidents for compliance began to appear on organization charts.

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[8]The Defense Industry Initiative had no statutory basis. If anything, the Defense Industry Initiative was intended to avoid regulation of corporations through voluntary self-regulation by the corporations themselves, at the suggestion of the Deputy Secretary of Defense, Vance Packard. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605 (1995); Note, *Growing the Carrot: Encouraging Effective Corporate Compliance*, 109 HARV. L. REV. 1783, 1793 n.2 (1996) (citing Allen R. Yuspeh, *The Defense Industry Initiatives (DII): Lessons Learned*, U.S. Sentencing Commission Symposium, Sept. 7, 1995, *in* CORPORATE CRIME IN AMERICA: STRENGTHENING THE 'GOOD CITIZEN' CORPORATION, 89, 90-91).

The final stage in the evolution of compliance programs occurred after the U.S. Sentencing Guidelines,[9] and in particular the Corporate Sentencing Guidelines, were upheld by the United States Supreme Court.[10] The Corporate Sentencing Guidelines created an elaborate system of multiplying fines for corporations found guilty of offenses, depending on such things as willfulness, level of corporate knowledge, repeat offenses and the like. The Corporate Sentencing Guidelines and resulting compliance program provisions apply solely to criminal transactions, even though the basic ingredients of the Guidelines were modeled on provisions of the earlier Defense Industry Initiative, including voluntary disclosure and written codes of conduct.

Whereas the Defense Industry Initiative was designed to ward off more regulation by the Pentagon, the emergence of the Sentencing Guidelines actually directed the formation of compliance programs in order to lessen the impact of criminal sentencing and, in many instances, exoneration. The very existence of a program itself offered protection against problems such as court-imposed programs. The Sentencing Guidelines' system imitated the Defense Industry Initiative's voluntary disclosure provision, which was probably the most controversial inheritance from the Defense Industry Initiative. These programs also resulted in corporations developing so-called "Miranda Rules" in order to protect Fifth Amendment rights of executives and employees. Corporations, such as FMC, after much thought, adopted ground rules under this program, warning executives and employees of the right not to incriminate themselves. FMC's program, discussed later, was described as "a corporate and employee responsibility program."

III. COMPLIANCE AND OVERSEAS ACTIVITIES

As compliance programs developed, more and more multinational corporations built into their programs very specific sections dealing with foreign corrupt practices, the Arab Boycott, and the overseas reach of antitrust statutes. Hence, the programs became, for the first time, worldwide compliance programs. Additionally, the Defense Industry Initiative and the Sentencing Guidelines impacted the development of compliance programs. Thus, a whole new body of law, as contrasted to domestic issues, began driving compliance programs, forming them into international codes of conduct rather than into programs that simply complied with domestic laws.

Any multinational corporation domiciled in the United States faces, on an almost daily basis, three bodies of U.S. law that can affect its business, and, indeed, embroil it, not only in civil difficulties, but possibly serious criminal ones as well. Each area of law arose out of incidents abroad, sometimes of a foreign policy nature (such as export controls) and some-

[9] Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (1994). The Corporate Sentencing Guidelines are part of the overall U.S. Sentencing Guidelines.

[10] Mistretta v. United States, 488 U.S. 361 (1989).

times in reaction to international incidents (foreign corrupt practices and Arab Boycott).

The three bodies of law include: 1) The Foreign Corrupt Practices Act (FCPA); 2) the Arab Boycott; and 3) the various export controls. The FCPA was enacted in reaction to the overseas bribery scandals of the early to mid-1970s,[11] while the Arab Boycott statute was a reaction to the Baghdad-based Arab Boycott list aimed at corporations or individuals doing business with Israel. Export controls covered issues involving rogue nations, terrorism and proliferation of arms concerns.

Each of these statutes is covered in well-defined compliance programs within corporations. Such programs set out specific guidelines for operating under, and compliance with, these laws. Indeed, reporting requirements themselves can involve a corporation in fines and penalties. Reporting requirements are rendered increasingly difficult for corporations with remote offices, normal employee turnover, and differing compliance attitudes of employees who are non-U.S. nationals.

The FCPA makes it unlawful to make a payment, which, directly or indirectly, with bribery of foreign officials, to obtain, or secure business. And yet, it allows so-called facilitating payments ("grease payments"),[12] as an acknowledgment of the practicality of doing business in differing cultural traditions. FMC requires that even these payments must be approved in advance by the operating manager.[13]

The Arab Boycott law, on the other hand, sets up a complex set of reporting requirements on doing business with Arab countries, or not doing business with Israel, including stringent reporting requirements on contacts even if no action of an overt nature occurs.[14] And yet, some transactions by overseas subsidiaries can lawfully take place depending on the origin of the goods, for instance, Argentine parts, shipped and assembled through an Irish subsidiary. In other words, if a U.S. subsidiary ships items that are

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[11] *See also* Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269 (1998).

[12] *See also* Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlement*, 18 NW. J. INT'L L. & BUS. 303 (1998) (discussing grease payments); Daniel L. Goelzer, *Designing an FCPA Compliance Program: Minimizing the Risks of Improper Foreign Payments*, 18 NW. J. INT'L L. & BUS. 282 (1998) (same).

[13] FMC Code of Ethics and Business Conduct Guidelines § I-3, at 13 [hereinafter Business Conduct Guidelines] (on file with the *Northwestern Journal of International Law & Business*). The Business Conduct Guidelines states that these payments "may be made, but only with the approval of a vice president." *Id.*

[14] For a recent report on the impact of the Arab boycott of Israel on U.S. firms and on U.S. anti-boycott legislation, see James R. Hines, Jr., Taxed Avoidance: American Participation in Unsanctioned International Boycotts (1997) (National Bureau of Economic Research Working Paper No. 6116) (arguing that "U.S. anti-boycott legislation significantly reduces the willingness of American firms to participate in the boycott of Israel").

entirely foreign-produced, the subsidiary would be subject to the Arab Boycott regulation.

Finally, the export controls cover a myriad of laws and regulations, dealing with such diverse geographic areas as Cuba, Libya and Sri Lanka, on issues ranging from civil rights and terrorism to arms proliferation. This perspective will not attempt to cover any other broad area of foreign business, such as the specialized one of doing business under statutes and regulations governing military sales financed with U.S. funds.

Today, any major corporation will include in its compliance program significant sections dealing with each of these legal areas. These are backed up with a multitude of loose-leaf volumes of specific instructions, model forms, and reference to in-house legal cadres with specific knowledge in these practice areas. No U.S. corporation, doing business abroad will escape dealing at some stage with each, or all, of these laws.

Although heavy focus in this paper and in other perspectives on overseas business has been placed on the FCPA, and properly so, corporate executives can be lulled into some sense of complacency, especially with efforts to diminish the problems in overseas bribery by the Organization for Economic Cooperation and Development (OECD)[15] and the International Chamber of Commerce (ICC).[16] Because of this focus, other lower profile problems, such as boycott and export regulations may not receive their proper coverage.

Although the heaviest attention has been on the FCPA, executives abroad, or a corporation's control people at home, need equally to worry about host country bribery statutes or regulations which can place an overseas executive at personal risk. Additionally, at home, resolving FCPA problems overseas may overlook local U.S. violations of false reporting under the securities laws or improper tax deductions under the Internal Revenue laws.[17]

In addition to IRS reporting issues, the U.S. securities laws which are basically disclosure statutes, provide for penalties for failure to report accurate financials which can be a further serious consideration when monies expended in bribes are masked or improperly reported.[18] Often FCPA violations have been buried in commission agent's fees, or other administrative entries, designed to mask their true purpose.

Obviously, both of these statutory areas present dilemmas under the FCPA. This has often meant that, when transactions are uncovered after

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[15] *See, e.g.*, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, Organization for Economic Cooperation and Development, 37 I.L.M. 1 (1998).

[16] *ICC Announces New Rules to Fight Extortion and Bribery in Trade*, Int'l Trade Daily. (BNA), at D3 (Mar. 28, 1996).

[17] 26 U.S.C. § 162 (1994).

[18] 15 U.S.C. § 78ff (1994).

investigation, even in arguable situations, it may be necessary to correct corporate financials for reporting purposes, or to amend tax returns, so as not to contain improper deductions. This can be a meticulous and painful process, possibly jeopardizing or calling into question, important financial filings.

IV. FMC AND COMPLIANCE SPECIFICS

The next sections will discuss specifically the evolution of a portion of FMC's compliance programs and some specifics contained in these programs. FMC's program developed in three stages: (1) the first stage involved guidelines driven by antitrust considerations, rewritten to accommodate new laws, *e.g.*, the FCPA and environmental laws; (2) the second stage occurred because of contracting problems with defense contractors; and (3) the third state was influenced by the Corporate Sentencing Guidelines, which added more severe penalties in criminal cases involving corporations.

A. Compliance Programs

Most sophisticated companies of significant size, such as the FMC Corporation, have long had compliance programs, especially in the areas of antitrust and conflict of interest.[19] As new statutes were enacted, the corporations amended the programs to cover foreign corrupt practices, Arab Boycott, and export controls. Environmental provisions[20] and government contracting provisions[21] were also added during rewrites as regulations in these areas took effect. The stated objective of the programs is to avoid exposure to violation of statutes and the concomitant possible civil or even criminal action against the Corporation.

FMC's compliance programs became more sophisticated than the original codes or guidelines, including innovative provisions for voluntary disclosure to authorities, which were virtually unknown in past programs. FMC originally subscribed to the Defense Industry Initiative[22] and as a result assembled:

- written codes of conduct;
- ethics training programs;
- internal hotline or ombudsmen;
- a system of disciplining employees who act improperly; and

[19] FMC Corporation's original program, dating back to the 1940s, was called "Business Conduct Guidelines," and featured antitrust as its centerpiece.

[20] Business Conduct Guidelines, *supra* note 13, at 21-23.

[21] *Id.* at 23-25.

[22] For a discussion of the Defense Industry Initiative, see *supra* note 8 and accompanying text.

- a commitment to policies of voluntary disclosure of potential violations of law.

The Defense Industry Initiative caused a total rewrite of the old Business Conduct Guidelines and an addition of a new Code of Ethics. FMC's revised "Business Conduct Guidelines"[23] leads off with Section I devoted to "Prohibited Payments." Though political contributions are covered in Subsection I.2., the more elaborate text devoted itself to coverage of payments to government officials, with the FCPA specifically referenced.[24]

The Business Conduct Guidelines focus on certain very pragmatic issues dealing with so-called "grease payments"[25] because of the recurring nature of these issues in practice. FMC recognizes the need for these payments: "In some countries where the company operates, required administrative action or procedural assistance, not involving obtaining or retaining business, can be obtained in a timely fashion only through the payment of modest gratuities to government officials or employees."[26] However, a hierarchy of control requiring a corporate vice president's approval was established: if over $5,000 was to be paid in grease payments, advance approval by the general counsel and the executive vice president-finance (Chief Financial Officer) would be required, with a report on the transaction sent to the corporate controller within thirty days.[27]

The same text, anticipating problems with the use of agents (Subsection 5), sets out clear guidelines for their use: (1) written text; (2) no connection with government officials; and (3) a model form for the agent to sign-off on compliance with law. Because of perceived problems inherent in the use of agents overseas, most corporations, such as FMC, adopt a form provision in their agency contracts, specifically asking agents to attest that no violation of U.S. or host country laws had occurred and no bribery had taken place. Authorities have viewed these provisions as helpful in defense of accusations of violations.

Following a number of years after the Defense Industry Initiative, the passage of the Sentencing Guidelines legislation as applied to corporations and the Supreme Court's decision to uphold the Sentencing Guidelines resulted in an expansion of FMC's codes of conduct beyond the defense industry group to the corporation as a whole. These provisions, modeled somewhat on the Defense Industry Initiative, and also containing voluntary disclosure provisions, have now become another familiar part of FMC's

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[23] Business Conduct Guidelines, *supra* note 13.

[24] *Id.* at 13. The Business Conduct Guidelines state that "[p]ayments of corporate, subsidiary or personal funds or anything else of value may not be made to a government official, employee, political party or candidate in order to obtain or retain business . . . , or to direct business to any other person." *Id.*

[25] *See* 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) (1994).

[26] Business Conduct Guidelines, *supra* note 13, at 13.

[27] *Id.*

compliance program.[28] The ingredients as prescribed by the Sentencing Guidelines Commission and as adopted by FMC are as follows:

- Compliance standards and procedures;
- Overall responsibility assigned to specific high level individuals within the organization;
- No delegation of discretionary authority to persons with propensity to illegal activities;
- Effective communication of standards and procedures to employees and agents;
- Reasonable steps to achieve compliance with standards, including monitoring, auditing and hotline;
- Consistent enforcement with appropriate disciplinary measures;
- Reasonable steps to deal with offenses when detected, and to prevent further offenses;
- Effective measures to detect and manage areas where substantial risk is known; and
- Nature and degree of program depend on size of organization.

The effect of crafting this compliance program, along with administration and auditing, is designed to allow corporations to escape or minimize the significant fines and penalties of the new sentencing guidelines as applied to corporations.[29] The advantages of such programs have been described as follows:

- Reduction of likelihood of basic violation;
- Reduction of sentence in case of violation;
- Removal of basis for a stockholder suit; and
- Avoidance of court imposed programs encouraged by the Commission in the absence of one in place.

The initial dilemma facing FMC's legal department and most corporate general counsel in developing a compliance program concerned what to include since hundreds of statutes could impact corporations in the criminal area. However, any counsel of significant tenure should easily be sensitive to areas of exposure based on historical experience. Hence, FMC chose eight areas in which it had, or might expect to have, exposure due to the nature of its business (*e.g.* defense contracting) or products handled (environmental). In addition, FMC added provisions dealing with the classic notions of obstruction of justice, false reporting or the like, due to which a

[28] FMC Corporate and Employee Responsibility Program [hereinafter Responsibility Program] (on file with the *Northwestern Journal of International Law & Business*).

[29] *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (1995).

corporation could experience difficulty procedurally even when no actual substantive violation might be involved.[30]

From the outset, FMC identified the FCPA and the Arab Boycott statutes as potentially problematic areas, ranking them third, after environment and antitrust laws. These statutes would probably have ranked second after environment laws, had not antitrust coverage experienced a resurgence in the latter part of the Bush Administration and the beginning years of the Clinton Administration.

Three full pages of text[31] are devoted to the FCPA and the Arab Boycott.[32] The Responsibility Program places considerable stress on "facilitating payments" and references back to the controls in the Business Conduct Guidelines.[33]

Most major companies, such as FMC, routinely seek Board approval in devising compliance programs after the programs have been reviewed by either an Audit or a Public Affairs Committee of the Board. To achieve Board approval FMC drafted a board resolution, sanctifying the program and naming the key non-legal executives who are in charge of the administration. In addition, annual reports on the compliance programs are made to the Public Affairs Committee and then to the entire Board. The Audit Committee is also separately briefed on any specific matters if, and when, they occur.

In addition to establishing the guidelines and delineating the roles of key executives and lawyers, FMC, along with many companies, developed videos, which explained the areas of conduct in which the corporation might be at risk, such as, antitrust, foreign corrupt practices, product safety, intelligence gathering and the like. Other companies also utilize videos and outside consultants to prepare sophisticated programs for the education of all the employees of companies (as provided for in the regulations under the Sentencing Guidelines[34]). These programs range from strict legal criminal considerations to guidelines for conflict of interest and other practical dilemmas posed for employees within an organization.[35]

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[30] FMC styles it "Related Crimes." Responsibility Program, *supra* note 28, at 24. "Fraud, bribery, perjury, obstruction of justice are felonies and may be easier to prove than the basic crimes. . ." *Id.*

[31] *Id.* at 9-11.

[32] 10 U.S.C. § 2410(i) (1994).

[33] Responsibility Program, *supra* note 28, at 9.

[34] *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (1997).

[35] FMC actually did an explanatory video of key executives discussing conflict problems moderated by Northwestern Law School Professor Steven Lubet, in addition to its overall Guidelines video.

B. Organization of Inside Compliance Programs

In the FMC model, the compliance program was formed first by identification of the areas of exposure, that is, specific criminal statutes that FMC had been exposed to in the past, plus generic areas of criminal exposure such as false statements and obstruction of justice, which often become areas of prosecution when the statutory violation is not clearly identified. It is not uncommon to find a corporation prosecuted for the false execution of documents alone.

Since FMC's Guidelines and Codes were already in existence, rewrites were begun within the legal department, updates in the applicable law were reviewed, and a full new corporate program developed.[36]

Once it had been assembled by the legal department, and after key areas were identified, the new program was presented to the Audit Committee of the FMC Board of Directors for review. As part of this process, the Chairman identified key non-legal executives and by memorandum described the responsibilities of these executives and identified the lawyer assistant in each area of specialty for the management of a program, including audit, education and dissemination of information to the company at large. The CFO was assigned to the FCPA and Arab Boycott areas (supported by an in-house lawyer) because of the financial and control nature of these exposures.

Typically, with FMC, or other corporations, some form of ethics review committee is organized to review the progress of the program and review changes as well as resolution of major conflict issues. Legal, senior management, Human Resources and Public Affairs executives serve on this committee. The scope, power, and authority of these groups differ from corporation to corporation and are often dictated by size or degree of difficulty experienced by the corporation in the past.

The Sentencing Guidelines themselves envision the use of training programs.[37] Since the implementation of the program is as important as the content itself, many companies have run into the difficulty of having a program fully conceived on paper, but have not implemented it. So, in attempting to obtain the benefits of a compliance program, if these corporations are challenged for violation of a statute, they would be unable to support the administration of the program. To overcome this problem, FMC ensured wide dissemination of the explanatory video, in the areas of FCPA and Arab Boycott, and required a circuit riding house counsel to pay periodic overseas visits to offices with exposure to violations.

The importance of these programs cannot be minimized, especially in regard to such crucial areas as antitrust and foreign corrupt practices law, as

[36]This was styled the "Corporate and Employee Responsibility Program," to emphasize responsibility while incorporating the new sentencing guidelines provisions. Responsibility Program, *supra* note 28.

[37]U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (1997).

many of these involve double and treble damages involved as well as criminal liability. The Sentencing Guidelines themselves provide for lesser fines and penalties in the face of implemented compliance programs.[38] Failure to develop such programs can result in court imposed programs.

C. Conclusion

The balance sheet on FMC's compliance programs has generally been good. The earliest program, which was centered around antitrust concerns, was simpler in nature than later forms but accomplished the main end of shielding the corporation from potential or actual violations of federal or state antitrust laws. The success of the earlier program is a tribute to the efforts of FMC's antitrust counsel who developed the earliest programs and met with key executives and employees and those units most where problems were most likely to occur. Since FMC has been in the business of commodity chemicals and other areas where there are common trade associations and constant cross supply of ingredients, continuous vigilance was necessary. Though some investigations necessarily occurred during the last fifteen plus years, FMC has been able to steer clear of any major exposure in the antitrust field.

The second stage of compliance programs developed as overseas issues became more important but implementation has proven to be somewhat more difficult, as these overseas areas became a prominent part of compliance programs, particularly, the Foreign Corrupt Practices Act and the Arab Boycott. As a result, the surveillance required in the compliance program had to be extended worldwide. With the changeover of personnel and the distances involved, the implementation of these programs has proven to be more difficult. Hence, technical violations (reporting) have occurred from time to time and resulted in investigations. However, FMC's record again is highly satisfactory since no major cases have developed in regard to the more elaborate compliance programs encompassing overseas related statutes and regulatory matters.

Finally, the Sentencing Guidelines,[39] called the Corporate and Employee Responsibility Program at FMC, have extended the reach of compliance programs to specific areas of criminal statutes. As a result the objective of the guidelines is to lessen fines and, by the creation of the program itself, to avoid the exposure of specific criminal statutes for the corporation on a whole. To date, this program still continues to evolve, but has resulted in good surveillance of the corporation as a whole. Because this is a continuous program, however, the surveillance, the educational program and the responsibilities of the non-legal officers and their legal assistants require continuous monitoring and training.

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[38] *Id.*
[39] *Id.*

Compliance programs can make a difference. However, care must be taken that they are not just for cosmetic purposes. Witness the recent book[40] calling to task corporate and governmental programs dealing only with appearance and not substance.

To be workable, such programs must be supported from the top down. If there is no real support at the executive level, the word drifts down the ranks that form is more important than substance. Under the pressure to obtain business, some corporate managements, competing with foreign corporations under less severe restrictions, may view operating executives who take compliance too seriously as being naïve or out of tune with the real world. But, when a violation is picked up, as in the Baxter boycott problems of recent years,[41] it can shake a company's management to the top.

As Tom Sullivan[42] cautions, "if the block of granite toppling off the roof falls on you, it makes no difference to you that it missed others." It isn't easy to assemble, monitor and explain compliance programs. They are often form and detail oriented. They must be administered through an ever-changing employee populace. Although, not to do them can sometimes result in a "bet your job, bet your company" scenario.

[40]PETER W. MORGAN & GLENN H. REYNOLDS, HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY 7-46 (1997).

[41]Baxter's general counsel was indicted for alleged violations.

[42]Partner, Jenner & Block; former U.S. Attorney for the Northern District of Illinois (1977-81).