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EMERGING TRENDS IN CORPORATE ENFORCEMENT AND CORPORATE COMPLIANCE: SYMPOSIUM INTRODUCTION

Miriam H. Baer and James A. Fanto***

Three articles in this volume focus on the topic of corporate compliance. “Compliance” refers to the complex function the corporation undertakes to educate its employees regarding relevant laws and regulations; identify and investigate instances of suspected wrongdoing; report such wrongdoing to appropriate authorities; and remedy the situational factors that have allowed such wrongdoing to fester.¹

Last February, the Center for the Study of Business Law & Regulation at Brooklyn Law School hosted a symposium on emerging trends in corporate enforcement and compliance. This symposium brought together scholars from a number of different disciplines to talk about compliance’s evolution, both as a field of study and as a governance function. As lawyers and law students are well aware, compliance has become big business both inside and outside organizations. Financial institutions and large, publicly held corporations allocate millions of dollars to their annual budgets for expenditures on personnel and technology designed to aid them in identifying and controlling their operational and legal risks.² These expenditures exist for good reason: when scandals involving criminal or regulatory violations erupt and spill into the open, regulators and prosecutors demand that corporations undertake quick and thorough internal investigations to identify how violations occurred and why. They also seek verification that the company made a sincere attempt in advance to identify the operational and legal gaps that produced these violations. Finally, prosecutors and regulators increasingly expect corporations to remediate the factors that caused harm in the first place and to devise systems to prevent future breakdowns in compliance. Some firms can meet these demands, often because they have committed to developing a vibrant compliance program. Many others fall short, particularly when their compliance program exists only on paper.

The three articles described below were written by professors who teach either in the legal studies departments of business schools, or in a

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1. See, e.g., Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 220-27 (2019) (describing compliance as a four-stage process of prevention, detection, investigation and remediation).

2. See generally William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 406 (2018) (observing that compliance-related budgets within very large financial institutions “are well in the billions”).

university's graduate program in business.³ This comes as no surprise, as academics across multiple fields have recognized the need to teach and study what it means for an organization to create and to maintain an "effective" compliance program. As compliance itself matures into a lucrative and technology-driven industry, and as firms become responsible for adhering to ever more complicated domestic and multinational legal regimes, "effectiveness" becomes an increasingly elusive concept.⁴ This poses challenges for practitioners and theorists alike.

Professor David Hess focuses on the ethical components of compliance.⁵ His article begins by asking how a compliance program loses its legitimacy with its employees. He describes a process of slow devolution, one in which the company's officers "chip away" at the program, by creating seemingly small exceptions to rules, which lead in turn to larger exceptions. The ultimate result, namely the company's violation of major laws, is often inadvertent and unplanned. In his view, managers do not set out to dismantle their compliance programs. Nevertheless, they harm their programs in two important ways. They resist seeking the input of their firm's chief compliance officers on decisions and strategies (because, after all, they already know what is ethical and what is not), and they rationalize and excuse their own and others' misbehavior. By permitting this unethical behavior to continue, they encourage even *more* unethical behavior. According to Professor Hess, a weak "ethical infrastructure" communicates to the company's employees—even those with strong ethical inclinations—that the compliance program is toothless. Misconduct grows more accepted and pervasive throughout the firm.

The final section of Professor Hess's article focuses on how an organization can protect the compliance program's legitimacy. He lays primary responsibility for this on the corporation's board of directors and argues that directors should take a more active role in overseeing the company's compliance program. Second, he advocates that the chief compliance officer position should be separate from and independent of the company's general counsel. Although many firms combine the chief compliance officer and general counsel positions, Professor Hess believes that the compliance program's legitimacy is more easily protected when the chief compliance officer is independent and reports directly to the company's board.

3. Professor Hess is a Professor of Business Law at the Stephen M. Ross School of Business at the University of Michigan. Professor Park is an Associate Professor of Business Law and Satell Fellow in Corporate Social Responsibility and Co-Director of the Corporate and Regulatory Compliance Graduate Program at the University of Connecticut. Professor Pacella is an Assistant Professor of Business Law and Ethics at Indiana University, Kelley School of Business.

4. See generally Root, *supra* note 1, at 212.

5. David Hess, *Chipping Away at Compliance: How Compliance Programs Lose Legitimacy and Its Impact on Unethical Behavior*, 14 BROOK. J. CORP. FIN. & COM. L. 5 (2019).

Professor Jennifer Pacella's contribution explores the important topic of enforcement actions brought against, and the resulting liability of, corporate compliance officers.⁶ On the one hand, she observes that this enforcement activity underscores the importance that regulators and enforcement officials attach to compliance officers: compliance officers are seen to be so significant in an organization that they have to be above reproach. On the other hand, as she also notes, there is a danger arising from aggressive enforcement against compliance officers if the latter are held legally responsible simply because a serious legal violation occurs in an organization. This broad legal responsibility could lead compliance officers to ask that their organizational role be clearly limited, which could, perversely, undermine organizational compliance.

A related contribution that Professor Pacella makes in this article—which echoes an insight of other scholars—is that the uncertain professional position of compliance officers, which allows organizations to ask them to fulfill other organizational roles than compliance, contributes to their enhanced risk of legal liability, as noted above. That is, she observes that there is no self-regulation of compliance officers because state authorities do not recognize the field as a bona fide independent profession. This leads to confusion over the exact position and role of compliance officers in an organization.

As Professor Pacella has written elsewhere, lawyers acting as compliance officers arguably provide a “law-related service” that would require them to comply with the legal profession's model rules of professional conduct.⁷ But compliance is not a recognized part of the legal profession and thus exists in a kind of unprotected professional limbo. She also observes that under whistleblower laws, compliance officers are not legally protected from retaliation for raising concerns or evidence of legal violations “up the chain” in the organization, which has the perverse effect of depriving them of this protection for a task that they are expected to perform. She thus calls for a clarification of both the role of compliance in an organization and of compliance's professional status with respect to other professions, all of which could improve the position of compliance officers and make for more effective compliance.

Finally, Professor Stephen Kim Park's article explores the intersection between corporate compliance and corporate social responsibility (CSR).⁸ Whereas corporate compliance ensures the company's compliance with the law, corporate social responsibility addresses its position on issues of

6. Jennifer M. Pacella, *Compliance Officers: Personal Liability, Protections, and Posture*, 14 BROOK. J. CORP. FIN. & COM. L. 23 (2019).

7. Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, 95 WASH. L. REV. (forthcoming 2020).

8. Stephen Kim Park, *Social Responsibility Regulation and Its Challenges to Corporate Compliance*, 14 BROOK. J. CORP. FIN. & COM. L. 39 (2019).

broader societal concern, such as the environment, human rights, and inequality. Professor Park's key observation is that a "small but growing number of regulatory mandates are emerging that impose obligations on companies to pursue, monitor, investigate, disclose, mitigate, or otherwise address CSR-related concerns."⁹ According to Professor Park, these mandates (many of which emanate from foreign countries) either will force firms to create new internal governance mechanisms or instead re-shape the firm's already existing compliance program.

As Professor Park wisely points out, CSR compliance poses a number of challenges for the corporate risk function. It complicates the company's assessment of its compliance program's effectiveness, particularly, insofar as multinational corporations operate in many jurisdictions and rely on a complex web of third parties to make a given product. It also enlarges the sources of legal authority of which a firm must be aware, thereby leading to "fragmentation" and uncertainty as to the firm's overall legal obligations. CSR compliance also potentially exacerbates a firm's compliance mission, such as when employees disagree with the company's CSR mission that is not mandated by law.

How does one navigate this tricky environment? Professor Park leaves that question for later scholarship and proposes that this contextualized portrait of "CSR-meets-compliance" should form the beginning of a longer conversation between academics and compliance practitioners.

Each of these three articles demonstrates in its own way how compliance has grown as a discipline and how compliance scholarship increasingly relies on a sophisticated understanding of how business organizations strive (and fail) to maintain ethical cultures, adhere to overlapping and potentially conflicting laws, and navigate difficult legal and professional boundaries. These authors usefully add their insights and research to a compliance conversation that has become robust and sophisticated, and which we expect will continue to evolve for quite some time.

9. *Id.* at 40.