



January 13, 2011

Mr. Greg Andres  
Acting Deputy Assistant Attorney General  
Criminal Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Greg:

Again, thank you for your effort to engage the ethics and compliance community in discussion about the ways the DOJ and business can work together to prevent organizational misconduct. Per our letter of October 15, 2010, we are writing to provide you input from the ethics and compliance community regarding the data the DOJ could release to help companies and other organizations reinforce the importance of ethics and compliance.

As the three leading nonprofit voices of the ethics and compliance professional community, the Ethics Resource Center (ERC), the Ethics and Compliance Officer Association (ECO), and the Society of Corporate Compliance and Ethics (SCCE) fielded surveys of our memberships, and we have collaborated to develop recommendations for the DOJ.

We welcome the recent efforts by the DOJ to publicize cases where it has rewarded companies for having strong compliance programs, and we encourage the Department to take steps to be even more forthcoming with information. To that end, following this cover please find our report and attachments to detail our recommendations.

We are eager to work with you to further develop the framework for the statistics the DOJ will release. We will be in touch to follow up. In the meantime, if you have any questions or concerns, please do not hesitate to contact Pat Harned by phone at 571-480-4422 or by email at [pat@ethics.org](mailto:pat@ethics.org).

Sincerely,

**Patricia J. Harned**  
*President*  
Ethics Resource Center

**Keith Darcy**  
*Executive Director*  
Ethics and Compliance Officer  
Association

**Roy Snell**  
*Executive Director*  
Society of Corporate Compliance  
and Ethics



**THE RELEASE OF STATISTICS ON  
ETHICS AND COMPLIANCE PROGRAMS IN ENFORCEMENT DECISIONS:  
A JOINT REPORT TO THE U.S. DEPARTMENT OF JUSTICE**

## **ABOUT OUR ORGANIZATIONS**

### **ETHICS AND COMPLIANCE OFFICER ASSOCIATION (ECO A)**

The ECOA is a member-driven association exclusively for individuals responsible for their organization's ethics, compliance, and business conduct programs. The only organization of its kind, its members represent the largest group of ethics and compliance practitioners in the world. Through the ECOA, practicing ethics and compliance officers collectively address the tough issues they face every day. Members learn from one another and, in turn, help foster a global commitment to ethics and integrity. The ECOA can be found online at [www.theecoa.org](http://www.theecoa.org).

### **ETHICS RESOURCE CENTER (ERC)**

The Ethics Resource Center (ERC) is a private, nonprofit organization devoted to independent research and the advancement of high ethical standards and practices in public and private institutions. For 89 years ERC has been a resource for institutions committed to a strong ethical culture.

ERC's expertise also informs the public dialogue on ethics and ethical behavior. ERC researchers analyze current and emerging issues and produce new ideas and benchmarks that matter – for the public trust. To learn more about ERC, visit [www.ethics.org](http://www.ethics.org).

### **THE SOCIETY OF CORPORATE COMPLIANCE & ETHICS (SCCE)**

The Society of Corporate Compliance & Ethics (SCCE) is a non-profit membership association dedicated to improving the quality of corporate governance, compliance and ethics. We provide compliance and ethics professionals with a wide range of resources – conferences, magazines, publications – and networking tools to help raise the standard of the profession as a whole and to help individuals work more effectively. The SCCE can be found online at [www.corporatecompliance.org](http://www.corporatecompliance.org).

## ACKNOWLEDGEMENTS

*Special thanks to the following individuals who compiled this report.*

**Keith Darcy**, *Executive Director*, Ethics and Compliance Officer Association

**Nick Fetzer**, *Assistant Director*, Ethics Resource Center Fellows Program

**Patricia Harned**, *President*, Ethics Resource Center

**Michael Horowitz**, *Partner*, Cadwalader, Wickersham & Taft

**Jeffrey Kaplan**, *Partner*, Kaplan & Walker LLP

**Tim Mazur**, *Chief Operating Officer*, Ethics and Compliance Officer Association

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

**Roy Snell**, *Chief Executive Officer*, Society of Corporate Compliance and Ethics

**Win Swenson**, *Partner*, Compliance Systems Legal Group

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In recent years, extensive ethics and compliance programs have become an integral part of American corporate life, having grown significantly in prevalence, scope and effectiveness. Based on our research and the direct experience of our memberships, we know that the development of these programs has played a major role in building ethical cultures and promoting ethical behavior inside American businesses. When well-implemented, there is evidence that ethics and compliance (E&C) programs reduce misconduct and grow strong ethical cultures.<sup>1</sup>

We believe that, working together, the private sector ethics and compliance community and government enforcement agencies can deepen this commitment to ethical business and respect for the law by sharing information and identifying best practices in ethics and compliance. In that spirit, we are delighted by the participation of Justice Department enforcement officials at forums sponsored by our organizations throughout 2010.<sup>2</sup> Among the areas of high interest, as identified in these discussions, is the importance given to ethics and compliance programs in prosecution and settlement decisions by government enforcement agencies.

In these forums hosted by the Ethics Resource Center (ERC), the Ethics and Compliance Officer Association (ECO), and the Society of Corporate Compliance and Ethics (SCCE),<sup>3</sup> E&C officers have urged enforcement officials to help build support for ethics and compliance through the public release of information about the mitigation benefits of strong ethics and compliance programs. Enforcement officials, in turn, want to know in greater detail how ethics and compliance officers use current DOJ data and what additional information would be most helpful.

To facilitate continued dialogue, inform it with empirical data, and to provide input from the ethics and compliance community to Acting Deputy Assistant Attorney General Greg Andres, the ERC, ECOA and SCCE have conducted surveys of our memberships consisting primarily of Chief Ethics and Compliance Officers (CECOs) and other ethics and compliance professionals.

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<sup>1</sup> Ethics Resource Center, *2009 National Business Ethics Survey*.

<sup>2</sup> Acting Deputy Assistant Attorney General Greg Andres was a featured speaker at the July 2010 ERC Fellows Program Meeting and at the September 2010 ECOA Annual Ethics & Compliance Conference.

<sup>3</sup> For descriptions of our organizations, please see page 1.

We inquired about their use of current DOJ data, the type of additional data that would be most beneficial, and CECO interaction with their companies' CEOs and boards of directors.

In the pages below, we summarize the findings from the surveys.

## **Survey Method**

Two surveys were distributed among corporate ethics and compliance professionals – one conducted by the Ethics Resource Center and the Society of Corporate Compliance and Ethics,<sup>4</sup> and one survey fielded among members of the Ethics and Compliance Officer Association. Both surveys posed a similar core set of questions; the ERC/SCCE survey contained additional questions not fielded by ECOA.

The survey period extended from October 28 through November 30, 2010.<sup>5</sup> In total, 1,223 ethics and compliance professionals participated in the effort; a strong representation of the ethics and compliance field.<sup>6</sup> More than half of the respondents (52%) indicated that they held the title of Chief Ethics and Compliance Officer or the equivalent in their organization.<sup>7</sup>

## **Most CECOs Say They Report on Justice Department Actions in Briefings to Senior Leadership**

There is strong evidence that data released by the DOJ will be used to proactively educate corporate leaders about the importance of compliance, and to raise the level of priority given to ethics and compliance programs.

An overwhelming majority, 87 (86.9) percent, of some 525 CECOs responding to the survey report that they personally provide ethics and compliance updates to top leadership – either the full board, the CEO, a board committee or combinations of these three groups. Seventy percent of CECOs surveyed say they “always” or “sometimes” referenced available information related

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<sup>4</sup> Members of the Health Care Compliance Association (HCCA) were also invited to participate in the ERC/SCCE survey.

<sup>5</sup> The ECOA survey period was from October 28 – November 8. The ERC/SCCE survey period was from October 28 – November 30, 2010.

<sup>6</sup> The ECOA survey's response rate was 11.5%, the ERC/SCCE survey's response rate was 11.24%.

<sup>7</sup> Based only on the SCCE/ERC survey results (525 respondents of 1,086 overall).

to Justice Department enforcement actions in board presentations or in compliance training and updates for senior management in the organization.

According to CECOs, information about DOJ enforcement is included in board presentations to reinforce the importance of corporate compliance; as one CECO commented, “All corporate departments compete for scarce resources, and it is sometimes difficult to prove the business case for dollars that support robust programs. All boards of directors know that it's ‘the right thing to do’ but we still have to justify our existence just as much as R&D, Sales, etc. Hard facts help.”

But about 14 percent of CECOs who provide briefings to the board say they are only occasional users of DOJ enforcement-related information and 17 percent do not use it at all when briefing boards and other top managers. Nonusers indicate that the data is difficult to obtain and less valuable than it could be.

Those CECOs who do not routinely use Justice Department-related data when presenting to company leadership most often indicate that they do not do so because they are not aware that information related to DOJ enforcement is available (38 percent) and some 24 percent report they can't make a clear link between current information about DOJ enforcement and support for their company's ethics and compliance program. Almost 13 percent say there simply isn't enough information to provide much insight. As one compliance officer explains: “I have looked at the DOJ Website and have never found any information in a format that is useful.”

The DOJ could significantly help ethics and compliance officers by initiating a specific, coordinated effort to gather E&C-related information about its enforcement decisions from all its prosecutors and then make that information easy for the private sector to obtain. As it is now, most CECOs report that the information they are able to obtain typically comes second-hand from the news media or trade associations, which raises the risk that they are working from filtered, and therefore an incomplete, picture. Given this filtering, it also is possible that some of the information is inaccurate or has been misinterpreted by intermediaries by the time the compliance officer provides it to company leaders. Sixty-six percent of CECOs surveyed say that they obtain DOJ data through trade association reports and newsletters and 14 percent said the news media was their main source of information. Only 14 percent say they got data directly from the DOJ. A small number (2 percent) say they are provided the data by other companies and about 5 percent report receiving it in “other” unspecified ways. A DOJ effort to assemble and disseminate data more widely and directly, perhaps by posting information online on a regular basis, clearly would make life easier for compliance officers by enabling them to deliver the most accurate information to company decision-makers.



## Compliance Officers Say Justice Department Data Should Be Specific about E&C Programs

Ethics and compliance officers almost unanimously agree that it would be beneficial if DOJ case information specifically included statistics about the consideration of E&C programs in enforcement decisions. Says one respondent: “Particularly in times of shrinking budgets and restricted resources it would be very helpful to have some evidence to demonstrate why a solid compliance program is needed - and why a better program is worth the effort versus a bare bones minimum.”

Further, E&C officers indicate that it would be helpful if the DOJ made a distinction between cases in which an organization received credit for an E&C program that was in place prior to an offense (i.e., pre-existing programs) and those in which companies were credited for E&C programs initiated only after the offense took place. Ninety-three percent say such differentiation would be helpful and just three percent say there would be no benefit. This information will likely have significant impact on company views of their programs – for example, if the DOJ looks equally favorably on pre- and post-E&C programs, it will diminish the incentive for companies to establish robust programs proactively. One survey respondent elaborated on this point, “While we are all striving to follow the regulations, we might find ourselves on the wrong side of an interpretation. Historical cases that clearly identify reasons for the sanction, how the sanction could be avoided, actions that lead to a sanction, what kind of compliance activity was in place at the organization at the time of the sanction – are all key for any organization to conduct its own risk analysis.”

Another four percent indicate that they aren’t sure if that information would make a difference. When this same question is asked of more than 1,000 compliance professionals, including non-CECOs, the results are almost identical with 93 percent saying differentiation would be beneficial.

CECOs indicate disappointment that Justice Department statements on past cases specifically tend to link favorable treatment for offenders to their willingness to voluntarily disclose violations and other cooperation with investigators yet ignore the value of existing E&C programs. Some 87 percent of CECOs say it would be somewhat or very helpful if Justice Department data provided separate information about the impact of E&C programs and the impact of disclosure/cooperation in having a mitigating impact on enforcement actions. Similarly, 84 percent of the broader group of professionals believe they would benefit if DOJ data provided a clear distinction between the benefits of disclosure/cooperation and benefits

earned because of E&C programs. Respondents indicate that drawing a distinction would make clear the relative benefit of E&C programs.

By large majorities, both the CECOs and broader group agree on four types of information that they would like the DOJ to make public:

- General statistics on the consideration given E&C programs in enforcement decisions.
- Descriptions (without identifying information) of individual cases in which E&C programs were a mitigating factor in enforcement decisions.
- Information about what specific aspects of an E&C program factored into enforcement decisions.
- Information about the benefits of an effective E&C program, such as helping avert a decision to prosecute or avoidance of other sanctions such as appointment of a monitor.

In every case, at least 93 percent of both CECOs and the larger group of compliance professionals say these four types of data would help them improve the effectiveness of E&C programs. “Given all of the attention that associations and others are giving to the need to ‘step up’ ethics and compliance efforts, any information regarding specifically what is considered positively by the DOJ and what is insufficient would be beneficial to all of us who are involved in the development and maintenance of such programs. If we are engaging in efforts that the DOJ will view as insufficient or only minimally compliant, and if that will be used negatively against an organization, it would be helpful to know what specific elements of a program are acceptable and what specific efforts will reduce penalties,” says one survey respondent.

## Conclusion

In a nutshell, E&C professionals want “more.” They would like to know how often an effective program yields a direct return in the form of mitigation. Ideally, data would be broken down by industry because corporate leaders tend to manage their companies in relation to industry peers and to learn lessons from companies that are most like their own. To the extent possible given confidentiality requirements, ethics and compliance officers would like specific examples detailing alleged misconduct, the nature of the E&C regime at the offending company, and how the DOJ responded when developing their legal strategy. E&C professionals also report that they would like guidance from the DOJ and other enforcement officials about their assessments of E&C programs, the attributes of effective programs, program deficiencies that raise concerns among enforcement officials, and examples of best practices. More broadly, they’d like to know enforcement officials’ perspective on what works and doesn’t work.

“Typically we see the allegations but have no insight into the role played by the company's ethics and compliance program or whether the ultimate punishment was reduced as a result. If punishment was reduced, we need to know why so companies can evaluate similar efforts,” one compliance officer observes.

“It would be helpful to know all aggravating and mitigating circumstances as well as the facts of the case that the circumstances apply to, in order to understand the importance of different aspects of an ethics program and entity behavior in response to a problem or prosecution, in order to prioritize the focus of an ethics program, because with shrinking budgets, we have to know what is more or less critical; we can't do it all,” says another E&C professional.

The E&C community is pleased to share these findings and we look forward to continued cooperation with government enforcement officials in our joint effort to build ethical cultures and advance private sector efforts to ensure that U.S. organizations and their employees conduct their business with integrity. We strongly believe that formal ethics and compliance programs are helping to achieve these objectives and that increased information-sharing and guidance from enforcement officials can enhance these programs' effectiveness.

**Appendix A:** Results from the SCCE/ERC and ECOA membership surveys

**Appendix B:** Selected comments from survey respondents

**Appendix C:** Suggested ethics and compliance program criteria to include on DOJ report on enforcement decisions

**APPENDIX A: RESULTS FROM THE SCCE/ERC AND ECOA MEMBERSHIP SURVEYS REGARDING THE USE OF DOJ ENFORCEMENT STATISTICS<sup>8</sup>**

Total number of respondents across 2 surveys: 1,223

Respondents who are Chief Ethics & Compliance Officers (CECOs): 52%<sup>9</sup>

**Question #1**

I personally provide ethics and compliance updates to my company's Board of Directors, a committee of the Board, and/or the CEO.

	<b>Overall</b>	<b>CECOs</b>
Sometimes/Always	62%	87%
Occasionally	8%	6%
Rarely/Never	29%	7%

**Question #2**

When we present compliance training or updates to our leadership, we refer to Department of Justice enforcement-related data to reinforce the importance of ethics and compliance in our company.

	<b>Overall</b>	<b>CECOs</b>
Sometimes/Always	65%	70%
Occasionally	16%	14%
Rarely/Never	19%	17%

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<sup>8</sup> Questions 1-4 were fielded only in the SCCE/ERC survey, and CECOs were identified only in the SCCE/ERC survey. Questions 5-7 were fielded in both surveys (SCCE/ERC and ECOA).

<sup>9</sup> Based only on the SCCE/ERC survey results (1,086 respondents).

### Question #3

What is your primary method for obtaining this information about DOJ enforcement actions?

	<b>Overall</b>	<b>CECOs</b>
From the DOJ directly	15%	14%
Media reports	16%	14%
Association/Trade group reports and newsletters	61%	66%
Information from other companies	2%	2%
Other	6%	5%

### Question #4

Why don't you refer to DOJ data more often in your board/CEO training?

	<b>Overall</b>	<b>CECOs</b>
Not enough time to present DOJ Information	5%	3%
Not enough information from DOJ	11%	13%
Unclear how to apply data to support the need for E&C	23%	24%
Unaware of DOJ data	34%	38%
Other	27%	23%

### Question #5

If the Justice Department decides to make E&C case information public, would it help you if DOJ differentiated cases where there was an E&C program in place prior to an offense versus one started after the offense occurred?

	<b>Overall</b>	<b>CECOs</b>
Yes	92%	93%
No	3%	3%
Don't Know	5%	4%

### Question #6

In publicizing past cases of companies receiving favorable treatment in enforcement decisions, the Justice Department has tended to emphasize voluntary disclosure and cooperation. If the Justice Department decides to make E&C case information public, how important is it to you that the influence of E&C programs is reported separately from the influence of disclosure cooperation?

	<b>Overall</b>	<b>CECOs</b>
Somewhat/Very Important	84%	87%
Neither	12%	12%
Unimportant/Somewhat Unimportant	5%	2%

### Question #7

How helpful would the Justice Department's making public the following be to your organization's efforts to develop and maintain a strong E&C program:

- a. General statistics about the consideration of E&C programs in enforcement decisions.

	<b>Overall</b>	<b>CECOs</b>
Very Helpful/Helpful	93%	93%
Neither	3%	4%
Somewhat Unhelpful/Not at all Helpful	4%	3%

- b. Descriptions (without identifying information) of individual cases in which an organization's E&C program played a favorable role in an enforcement decision.

	<b>Overall</b>	<b>CECOs</b>
Very Helpful/Helpful	97%	97%
Neither	1%	1%
Somewhat Unhelpful/Not at all Helpful	2%	2%

- c. Information about whether specific aspects of program (e.g., sufficiency of E&C training, appropriate position of the E&C officer) played a role in enforcement.

	<b>Overall</b>	<b>CECOs</b>
Very Helpful/Helpful	96%	96%
Neither	2%	2%
Somewhat Unhelpful/Not at all Helpful	2%	2%

- d. In addition to cases where an organization's E&C program contributed to the organization's avoiding prosecution entirely, information about cases where a program contributed to the organization's receiving some other enforcement-related benefit, such as avoiding having to engage a monitor.

	<b>Overall</b>	<b>CECOs</b>
Very Helpful/Helpful	96%	97%
Neither	3%	2%
Somewhat Unhelpful/Not at all Helpful	2%	2%

## **APPENDIX B: SELECTED COMMENTS FROM SURVEY RESPONDENTS**

*“Companies like mine don't base their E&C program on whether the DOJ would be happy with it or not. This is because a federal crime is but a fraction of the violative conduct we are trying to prevent. So while the DOJ may be able to provide some impetus to how our program is designed, it's only one driver. I'd say the same thing about the Federal Sentencing Guidelines, except they are cited so often as the main place an 'effective' compliance program is codified. If the DOJ was more consistent with the FSGs, then there'd be a better story to tell my Board about what these Fed gov't agencies JOINTLY and CONSISTENTLY say they want in our E&C program.”*

*“Generally the more information the DOJ can provide, the better. Typically we see the allegations but have no insight into the role played by the Company's Ethics and Compliance Program or whether the ultimate punishment was reduced as a result. If punishment was reduced, we need to know why so companies can evaluate similar efforts. The current DOJ approach allows cynical executives to conclude that any violation justifies a DOJ conclusion that the compliance program was ineffective no matter how robust the program was in preventing other problems. As a result, additional resources are diverted elsewhere, an outcome potentially harmful to society at large and in opposition to what the DOJ probably intended.”*

*“Given all of the attention that associations and others are giving to the need to 'step up' ethics and compliance efforts, any information regarding specifically what is considered positively by the DOJ and what is insufficient would be beneficial to all of us who are involved in the development and maintenance of such programs. If we are engaging in efforts that the DOJ will view as insufficient or only minimally compliant and if that will be used negatively against an organization, it would be helpful to know what specific elements of a program are acceptable and what specific efforts will reduce penalties.”*

*“I have found in my professional experience that actual cases involving prosecutions of misconduct are very persuasive to many employees, and lend a sense of reality and relevance that may otherwise escape them. The closer they can identify with the convicted party, the more effective it is. I have found DOD's 'Encyclopedia of Ethical Failure' to be useful in this regard.”*

*“I hope DOJ issues more information on the specific aspects of its enforcement decisions on a case-by-case basis...”*



*“I would like to receive very specific descriptions of the aspects of compliance programs that are the most valuable in weight in the decision process. These could be utilized as best practice.”*

*“I would like to see information from the Department of Justice about cases according to sector, size, and status of an organization as an issuer, non-issuer, exempt organization, or public-sector organization. I also would be interested in gaining more insight into whether ethos, culture, principled leadership, and other aspects of ethics and integrity have come to have meaning for the Department of Justice in its enforcement actions. There has been a longstanding debate within the department about the comparative merits of ethics and compliance. They are distinct but complementary ways of assessing and guiding behavior. Organizations require both to operate effectively. Despite the revisions to the organizational sentencing guidelines in 2004, the guidelines and the Department of Justice still have a reputation for focusing on legal compliance. A "culture of compliance" will not save a company. It actually can create disincentives to ethical and legal behavior. It is critical for directors and officers to look beyond the letter of the law to the spirit of the law and the guidelines and the Department of Justice's enforcement priorities should provide incentives for organizations' leaders to do this.”*

*“If not already covered, information about how long the E&C program was in place prior to the DOJ action would be helpful.”*

*“It is better to have more specific information about whether and how aspects of an organization's ethics and compliance program affects enforcement/prosecution/penalty efforts--specific to the point of identifying which aspects of the program helped or hurt the organization and how. Communication from the DOJ on this will only spur companies to make more efforts in the areas noted, which should be a desired result, right?”*

*“It is tantamount to the growth, credibility and structure of an Ethics and Compliance (E&C) program to show the value that program brings to the system it is serving. DOJ and OIG partnering with the E&C programs by providing systems that truly embrace the principles of E&C in their business dealings with consideration when events occur sends a message to other systems that investing in a solid program brings value that at times is immeasurable. The millions of dollars lost in investigations, civil and criminal defense, can be better spent on instilling a culture of ethical business practices and improving health and business systems nationally and internationally.”*

*“It would be extremely helpful to have clarity regarding the preferred reporting hierarchy for a compliance officer in a public institution of higher education. I report functionally to the President through his chief of staff. I make reports to the Audit Committee of the Board of*

*Regents on a regular basis. I have a dotted line reporting relationship to the General Counsel. It would be very helpful to have the DOJ's views on this. The circumstances in higher ed differ from those in a corporate setting. Thank you."*

*"While we are all striving to follow the regulations, we might find ourselves on the wrong side of an interpretation. Historical cases that clearly identify reasons for the sanction, how the sanction could be avoided, actions that lead to a sanction, what kind of compliance activity was in place at the organization at the time of the sanction—are all key for any organization to conduct their own risk analysis. In closing, the facts are very important and I believe all organizations would appreciate full disclosure of the facts within the limits of the case (so to protect the organization being sanctioned)."*

*"Without specific information from the Department that shows compliance programs really matter, it is difficult to convince companies that the government actually cares. Everyone already knows the government wants you to turn yourself in and cooperate, but that seems to be the only thing that matters. We hear about that all the time; more cases about disclosure and cooperation will not help convince management, but compliance cases will. Also, we need to know that the Department cares enough to distinguish real cases from paper ones. We need the department to make clear, for example, that programs where the chief compliance officer has no power, no protection, and no access to the board will be treated as shams, but programs where the compliance people are empowered will be given credit. Until the government makes this clear, programs are going to remain underpowered and not live up to their potential."*

*"DOJ should highlight in these cases any ethics and compliance practices they observed in a matter or resolution that they deemed to be highly effective; and conversely those that it did not deem effective. This is an emerging profession and area, and the DOJ could assist substantially in fertilizing best practices through publicity of its learnings from specific matters."*

*"If there is a way to find out how the DOJ views the structure and role of the chief ethics and compliance officer within an organization, this would be very helpful as well. For example, does the fact that a CECO exists help a company? Does the fact that a CECO reports in to the GC help or hinder the DOJ's view? Is the DOJ more willing to take a CECO role seriously if it reports to a non-GC high executive and of course to the board?"*

*"In cases involving indirect FCPA violations by third parties, it would be very helpful to know what kind of consideration the DOJ gave to due diligence efforts by the organization."*

*“It would be extremely helpful to know if the E&C program caught the issue that prompted the self-disclosure. Further, it is critical to know (in a sanitized, non-identifying fashion) the precise compliance practices/controls the DOJ found impressive. The control could be as straightforward as company X has a policy of not paying invoices that are not accompanied by receipts, or company Y has "facilitating payment - customs" as a recognized/communicated entry in its books and records. Details matter.”*

*“Just an idea, but would it be possible for there to be an RSS feed so it's easy to follow when new case information is posted?”*

## **APPENDIX C: SUGGESTED ETHICS AND COMPLIANCE PROGRAM CRITERIA TO INCLUDE IN THE DOJ REPORT ON ENFORCEMENT DECISIONS**

The preceding report strongly suggests that information on whether and how the DOJ gives credit to organizations for ethics and compliance programs will strengthen the quality of these internal efforts. The following items illustrate the kinds of extremely useful information that the DOJ could include in a release of statistics pertaining to the role E&C programs played in its enforcement decisions.<sup>10</sup>

### **1. Benefits given to companies with effective programs.**

The department could identify the number of decisions in which it opted for any of the following because an effective E&C program was present.

- 1) Organization was permitted to conduct an initial investigation
- 2) The DOJ declined to prosecute criminally; handled civilly
- 3) The DOJ declined to take any action at all
- 4) Deferred prosecution subject to settlement agreement
- 5) Non-prosecution subject to settlement agreement
- 6) Settlement agreement; no E&C program imposed because of an existing program
- 7) Settlement agreement; E&C program mandated, but it is essentially a continuation of the existing program
- 8) Settlement agreement; E&C program imposed but more lenient because of existing program; some enhancements required
- 9) No monitor imposed in settlement
- 10) No fine imposed
- 11) Reduced fine because of the existing program
- 12) Civil penalty; no criminal fine because of the existing program
- 13) Subsidiary, not parent, subject to enforcement action because of the existing program

### **2. List of reasons for rejection of or reduction in credit for an E&C program.**

In cases where the department did not give credit to an organization for its ethics and compliance program, the department could identify key features that were lacking. Examples include:

- 1) Chief Ethics and Compliance Officer (CECO) not empowered
- 2) CECO does not report to the board
- 3) The organization had not provided training to those who were involved in the misconduct

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<sup>10</sup> Additional guidance and potential criteria are set forth in Chapter 8 of the US Sentencing Guidelines and the OECD Good Practice Guidance in FCPA cases.

- 4) No meaningful mechanism in place for anonymous or confidential reporting (helpline/reporting system)
- 5) Retaliation toward the whistleblower occurred
- 6) No E&C audits were undertaken or audits were infrequent
- 7) No evaluations of the effectiveness of the E&C program took place or evaluations were insufficiently frequent
- 8) The organization's performance management system did not encourage, recognize, or reward ethical conduct
- 9) Inadequate disciplinary system
- 10) Allegations not effectively investigated
- 11) Organization did not undertake systematic efforts to build a strong ethical culture

**3. Extent to which an E&C Program Factored into Justice Department Decisions.**

DOJ could provide more-specific information as to the extent to which an E&C program factored into enforcement decisions. For example:

Percentage weight given to the E&C program in a prosecutors' decision:

- 1) None
- 2) 1-50%
- 3) 51-90%
- 4) 91-100%

Estimated reduction in financial penalty to company from the E&C program:

1. \$1 - 100,000
2. \$100,000 - 1,000,000
3. \$1,000,000 - 25,000,000
4. \$25,000,000 - 100,000,000
5. More

#### **4. Case Descriptions:**

The DOJ could provide case descriptions of enforcement decisions, with reference to consideration given to ethics and compliance efforts. For example, the following are recent Justice Department and SEC acknowledgments of company ethics and compliance programs and the role they played.

##### **Example from the SEC:**

#### **U.S. SECURITIES AND EXCHANGE COMMISSION**

Litigation Release No. 21222 / September 24, 2009

*Securities and Exchange Commission v. Christopher A. Black*, Case No. 09-CV-0128 (S.D. Ind., September 24, 2009)

SEC FILES SETTLED REGULATION FD CHARGES AGAINST FORMER CHIEF FINANCIAL OFFICER

...

“In determining not to bring an enforcement action against ACL, the Commission considered several factors. Prior to the June 16, 2007 disclosure by Black, ACL cultivated an environment of compliance by providing training regarding the requirements of Regulation FD and by adopting policies that implemented controls to prevent violations. Further, Black alone was responsible for the violation and he acted outside the control systems established by ACL to prevent improper disclosures.”

...

##### **Example from the DOJ:**

UNITED STATES OF AMERICA v. UNIVERSAL LEAF TABACOS LTDA., E.D. Va.  
Aug. 6, 2010

p. 4, fn. 2

“2. Pursuant to Universal's internal compliance program, Universal maintained on its website an employee "hotline" that allowed current and former employees to report improper conduct. It is because of this useful compliance initiative that the improper conduct came to light. The agreed upon disposition partly reflects credit given for Universal's pre-existing compliance program.”

**NOBLE CORPORATION NON PROSECUTION AGREEMENT**  
(Nov. 4, 2010)

“The Department enters into this Non-Prosecution Agreement based, in part, on the following factors: . . . (e) the existence of Noble's pre-existing compliance program and steps taken by Noble's Audit Committee to detect and prevent improper conduct from occurring;”

Of these three, the most helpful is the SEC's because the company, in fact, faced no punitive action from the government and the program played a role in this disposition. While the Noble case is helpful because it mentions the compliance program, the disposition of the case seems to be exactly what would have happened in any voluntary disclosure, with or without a compliance program. The statement also gives no indication what, if any, parts of the program merited credit. In this respect the Black case and the Universal Leaf case are helpful because they indicate some aspects of the programs that merited praise.