The Effect of Compliance Programs on Corporate Criminal Liability under US Federal Law

From Charging, to Trial, to Sentencing

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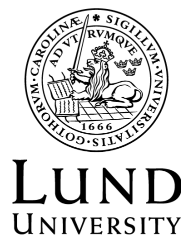

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Abstract

That corporations can be held criminally liable for the acts of their agents has by now long been established in US federal law, and so has the fact that corporate compliance programs *may* allow corporations to limit or completely avoid this liability. The aim of this essay is to understand under what circumstances such a reduction in liability is possible during the pre-trial, trial and sentencing stages of the US federal criminal process, as well as to understand what is required from a compliance program for it to have this effect.

In order to achieve this aim, the paper analyzes key guiding documents and court cases on the subject, such as the Justice Manual, the Federal Sentencing Guidelines, and the *Basic* and *Hilton Hotels* cases. The paper employs the legal dogmatic method, whereby various legal sources are structured and analyzed together in an effort to understand the current legal landscape on the subject. Ultimately, the paper concludes that the effect of compliance programs on corporate liability under federal law is in practice a marginal one, and that the exact requirements placed on compliance programs for them to limit liability are to a large extent unclear.

Foreword

And so it is finally over, all these years at Lund University. This final undertaking has been difficult but rewarding, and it feels like a suitable end to this whole journey. Now it's onto new adventures, and I'm excited for what's to come.

But no thesis is complete without acknowledging those that helped along the way. Firstly I'd like to thank my family; Katarina, Alex, Stevi - your support has been ceaseless, in matters both big and small. I'd also like to thank my wonderful coworkers, Camille, Sören and Elise. I've learnt an incredible amount from all of you, and your kindness and knowledge made for an amazing start to my career. I'll miss you dearly. And thank you Truls; truly, few things are as precious as having a beer with a friend after a long day of writing. Lastly, I'd like to thank Lovisa Halje for her help during the writing of this paper.

Lomma, 23rd of May, 2024.

Abbreviations

Cir	Circuit
Co	Corporation
DPA	Deferred Prosecution Agreement
ECCP	Evaluation of Corporate Compliance Programs
FRE	Federal Rules of Evidence
HIPAA	Health Insurance Portability and Accountability Act
JM	Justice Manual
J	Journal
L Rev	Law Review
NPA	Non-prosecution Agreement
NSA	Negotiated Settlement Agreement
DoJ	US Department of Justice
U	University
USSC	US Sentencing Commission
SC	Supreme Court
SOX	The Sarbanes-Oxley Act

1. Introduction

1.1 Background

Since the Supreme Court's ("SC") ruling in the *New York Central & Hudson River Railroad Co. v. United States* in 1909,[1] it has been possible for corporations to be held criminally liable for the illegal conduct of its agents[2] under the principle of respondeat superior,[3] giving rise to the complex question of where the line is drawn between the corporate agent's personal liability and that of the corporation. Compliance programs are a part of this puzzle, and have long been acknowledged as one means to protect a corporation from liability stemming from the illegal acts of its agents. The immediate follow-up question, and the main matter with which this paper is concerned, is under what circumstances and in what ways a corporate compliance program can serve to limit a corporation's liability. The possibility for compliance programs to protect corporations from liability are most notably found in the US Federal Sentencing Guidelines ("Guidelines"),[4] and in the Justice Manual ("JM"),[5] which aid judges and prosecutors, respectively, and allow corporations to limit or avoid liability should they have an adequate compliance program, but the question of the effect of compliance programs during trial has also been discussed in courts since at least the 1940's.[6]

While already constituting an emerging trend in the 1970's,[7] these aforementioned incentives are credited with the growth of the compliance industry,[8] and having a compliance program is today an expectation of any serious

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[1] New York Central & Hudson River Railroad Co v US 212 US 481, 1909.
[2] Note that the term is broader than "employee", and includes others who might have the authority to act on the behalf of the corporation.
[3] The legal principle according to which a principle may be held liable for the wrongdoing of an agent.
[4] US Sentencing Commission, *Guidelines Manual* (01 November 2023) ("USSG").
[5] US DoJ, *Justice Manual* (2018). The Justice Manual was known as the United States Attorney's Manual prior to 2018.
[6] See Holland Furnace Co v US 158 F.2d 2 (6th Cir 1946).
[7] Perhaps on account of the Bank Secrecy Act of 1970. See Veronica Root Martinez, "Complex Compliance Investigations" (2020) no 2 Columbia L Rev 246, 267; W.R Heaston, "Copycat Compliance and the Irony of "Best Practices" (2022) no 24 U of Pennsylvania J of Business Law 750, 761.
[8] Diana E Murphy, "The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics" (2002) Iowa L Rev 697, p 710; Kimberly D Krawiec, "Cosmetic

corporation - with the US federal government having made it an outright requirement for partaking in the government procurement process.[9] But the term "compliance program" is a broad one, and it may imply different things in different contexts. In the widest sense it encompasses the efforts of a corporation to ensure adherence to law, policy or ethics.[10] On account of this width, the actual composition of any given program may vary greatly depending on available resources, industry, corporate priorities and country. For example; on account of the US Health Insurance Portability and Accountability Act ("HIPAA"), firms in the medical industry are required to adhere to certain rules, thus necessitating that firms take that into account when designing their compliance programs. Similarly, corporations operating in the financial sector have other obligations imposed on them by the Sarbanes-Oxley act of 2002 ("SOX"), which came as a consequence of the Enron scandal.[11] Requirements for compliance programs may also emerge from within the corporate world itself, such as the SOC2 certification[12] - while these do not constitute "requirements" in the legal sense, they may nevertheless act as practical obligations, owing to market preference.[13]

The costs of non-compliance can potentially be astronomic, with a breach of the Sherman Act,[14] as an example, having cost Citigroup, one of the biggest banks in the US, over $900 million.[15] Given the high cost of non-compliance and

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Compliance and the Failure of Negotiated Governance" (2003) Washington University Law Quarterly 487, p 488; Frank O Bowman, "Drifting down the Dnieper with Prince Potemkin: Some Skeptical Reflections About the Place of Compliance Programs in Federal Criminal Sentencing (2004) Wake Forest L Rev 671, p 679.

[9] See Federal Acquisition Regulation, 3.1004(a).

[10] Charles J Walsh & Alissa Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?" (1995) Rutgers L Rev 605, p 645. But note that other aspects are of relevance too, such as reputation.

[11] Krawiec (n 8) p 488. "The Enron scandal" refers to the revelation that corporate leadership at the Enron corporation, a multi-billion dollar US enterprise, had participated in widespread accounting fraud.

[12] "System and Organisation Controls", developed by the American Institute of Certified Public Accountants. See https://www.aicpa-cima.com/topic/audit-assurance/audit-and-assurance-greater-than-soc-2 (accessed on 14/05/2024).

[13] Personal experience has proven this to very much be the case regarding SOC2.

[14] The Sherman Antitrust Act of 1890, 15 US Code §§1-38, prohibiting monopolies. See Cornell Law School, Legal Information Institute, "Sherman Antitrust Act". Available at: https://www.law.cornell.edu/wex/sherman_antitrust_act#:~:text=Sherman%20Antitrust%20Act%20of%201890,of%20foreign%20or%20interstate%20trade (accessed on 14/05/2024).

[15] Antitrust Division of the DoJ, "Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 million or more" https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (accessed 14/05/2024).

the cost of implementing a compliance program,[16] the corporate world has generally converged on a set of "best practices".[17] But naturally, that an industry has a propensity for certain compliance measures is not in itself an indication that prosecutors, juries and judges consider them sufficient to award any protection from criminal liability during the federal criminal process. And so the question remains of how, and under what circumstances compliance programs can limit corporate criminal liability.

1.2 Purpose and research question

This paper aims to provide a comprehensive overview of the role that compliance programs play in avoiding or limiting corporate liability during the entire federal criminal process, ie from the moment the criminal act itself is committed, to the (potential) sentencing of the corporation. While there is ample writing concerning the role of compliance programs in avoiding prosecution, as well as their role in limiting liability at sentencing, there is a relative lack of research concerning their role during trial, which this paper aims to remedy.[18] This gap in academic study of the subject has meant that existing material on the subject is somewhat incomplete, which has served as the primary motivator for the selection of this topic. Since the trial stage has remained a relatively unexplored territory in the context of the effect of compliance programs on corporate criminal liability, existing attempts at providing an overarching analysis of the topic have not been sufficiently comprehensive - leading to the aim of this paper. To this end, the two overarching research questions this paper aims to answer are the following:

1. Are compliance programs an effective means for corporations to avoid criminal liability during the federal criminal process, ie once a crime has been committed by an agent of the corporation?

[16] Bowman (n 8) p 680, noting that compliance programs are notoriously costly to implement.

[17] For an in-depth discussion of the implications of "best practices" see Heaston (n 7).

[18] See for example Walsh & Pyrich (n 10); John F Fatino, "Corporate Compliance Programs: An Approach to Avoid or Minimize Criminal and Civil Liability" (2002) Drake L Rev 81. These papers both discuss the effect of compliance programs under the JM and the Guidelines, but do not go into depth regarding the effect at trial.

2. What is required of a compliance program for it to have a positive effect in avoiding corporate criminal liability?

1.3 Delimitations

It should be noted that while this paper concerns itself with the effects of compliance programs on corporate criminal liability, much of the source material concerns organizations in a broader sense. The term "organization" includes corporations, but also labor unions, funds and nonprofits to name a few.[19] When the source material uses "organization", so will this paper, in order to provide information as accurately as possible.

1.4 Materials and method

As the aim of this paper is to understand current law regarding the impact of compliance programs on corporate criminal liability, the legal dogmatic method has been chosen, which serves to systematize and interpret current law.[20]

Given that this paper concerns itself with US law, some considerations are in order, pertaining to this specific jurisdiction. The US has a common law legal system, whereby case law, under the principle of stare decisis,[21] constitutes an authoritative source of law.[22] This grants the courts immense law-making power, in that the interpretation and application of the law in one case itself becomes part of the law, upon which prosecutors, defendants and judges all can, and must rely.[23] It should be noted here that as a direct consequence of this system, the precedent of cases may remain legally relevant decades or more after their initial setting. There are three levels of courts within the US hierarchy of courts: federal district

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[19] See Paula Desio (Deputy General Counsel, USSC), "An Overview of the Organizational Guidelines". Available at: https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf (accessed on 15/05/2024) p 1.

[20] Aleksander Peczenik, *Juridikens Metod och Material* (Fritzes Förlag 1995) p 33.

[21] "Let the decision stand", meaning that the same circumstances should result in the same outcome.

[22] Mikaila Mariel Lemonik Arthur, *Law and Justice Around the World: A Comparative Approach* (University of California Press 2020) p 22.

[23] Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) p 104.

courts constitute the lowest level, followed by appellate courts (also called circuit courts), and lastly the SC. In this hierarchy of courts, federal district courts are subject to oversight by appellate courts (ie circuit courts), which are in turn subject to oversight by the SC.[24] Within this system, lower courts are bound to the decisions of higher courts - while higher courts may disregard the decisions of lower courts. While courts have no obligation to follow the decisions made by other courts of the same rank (ie district court to district court, or appellate court to appellate court), these may nevertheless be cited in court decisions, acting as guidance rather than binding precedent.[25]

The various internal guidance documents discussed in this paper, such as the JM and the Guidelines do not constitute law, insofar as they neither grant rights nor impose obligations.[26] They do however have some authority in their effect as internal policy documents for the Department of Justice ("DoJ"). Neither document is thus strictly binding upon their intended audiences, and the enforcement of these documents is discretionary.[27] On a similar note, this paper also utilizes information found on various web-pages belonging to the DoJ. This information falls under both the Information Act,[28] and Memorandum M-19-15, issued by the Office of Management and Budget, which is part of the Executive Office of the President of the US, and requires all government agencies to ensure the quality and accuracy of the information they disseminate, online or otherwise.[29]

Beyond these aforementioned sources, a number of articles from various US scholarly journals and books will be used as well, with publication dates spanning from the 70's until today. While used mainly for the sake of discussion, they are at times relied upon for the provision of factual information. In such instances, efforts have been made to verify the accuracy and exactitudes of the

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[24] Offices of United States Attorneys, "Introduction to the Federal Court System". Available at: https://www.justice.gov/usao/justice-101/federal-courts#:~:text=The%20federal%20court%20system%20has,appeal%20in%20the%20federal%20system (accessed 11/05/2024).
[25] Schauer (n 23) p 71.
[26] See JM (n 5), 1-1.200 on Authority, and 4.1 in this paper.
[27] Ellen S Podgor, "Department of Justice Guidelines: Balancing "Discretionary Justice" Cornell J of Law and Public Policy 167, p 169. A thorough analysis of the function of these documents can be found later in this paper. See ch 2.
[28] 44 US Code §3516.
[29] See Memorandum M-19-15, Office of Management and Budget, p 2, which updated the previous "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies", issued by the same office.

information in question, either by comparison to other sources, or by following the citations provided in the papers themselves.

1.5 Outline

The paper consists of five chapters, of which the first serves as an introduction, and the last as a conclusion. The three main chapters of the paper follow the chronology of the federal criminal process, from the filing of charges to (potential) sentencing.

The second chapter thusly concerns the pre-trial stage, where the decision of how to proceed rests with the prosecutor. In order to understand the role that compliance programs have on the prosecutor's decision to prosecute, this chapter primarily rests upon the analysis of two DoJ policy documents: the JM, which provides general guidelines for federal prosecutors, and also the "Evaluation of Corporate Compliance Program" document, which was issued as an elaboration on the guidance of the JM in regards to compliance programs during the pre-trial stage.

The third chapter concerns the trial stage. Given that the relevance of compliance programs during this stage rests upon an interpretation of the foundation of corporate criminal liability, as established by the *New York Central & Hudson River Railway Co. v. US* case, an analysis of this foundation will be provided in this chapter. This then serves as a background to the main focus of the chapter, which is the analysis of the several cases, coming from various federal courts, in which compliance programs have been of relevance.

The fourth chapter concerns sentencing, focusing on the Guidelines. The chapter begins with a brief overview of the function and history of the Guidelines, which then allows for an analysis of how they interact with compliance programs.

Lastly, in the fifth chapter, the paper summarizes the findings of earlier chapters and provides some final conclusionary remarks.

2. The pre-trial stage

2.1 Introduction

The first step in the federal criminal process is investigation and charging. Once the investigators present the information relating to the criminal act to the prosecutor, the prosecutor arrives at the decision of whether or not to press charges, and against whom - the corporation or its agent.[30] This would then suggest that the power that the prosecutor has in this matter is significant. Indeed, their discretion is significant,[31] including not only the discretion over who would be facing the charges, but also what the charges would be, and what evidence would be submitted.[32] While there are ultimately limits to their discretion, they are generally free to act as they see fit within these boundaries.[33] Put simply, the reality that a crime has been committed is not the sole determiner for if charges will be pressed against the corporation or not.[34] As a part of this process, the corporation will be given a chance to provide any information which could aid the prosecutor in their decision - and this very often includes the corporation's compliance program.[35] It should of course be kept in mind that the compliance program is but one of several factors that may impact the final decision of the prosecutor, and that the existence of a compliance program is no guarantee that no charges will be filed.[36]

The prosecutor has a handful of alternative actions available to them, depending on their evaluation of the information provided by the investigators and the corporation. Beyond charging or not charging the corporation, the prosecutor could also pursue negotiated settlement agreements ("NSA") such as

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[30] Offices of United States Attorneys, "Charging" . Available at: https://www.justice.gov/usao/justice-101/charging (accessed on 29/04/2024).
[31] Dan K Webb & Steven F Molo "Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines" (1993) Washington U Law Quarterly 375, p 377-378.
[32] Podgor (n 27) p 168.
[33] Ibid.
[34] Robert E. Bloch, "Compliance Programs and Criminal Antitrust Litigation: A Prosecutor's Perspective (1988) Antitrust Law J 223, p 225.
[35] Ibid.
[36] Fatino (n 18) p 90.

non-prosecution agreements ("NPA") or deferred prosecution agreements "(DPA"). Under an NPA, the prosecutor agrees not to charge the corporation, on the condition that the corporation follows certain directives set by the prosecutor. Under a DPA, however, the prosecutor agrees to postpone its decision on whether or not to charge the company - giving the corporation a chance to remedy the issue.[37]

As part of this process, the prosecutor will evaluate the compliance program (if one exists) belonging to the corporation facing the potential charge. In order to advise the prosecutor in this task, the Department of Justice has published the Justice Manual ("JM"), which provides prosecutors with a comprehensive guide for how to approach any given case.[38] As part of the JM, prosecutors have at their disposal the Principles of Federal Prosecutions of Business Organisations ("Principles"), which give specific guidance on how to prosecute (or not prosecute) business organizations - a term which includes corporations. Moreover, in order to provide more concrete guidance for federal prosecutors, the DoJ issued a document in 2019, which was updated in 2023, elaborating on how to evaluate a corporate compliance program ("ECCP").[39] It is important to note that guidance documents such as the ECCP do not have the authority that the JM has, meaning that the JM takes precedence in the event of conflict.[40] Further, neither of these documents constitute law insofar as they do not grant any rights, nor do they impose any obligation, and thus they cannot be enforced by any court, and there is no guarantee that a prosecutor acting outside of the recommendations made by the JM will face internal disciplinary action.[41] Ultimately, understanding the impact that compliance programs may have at this stage of the federal criminal process therefore requires an understanding of these two documents.

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[37] Harry First, General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers, in Otto G Obermaier and Robert G Morvillo (eds), *White Collar Crime: Business and Regulatory Offenses*, Law Journal Press, 2017 p 72.
[38] JM 1-1.000.
[39] DoJ, Criminal Division, *Evaluation of Corporate Compliance Programs* (2023). Available at: https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl (accessed on 04/18/2024). ("ECCP").
[40] JM (n 5) 1-19.000.
[41] Podgor (n 27) p 169.

2.2 Effective compliance programs according to the Justice Manual's Principles

The principal aim of the evaluation of a compliance program under the JM is to discern whether or not it actually serves as a means to ensure compliance, or if it is just merely window-dressing. To this end, the JM poses three broad questions by which the effectiveness of a compliance program can be gauged: Is it effective? Is it being adhered to in good faith? Does it fulfill its purpose? The DoJ thus does not follow a "checklist" when evaluating compliance programs - each program is evaluated on its own terms and within its own context.[42]

In order to be considered adequate, a compliance program is expected to create a culture of compliance, in which personnel within the company may raise concerns or file reports without fear of retaliation.[43] The JM also considers financial incentives for company employees as a means of creating a corporate culture of compliance - both through rewarding compliant behavior, as well as punishing misconduct. An example brought up is that of clawback provisions, which would enable the employer to recover funds already paid to the employee in the event of misconduct. Such a provision is not in itself sufficient however, as the mere existence of it means little without actual execution.[44]

Another factor considered relevant by the JM is the corporation's use of digital communication platforms and personal devices such as phones and computers; a policy that emphasizes the preservation of such as chat logs and emails could be seen as a sign of a functional compliance program, as it facilitates the discovery and remediation of illegal conduct.[45]

2.3 Effective compliance under the ECCP

2.3.1 Introduction

Given the brevity and general nature of the guidance provided in the JM, the Criminal Division of the DoJ issued a document called "Evaluating Corporate

[42] DoJ, Justice Manual, 9-28.000.
[43] This is echoed by the USSG (n 4), see 4.2.
[44] ibid.
[45] ibid.

Compliance Programs", which expands upon the practicalities of the evaluation. The ECCP outlines three criteria by which to evaluate a compliance program: its design, its resources and empowerment, and its practical effect, with the overarching caveat that the specifics of any given program must be evaluated in context of a company's size and resources.

2.3.2 Design

The ECCP divides the evaluation of the design of the compliance program into a number of categories: risk assessment, policies & procedures, training & communication, reporting & investigation, third-party management, and mergers & acquisitions.

The ECCP considers risk awareness and management key for ensuring an effective compliance program. To this end, the program must be evaluated on the robustness of the methodology used to identify risks, the measures taken in response to risk, and the time frame in which the assessment is done - any risk assessment, irregardless of how thorough will sooner or later become obsolete, thus necessitating continuous review and revision.[46]

Policies is another area in which the ECCP has comparatively extensive requirements, potentially on account of the relative ease at which a policy can be drawn up as compared to other measures. Fundamentally, the ECCP asks prosecutors to evaluate the procedure according to which a corporation's policies are designed - who is responsible for them and their competence, who has been consulted, and the frequency at which they are revised. Further, the level of comprehensiveness is also evaluated, as is its correlation to the actual risks the corporation is facing. Lastly, the prosecutor is asked to evaluate the implementation of the policies, as well as the general level of understanding of said policies amongst the employees of the corporation.[47]

Another core element of a compliance program is that of training and communication. In this regard, the ECCP considers measures effective if they span at least all directors, officers and relevant employees, and agents and partners

[46] ECCP (n 39) p 2.
[47] Ibid p 3.

as appropriate. Another factor is *how* the information is relayed within the corporation, as different levels of knowledge and responsibility are to be expected from different parts of the corporate structure.[48]

But risk management, policies and communication are to a large extent preventative measures. Once criminal behavior has occurred, the corporation is reliant on a functional system of reporting, in order to be able to remedy the behavior in question. According to the ECCP such a reporting system should be preferably anonymous, but at least confidential, to guarantee that the reporting employee will not face repercussions - thus increasing the likelihood of reporting, which in turn strengthens the function and integrity of the system. Moreover, the response to reports made should be evaluated, both in terms of timeliness and efficiency.[49]

A corporation should also carry out risk-based due diligence of its relationship with third parties - as these can be used as fronts to mask criminal conduct. The same goes for mergers and acquisitions. To this end, the corporation's compliance program should exercise appropriate control over its partners and acquisition targets, primarily through the writing and enforcement of contract terms, but potentially also by the cessation of the relationship in question. The willingness of a corporation to end a relationship with a third party is of special importance, as it serves to prove the proper function of due diligence.[50]

2.3.3 Resources and empowerment

It goes without saying that a program that on paper is comprehensive and effective yields little in terms of actual prevention of criminal behavior without sufficient resources and power within the organization. This criterion can be broken down into two distinct parts: that of empowerment, and that of resources, that in turn must be broken down into two sub-criteria each.

To evaluate the level of empowerment of a program is to evaluate two things: its autonomy in relationship to the company's management structure, as

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[48] ECCP (n 39) p 4.
[49] Ibid p 5.
[50] Ibid p 7.

well as the seniority of its managing staff. As far as autonomy is concerned, one must understand where the program falls within the company's hierarchy; does it independently report to the board of their directors or the CEO, or does it fall under the legal department, or some other business function?[51]

The question of resources is not only a matter of funding. While funding undeniably plays a crucial role in determining if a program has sufficient resources, other factors such as access to information and personnel are also of great importance - and further, that the personnel possess adequate experience and qualification.[52]

2.3.4 Effect

The practical effect of a compliance program is perhaps the most difficult criterion to evaluate, simply on the grounds that the concept of *effectiveness* can be interpreted in a multitude of ways. The ECCP begins its section on the evaluation of the efficiency of a compliance program by stating that *effectiveness* does not mean the prevention of all criminal conduct.[53]

Beyond the prevention of criminal conduct, efficiency is also a matter of how criminal conduct is dealt with within the organization once detected - if it at all is, and how the corporation implements lessons learned into the program for better performance in the future.[54]

2.4 Summary and analysis

2.4.1 The effect of compliance programs on the decision to prosecute

Fundamentally, there are two possible scenarios in which a compliance program may factor into the decision not to prosecute a corporation. On the one hand we have the cases in which the prosecutor enters into an NPA or a DPA - which may

[51] ECCP (n 39) p 9.
[52] Ibid p 11.
[53] Ibid p 14, with reference to USSG (n 4) §8B2.1(a).
[54] Ibid p 18.

come with certain requirements for the corporation. On the other hand, we have the cases in which the prosecutor decides not to prosecute at all, as well as not entering into any agreements with the corporation in question.

Analyzing the cases that involve an agreement of some sort between the prosecutor and the corporation is difficult, as very little data is provided by the DoJ.[55] The DoJ does not need to publish its reasons for agreeing or refusing to enter into an NPA or a DPA, and neither does the DoJ explain what role corporate compliance programs play in this decision.[56] Some data does however exist, coming from the Government Accountability Office[57] ("GAO"), which states in a report from 2009 on the DoJ use of NPA:s and DPA:s that out of 57 agreements reviewed, 45 included requirements that a corporation improve its compliance program.[58] While this would suggest that many corporations suffer from inadequate compliance programs, this statistic alone does little to explain what actually constitutes an *effective* compliance program, and what importance is ascribed to these programs in the prosecutor's decision to pursue an agreement instead of pressing charges. One possible interpretation is that compliance programs are of lesser relevance in these decisions, as the prosecutors in these cases opted for agreements despite lacking compliance programs. But it is also possible that the compliance programs were in fact good enough to avert prosecution - that they bear improvement is not necessarily the same as being insufficient.

The cases that do not involve any agreement at all suffer from an even greater lack of data. But the increasing prevalence of compliance programs taken together with the fact that white-collar crime is relatively rarely prosecuted[59] could be interpreted as a sign that compliance programs are in fact an effective way for corporations to avoid liability through simply not being prosecuted in the first place. But it should go without saying that several factors are likely at play;

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[55] Philip A Wellner, "Effective Compliance Programs and Corporate Criminal Prosecutions" (2005) Cardozo L Rev 497, p 506.
[56] Maurice E Stucke, "In Search of Effective Ethics and Compliance Programs" (2014) J of Corporation Law 769, p 787.
[57] The GAO has as its mission to provide Congress and Executive Offices with information. See Government Accountability Office, "What GAO Does". Available at: https://www.gao.gov/about/what-gao-does (accessed on 15/05/2024).
[58] Government Accountability Office, *report 10-110* (2009) p 33.
[59] Wellner p 506.

Szockyj points to the differences in resources, taken together with the often considerable social and political power held by corporations as other possible explanations as to why corporations are so rarely charged by federal prosecutors.[60] Another possible explanation is offered by Simons, who points to the obvious difference in punishments available - a corporation cannot be imprisoned. And with this in mind, it may be of lesser interest for a federal prosecutor to pursue charges against a corporation, when individuals within the corporation may be charged personally, potentially ending in imprisonment, which can be considered a more impactful punishment than a "mere" fine.[61] In light of these arguments, it is indeed also possible that compliance programs do not in fact play a particularly important role in a corporation's efforts to avoid prosecution. As the existence of an effective compliance program is only one of several factors that guide the prosecutor's decision, and no weight or hierarchy exists within these factors, it is difficult to fully discern the effect that a compliance program ultimately has at this stage of criminal proceedings. But one could interpret the fact that a majority of the agreements between corporations and prosecutors in the aforementioned report by the GAO included provisions about the improvement of compliance programs to mean that corporations that do have satisfactory compliance programs do not often face charges. Whether that is as a consequence of prosecutors not charging them or if crime is simply less frequent in such companies is difficult to gauge however, owing to lack of data from the DoJ.

2.4.2 What is expected of a compliance program for it to affect prosecution

Notwithstanding the question of how impactful compliance programs are in the decision of whether or not to prosecute a corporation, there is also the matter of what is required of a compliance program to have a positive effect in this decision. The fundamental problem with understanding what the JM expects of a compliance program is that it primarily concerns results, while only giving scattered examples of concrete measures.

[60] Elizabeth Szockyj, "Imprisoning White-Collar Criminals" (1999) Southern Illinois U Law J 485, p 488.
[61] Michael A Simons, "Vicarious Snitching: Crime, Cooperation and Good Corporate Citizenship" (2002) St. John's L Rev 979, p 987.

While the guidance provided by the ECCP is slightly more concrete, it largely inherits this problem, and is in large part of a very general nature, leaving it difficult to discern anything in terms of practical measures to be implemented - that a reporting mechanism should exist and be anonymous or at least confidential is just about the only concrete measure provided. But in general terms one should keep in mind that the foremost issue with which the prosecutor is concerned is whether or not the program in question actually serves a practical purpose, or if it is merely a program that exists on paper in order to assuage stakeholders - a so-called "paper program". Key in remedying this issue is, according to Shenefield,[62] is the sincere involvement of upper management, claiming that lower-level agents follow their superiors.[63]

In regards to the evaluation of the design of a compliance program, and more specifically to the evaluation of the program's risk management, Stucke points out that the risks are often not only unknown, but unknowable on account of the often very complex regulatory environment multinational firms operate in, which makes the task of evaluating a corporation's risk management a difficult task, given that such matters are often beyond the expertise of any single prosecutor.[64] Further, the ECCP's emphasis on communication is difficult to fully understand. Common practice is to do this through internal newsletters and publications on corporate websites,[65] but that this is common practice does not necessarily imply that it is considered effective by the DoJ.

[62] John H Shenefield served as the Associate Attorney General at the DoJ, as well as Assistant Attorney General of the antitrust division of the DoJ.
[63] John H Shenefield, "Compliance Programs as Viewed from the Antitrust Division" (1979) Antitrust Law J 73, p 75.
[64] Stucke (n 56) p 811.
[65] Krawiec (n 8) p 496.

3. The Trial Stage

3.1 Introduction

Should the federal prosecutor decide to press charges against the corporation, the corporation will, after the preliminary hearing, where the prosecutor first presents the case to the judge and the jury, face trial in a federal district court. In order to understand the role that compliance programs can play at this stage of the criminal process, a brief explanation of the trial proceedings is necessary.

The first step of the trial process is the selection of the jury, which will later be charged with delivering the final verdict of guilty or not guilty. The jury is chosen from a pool of randomly selected individuals, during the process of voir dire, in which suitable jurors are chosen while others are excused.[66] This is followed by the statements and arguments by the two parties - in this case the federal prosecutor on the one hand, and representatives of the corporation on the other. Following this, the judge will decide what evidence will be presented to the jury for its deliberations.[67] This process is governed by the Federal Rules of Evidence ("FRE"),[68] which generally promote the admission of any and all evidence that could be of importance to the case.[69] Judges do however have significant discretion in what evidence ultimately is admitted.[70] The judge then instructs the jury on how to approach the provided evidence and relevant law, after which the jury proceeds to its deliberations, leading to the final verdict.[71] With the jury's verdict in hand, the judge may then decide on a sentence. The decision may be appealed to a federal appellate court, whose decision may in turn

[66] United States Courts, "Juror Selection Process". Available at: https://www.uscourts.gov/services-forms/jury-service/juror-selection-process (accessed on 08/05/2024).
[67] Jon R Waltz, "Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence" (1985) Northwestern U L Rev 1097, p 1100.
[68] At the time of writing, the 2023 edition is the most recent.
[69] Waltz p 1118. See also FRE Rule 402.
[70] Thomas M Mengler, "Theory of Discretion in the Federal Rules of Evidence" (1989) Iowa L Rev 413, pp 426 & 442. See also FRE Rule 403.
[71] Offices of the US Attorneys, "Trial". Available at: https://www.justice.gov/usao/justice-101/trial (accessed on 01/05/2024). Note that jury deliberations are not published.

be overturned by an en banc[72] decision by the same appellate court, or ultimately by the Supreme Court.[73]

3.2 The foundation of corporate liability

According to the aforementioned *New York Central & Hudson River Railroad Co.* case, which bases corporate criminal liability on the tort law principle of respondeat superior, there are three criteria that need to be met in order for a corporation to be held liable for the illegal conduct of its agent.[74]

The first criterion is that of intent, or mens rea.[75] Historically, corporations could not be held liable, as they in themselves do not have an intent, but seeing as corporations do not themselves act, and can only act and intend through its agents, the intent of the agents becomes the intent of the corporation.[76] And in this, the matter of intent has become less important in corporate prosecution, with courts often finding corporations (and their directors) liable without addressing the matter of the corporation's intent.[77]

For the second criterion to be met, the act must have been intra vires.[78] This criterion has received a wide interpretation by the courts - already in *New York Central & Hudson River Railroad Co.* the court stated that even criminal acts not authorized by corporate leadership can fall intra vires.[79] The same goes for acts falling outside of the corporate charter.[80]

Lastly, the act in question must have been intended to benefit the corporation. It is however not necessary for the corporation to be sole benefactor of the act, and neither is it necessary that the corporation actually benefits - only

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[72] "On the bench" - a procedure in which all the judges of a court hears a case. Such procedures are however rare, See Pauline T Kim, "Lower Court Discretion" (2007) New York L Rev 383, p 391.
[73] It should be noted however that appellate courts confirm the decisions of district courts in a majority of cases, see US Courts, "Just the Facts: US Courts Appeals". Available at: https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals (accessed on 10/05/2024)
[74] Note here that this liability does not include all crimes; crimes such as rape and murder, which require "commission by a natural person", are excluded. See Robet E Wagner, "Corporate Criminal Prosecutions and the Exclusionary Rule" (2016) no. 4 Florida L Rev 1119, p 1122.
[75] Latin for "the guilty mind", here meaning "intent".
[76] Bloch (n 34) p 227.
[77] JM Anderson & I Waggoner, *The Changing Role of Criminal Law in Controlling Corporate Behavior* (Rand Corporation 2014) pp 36-37.
[78] "Within the authority" - here understood as an act occurring within the scope of employment or contract.
[79] New York Central & Hudson River Railroad Co v US 492.
[80] Anderson & Waggoner p 18.

that this was the intention.[81] In practice, this width has meant that only acts that are plainly inimical to corporate interests are considered sufficient to fall outside the scope of this criterion.[82] The end result is that it is generally easy for prosecutors to prove that any given illegal act was indeed to the benefit of the corporation under this standard.[83]

3.3 Compliance programs as evidence against respondeat superior

While corporations could at one point avoid liability for the illegal acts of its employees if these went against corporate policy, as in the *Holland Furnace* case,[84] heard by the 6th circuit of appeals in 1946, the courts have in the decades since consistently held, in cases such as *Hilton Hotels*[85] and *Beusch*,[86] that the existence of a compliance program does not in itself automatically provide a shield from corporate liability. This stance is broad, and extends even to situations in which the agent of the corporation went against the express instructions and policies of the corporation.[87] As shown in *Potter*,[88] not even the strict enforcement of said compliance program can shield the corporation.

Subsequently, it is only in regards to the principle of respondeat superior that compliance programs can serve to limit the liability of a corporation - a compliance program may be submitted as evidence to prove that one of the three criteria of respondeat superior is not fulfilled, and that the corporation thus cannot be liable. Attempts have been made by corporations to submit their compliance programs as evidence regarding all three of these criteria, and they will be examined in turn below. On the whole, however, it is also possible for the admission of a compliance program to be flatly denied, as was the case in

[81] VS Khanna, "Corporate Criminal Liability: What Purpose Does it Serve?" (1996) no 7 Harvard L Rev 1477, pp 1490-1491.
[82] Tania Brief & Terrell McSweeny, "Corporate Criminal Liability" (2003) no 2 American Criminal L Rev 337, p 343.
[83] Wellner (n 55) p 504.
[84] Holland Furnace Co v US 158 F.2d 2 (6th Cir 1946). Note that this case concerned a low-level employee, which was regarded as a factor of importance for the outcome of the case.
[85] US v Hilton Hotels Co 467 F.2d 1000 (9th Cir 1973).
[86] US v Beusch 596 F.2d 871 (9th Cir 1979).
[87] Walsh & Pyrich (n 10) p 662.
[88] US v Potter 463 F.3d 9 (1st Cir 2006).

American Radiator,[89] where the court rejected the admission of a compliance program as evidence on the grounds that it was of little significance.[90]

In at least one case, *Corrugated Container*,[91] heard by the South Texas District Court in 1979, a compliance program was admitted as evidence concerning the corporation's intent.[92] On the other hand, in *Basic*,[93] heard by the 4th circuit court of appeals in 1983, the appeals found that the lower court had been right to decline the admission of a compliance program as evidence regarding the corporation's intent, stating that intent is not shown by policies (or compliance programs), but rather by the actions of employees, officers and directors acting within the scope of their authorities.[94] That is, because corporations can only act through their agents, the intent of the agents becomes the intent of the corporation by which they are hired.[95]

Regarding the intra vires criterion, the court did allow for the submission of a corporate compliance program as evidence regarding the authority of the employee committing the offense in *Beusch*, heard by the 9th circuit court of appeals in 1979, on the condition that it was in fact faithfully enforced, and did not constitute a mere "paper program".[96] In the same case, with reference to *Armour*,[97] the court pointed out that a corporation's policy prohibiting illegal conduct does not automatically place the agent's conduct outside of the scope of employment.[98] Ultimately, however, the corporation in *Beusch* was convicted.[99] Also worth mentioning in regards to this criterion is that the 5th circuit court of appeals in *Standard Oil*[100] linked the "scope of employment" criterion to that of corporate benefit by stating that an action cannot be considered to be within the scope of employment without an intent to benefit the corporation - as every agent is hired with the purpose of benefiting the corporation in one way or another.[101]

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[89] US v American Radiator Standard Sanitation Co 433 F.2d 174 (3rd Cir 1970).
[90] Ibid p 204.
[91] In re Corrugated Container Antitrust Litigation no 301, Texas Southern District Court, 1979.
[92] Bloch (n 34) p 228.
[93] US v Basic Construction Co 711 F2d 570 (4th Cir 1983).
[94] Ibid p 573.
[95] Bloch (n 34) p 227.
[96] US v Beusch p 878.
[97] US v Armour Co 168 F.2d p 343 (3rd Cir. 1948).
[98] US v Beusch p 878.
[99] US v Beusch p 879.
[100] Standard Oil Company of Texas v US 307 F.2d 120 (5th Cir 1962).
[101] Standard Oil Co of Texas v US p 128.

In *Basic*, the court did accept the submission of a compliance program as evidence in evaluating whether or not the illegal act committed by its employee was in fact to the benefit of the corporation.[102] The case nevertheless ended with a conviction of the corporation, which was confirmed by the 4th circuit court of appeals.[103]

3.4 Summary and analysis

3.4.1 Evidence: a path to relevance?

While it is indeed clear that a compliance program cannot *per se* shield a corporation from liability, there is a small relevance afforded to compliance programs through their admission as evidence. But while the courts have carved out a small space in which compliance programs can be of relevance during the trial, it seems that courts have generally been reluctant to allow any space for compliance programs to affect liability.[104] The *Corrugated Container* case is the only case in which a compliance program has been allowed as evidence regarding a corporation's intent, and both Bloch[105] and Shenefield considered the court's decision in the case problematic on account of its broader implications on corporate liability - their reasoning may explain the reluctance of courts in subsequent cases to admit corporate compliance programs as evidence regarding intent.[106] As a possible explanation as for why courts have so rarely allowed compliance programs as evidence, despite being given the opportunity to do so by the precedent set by *Hilton Hotels*, First points to the lack of logical connection between the existence of a compliance program and the criterion of the intent to benefit the corporation.[107] The ruling in *Basic* could be seen as supporting this thesis, as the court there declined the admission of a compliance program as evidence on the grounds that it was of little relevance. And while that may serve as a satisfactory explanation regarding the criterion of intent, it gives little clarity

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[102] US v Basic Construction Co 573.
[103] Ibid p 575.
[104] Walsh & Pyrich (n 10) p 665.
[105] Robert E. Bloch served as Chief of the Professions and Intellectual Property section of the DoJ antitrust division.
[106] See Shenefield (n 63) p 79; Bloch (n 34) p 228.
[107] First (n 37) p 22.

in regards to the other two criteria, the action being within the scope of the employment and to the benefit of the corporation.

Another surely important factor to consider is that of the discretion of the judge in the matter of evidence admissibility. By way of FRE rule 403, judges may disallow the admission even of logically relevant evidence, on the grounds that it may endanger the integrity of the judicial process, eg by being too time-consuming.[108] The broad discretion afforded by judges in this regard could serve to explain the seeming disconnect between *Hilton Hotels* and courts subsequent reluctance to admit compliance programs as evidence. Put simply, that they *may* admit compliance as evidence does not mean that they *must*. And while a decision not to allow the admission of a compliance program as evidence is subject to appellate review, this may nevertheless not imply a practical difference in outcome, as the appellate court in *Basic* upheld the district court's rejection of a compliance program as evidence, again keeping in mind as well that the majority of appeals are unsuccessful.[109]

While courts have indeed, in at least a few cases, allowed the submission of compliance programs as evidence, the outcome in the *Beusch* and *Basic* cases could suggest that they nevertheless rarely serve to protect a corporation from liability at the trial stage, ie that they are admitted some legal relevance does seem to result in a practical difference in outcome. Though it must be kept in mind that these two cases make up an incredibly small sample size, and that it is difficult to gauge if the outcome in the aforementioned cases came as a result of other factors specific to their respective facts and circumstances, or if they can be interpreted as a sign that juries generally find compliance programs unpersuasive pieces of evidence. Further, owing to the lack of insight into the compliance programs relevant to these two cases and the jury's findings during the deliberations, as these are not published, it is impossible to evaluate the effect that the specific structure of these compliance programs would have on the jury's decision - though one could assume that the bar set by the court in regards to its admission

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[108] E.J. Imwinkelried, "Federal Rule of Evidence 402: The Second Revolution (1987) no 2 Rev of Litigation 129, p 144.
[109] United States Courts, "Just the Facts: US Courts of Appeals". Available at: https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals (accessed on 10/05/2024).

as evidence would hold true also for the jury, ie that a compliance program, in order to be given any weight at this stage, must not be a paper program.

3.4.2 What is expected of a compliance program for it protect the corporation against liability?

That no jury in any of the cases discussed in this chapter found a corporation not guilty, despite the admission of compliance programs as evidence, could suggest that the composition of a compliance program is of marginal relevance at this stage. It could, however, on account of the relatively small number of cases in which compliance programs have been admitted, also simply be as a consequence of these corporations having sub-par programs - the sample size is so small that this is not impossible. In the most general terms, however, the court's statement in *Beusch*, that a compliance program, in order for it to be admitted into evidence, must constitute more than a paper-program. But one needs to keep in mind, again, that this only concerned its admission as evidence - what the jury makes of compliance programs is a question that is difficult to answer, given that jury deliberations are not published, and that the sample size of cases is so small.

In more general terms, there is ample writing concerning the psychology of how juries evaluate evidence, but such data would only be tangentially related to the topic at hand, as no studies have been done specifically on the effects of compliance programs as evidence.

4. Post Trial: Sentencing

4.1 Introduction

If guilt has been established, either by plea or trial, the process will move on to sentencing, the point at which the Guidelines come into play - which is also the last point at which a compliance program can serve to reduce the liability of a corporation for the acts of its agents. The Guidelines are a set of guidelines intended for federal judges to aid them in their sentencing, and has a chapter on the sentencing of organizations. These Guidelines are published by the Sentencing Commission ("USSC"), an independent agency under the Department of Justice, which was created during the justice reform of the 1980's by the passing of the Sentencing Reform Act.[110] The first Guidelines were published in 1987 as a means to reduce disparity in sentencing,[111] with the most recent edition, at the time of writing, being from 2023.

The Guidelines have since 1991 allowed for a reduction in penalty for corporations if the corporations can show that they have an *efficient compliance program*.[112] This reduction is given through a decrease in *culpability score* - a system by which different circumstances of a case are given a point number, which are then added together to arrive at a final score, which is then used to increase or reduce the fine, according to a matrix.[113]

The Guidelines were upon their initial publication presumptive in nature, meaning that judges had available to them the range and severity of punishments prescribed by the Guidelines, and could only deviate from this range should there be special reason to do so (should the criminal be a repeat offender, for example). Any such deviation would then be subject to Appellate Court oversight.[114] This

[110] Congressional Research Service, "Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options (2009) p 4.
[111] Ibid. See also USSG (n 4) Ch 1 pt 1.
[112] Stucke (n 56) p 770.
[113] See USSG (n 4) at §8C2.5.
[114] Congressional Research Service (n 108) p 14.

came to change in 2005 however, with the Supreme Court's ruling in the *Booker*[115] case, in which the SC found the presumptive nature of the Guidelines unconstitutional on the grounds that it went against the 6th amendment.[116] But as clarified by the 2nd Circuit Court of Appeals in the *Crosby*[117] case, that the Guidelines are no longer presumptive does not mean that they can be disregarded - rather, federal judges are required to consider the Guidelines, while at the same time being able to deviate from their recommendations.[118] In practice though, judges, though they do have discretion to do so, post *Booker*, rarely sentence outside of the Guidelines,[119] which is in line with DoJ policy.[120]

4.2 An effective compliance program according to the Guidelines

In the 2023 edition of the Guidelines, the description of an *effective compliance program* is found in chapter 8, part B. The Guidelines describe the *effective* compliance program in a number of points. In addition to these, two general notes are also made. Firstly, the program should create a "culture of compliance",[121] which in theory means that insubstantial programs based on the practice of "box-checking"[122] do not qualify as *effective*.[123] Secondly, the interpretation of each requirement must be done in context to the size, means, and relevant industry.[124]

According to the first point, the company must establish standards and procedures for detecting criminal conduct. One should note here that the perhaps

[115] US v Booker 543 US 220 (2005). This case was something of a logical consequence of the earlier Blakely v Washington 542 US 296 (2004), in which the SC found that the mandatory nature of Washington State's sentencing guidelines were unconstitutional.
[116] More specifically, the 6th amendment right to a trial by jury.
[117] US v Crosby 397 F.3d 103 (2nd Cir 2005).
[118] US v Crosby p 111.
[119] Nancy Gertner, "Judicial Discretion in Federal Sentencing - Real or Imagined?" (2016) no 3 Federal Sentencing Reporter p 165.
[120] Wellner (n 55) p 508.
[121] This change came as part of the review of the Guidelines mandated by the SOX act. See David A Hess, "A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines" (2007) no 8 Michigan L Rev 1781, p 1783.
[122] An approach to compliance by which a compliance program is viewed as a set of criteria to fulfill, as opposed to an involved attempt at disauding criminal behavior.
[123] Wellner p 506, noting that this change came into effect in 2004.
[124] USSG (n 4) §8B2.1 Commentary 2(A).

most obvious problem encountered in implementation of a compliance program is that policy does not necessarily correlate to behavior; a telling example of this is the common practice of corporations making their employees sign that they have read and will adhere to corporate policy documents - which of course does little to guarantee that this will be the case, as such agreements only provide a legal remedy and not a real guarantee of behavior.[125] This, however, could potentially, as Fatino states, have the opposite effect, and incriminate the corporation further, if such a policy displays glaring faults.[126]

Secondly, company leadership (ie the board, the CEO, as well as any other relevant officer of the company) must be knowledgeable in the working and function of the compliance program, as well as exercise oversight.[127] Moreover, if high level personnel is involved with the crime in question, the compliance program will be presumed to be ineffective.[128] This general emphasis is shared by the antitrust division of the DoJ[129] and has been acknowledged as a prerequisite for a functional compliance program in business ethics literature.[130]

Thirdly, any person who is known by the company to have partaken in criminal behavior or might otherwise jeopardize the integrity of the program should not be given substantial authority over the program.

The corporation must periodically communicate and re-communicate to its employees the function of its compliance program. Common practice, not to say anything of what judges generally think, is to accomplish this through the publication of policies and manuals on corporate websites or platforms, or through newsletters sent to agents of the corporation.[131]

The corporation must also continuously evaluate the effectiveness of its program, and monitor its employees' adherence to its established procedures. The corporation must ensure adherence to its compliance programs, both by

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[125] Eugene Soltes, "Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts and, Firms" (2018) no. 3 New York U J of Law & Business 965, p 990.
[126] Fatino (n 18) p 100.
[127] USSG (n 4) §8B2.1(b)(2)(B)
[128] Ibid §8C2.5(f)(3)(B)
[129] Shenefield (n 63) p 75.
[130] Stucke (n 56) p 806.
[131] Krawiec (n 8) p 496.

encouragement as well as by disciplinary action in case of deviation. Should the company detect any criminal conduct within its organization, it must take reasonable steps to ensure an appropriate response, including: the cessation of the conduct in question, the prevention of future criminal conduct, as well as an evaluation and possible modification of its program to enable better prevention of such conduct.[132] While no exact method is provided, a simple "walk-by" by a manager is mentioned as an example for smaller firms - though since nothing is said of larger firms, it is unclear whether or not this would suffice for a larger corporation.[133] Generally though, one would assume that the general expectation that larger firms have more comprehensive structures would encompass this criterion too.

4.3 The effect of an effective compliance program on the culpability score

As mentioned previously in this chapter, the Guidelines arrive at any given sentence through the calculation of a *culpability score*, which determines the severity of the final sentence. The calculation starts at five points, with the max being ten, and the lowest being zero - while a corporation could achieve scores beyond the maximum and the minimum, such results carry no further impact. According to this system, corporate tolerance of the criminal behavior, prior criminal history, violations of court orders and obstruction of justice all serve to increase the score by between 1-5 points, depending on severity and the size of the organization, while possessing an effective compliance program offers a reduction of three points, and self-reporting up to a reduction of 5 points, depending on the immediacy of the report.[134]

The resulting score can then be matched to the matrix in figure 2. Each score presents a range within which the final modifier to the fine may be chosen. At a culpability score of 10, the Guidelines provide for a maximum multiplier of 4 times the penalty, while at 0 or less, the range is between 0.05 and 0.2 times the penalty sum.

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[132] USSG (n 4) §8B2.1(4).
[133] Stucke (n 56) p 816, regarding USSG §8B2.1 Commentary 2(C)(iii).
[134] USSG §8C2.5.

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.

Figure 2: The sentence modifier, based on the final culpability score.[135]

4.4 Summary and analysis

4.4.1 Are compliance programs an effective means to avoid corporate criminal liability during the sentencing stage?

That only five organizations received a reduction in penalty between 1992 and 2010[136] could stem from two factors, keeping in mind that the Guidelines were presumptive until *Booker* in 2008: either federal judges do not ascribe much importance to the Guidelines, and have since 2008 issued their sentences outside of the suggested of the Guidelines, or corporations simply rarely possess compliance programs adequate enough to warrant a reduction according to the criteria in the Guidelines. Regarding the second possibility, Stucke points out that this may be a logical consequence of the fact that corporations that do possess *effective* compliance programs would be less likely to find themselves in the courtroom in the first place, as their programs would have prevented the crime in question from ever being committed.[137] Other than the aforementioned five, only eight organizations sentenced under the Guidelines between 1991 and 2004 were

[135] USSG (n 4) §8C2.7.
[136] Stucke (n 56) p 783.
[137] Ibid p 786.

found to at all have a compliance program, with between 200-300 organizations being sentenced under the Guidelines during the same time period.[138] Notwithstanding the possibility that these organizations would, of their own volition, have decided not to submit their compliance programs as evidence during sentencing, this would lead to the seemingly paradoxical conclusion that only a small minority of organizations possess a compliance program, despite the overall growth of the compliance industry and increased regulatory demands for such programs. According to Root Martinez, the US government appears to have adopted an approach following SOX[139] which emphasized negotiated settlement agreements over trials as a means to ensure corporate compliance.[140] The increased use of such agreements in recent decades[141] could signal that this is the stage where compliance programs may serve to have their biggest effects on avoiding corporate criminal liability - if federal prosecutors are already keen on obtaining such agreements instead of going to trial, displaying a corporate dedication to compliance through a compliance program may count for more than at trial or sentencing.

4.4.2 What is required of a program for it to be considered effective under the Guidelines?

The general nature of the Guidelines, and the lack of specific prescribed procedures gives rise to the issue of translating them into concrete, practical action.[142] As Stucke points out, it is practically impossible for either the courts or the DoJ to provide detailed guidance on what is expected of a compliance program, due on the one hand to the varying circumstances faced by different corporations in different industries and with different means available, and on the

[138] Bowman (n 8) p 684.
[139] While the act was primarily targeted at combating fraud in the financial sector, the act also stipulated that the USSC had to revise the Guidelines to ensure that they sufficiently deter and punish criminal conduct. See Sarbanes-Oxley Act of 2002, 805(a)(5). As a reaction to the passing of the act, the New York Stock Exchange required the adoption of ethics rules for listed corporations. See Hess (n 121) p 1783.
[140] Root Martinez (n 7) p 260.
[141] David M Uhlman, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability (2013) no 4 Maryland L Rev 1295, p 1303.
[142] This has been one of the most prominent criticisms of the description of an effective compliance program found in the Guidelines. See for example Ethics Resource Center, "The Federal Sentencing Guidelines For Organizations at Twenty Years: A Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs" p 5.

other because providing a list of required measures would in effect be an endorsement of a check-box approach to compliance, which is expressly what the USSC desired to prevent.[143]

In broad terms, however, it can be noted that a program is not required to prevent all criminal conduct in order to be considered effective under the Guidelines.[144] Indeed, had this been required, there would be no point in offering reductions in liability for effective compliance programs, as no corporation with such a program would ever reach the sentencing stage. Instead, according to Desio,[145] a compliance program is expected to be *reasonably* effective in preventing crime.[146] In practice this means that not all measures that could in theory serve to ensure better compliance are required, as the implementation of certain compliance program measures lie beyond the economic ability of many corporations.[147] The inverse would then of course also hold true: a greater budget for a compliance program is not necessarily indicative of effectiveness in the regulatory sense.[148] The effectiveness criterion rests upon the exercise of *due*[149] diligence in preventing criminal conduct.[150]

Moreover, the general reluctance of federal judges to award any reductions in liability on account of effective compliance programs could imply that standard industry practice is not considered *effective* by judges. There is however little data by which to evaluate the likelihood of this being true.

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[143] Stucke (n 56) p 801.
[144] USSG (n 4) §8B2.1.
[145] Paula Desio was Deputy General Counsel for the USSC in 2020.
[146] Desio (n 19) p 1.
[147] Soltes (n 125) p 1002.
[148] Ibid p 1003.
[149] Which again comes back to the criterion of reasonability.
[150] Fatino (n 18) p 92.

5. Summary and conclusions

This paper has aimed to analyze the role that corporate compliance programs play in avoiding or limiting corporate criminal liability during the pre-trial, trial and sentencing stages of the federal criminal process, and what is required of such programs for them to have a liability-limiting effect.

Generally, it is clear that compliance programs do have *a* role to play in avoiding corporate liability, but this role, incentives and opportunities available to corporations, prosecutors and judges, seems to rarely be a deciding factor in the practical outcome of any federal criminal process, judging by available data.

The propensity of federal prosecutors to pursue various NSA:s in recent years could however be interpreted that there is a greater willingness to "work things out" during this stage, at which point a well-functioning compliance program could be seen as indicative of a corporate willingness to cooperate and to remedy potential issues, which could in turn potentially serve to increase the likelihood of an NSA, thus sparing both the corporation and the prosecutor the effort of going to court.

This stands in stark contrast to the trial stage, during which compliance programs have considerably less impact. While they have been allowed as evidence, primarily in proving that the illegal act in question was not to the benefit of the corporation and that it was outside of the scope of employment, this has yielded little in terms of protection, as juries have found the corporation liable in all cases discussed, despite the existence of compliance programs - though the sample size is small, which makes it difficult to draw definitive conclusions.

Similarly, little practical effect has been given to compliance programs during the sentencing stage over the course of the decades during which this possibility has existed, with only a handful of corporations ever being granted any kind of reduction in liability on account of their compliance programs. Though if

this is as a consequence of generally lacking compliance programs, or that judges prefer to set aside the Guidelines is yet unclear.

In regards to what is required for compliance programs to have a positive effect on corporate liability, many uncertainties remain however, as neither prosecutors, judges or juries have pronounced a clear set of practices which are considered to be *effective*. While this is partially explained by the fact that effective compliance programs may have many forms depending on industry, resources, jurisdiction etc, as well as the general desire to avoid incentivizing box-ticking, this nevertheless means that the matter of effectiveness still does not have a satisfactory and comprehensive answer, leaving corporations to guess whether their practices are considered sufficient or not.

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