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# THE “VALUE” OF “VALUES” IN SMALL BUSINESS: COMPLIANCE AND ETHICS PROGRAMS FOR “THE REST OF US”

Paul Fiorelli\* & Ann Marie Tracey\*\*

Why should small businesses care about ethics and compliance, or put more bluntly, what is the “value” of “values”?<sup>1</sup> Should small organizations spend money on ethics and compliance programs, and if so, what can they expect as the return on their investment? Must small organizations mirror large businesses’ state-of-the-art “best practices” for compliance programs, or will a less formal approach satisfy prosecutors if they get in trouble? This Essay will address these questions by analyzing how Chapter 8 of the Federal Sentencing Guidelines for Organizations (“Chapter 8” or “FSGO”) applies to small businesses and will provide a practical approach to what small companies can do to satisfy these guidelines.

Regardless of size, all businesses find themselves in a “treacherous ethics landscape,” according to the Ethics Resource Center’s 2007 National Business Ethics Survey (“NBES”).<sup>2</sup> Several years after Enron, WorldCom, Tyco, and Arthur Andersen, even small businesses show no “meaningful reduction in their enterprise-wide risk of unethical behavior.”<sup>3</sup> The 2007 NBES goes so far as to conclude that the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”)<sup>4</sup> has not resulted in a safer environment than what businesses experienced before Enron.<sup>5</sup> Instead, the 2007 survey found that in the previous twelve-month period, 56% of employees polled had personally witnessed violations of company ethics standards, policy, or even the law.<sup>6</sup> This is almost identical to the 55% of employees who witnessed

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<sup>1</sup> Chapter 8 of the 2007 Federal Sentencing Guidelines for Organizations discusses the “size” of an organization (see e.g. § 8B2.1 cmt. nn. 2(C)(i)) and uses the terms “large organization” (see e.g. § 8B2.1(C)(ii)) and “small organization” (see § 8B2.1(C)(iii)), but these Guidelines do not mention a specific numeric demarcation between “large” and “small” organizations.

<sup>2</sup> Ethics Resource Ctr., *Ethics Resource Center’s National Business Ethics Survey: An Inside View of Private Sector Ethics* 1, <http://www.ethics.org/research/nbesoffers.asp> (2007) (copy on file with the University of Dayton Law Review).

<sup>3</sup> *Id.*

<sup>4</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>5</sup> Ethics Resource Ctr., *supra* n. 2, at 15.

<sup>6</sup> This was up 10% from 2003 and represented an increase from 2005 as well. *Id.* at 1.

these violations in 2000, pre-Sarbanes-Oxley.<sup>7</sup> The most frequent types of impropriety observed were conflicts of interest, intimidating or abusive behavior, and lying to employees.<sup>8</sup>

With all of the publicity that Sarbanes-Oxley has received, why does it seem to have such a limited impact on ethics in the workplace? One possible explanation is that Sarbanes-Oxley is targeted towards publicly traded companies and not small, closely-held organizations. What some large and many small organizations do not realize is that compliance and ethics programs may: (1) be required to compete for certain government contracts;<sup>9</sup> (2) keep companies from being prosecuted if they are engaged in wrongdoing;<sup>10</sup> and (3) reduce fines if they are convicted of violating federal laws. Chapter 8 of the FSGO, which the United States Sentencing Commission ("USSC" or "the Commission") developed, defines the minimum requirements of an effective compliance and ethics program that small companies should consider adopting in order to minimize their risk of violations.

Many companies have never heard of the FSGO. The lack of awareness about the FSGO was underscored by Dr. Stuart Gilman, then-President of the Ethics Resource Center, in testimony to the Ad Hoc Advisory Group to the United States Sentencing Commission ("Advisory Group").

First of all, in terms of small businesses, I would argue you don't have a legal question. I think you really have a publicity question. One symptom of that is a year-and-a-half ago, I gave a speech for the Small Business Administration in which the General Counsel and the Inspector General came up to me afterward and said that

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 72 Fed. Reg. 7588, 7588-90 (Feb. 16, 2007) (available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-698.pdf>).

<sup>10</sup> Having an effective compliance program is important armor against federal prosecution. Under current U.S. Department of Justice policy, "[t]he existence and adequacy of [a] compliance program," together with other factors—such as the nature and seriousness of the offense, the pervasiveness of the wrongdoing, and the willingness to cooperate—are taken into consideration in deciding whether or not to prosecute a company. Memo. from Eric H. Holder, Jr., Dep. Atty. Gen., to All Component Heads & U.S. Attys., *Bringing Criminal Charges against Corporations* § II.A.5 (June 16, 1999) (available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>). Mr. Holder's successor, Deputy Attorney General Larry Thompson, modified Holder's Memorandum in 2003 but continued the Department of Justice's practice of considering the existence and adequacy of a compliance program in determining whether to charge an organization. Memo. from Larry D. Thompson, Dep. Atty. Gen., to Heads of Dept. Components & U.S. Attys., *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm)).

[they] had no idea there were corporate sentencing guidelines.<sup>11</sup>

The logic would follow that if key administrators of the Small Business Administration ("SBA") are unfamiliar with the FSGO, the SBA is probably not promoting its value. If the SBA is not promoting the FSGO, it is not surprising that many of its members are unfamiliar with its purpose and impact. "Small businesses may be so focused on economic survival that they may be woefully ignorant of the application to their companies of laws covering fraud, environmental concerns, zoning, export controls, bribery, antitrust and price fixing, discrimination and harassment."<sup>12</sup>

### I. HISTORY OF THE UNITED STATES SENTENCING COMMISSION

The USSC was an outgrowth of Congress's dissatisfaction with unfettered federal judicial discretion in the sentencing of individual offenders. Observing what it perceived to be too much variance in prison terms, depending on the judge or circuit, Congress mandated more determinate sentencing in the Comprehensive Crime Control Act of 1984.<sup>13</sup> This led Congress to establish the USSC in 1987. One of the first goals of the Commission was to gather sentencing data from across the country to try to develop a coherent sentencing scheme, or "guidelines," that federal judges would follow.<sup>14</sup> On May 1, 1987, the Commission submitted to Congress the Federal Sentencing Guidelines Manual. This manual contained seven chapters that established a formula, based on baseline offenses as well as aggravating and mitigating factors, which a judge should use in calculating a sentencing range. Because Congress did not amend these recommendations, they became effective on November 1, 1987.<sup>15</sup>

<sup>11</sup> Stuart Gilman, Pres., Ethics Resource Ctr., Panel Remarks, *Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines: Plenary Session I*, at 56-57 (Jud. Conf. Ctr., D.C., Nov. 14, 2002) (available at [http://www.ussc.gov/corp/ph11\\_02/plenary1.pdf](http://www.ussc.gov/corp/ph11_02/plenary1.pdf)).

<sup>12</sup> Beverley Earle, *Because It's the Bottom Line: The Need for Corporate Compliance Programs for Small- and Medium-Size Businesses*, 25 Bus. Forum: J. Sch. Bus. & Econ., Cal. St., L.A. 3 (Summer/Fall 2000).

<sup>13</sup> U.S. Senten. Commn., *An Overview of the United States Sentencing Commission 1*, <http://www.ussc.gov/general/USSCoverview.pdf> (accessed Feb. 22, 2008).

<sup>14</sup> The sentencing guidelines established by the Commission are designed to incorporate the purposes of sentencing (*i.e.*, just punishment, deterrence, incapacitation, and rehabilitation); provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors; reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process.

*Id.*

<sup>15</sup> These "guidelines" effectively became "mandates," and judges who sentenced outside the range, especially judges who gave a more lenient sentence than the guidelines called for, could expect an immediate appeal from the prosecutor. These individual guidelines were challenged, and in January



Between 1987 and 1991, the Commission shifted its focus from individuals to organizations. After considerable study, public hearings, and debates, the Commission added the eighth chapter to the Federal Sentencing Guidelines Manual.<sup>16</sup> Chapter 8 employed a “carrot and stick” approach regarding organizational wrongdoing. Companies that developed effective programs designed to prevent and detect violations would be rewarded with significant fine reductions. Organizations that tolerated, condoned, and encouraged bad behavior would face multiples of the original fine.<sup>17</sup>

The Defense Industry Initiative (“DII”), established in 1986, is a group of defense contractors, “who pledged to adopt and implement a set of principles of business ethics and conduct that acknowledge and express their federal-procurement-related corporate responsibilities to the Department of Defense, as well as to the public, the Government, and to each other.”<sup>18</sup> Signatories to the DII were leaders in developing compliance programs. “In the early [1990s] companies in other industries began to seek out the experience gained through the DII. Their primary motive was compliance with the United States Sentencing Guidelines for Organizations, which were promulgated in 1991.”<sup>19</sup>

While the sections regarding individuals created controversy, Chapter 8 of the guidelines was considered a significant achievement by then-Chair of the Commission, Judge Diana E. Murphy:

Some believe that the Federal Sentencing Guidelines for organizations represent a milestone both in federal criminal law and in organizational behavior. Their impact has been wide ranging. They are a real success story for the United States Sentencing Commission in its work to deter crime and encourage compliance with the law. Like any body of law, however, the organizational guidelines may need to be modified as circumstances change. In this tenth anniversary year for these guidelines, practitioners and industry representatives are encouraged to share their thinking about the organizational guidelines and their effect.<sup>20</sup>

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2005, the Supreme Court held that the mandatory nature of the guidelines was unconstitutional. *U.S. v. Booker*, 543 U.S. 220 (2005). The guidelines became just that—guidelines for federal judges.

<sup>16</sup> Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture within Organizations?* 39 Wake Forest L. Rev. 565, 566 (2004).

<sup>17</sup> *Id.*

<sup>18</sup> Def. Indus. Initiative on Bus. Ethics & Conduct, *Statement of DII Purpose and Organization*, <http://www.dii.org/Statement.htm> (Jan. 20, 2004).

<sup>19</sup> Ethics & Compl. Officer Assn., *Business Ethics - Historical Perspective*, <http://www.theecoa.org/AM/Template.cfm?Section=History&Template=/CM/HTMLDisplay.cfm&ContentID=1501> (accessed Feb. 22, 2008).

<sup>20</sup> Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 719 (2002).

In 2002, Judge Murphy and the USSC formalized the call for review by empanelling a fifteen-person Advisory Group to study the existing FSGO and make recommendations for improvements.<sup>21</sup> Over an eighteen-month period, the Advisory Group met regularly, requested public comments, and conducted a public hearing. On October 7, 2003, the Advisory Group presented its findings to the USSC.<sup>22</sup> The Commission made some modifications to this report and sent the revised Chapter 8 guidelines to Congress on May 1, 2004. These changes became effective on November 1, 2004.

## II. ORGANIZATIONAL SIZE

Are small businesses with criminal problems more likely to encounter Chapter 8 than large companies?<sup>23</sup> "The overwhelming majority of organizations ultimately criminally convicted and sentenced in federal court are small, closely-held companies."<sup>24</sup> Throughout Chapter 8's history, the Commission, Congress, and the Advisory Group have wanted the FSGO to be applicable to small business. In a 1995 keynote address, Senator Ted Kennedy stated: "Finally, enforcement authorities must weigh the special issues involved when small businesses are the target of prosecution. We must make sure that mom and pop businesses have an opportunity to develop effective compliance efforts so they, too, can prevent crime and minimize their criminal liability."<sup>25</sup> Senator Kennedy's sentiments were echoed by then-Commission Vice-Chair, John Steer: "These small

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<sup>21</sup> The co-author, Paul Fiorelli, was privileged to serve as a member of the Ad Hoc Advisory Group. For a complete list of the group's members, see U.S. Senten. Commn., *Ad Hoc Advisory Group on Organizational Guidelines*, <http://www.ussc.gov/corp/advgrplst.htm> (accessed Feb. 22, 2008).

<sup>22</sup> To view the entire report, please see U.S. Senten. Commn., *Presentation of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines*, [http://www.ussc.gov/corp/advgrprpt/1007\\_Brief.pdf](http://www.ussc.gov/corp/advgrprpt/1007_Brief.pdf) (Oct. 7, 2003).

<sup>23</sup> There are not many organizational cases prosecuted per year, and in 2003 none of the 200 organizational defendants received credit for an effective compliance program. Professor Paul McGreal opined on that statistic and gave three possible explanations. First, the standard to receive credit for an effective compliance program was so unrealistic that no organization could achieve it. Second, judges automatically held a compliance program to be ineffective if the organization was before the court with a violation of law. Third, and what McGreal believes is the correct answer, companies that had an effective program either reached a settlement with the government, or avoided prosecution altogether.

Paul Fiorelli & Ann Marie Tracey, *Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm*, 32 J. Corp. L. 467, 478 (2007) (citing Paul E. McGreal, Corp. Compl. Prof Blog, *More on the USSC Annual Report*, [http://lawprofessors.typepad.com/compliance\\_prof/2005/week26/index.html](http://lawprofessors.typepad.com/compliance_prof/2005/week26/index.html) (July 1, 2005)).

<sup>24</sup> John R. Steer, *Changing Organizational Behavior – The Federal Sentencing Guidelines Experiment Begins to Bear Fruit* 17, <http://www.ussc.gov/corp/corpbbehavior2.PDF> (accessed Feb. 22, 2008).

<sup>25</sup> Edward Kennedy, Keynote Address, *How the Organizational Guidelines Have Brought Greater Rationality to Federal Enforcement of Corporate Crime* 120 (U.S. Senten. Commn. Second Symposium on Crime & Punishment in the U.S., D.C., Sept. 7, 1995) (available at <http://www.ussc.gov/sympo/wcsympo.pdf>).

businesses are less likely to have become aware of the sentencing guidelines, or to have acted on any awareness they may have gained, by allocating resources to develop a sufficient compliance program.”<sup>26</sup> During the Advisory Group’s review, there was some expressed sentiment that organizations that failed to implement an effective compliance program should receive a sentencing enhancement. The Advisory Group did not recommend this enhancement, however, in part due to the impact it could have on small firms:

In considering this issue, the Advisory Group came to understand that the consequence of an amendment of this nature will most likely have a disproportionate impact upon small companies. Of the 1,089 cases sentenced under the organizational sentencing guidelines between 1991 and 1999, only three organizational defendants qualified for the credit for an effective compliance program. . . . Perhaps, more importantly, the principal reason that the overwhelming majority of convicted organizations do not receive sentencing credit for having an effective program is related to their size. . . . Most commentators concurred that small organizations *should* get credit under the organizational sentencing guidelines for substantial compliance efforts but cannot because of their inability to implement sophisticated compliance programs. While the “carrot and stick” approach offers a balanced approach to the process, many of “carrots” will not apply to the small organization.<sup>27</sup>

Chapter 8 recognizes that larger organizations should have a more formalized program and incorporates that philosophy into the formula for determining the federal fine range. Section 8C2.5 of the FSGO deals with an organization’s “culpability score,” which ultimately has the effect of having the fine increase, decrease, or remain the same. Each convicted organization starts with a score of five.<sup>28</sup> This base score can be increased to a maximum score of ten, or decreased to a minimum score of zero, based on aggravating and mitigating factors.<sup>29</sup> The first aggravating factor is organizational size, coupled with tolerance, or willful ignorance of an offense by high-level or substantial authority personnel (“high-level tolerance”).<sup>30</sup>

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<sup>26</sup> Steer, *supra* n. 24, at 17.

<sup>27</sup> U.S. Senten. Comm., *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines* 131-33, [http://www.ussc.gov/corp/advgrrpt/AG\\_FINAL.pdf](http://www.ussc.gov/corp/advgrrpt/AG_FINAL.pdf) (Oct. 7, 2003) (emphasis in original) [hereinafter *Ad Hoc Advisory Group Rpt.*].

<sup>28</sup> *U.S. Sentencing Guidelines Manual* § 8C2.5(a) (2007) [hereinafter *Sentencing Manual*].

<sup>29</sup> *Id.* at § 8C2.6.

<sup>30</sup> *Id.* at § 8C2.5(b).



The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management’s tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.<sup>31</sup>

Organizations with 5,000 or more employees, who also have high-level tolerance, will add five points to their starting score of five, for a total of ten points (the maximum number of points possible).<sup>32</sup> These additional points will decrease as the size of the organization becomes smaller (e.g., for companies with 1,000 or more employees, add four points; 200 or more employees, add three points; 50 or more employees, add two points; and 10 or more employees, add one point).

Section 8C2.6 of the FGSO uses the culpability score to determine a minimum and maximum “multiplier” that federal judges use in calculating the appropriate fine.

Culpability Score	Minimum Multitplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20

<sup>31</sup> *Id.* at § 8C2.5 cmt. background.

<sup>32</sup> *Id.* at § 8C2.5(b)(1).



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	0.05	0.20

With a culpability score of ten and a maximum multiplier of four, fines for organizations in this category could be 400% of the original penalty. Organizations that have reduced their culpability score to zero may only have to pay 5% of their original fine, which has the mathematic effect of dividing a potential fine by twenty. “Thus, a company with no ethics program may be forced to pay a fine eighty times that paid by another company with an acceptable ethics program, despite similar misconduct. With potential fines . . . possibly exceeding \$290,000,000, the slogan ‘Good Ethics is Good Business’ gains new meaning and importance.”<sup>33</sup>

III. AN EFFECTIVE ETHICS AND COMPLIANCE PROGRAM FOR SMALL BUSINESSES

One way for an organization, large or small, to reduce its guidelines culpability score by up to three points, and therefore pay a smaller fine, is to implement an effective compliance and ethics program.<sup>34</sup> This presents some challenges, however. The problem that both small and large organizations face is a rebuttable presumption that they did not have an effective compliance and ethics program if an individual within high-level personnel “participated in, condoned, or was willfully ignorant of the

<sup>33</sup> Paul E. Fiorelli, *Fine Reductions through Effective Ethics Programs*, 56 Alb. L. Rev. 403, 408 (1992) (citations omitted).

<sup>34</sup> The guidelines identify seven components essential for an effective compliance program. Such a program has standards and procedures designed to prevent and detect criminal conduct, has a high level of oversight and commitment to the program, has measures to prevent those with substantial authority from engaging in illegal behavior, takes reasonable steps to communicate to and train employees about the program, promotes compliance and ethics through incentives and sanctions, and finally, takes appropriate action on misconduct and takes measures to prevent such conduct from occurring in the future. See *Sentencing Manual*, *supra* n. 28, at § 8B2.1.

offense.”<sup>35</sup> The rebuttable presumption is particularly acute in small companies because many of them are relatively “flat” without many layers between the owners and entry-level employees. “First, as you know, most of the cases involving small businesses . . . typically involve somebody from management. It is . . . often the CEO who is also involved. So credit for compliance won't even come into play . . . .”<sup>36</sup>

Small businesses will either have to prove that a member of its high-level personnel was not involved, or if she or he were involved, that it was an isolated incident. One situation where this could occur might have a high-level officer (e.g., VP of Marketing) devising a scheme on her or his own that violates a law (e.g., export control, price fixing, or pollution) for the benefit of the company. If the company detected this scheme through its compliance program (e.g., hotline, internal controls, code of ethics, or training), disciplined the offending executive, reported the incident to the appropriate governmental authority, cooperated with any government investigation, accepted responsibility, and paid restitution, the company should be able to rebut the presumption that the program was ineffective and qualify for significant fine reductions.

Large organizations typically have more resources than small companies to invest in developing a compliance and ethics program, which the amended guidelines recognize. “A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization.”<sup>37</sup> Large companies need more formal structures to get their message out, across the country or the world. Management of a small company is much more visible to everyone in the company:

[P]art of what drives the need for formality is, in a large organization, you have people in command at a central location making decisions on policy and how things are going to run. Then the organization is scattered around the country or the world. So . . . the separation for people making decisions . . . and the people who are actually implementing the business on a day-to-day basis is what drives the need for formality. In a small company, the CEO . . . can walk the floor, . . . talk to people, . . . hold meetings with the direct reports, and pretty quickly cover the entire

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<sup>35</sup> *Id.* at § 8C2.5(b)(1)(A)(i) (dealing with organizations with 5,000 or more employees). This same provision is included in the sections dealing with organizations or units with 1,000 or more employees, 200 or more employees, 50 or more employees, or 10 or more employees. *Id.*

<sup>36</sup> Winthrop M. Swenson, Member of the Ad Hoc Advisory Group, Remarks, *Presentation of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines* 57-58 (Jud. Conf. Ctr., D.C., Oct. 7, 2003) (available at [http://www.ussc.gov/corp/advgrprpt/1007\\_Brief.pdf](http://www.ussc.gov/corp/advgrprpt/1007_Brief.pdf)).

<sup>37</sup> *Sentencing Manual*, *supra* n. 28, at § 8B2.1 cmt. 2(C)(ii).

organization and accomplish the things that need to be accomplished . . . .<sup>38</sup>

The FSGO encourages large organizations to assist small companies in developing their programs. “As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.”<sup>39</sup> Lockheed Martin, a major defense contractor, demonstrated its willingness to help small businesses in a letter from its CEO, Robert J. Stevens, to Lockheed Martin’s suppliers:

Dear Supplier:

At Lockheed Martin, we value your business and your trust. As a supplier, you're an integral part of our Mission Success team. We are committed to fair competition and the sense of responsibility required of a good customer and teammate.

Lockheed Martin aims to “set the standard” for ethical business conduct. We have established a comprehensive set of guidelines on business conduct. The following is an overview of some of the guidelines that pertain to our working relationship with you. You can count on us to do everything in our power to meet our standards of business conduct. We are counting on you to do the same. Upon request, Lockheed Martin will make its Ethics awareness training materials available to your company.

Should you have any questions or wish to use our training materials, please do not hesitate to call us at 1-800-LM-ETHIC (1-800-563-8442).

Sincerely,

Robert J. Stevens, Chairman, President and Chief Executive Officer<sup>40</sup>

Steve Priest, President of the Ethical Leadership Group, had a similar experience with one of his clients. “[W]e’ve had wonderful experience with a client . . . and they have spent a lot of time and a lot of money nurturing the supply chain trying to communicate the sentencing

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<sup>38</sup> Swenson, *supra* n. 36, at 58-59.

<sup>39</sup> *Sentencing Manual*, *supra* n. 28, at § 8B2.1 cmt. 2(C)(ii).

<sup>40</sup> Ltr. from Robert J. Stevens, Chairman, Pres., & CEO, Lockheed Martin, to Suppliers, *Partners in Setting the Standard: Ethics and Business Conduct Guidelines for Suppliers* (updated Oct. 2007) (available at [http://www.lockheedmartin.com/data/assets/corporate/documents/Partners\\_in\\_Setting\\_the\\_Standard.pdf](http://www.lockheedmartin.com/data/assets/corporate/documents/Partners_in_Setting_the_Standard.pdf)).



guidelines to them.”<sup>41</sup> Mr. Priest was praising the efforts of Honda of America Manufacturing, Inc. (“Honda of America”). Honda of America has been conducting workshops with its suppliers for years, emphasizing the importance of the FSGO. According to Mike Marrero, from Honda of America’s Corporate Compliance and Ethics Office:

Honda of America does not try to force their program onto suppliers. Rather, they create value by making the business case. An annual Corporate Citizenship Award is given to a supplier, a component of which is having an effective compliance and ethics program. Honda of America makes its code of ethics and related training materials available to the suppliers, as a starting point, which can be altered to suit the needs of the supplier based on size, risks and culture. The corporate compliance and ethics phone line is also available to suppliers to discuss any concerns they may have related to Honda of America’s business. These programs need not be expensive, especially when a large organization is willing to help their suppliers succeed. Even small organizations have policies and procedures and Honda of America encourages the suppliers to consolidate the policies and procedures into a code of conduct, train their employees on the code and in essence ‘cause a pause’ among associates when the right course of action is not immediately evident.<sup>42</sup>

Lockheed Martin and Honda of America’s work with their suppliers is a model of how large organizations can help small companies create an effective compliance and ethics program.

#### *A. High-Level Oversight*

The U.S. Sentencing Guidelines Manual requires a company to commit to compliance and ethics programs in the form of program oversight by high-level personnel within the organization.<sup>43</sup> A compliance and ethics initiative typically requires some type of champion or “ethics task force” to oversee its design and implementation. While many large organizations have a person or a group of people dedicated to ethics and compliance,

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<sup>41</sup> Steven Priest, Pres., Ethical Leadership Group, Panel Remarks, *Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines: Plenary Session I*, at 10 (Jud. Conf. Ctr., D.C., Nov. 14, 2002) (available at [http://www.ussc.gov/corp/ph11\\_02/plenary1.pdf](http://www.ussc.gov/corp/ph11_02/plenary1.pdf)).

<sup>42</sup> Telephone Interview with Mike Marrero, Corp. Compl. & Ethics Off., Honda of Am. (Jan. 9, 2008) (copy on file with authors).

<sup>43</sup> *Sentencing Manual*, *supra* n. 28, at § 8B2.1(b)(2)(B) (“High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.”).



small organizations will normally not be able to afford this. It is more likely that several employees with other responsibilities will add the ethics task force, or ethics initiatives, to their duties.

### *B. Company Values*

One of the first things an ethics task force should do before it develops a compliance or ethics program is to determine the organization's values.

Your company values will be the foundation of your ethics and business conduct program. The best way to determine your values is to talk with your company's leadership and employees. Some companies find it most effective to conduct focus groups, while others have used written questionnaires or asked employees for suggestions.<sup>44</sup>

This sentiment was repeated during the Advisory Group's public hearing: "[A] company that's really excellent has a set of values, and those values have typically involved doing the right thing, being a good citizen. . . . Legal compliance is . . . a subset."<sup>45</sup> Companies can determine their values by asking questions—e.g., "What do we stand for? What is most important to us? How do we want to be perceived? What was the philosophy of the founders/owners of our company? Who are the stakeholders of our company and what is important to them?"<sup>46</sup>

Small businesses are well-situated to pursue these questions. Unlike a large company, a "small firm is likely to be owner-managed,"<sup>47</sup> with a management that does not have to answer to shareholders.<sup>48</sup> For good or bad, "the most direct influence is the ethical stance of those in power within the organization and the industry within which one is operating."<sup>49</sup> Consequently, small business owner-managers are in a unique position to have a profound influence on their companies' values and ethics policies.

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<sup>44</sup> Def. Indus. Initiative on Bus. Ethics & Conduct, *Creating and Maintaining an Effective Ethics and Business Conduct Program 2*, <http://www.dii.org/toolkit/DII-Toolkit.pdf> (accessed Feb. 24, 2008) [hereinafter Def. Indus. Initiative].

<sup>45</sup> Lynn Sharp Paine, John G. McClean Prof. Bus. Administration, Harv. Bus. Sch., Panel Remarks, *Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines: Plenary Session I*, at 115-16 (Jud. Conf. Ctr., D.C., Nov. 14, 2002) (available at [http://www.uscc.gov/corp/ph11\\_02/plenary1.pdf](http://www.uscc.gov/corp/ph11_02/plenary1.pdf)).

<sup>46</sup> Def. Indus. Initiative, *supra* n. 44, at 2.

<sup>47</sup> Laura J. Spence & Robert Rutherford, *Small Business and Empirical Perspectives in Business Ethics: Editorial*, 47 J. Bus. Ethics 1 (2003).

<sup>48</sup> M. Lahdesmaki, *When Ethics Matters – Interpreting the Ethical Discourse of Small Nature-Based Entrepreneurs*, 61 J. Bus. Ethics 55, 56 (2005).

<sup>49</sup> Scott J. Vitell et al., *Ethical Problems, Conflicts and Beliefs of Small Business Professionals*, 28 J. Bus. Ethics 15, 19 (2000). This ethical stance can directly contribute to unethical behavior. Other factors that come into play include the societal and industry climates and the behavior of peers and supervisors. *Id.* at 19 tbl. V.

### C. Risk Assessment

Once an organization determines its values, the ethics task force should conduct a risk assessment to evaluate areas of exposure.

Building upon a foundation of ethics, many companies choose to include certain areas of compliance training and awareness in their ethics and business conduct programs. First, your company should conduct a comprehensive risk assessment by looking closely at your particular business to determine areas of business and legal risk. Identified risk areas may call for training for all employees or for select groups of employees in specific risk areas.<sup>50</sup>

Because small companies have greater difficulty in competing, the unethical conduct is more likely to occur in the area of sales and recruitment.<sup>51</sup> The types of scenarios in which these problems arise most often involve gift-giving and kickbacks.<sup>52</sup> Other trouble spots include dishonesty regarding contracts and employee actions such as firing, demotions, pay raises, and layoffs.<sup>53</sup> Owner-managers also encounter challenges with respect to pricing, marketing, collaborating with similarly situated entrepreneurs, and procurement matters.<sup>54</sup> It is important that organizations identify their specific risk areas and then develop a plan for minimizing them. For instance, companies that have no international sales do not need to be terribly concerned about the Foreign Corrupt Practices Act. Organizations that give sales people pricing authority should develop policies, conduct training, perform audits, and monitor potential price-fixing violations. Risk assessments need not be formal but may occur as conversations between managers and employees about their legal, regulatory, and economic vulnerabilities.

### D. Written Policies and Codes

The next step for a small firm is to develop a written policy, signed by the company's top official, and a written code of business ethics and conduct.<sup>55</sup> William Laufer, a professor at the Wharton School of the University of Pennsylvania, presented to the USSC some unexpected results regarding the percentage of small businesses adopting codes of ethics:

First, we thought that only a small percentage of firms surveyed would have clearly articulated and/or codified

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<sup>50</sup> Def. Indus. Initiative, *supra* n. 44, at 3.

<sup>51</sup> Vitell et al., *supra* n. 49, at 18. However, small business entrepreneurs in one study did not view this as a problem with respect to ethics. Lahdesmaki, *supra* n. 48, at 64.

<sup>52</sup> Vitell et al., *supra* n. 49, at 18.

<sup>53</sup> *Id.*

<sup>54</sup> Lahdesmaki, *supra* n. 48, at 60.

<sup>55</sup> Def. Indus. Initiative, *supra* n. 44, at 4.

standards of conduct and we also hypothesized that only a small percentage of firms surveyed would have designated a person and/or committee with oversight responsibility. . . . Seventy-five percent of survey respondents acknowledge having standards of conduct with oversight by high-level personnel. . . . Small firms use a combination of written codes, legal memoranda, posters, and personnel meetings to communicate standards of conduct. . . . It is worth noting here that we were generally surprised to see such a high percentage of small firms with identifiable standards of conduct and compliance procedures. The data support the view that in spite of the conventional academic wisdom that small businesses are informal customer-oriented organizations, most small firms have codes, programs, and compliance procedures that in many respects resemble their larger counterparts.<sup>56</sup>

The content of the ethics code matters. In order to have a work environment that is both practical and ethical, “[s]mall business owners may also need to spend time developing benchmarks or guidelines concerning ethical behaviors of employees. While these guidelines can not be expected to cover every possible scenario, they will still help address the business development/profit motive dimension identified in this study.”<sup>57</sup> These policies should be memorialized and represent the firm’s position. Common issues addressed in a code of business conduct and ethics include: conflicts of interest, discrimination and harassment, privacy, gift-giving and bribes, and competitive information gathering.<sup>58</sup>

The need for a written code of business conduct and ethics has become even more important in light of a requirement that became effective on December 24, 2007. This mandate covers any company engaged in new government contracts that are expected to exceed \$5 million and have a performance period of 120 days or more.<sup>59</sup>

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<sup>56</sup> William S. Laufer, Prof., Wharton Sch. U. of Pa., Remarks, *Presentation of the Preliminary Results of a Study of Small Business Compliance Practices* 129-31 (U.S. Senten. Commn. Second Symposium on Crime & Punishment in the U.S., D.C., Sept. 7, 1995) (available at <http://www.ussc.gov/sympo/wcsympo.pdf>).

<sup>57</sup> Jeff Hornsby et al., *The Ethical Perceptions of Small Business Owners: A Factor Analytic Study*, 32 J. Small Bus. Mgt. 9, 14 (1994).

<sup>58</sup> Small businesses are well-advised to incorporate the Federal Sentencing Guidelines approach with respect to an ethics code. According to the 2007 NBES Survey, only about 25% of companies have an ethics and compliance program that is well-implemented. Ethics Resource Ctr., *supra* n. 2, at 19. This is tested by how willing employees are to seek ethics advice, how well prepared they feel to handle problem conduct scenarios, whether the business rewards ethical behavior and not questionable actions, and finally, positive attitudes toward the business. Consequently, small businesses are confronting a two-pronged challenge in this regard—adopting ethics codes that support reporting misconduct and ensuring they are designed to accomplish the desired end.

<sup>59</sup> 72 Fed. Reg. at 7588.



### E. Background Checks

The FSGO requires a company to screen out problem personnel. It provides: “The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.”<sup>60</sup> This means that companies, small and large, need to use their best efforts to determine whether prospective or current employees in substantial authority positions,<sup>61</sup> had problems in their past that would indicate a potential for violations in the future. Documenting one’s efforts is critical, but obtaining this information may be easier said than done:

First, given the current state of employment laws, the potential for defamation suits, and a genuine concern for workers’ privacy, it may be difficult to obtain relevant information about prospective employees. Previous employers are often unwilling to give hiring employers much more than the ex-employee’s dates of employment. Even if this meager response represents the sum result of its inquiry, hiring employers should always document whatever information they receive about the employee. Failing to conduct an adequate background check could give rise to a claim of negligent hiring; documentation will assist employers in defending against such actions.<sup>62</sup>

### F. Training

Companies like LRN,<sup>63</sup> Corpedia,<sup>64</sup> Global Compliance,<sup>65</sup> Working Values,<sup>66</sup> and Integrity Interactive<sup>67</sup> have developed compliance and ethics training packages for many organizations. While these companies and others may provide excellent service to their clients, training is not “one size fits all.” The Advisory Group recognized that the requirement for training would impact small organizations:

<sup>60</sup> *Sentencing Manual*, *supra* n. 2831, at § 8B2.1(b)(3).

<sup>61</sup> *Id.* at § 8A1.2 cmt. 3(c) (“Substantial authority personnel” [of the organization] means individuals” who have substantial control over the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.).

<sup>62</sup> Fiorelli, *supra* n. 33, at 421.

<sup>63</sup> LRN Corp., <http://www.lrn.com/> (accessed Feb. 12, 2008).

<sup>64</sup> Corpedia, Inc., <http://welcome.corpedia.com/> (accessed Feb. 24, 2008).

<sup>65</sup> Global Compliance, <http://www.globalcompliance.com/index.html> (accessed Feb. 24, 2008).

<sup>66</sup> Working Values, <http://www.workingvalues.com/> (accessed Feb. 24, 2008).

<sup>67</sup> Integrity Interactive Corp., <http://www.integrity-interactive.com/> (accessed Feb. 24, 2008).



Training does not need to be either formal or expensive in order to be effective. United States Attorney Debra Yang (C.D. Ca.) addressed this concept during the Advisory Group's public hearing, stating that "[w]hen you are a very small company, training could begin by just somebody starting that process during orientation."<sup>68</sup>

Delivering this type of effective message early in the employee's tenure at an organization is essential.<sup>69</sup>

### *G. Monitoring, Auditing, and Reporting*

Once a compliance or ethics program has been developed, can organizations put them "in a drawer" and forget about them? Not if they want to receive credit for being an effective compliance and ethics program. Under the FSGO, a company must have more than just a "paper program":

I think you have three shades of the spectrum. You have the small business that has not put in any kind of written plan, much less any implementation of a written plan. That's a significant percentage. . . . Then you have another significant percentage that has put in a written plan in the drawer, that hasn't followed up on it . . . . There are really very few small businesses in my experience, and by this I mean fewer than 50 people, that engage in auditing practices or have [an] ombudsman or have a hot line . . . .<sup>70</sup>

Chapter 8 requires an organization to take reasonable steps to ensure that its compliance and ethics program is followed. This is accomplished by: (1) monitoring and auditing compliance with the company's rules, regulations and requirements; (2) periodically assessing the effectiveness of the program; and (3) establishing an anonymous or confidential reporting system.<sup>71</sup> The Advisory Group noted that auditing and monitoring might depend on the size of the organization:

In small organizations, periodic evaluations of compliance in the course of day-to-day business operating practices will often be adequate monitoring steps so that further auditing or evaluations will not be needed. In larger organizations,

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<sup>68</sup> *Ad Hoc Advisory Group Rpt.*, *supra* n. 27, at 71 (quoting Debra Yang, U.S. Atty., Panel Remarks, *Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines: Breakout Session II*, at 58 (Jud. Conf. Ctr., D.C., Nov. 14, 2002) (available at [http://www.ussc.gov/corp/ph11\\_02/BRKOUT2.pdf](http://www.ussc.gov/corp/ph11_02/BRKOUT2.pdf))).

<sup>69</sup> Vitell et al., *supra* n. 49, at 22.

<sup>70</sup> Jamie Cowdery, Partner, Cowdery, Ecker & Murphy, LLC, Panel Remarks, *Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines: Plenary Session I*, at 36-37 (Jud. Conf. Ctr., D.C., Nov. 14, 2002) (available at [http://www.ussc.gov/corp/ph11\\_02/plenary1.pdf](http://www.ussc.gov/corp/ph11_02/plenary1.pdf)).

<sup>71</sup> *Sentencing Manual*, *supra* n. 28, at § 8B2.1(b)(5)(A)-(C).

however, separate audits of compliance performance will usually be warranted, with such audits being conducted by internal or external parties who are independent of the managers overseeing the performance under scrutiny.<sup>72</sup>

In addition to monitoring and auditing the practices, the revised guidelines call for a periodic review of the compliance and ethics program. Small organizations may be able to accomplish this type of assessment with surveys or focus groups.<sup>73</sup>

An effective compliance and ethics program also needs a procedure for reporting potential problems. While comprehensive ethics and compliance programs can significantly increase the likelihood of employees reporting misconduct,<sup>74</sup> even well-structured protocols can prove to be problematic. Skeptical about reporting misconduct through an official channel like a hotline, employees prefer to bring the problem to the attention of a person they trust, usually someone in supervision or management.<sup>75</sup> Sometimes the traditional reporting mechanism (e.g., discussing the problem with your supervisor) is inappropriate, especially if the supervisor is the cause of the problem, or if she or he is ignoring your concerns. In these cases, companies need another way for employees to report potential problems. Many large companies outsource this function to an online reporting hotline,<sup>76</sup> but small organizations might handle the information “in-house” with a simple P.O. Box or confidential drop box.<sup>77</sup>

#### H. Consistent Enforcement

The FSGO requires that companies be even-handed in applying their policies throughout the organization. Just as Chapters 1-7 of the Federal Sentencing Guidelines for individuals were designed to promote consistent sentencing amongst judicial circuits, the FSGO requires consistent discipline for violations inside an organization. This means that similar violations within different units of the organization should be treated the same. It also means that different “performers” should be treated the same for similar violations. For instance, two employees may submit

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<sup>72</sup> *Ad Hoc Advisory Group Rpt.*, *supra* n. 27, at 77.

<sup>73</sup> *Def. Indus. Initiative*, *supra* n. 44, at 10.

<sup>74</sup> *Ethics Resource Ctr.*, *supra* n. 2, at 12.

<sup>75</sup> Fear of retaliation remains a significant obstacle to “blowing the whistle” on observed misdeeds. *Id.* at 6.

<sup>76</sup> For examples of companies with outsourced whistleblowing hotlines, see e.g., Global Compliance, *AlertLine Allegation Reporting*, <http://www.globalcompliance.com/alertline-allegation-reporting.html?gclid=CJn8gdyH8ZACFQMsFQodzSSm0Q> (accessed Feb. 24, 2008); EthicsPoint, *Employee Hotline and Issue Awareness*, <http://www.info.ethicspoint.com/solutions/hotline/> (accessed Mar. 16, 2008); or Syrus Global, *Ethics Employee Reporting, Helpline, and Case Management Solutions*, [http://www.syrusglobal.com/sg/pub/ethics\\_reporting/concom.aspx](http://www.syrusglobal.com/sg/pub/ethics_reporting/concom.aspx) (accessed Feb. 24, 2008).

<sup>77</sup> *Ethical Leadership Group for Honda of Am.*, *Federal Sentencing Guidelines for Organizations: Best Practices 4* (unpublished doc., Mar. 12, 2007) (copy on file with the University of Dayton Law Review).

reimbursement requests that were inflated by \$500. If “superstars” receive a mild sanction for a violation (e.g., scolding or a slap on the wrist) and the average employees are fired, employees will not be motivated to follow the rules. Instead they will attempt to join the privileged class that can ignore the rules.

This section of Chapter 8 also calls for an organization to promote its compliance programs by using appropriate incentives to reward good behavior<sup>78</sup> and discipline those who engage in improper behavior or who allow others to engage in improper behavior.<sup>79</sup> Organizations understood the concept of disciplining bad behavior, or disciplining those who negligently allowed the bad behavior to occur, but they found the provision rewarding good behavior a bit more difficult to apply. The Advisory Group addressed the concept of rewarding good behavior when it

concluded that few changes are needed to the provisions on accountability, in general, [and] it concluded that language should be added to promote compliance standards through positive incentives as well as through disciplinary mechanisms. A culture of compliance can be promoted where organizational actors are judged by, and rewarded for, their positive compliance performance. Accordingly, the Advisory Group proposes the addition of language indicating that compliance standards should be promoted through incentives as well as enforced through disciplinary measures, giving both a “carrot and stick” to this component of the guidelines.<sup>80</sup>

### *I. Internal Controls*

Section 404 of Sarbanes-Oxley stresses the importance of internal controls in publicly traded companies.<sup>81</sup> Management and the board need such measures to be in place to detect and prevent problems and scandals like those that prompted Sarbanes-Oxley’s passage. Internal controls are also critical in a small company and are an important part of a compliance or ethics program.<sup>82</sup> One of the classic internal controls is a “segregation of

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<sup>78</sup> *Sentencing Manual*, *supra* n. 2831, at § 8B2.1(b)(6)(A).

<sup>79</sup> *Id.* at § 8B2.1(b)(6)(B).

<sup>80</sup> *Ad Hoc Advisory Group Rpt.*, *supra* n. 27, at 86.

<sup>81</sup> Clyde Stoltenberg et al., *A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the U.S. and European Union: The Impact of Tensions Created by Extraterritorial Application of Section 404*, at 53 *Am. J. Comp. L.* 457, 458 (2005). “Section 404, the object of very pointed criticism, requires management, supported by the Board of Directors, to provide reasonable assurances regarding the reliability of internal control over financial reporting and all relevant systems.” *Id.*

<sup>82</sup> *Sentencing Manual*, *supra* n. 28, at § 8B2.1 cmt. 1. “‘Standards and procedures’ means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.” *Id.*



duties” within companies.<sup>83</sup> For instance, the person who sends out the company’s invoices should not be the same person opening letters and posting the payments to the accounts. When a person controls both sides of this type of activity (billing and posting payments), she or he has unchecked power to self-deal, such as by inflating an invoice, placing the correct amount in the accounts, and siphoning off the excess.

The final requirement of “promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law”<sup>84</sup> is for the company to take reasonable steps to ensure that the violation does not happen again.<sup>85</sup> If the organization did not have internal controls in place to detect and prevent this type of violation, it should analyze the problem and adopt appropriate measures. If the firm had internal controls designed to prevent the instant offense, it should evaluate why they failed. For instance, it should examine whether the controls need to be revised, or whether any controls could have prevented the offense.

Organizations can either take the initiative of developing compliance and ethics programs on their own, or have the government impose one on them. Organizations, with fifty or more employees, convicted of violating a federal statute, will be required to develop and implement an effective compliance and ethics program as a condition of their probation.<sup>86</sup> “Instead of waiting for a compliance program to be imposed on them as a condition of probation, organizations should be proactive and implement these programs in order to reduce fines, avoid probation, and possibly even avoid prosecution.”<sup>87</sup>

#### IV. CONCLUSION

The widespread demands inherent in running a small business complicate the life of the entrepreneur. Unlike the CEO of a publicly traded company, an owner-manager wears many hats, leaving little opportunity to ponder profound ethical thoughts.<sup>88</sup> Rather than a nuisance, sound ethical

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<sup>83</sup> Comm. of Sponsoring Orgs. of the Treadway Commn., *Internal Control – Integrated Framework: Executive Summary*, “Control Activities,” [http://www.coso.org/publications/executive\\_summary\\_integrated\\_framework.htm](http://www.coso.org/publications/executive_summary_integrated_framework.htm) (accessed Feb. 24, 2008).

Control activities are the policies and procedures that help ensure management directives are carried out. They help ensure that necessary actions are taken to address risks to achievement of the entity’s objectives. Control activities occur throughout the organization, at all levels and in all functions. They include a range of activities as diverse as approvals, authorizations, verifications, reconciliations, reviews of operating performance, security of assets and segregation of duties.

*Id.*

<sup>84</sup> *Sentencing Manual*, *supra* n. 28, at § 8B2.1(b).

<sup>85</sup> *Id.* at § 8B2.1(b)(7).

<sup>86</sup> *Id.* at § 8D1.1(a).

<sup>87</sup> Fiorelli & Tracey, *supra* n. 23, at 477-78 (citation omitted).

<sup>88</sup> Lahdesmaki, *supra* n. 48, at 56.



practices are an important, common-sense business calling card that entrepreneurs purposely can employ and use to benefit their organization.<sup>89</sup>

A strong ethical culture yields high returns for U.S. companies—when present, misconduct may drop by as much as 75%. Yet fewer than *one in ten* companies today has a strong ethical culture in place.<sup>90</sup> “If U.S. businesses viewed ethics as building reputational capital—protecting corporate brand and preventing misconduct—ethics risk in the U.S. would be substantially reduced.”<sup>91</sup> In addition to reduced infractions, strong codes can simplify life for the owner-manager: “[B]y creating a comprehensive and definitive ethics position or stance, most micro, operational or tactical decisions having potential ethical content, could be simplified.”<sup>92</sup>

Finally, owner-managers are mistaken in any belief that “compliance” and “ethics” are luxuries they must forego in the face of their day-to-day responsibilities. The following question was posed to Mr. John Pepper, former Chairman of Procter & Gamble: “Is ethics reserved to large organizations that can afford to be ethical, as opposed to small mom and pop companies that are just struggling on a day by day basis to get by?” His response was: “I think of the small businesses that have grown to be big businesses are very value based. . . . I think that often is the reason they get big.”<sup>93</sup> Using compliance and ethics as a competitive advantage in growing a small company into a large one certainly is a valuable value.

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<sup>89</sup> *Id.* at 67.

<sup>90</sup> Ethics Resource Ctr., *supra* n. 2, at 9 (“Only nine percent of companies in the U.S. today have strong ethical cultures.”).

<sup>91</sup> *Id.* at 25.

<sup>92</sup> Vitell et al., *supra* n. 49, at 23.

<sup>93</sup> John Pepper, Former Chairman, Procter & Gamble, Speech, *Heroes of Professional Ethics Lecture Series* (Xavier U., Cincinnati, Ohio, Feb. 1, 2006) (copy on file with the authors). For more information about this lecture series, please visit <http://www.heroesofethics.com/speakers.html>.