

AUTO INDUSTRY COMPLIANCE: WILL THE TONE AT THE TOP GO TONE DEAF IN THE WAKE OF DEREGULATION?

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INTRODUCTION

Over the past decade, corporate executives have focused attention on building robust compliance programs that both deter wrongdoing and enhance reputation. The automotive industry has been particularly focused on compliance, following its heavily publicized compliance breaches, especially over the past decade. First, there were the recall debacles by the Original Equipment Manufacturers (“OEMs”).¹ The recalls involving General Motors Company (“GM”), Toyota Motor Corporation (“Toyota”), Takata Corporation (“Takata”) and Volkswagen Group (“VW”) were notable, not just “because of the safety issues that impacted consumers,”² but rather because these companies covered up those safety issues for years, which ultimately led to significant fines from the Department of Justice (“DOJ”).³ Next came the automotive suppliers’ compliance breaches where, between 2012 and 2017, the DOJ’s Antitrust Division (“DOJ-AD”) reached deals with or prosecuted over forty-eight corporate automotive supplier defendants and sixty-five individuals as part of a global price fixing investigation.⁴ The DOJ has collected more than \$2.9 billion in criminal fines against such defendants,⁵ many of who are still involved in multi-district civil litigation in the Eastern District of Michigan. To date, the defendants’

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¹ STOUT RISIUS ROSS, INC., ROAD MAP FOR A NEW ERA, AUTOMOTIVE WARRANTY & RECALL REPORT 4 (2015), https://www.autosafety.org/sites/default/files/imce_staff_uploads/RECALLS.STOUT_.RISIUS.2015AutomotiveWarrantyRecallReport.pdf.

² *The 5 Deadliest Defects in History*, AUTOINSURANCE.ORG (2018), <https://www.autoinsurance.org/5-deadliest-vehicle-defects/>.

³ STOUT RISIUS ROSS, INC., *supra* n.1, at 5.

⁴ MORGAN, LEWIS & BOCKIUS LLP, 2017 MID-YEAR GLOBAL CARTEL ENFORCEMENT REPORT 27 (2017), <https://www.morganlewis.com/documents/m/documents/cartel/2017-mid-year-cartel-report-july2017.pdf>.

⁵ *Id.*

settlements exceed \$1 billion.⁶ The civil litigation has nearly 2,000 pleadings and counting.⁷

Under Chapter 8 of the Federal Sentencing Guidelines for Organizations (“FSGO”), companies may seek reduced criminal penalties by maintaining an effective compliance and ethics program.⁸ The policy behind the FSGO is to incentivize corporate whistleblowing, with the promise of amnesty or reduction in criminal fines and penalties.⁹ The strategy on its face works, as the DOJ has steadily increased its cases filed, pleas secured, and fines collected.¹⁰ The ante was upped in 2015 following the publication of United States Deputy Attorney General Sally Yates’ “Individual Accountability for Corporate Wrongdoing” memorandum (commonly known and hereinafter referred to as the “Yates Memo” or “Memo”), which required organizations to fully disclose all known information about individual wrongdoing prior to receiving credit for cooperation as part of a plea deal.¹¹

With the hammer swiftly coming down on the OEMs and automotive suppliers, it would make sense that the pressure to stay “compliant” would be greater than ever. The pace, volume, and severity of enforcement has continued to grow.¹² However, one might argue that the FSGO was not enough of an incentive in the automotive cases given the billions of dollars collected in fines. Further, there are headwinds now facing compliance and ethics program enforcement such as President Trump’s deregulation platform, decreased enforcement numbers of compliance violations, and the

⁶ Leah Radtke, *Settlements in Landmark Auto Parts Litigation Surpass \$1 Billion*, BUS. WIRE (Feb. 28, 2018, 3:35 PM), <https://www.businesswire.com/news/home/20180228006422/en/Settlements-Landmark-Auto-Parts-Litigation-Surpass-1>.

⁷ Marianne Battani, *Automotive Parts Antitrust Litigation (2:12-md-02311)*, CT. LISTENER (Sept. 10, 2018, 4:19 PM), https://www.courtlistener.com/docket/4291958/automotive-wire-harness-systems-antitrust-litigation/?filed_after=&filed_before=&entry_gte=&entry_lte=&order_by=desc.

⁸ See generally U.S. SENTENCING GUIDELINES MANUAL ch. 8 (U.S. SENTENCING COMM’N 2018).

⁹ *Frequently Asked Questions about the Antitrust Division’s Leniency Program and Model Leniency Letters*, U.S. DEP’T OF JUSTICE, 6-7 (last updated Jan. 26, 2017), <https://www.justice.gov/atr/page/file/926521/download>.

¹⁰ *Criminal Enforcement Trends Chart*, U.S. DEP’T OF JUSTICE figs.1-4 (last updated Jan. 28, 2019), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

¹¹ Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice to All U.S. Att’ys et al., *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) [hereinafter Yates Memo] (on file with author).

¹² U.S. DEP’T OF JUSTICE, *supra* n.10.

murky emerging data privacy issues in the European Union (“EU”) and in the United States (“US”) with the Global Data Privacy Regulation (“GDPR”) and its California equivalent, respectively.¹³ Is the investment in a robust compliance and ethics program still worth it? The answer is a resounding “yes”: the investment in compliance is necessary and the need for resources to meet the pace of change will continue to grow; the “Tone at the Top” needs to remain the focus of such investment and should continue to reinforce the importance of compliance. In Part I, we will discuss the key themes that emerged from the last decade of enforcement relative to the automotive industry, the effects of the change of administration and the trends on the horizon. In Part II we will outline steps that organizations can take to maintain a culture driven by the “Tone at the Top” and ways make their compliance and ethics programs more effective.

PART I – HOW DID WE GET HERE?

The Sentencing Reform Act of 1984 (“SRA”) provided a structure for the sentencing of organizations—that structure was finally enacted in 1991 with the FSGO.¹⁴ The rationale was simple:

Current law . . . rarely distinguishes between individuals and organizations for sentencing purposes. Thus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterizes offenses typically perpetrated by organizations.¹⁵

Broadly speaking, the FSGO, also referred to as “Chapter Eight,” provides a foundation for organizations to self-police through incentives for amnesty and/or cooperation credit for those who voluntarily disclose their wrongdoing and who have effective compliance and ethics programs. In particular, an organization must satisfy two criteria in order to warrant favorable consideration under the FSGO:

¹³ See Cal. Civ. Code § 1798.120 (Deering 2018) (enacting the California Consumer Privacy Act of 2018 on June 28, 2018); see also *GDPR Key Changes*, EU GDPR (Sept. 10, 2018), <https://eugdpr.org/the-regulation/> (stating that the EU’s Global GDPR took effect on May 25, 2018).

¹⁴ PAULA DESIO, U.S. SENTENCING COMM’N, AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES, <https://www.uscc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf>.

¹⁵ S. REP. NO. 98–225, at 66–67 (1984).

1. Exercise due diligence in fulfilling the seven minimum requirements at §8B2.1(b)(2);¹⁶ and
2. Promote ethical conduct and an organizational culture that encourages a commitment to and compliance with the law.

In September 2015, another critical piece for organizational sentencing came into play when then United States Deputy Attorney General Sally Yates enumerated a six-factor test for evaluating the level of cooperation credit that organizations can obtain as part of their plea deals in the Yates Memo. The Memo makes cooperation credit dependent upon corporations providing full information about individual wrongdoers.¹⁷

Against the backdrop of the “carrot and stick” approach to sentencing was the criminal charging of the major automotive OEMs for fraud under the DOJ’s jurisdiction. While the DOJ has brought a number of actions against the OEMs and the suppliers, some are notable for the size of the fines and the basis of the actions. For example, the DOJ levied a \$1.2 billion fine against Toyota in connection with the recall of vehicles for unintended acceleration.¹⁸

¹⁶ See U.S SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM’N 2018) (stating the seven minimum requirements include (1) creating a compliance program that is “generally effective in preventing and detecting criminal conduct”; (2) possessing sufficient oversight and an ethical “organizational culture”; (3) withholding oversight roles from those known or should have been known to engage in unethical activities; (4) facilitating sufficient communication of ethical standards and procedures; (5) monitoring, auditing, and periodically evaluating the compliance program; (6) promoting and consistently enforcing the compliance program through appropriate incentives and discipline; (7) taking reasonable steps to respond to criminal conduct, which includes making any necessary modifications to the program).

¹⁷ Yates, *supra* n.11, at 2-3. “The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.”

¹⁸ Press Release, Dep’t of Justice, Justice Department Announces Criminal Charge Against Toyota Motor Corporation and Deferred Prosecution Agreement with \$1.2 Billion

The matter included a number of conditions, such as placing an independent monitor at Toyota, and deferred prosecution if these conditions were met.¹⁹ Not only was this fine the largest of its kind to date, it was also far in excess of the fine permitted under the regulatory structure enacted under the authority of the National Highway Transportation Safety Act (“NHTSA”), where the maximum penalty was \$35 million at the time.²⁰ To work around the NHTSA’s maximum fine, the basis for the DOJ’s charge was “wire fraud” based on Toyota’s concealment of its prior knowledge of the issue, rather than breach of the NHTSA.²¹

A similar story of deception emerged regarding GM and its ignition switch defect, the knowledge of which spanned over a decade inside GM’s hallways.²² Under its Deferred Prosecution Agreement with the DOJ, GM was required to forfeit \$900 million; additionally, it set up a victim fund to compensate those who were injured or who died as a result of the defect, which paid out nearly \$600 million.²³ Again, much of this corporate damage was self-imposed as a result of GM’s failure to address the defect at its inception—GM’s criminal charges stemmed from its concealment and wire fraud, as with Toyota and other major automotive players.²⁴ Thus, in these cases, corporate financial harm did not stem from design or manufacturing errors, but rather from the damage originated from their employees falsifying, concealing and covering up those issues.

Financial Penalty (Mar. 9, 2014), <https://www.justice.gov/opa/pr/justice-department-announces-criminal-charge-against-toyota-motor-corporation-and-deferred>.

¹⁹ *Id.*

²⁰ 49 U.S.C. § 30165 (2012).

²¹ Dep’t of Justice, *supra* n.18.

²² Press Release, Dep’t of Justice, Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement With \$900 Million Forfeiture (Sept. 17, 2015), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred>; *see also* Mike Spector, *GM Ignition-Switch Fund Offers \$595 Million to Victims*, WALL ST. J. (Dec. 10, 2015), <https://www.wsj.com/articles/gm-ignition-switch-fund-offers-595-million-to-victims-1449755042>.

²³ Dep’t of Justice, *supra* n.22.

²⁴ *See, e.g.*, Press Release, Dep’t of Justice, Takata Corporation Pleads Guilty, Sentenced to Pay \$1 Billion in Criminal Penalties for Airbag Scheme (Feb. 27, 2017), (stating Takata agreed to pay \$1 billion in criminal fines for its airbag recalls after pleading to wire fraud) <https://www.justice.gov/opa/pr/takata-corporation-pleads-guilty-sentenced-pay-1-billion-criminal-penalties-airbag-scheme>; *see also, e.g.*, Press Release, Dep’t of Justice, Former CEO of Volkswagen AG Charged with Conspiracy and Wire Fraud in Diesel Emissions Scandal (May 3, 2018), (on file with author)(regarding Volkswagen paying \$2.8 billion for lying about its “clean diesel” emissions, along with a criminal indictment of its CEO).

At the same time the Automotive OEMs were taking reputational hits for their wrongdoings, the DOJ-AD was pursuing litigation against auto parts manufacturers under Section 1 of the Sherman Act in one of the largest and longest running criminal investigations in its history.²⁵ As noted above, the DOJ charged forty-eight companies and sixty-five individuals in this seven-year long tour de force.²⁶ Noteworthy in this body of auto parts cases is that a large majority of these cases involved Japanese auto parts manufacturers engaged in criminal conspiracies in the US and in other global markets such as the EU, Latin America, Canada, Korea, Australia and Japan itself.²⁷ The FSGO in these cases led to fines under multiple characterizations, including “amnesty,” “amnesty plus,” and “penalty plus.”²⁸ Many of the defendants worked hard to either establish or reinforce their compliance programs in the wake of these pleas.²⁹

It appears as though the number of organizational cases is down over the past two years and is lower still for fiscal year 2018.³⁰ This may or may not be due to the change in US presidential administrations, as former Attorney General Jeff Sessions remained somewhat neutral as to corporate prosecutions.³¹ Bloomberg News reported that the “number of white-collar prosecutions is on track to hit a twenty year low under President Donald Trump, after reaching a high in 2011 during the Barack Obama administration.”³² Despite these declining numbers, Trump Administration officials have reinforced the Administration’s intent to deter crime. Former Deputy Attorney General Rod Rosenstein stated that the Justice Department would “reward companies that try in good faith to deter crime” through corporate-compliance programs “that help to prevent problems and help detect any wrongdoing quickly.”³³ Further, a survey of over 800 compliance

²⁵ Michelle Burtis et. al., *Connecting the Dots: Tracing the DOJ’s Inclusion of Indirect Commerce in Auto Parts Criminal Penalties*, ANTITRUST MAG., Summer 2018, at 61, 62.

²⁶ MORGAN, LEWIS & BOCKIUS LLP, *supra* n.4.

²⁷ Burtis et. al., *supra* n.25, at 61.

²⁸ *Id.*

²⁹ Bill Vlasic & Hilary Stout, *Auto Industry Galvanized After Record Recall Year*, N.Y. TIMES (Dec. 30, 2014), <https://www.nytimes.com/2014/12/31/business/a-year-of-record-recalls-galvanizes-auto-industry-into-action.html>.

³⁰ U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2017 11 (2018).

³¹ Mary Strimel, *Individual Accountability Likely to Continue for Cartel Enforcement*, ANTITRUST ALERT (June 5, 2017), <https://www.antitrustalert.com/2017/06/articles/cartel-enforcement/individual-accountability-likely-to-continue-for-cartel-enforcement/>.

³² Patricia Hurtado, *White-Collar Prosecutions Fall to 20-Year Low Under Trump*, BLOOMBERG (May 25, 2018), <https://www.bloomberg.com/news/articles/2018-05-25/white-collar-prosecutions-fall-to-20-year-low-under-trump>.

³³ *Id.* at 2.

professionals found that a majority of those professionals expect that their compliance budgets will increase over the coming year.³⁴ Finally, compliance professionals have expressed a sense of concern around the new GDPR in the EU and parallel rules to be implemented in the US.³⁵

For the automotive industry, this may mean that, at least for now, auto companies are no longer in the crosshairs of the DOJ. The question now becomes: “should we continue to press the gas pedal on our compliance efforts?” Part II explores the culture of compliance and the “Tone at the Top” of the automotive OEMs and auto parts suppliers following the past decade’s plea deals.

PART II – A CULTURE OF COMPLIANCE STARTS WITH THE “TONE AT THE TOP”

Companies that have gone through major government investigations, especially those resulting in plea agreements, should have a burning platform from which they can create or sustain robust compliance and ethics programs. The reality may be otherwise, even when their reputations are on the line. The reasons for this corporate ineffectiveness, or even apathy, may include a lack of resources, an overly legalistic program, a disconnect with the company’s strategy, and a lack of corporate sponsorship.³⁶ Companies can believe they have put the right elements in place, but belief is not enough. Further, as an investigation winds down and the company moves forward, the memories of the events leading to the investigation can fade, especially if the company itself or current management personnel were not directly involved. So, how can companies ensure that they do not end up at the wrong end of a subpoena or with a loss of public trust in the future? Sustainable compliance

³⁴ STACEY ENGLISH & SUSANNAH HAMMOND, COST OF COMPLIANCE 8 (2018), <http://thomsonreutersfinancial.lookbookhq.com/regulatorychangemanagement2018/CostOfCompliance2018>.

³⁵ *Id.* at 5.

³⁶ There is a more sinister reason for the failure of the compliance programs, which is that executives view the cost of compliance failures as a cost of doing business. In a recent article on compliance programs in the Harvard Business Review, the authors note that: “of the nearly 3,000 executives interviewed for EY’s 2016 Global Fraud Survey, 42% said they could justify unethical behavior to meet financial targets.” Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar.-Apr. 2018, at 116; *see also* Hui Chen, *Seven Signs of Ineffective Compliance Programs*, BLOOMBERG BNA (Mar. 21, 2018), <https://www.bna.com/seven-signs-ineffective-n57982090159/>; *see also generally* ERNST & YOUNG GLOBAL LTD., CORPORATE MISCONDUCT-INDIVIDUAL CONSEQUENCES - 14TH GLOBAL FRAUD SURVEY (2016), <https://www.ey.com/Publication/vwLUAssets/ey-global-fraud-survey-2016/%24FILE/ey-global-fraud-survey-final.pdf>.

programs must begin at the top of the organization and that “Tone at the Top” must be clear and compelling.

The expression “Tone at the Top” means that the behavior exhibited by the topmost executives sets the standard for the rest of an organization and thus will influence the credibility and success of an organization’s compliance program.³⁷ Executives, starting with the CEO, must demonstrate and reinforce the importance of ethical and compliant behavior. While there are many other factors contributing to an effective compliance program, none can be truly effective if the CEO is unethical.³⁸ There are many ways that companies can enhance their Tone at the Top and support the healthy functioning of their compliance programs.

Boards of directors play a key role in supporting organizations’ Tone at the Top, as one of a board’s essential functions is to fire and hire the CEO. Common sense dictates that a CEO who presided over a major compliance failure should not be the person to lead the company in the future. Stunningly, boards are not always willing to oust such a CEO. Examples of CEOs who did not exhibit a strong Tone at the Top include Audi AG’s Rupert Stadler, who went to jail for his role in the Volkswagen emissions cheating case, yet was not initially terminated,³⁹ and Wells Fargo & Company’s Timothy Sloan, who oversaw the termination of over 5,000 employees but absolved management personnel of responsibility.⁴⁰ On the other hand, Mary Barra and the GM board of directors demonstrated an excellent Tone at the Top in the wake of the GM ignition switch issue by commissioning an

³⁷ The origin of the expression came from the field of accounting and related to ferreting out fraud and maintaining an ethical culture.

³⁸ See DELOITTE TOUCHE TOHMATSU LTD., BUILDING WORLD-CLASS ETHICS AND COMPLIANCE PROGRAMS 4 (2018), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-ers-building-world-class-ethics-and-compliance.pdf> (discussing the five core ingredients for establishing a world class ethics and compliance program, namely, the following: tone at the top; corporate culture; compliance risk assessments; the Chief Compliance Officer; and testing and monitoring).

³⁹ Kirsten Korosec, *VW fires jailed Audi CEO Rupert Stadler*, TECHCRUNCH (Oct. 2, 2018), <https://techcrunch.com/2018/10/02/vw-fires-audi-ceo-rupert-stadler-diesel-emissions-cheating/>.

⁴⁰ Hugh Son, *Wells Fargo Is Going Backward With Thousands Of Job Cuts As JP Morgan And Other Banks Boom*, CNBC (Sept. 21, 2018, 6:59 AM), <https://www.cnbc.com/2018/09/21/embattled-wells-fargo-ceo-tim-sloan-announces-thousands-of-job-cuts.html>.

independent investigation and acting to terminate all employees who contributed to the ongoing production of defective switches.⁴¹

How does a board fulfill its responsibility to hire a CEO who will sufficiently set the Tone at the Top? In addition to finding someone with the requisite business acumen and leadership capability, the board must test for ethical leadership. This task is harder than it sounds. David Mayer, Associate Professor at the University of Michigan, writes in *Fast Company* that unstructured interviews, integrity tests, and character references do not produce the desired results.⁴² Mayer states that “[o]ne comprehensive review of the data found that, on average, we’re barely better lie detectors than sheer chance.”⁴³ While the CEO alone cannot establish a culture of compliance, hiring the right person is essential to success. As noted above, the converse is also true—an unethical CEO can demoralize employees and underscore a culture of hypocrisy.

In addition to hiring the right CEO, a company must live by a shared set of values in order to promote ethical behaviors. This set of shared values can derive from the company’s mission statement or purpose, a code of conduct, or a compliance policy. The key is that, whatever the source, a CEO and executive team must consistently embody and demonstrate those shared values with their words and, more importantly, their actions. The motivation for the values-driven behavior should simply be a sincere and authentic desire to do the right thing in *all* circumstances. If the top brass is motivated merely by “checking the box” on the compliance program, it will be hard to create or sustain a values-driven culture.

A good exercise to test the ethical mettle of executives, or their devotion to a company’s purported values, is to have them select a list of employees who they perceive to be high performers in the company and then imagine that one of these employees engages in wrongdoing. If the executives cannot unequivocally conclude that they will discipline or terminate the employee, then their company’s values are meaningless, and can give way to a double standard. Employees in the company will

⁴¹ ANTON VALUKAS, JENNER AND BLOCK LLP, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 12 (2014), <http://www.beasleyallen.com/webfiles/valukas-report-on-gm-redacted.pdf>.

⁴² David Mayer, *Why Your Hiring Process Keeps Missing Candidates Character Flaws*, FAST COMPANY (Sept. 9, 2016), <https://www.fastcompany.com/3063404/why-your-hiring-process-keeps-missing-candidates-character-flaws>.

⁴³ *Id.* (citing research from Taya Cohen at Carnegie Mellon stating in addition to using structured interviews to test the habituation of one’s ethical values, companies should hire a person prone to guilt as they self-police their behavior).

immediately detect that the rules apply only to low-performers and that “good performance” excuses ethics.⁴⁴

While consistent application of ethical norms are important, a far more difficult task is creating a safe place to report wrongdoing.⁴⁵ Research has shown that employees who witness wrongdoing (or perceived wrongdoing) in the workplace do not report it, perhaps often out of fear of retaliation or being labeled as a troublemaker, among other reasons.⁴⁶ The number of ethics reports by employees is growing, but the pressure to compromise standards is also on the rise, leading to greater likelihood of misconduct.⁴⁷ The Tone at the Top is essential to creating a safe environment, as leaders who are themselves ethical presumably have an interest in exposing others’ ethical lapses.

Finally, top executives should build a positive business case for compliance that goes beyond the FSGO and an avoidance-of-liability culture, which is often the minimum standard. Compliance and ethics programs should be enhanced not just because it is the “right” thing to do, but also because it is good for business. Using ethics as a foundation for a company’s strategy implicitly reduces operating costs, increases sales, and increases the

⁴⁴ In February 2017, the Department of Justice issued an “Evaluation of Corporate Compliance Programs” to ensure that an organization does not have a “paper program.” In Section 8, which focuses on discipline and incentives, the evaluation asks: What disciplinary actions did the company take in response to the misconduct and when did they occur? Were managers held accountable for misconduct that occurred under their supervision? Did the company’s response consider disciplinary actions for supervisors’ failure in oversight? See DEP’T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 6 (2017), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁴⁵ The Ethics and Compliance Initiative (“ECI”), a research organization dedicated to surveying and reporting on the efficacy of ethics and compliance programs, reports: “When organizations prioritize integrity, employees are: less likely to feel pressure to violate ethics standards; less likely to observe misconduct; more likely to report misconduct they observe; and less likely to experience retaliation for reporting. See ETHICS AND COMPLIANCE INITIATIVE, THE STATE OF ETHICS AND COMPLIANCE IN THE WORKPLACE 7 (2018), <https://higherlogicdownload.s3.amazonaws.com/THEECO/11f760b1-56e0-43c6-85da-03df2ce2b5ac/UploadedImages/research/GBES2018-Final.pdf> (reporting that only sixty-nine percent of employees report observed workplace misconduct in 2017).

⁴⁶ See *id.* at 5-8. The 2018 Global Business Ethics Survey stated that the percentage of employees who have witnessed wrongdoing approached a 25-year low, but that percentage is still a whopping 47%, with 69% of people reporting the misconduct. Despite the increase in the level of reporting of misconduct, retaliation rates have doubled in the same period. *Id.* at 7-8.

⁴⁷ *Id.* at 8.

likelihood of upward pricing adjustments.⁴⁸ Azish Filabi, Executive Director of Ethical Systems, a research collaboration of top business academics which focuses on good business ethics and is housed out of NYU's Stern School of Business, advocates going beyond the "carrot and stick" approach, citing research that underscores his point: "Research shows that ethics pays in various ways for companies, and I can point to areas of research in three specific instances: No. 1 enhancing corporate reputation; No. 2 illegal conduct can be very costly; and No. 3 good governance pays off financially."⁴⁹ The ethics "premium" seemingly goes beyond prevention and reduced fines—the reputational damage can result in market impact as it did with Volkswagen, when it lost 23 percent of its market capitalization in a single month.

CONCLUSION AND NEXT STEPS

Despite a tsunami of investigations, plea deals, and prosecutions, companies still have a difficult time gaining traction with their compliance programs. The numbers measuring the efficacy of these programs demonstrate that no major step change is imminent. Given the uncertainty of government enforcement, the active deregulation policies of the Trump Administration, and the advent of unknown compliance horizons such as data privacy, companies need to go beyond liability prevention as their motivation for strong compliance and ethics programs. The "Tone at the Top" must demonstrate a strong commitment to compliance and ethics as a way to "do well by doing good" to be able to ride the next wave of compliance challenges.

⁴⁸ Hal Conick, *How to Hire Ethical Marketers and Become an Ethical Leader*, AM. MARKETING ASS'N (Sept. 1, 2017), <https://www.ama.org/publications/MarketingNews/Pages/how-hire-ethical-employees-become-ethical-leader.aspx>.

⁴⁹ *Id.*