COMPLIANCE AND ETHICS PROGRAMS
FOR GOVERNMENT ORGANIZATIONS
Lessons from the Private Sector

A White Paper from the

Rutgers Center for Government Compliance and Ethics

December 2010

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> *If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*
>
> **James Madison, Federalist Paper No. 51 (1788)**

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From the Rutgers Center for Government Compliance and Ethics

A. Executive Summary

James Madison's observation about the obligation of government to control itself, as well as the governed, is as true now as it was 222 years ago. While much political debate flows around the policies and rules governing the governed, this paper focuses on the obligation of the government to control itself, and how the application of well-established principles of compliance and ethics in the private sector can help accomplish this end.

Controls do exist on the government; however, often they fail to reach the specific day-to-day operational failures that cause adverse public reaction and embarrassment to the agencies that carry out the legislative mandates and serve the public. For example, a major control on government action is the election of the people's

representatives; however, this cycle of elections falls short in meeting the more time-sensitive needs of controlling the government agencies and organizations that carry out the public's will on a daily basis. This is true of local governmental functions like public safety, education, and sanitation and, at the regional and national levels, applies to such functions as interstate transportation and management of natural resources. Furthermore, while the ballot box directly affects those in elected office, many public administrators are career appointees who may be only very tangentially affected by the electoral process.

In addition to the election process, legislative oversight, internal and external audits, and transparency in government, in combination with a free press and an independent judiciary, all work to provide controls on governmental processes. Nevertheless, ongoing experience demonstrates that existing controls are insufficient to assure that ethical behavior and compliance with the law are integrated into the mission of these governmental bodies (referred to generally herein as "agencies") so that they become a part of the operation of the agency on a day-to-day basis. This observation, in turn, suggests the need for an affirmative effort to prevent and detect unethical and non-compliant behavior. This should be exerted not only by the overseers (inspectors general, auditors, legislatures, and the judiciary – whose oversight typically comes too late to prevent and mitigate the damage done) but also by the very people charged with executing the mission of the agency on a daily basis.

This paper does not propose that the current oversight mechanisms be abandoned. It recommends that, in addition to existing mechanisms, government agencies adopt certain business management processes, already well established and proven in much of the private sector, together with an organizational consciousness of conducting their respective missions both ethically and in compliance with the law. The paper will examine the private sector efforts to establish internal compliance and ethics programs; how and why those can be adopted by a government organization; and the

benefits which these practices can bring to a government agency in achieving its mission.

B. The Rutgers Center for Government Compliance and Ethics

The Rutgers Center for Government Compliance and Ethics (RCGCE) was established in July 2010 by Rayman Solomon, Dean of the Rutgers School of Law–Camden, with the mission to:

> *Advance the application of effective ethics and compliance program principles as an element of public governance at the federal, state and local levels in the United States and internationally through a variety of activities including research, education, networking and thought leadership.*

This paper has been prepared by RCGCE's Advisory Board[1] for the purpose of advancing RCGCE's mission.

C. Compliance and Ethics Programs

a. Introduction

For many in the public sector, the notion of a compliance and ethics (C & E) program will be a matter of first impression. Others may equate a compliance and ethics program with the existence of a code of conduct and perhaps an ethics office or ethics officer. Still others may have adopted full or partial C & E programs, especially where the government provides products and services not dissimilar from a private sector

[1] The RCGCE Board consists of Joseph Murphy, Chair; Dean Rayman Solomon; Donna Boeheme; John Steer; Paula Desio; Mark Rowe; and Emil Moschella. Their biographies appear at Appendix B.

counterpart, such as the Tennessee Valley Authority, Veterans Health Administration and government-owned medical facilities.

Before discussing the application of such programs in the public sector, it is helpful to start with a basic overview of compliance and ethics program principles. It is not the intent of this paper to vet all the issues associated with each of the elements of a compliance and ethics program, but to provide sufficient background for further discussion.

b. The Federal Sentencing Guidelines for Organizations

Modern day C & E program methodology is anchored in the Federal Sentencing Guidelines for Organizations (FSGO),[2] originally adopted in 1991 and modified in 2004 and 2010. The FSGO set out the "due diligence" standards for organizations' efforts to prevent and detect non-compliance with the law. While meeting these standards is not typically a defense to a criminal charge, it will work to mitigate criminal penalties and affect the prosecutor's charging decisions.[3] Therefore, an organization that has made a robust effort to prevent and detect violations of the law by its employees and others acting for it will be treated less harshly than one that was indifferent to complying with the law.

While the FSGO were developed in 1991 as part of the effort to standardize sentencing practices by judges under federal criminal law, their criteria for penalty mitigation were quickly and voluntarily adopted by many business organizations as the methodology for compliance with *all* rules – including federal, state and local laws,

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[2] See United States Sentencing Guidelines, Chapter 8 et seq., particularly USSG § 8B2.1, for the elements of an effective compliance and ethics program.

[3] The Department of Justice prosecution guidelines as set forth in the US Attorney's Manual require that the United States Attorneys consider the quality of an organization's compliance and ethics program in deciding whether and how to charge a potential defendant organization. See generally, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm

industry-specific government regulations, and internal policies, especially internal codes of conduct.

Since the FSGO provide for fundamental management procedures, their application is generally similar from industry to industry, with variations to accommodate different areas of risk, industry and types of business operations. For instance, a banking institution will need to meet the requirements of such industry-specific laws as the Bank Secrecy Act, while hospitals that treat Medicare and Medicaid patients must dedicate significant resources to regulations governing billing claims. However, the management processes supporting both will be similar, and both will share a number of risk areas that are common to all organizations,[4] such as discrimination, harassment, data security, and corruption to name just a few. Hence, the underlying assertion is that the generally accepted minimal C & E program standards are those provided by the FSGO, subject to additional areas of emphasis based on the nature of the organization's activities.

While the FSGO form a convenient starting point, it is also true that C & E program standards have evolved over time, and additional guidance has been provided in standards promulgated by other agencies in the U.S. and globally. For example, the Organization for Economic Co-operation and Development (OECD) Working Group on Bribery has promulgated an important set of Good Practice Guidance steps[5] that may serve as a guide for companies and other organizations, including those that would not be subject to the FSGO. The Good Practice Guidance also adds insights and particular areas of focus that could improve C & E programs generally.

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[4] There is also some flexibility on the implementation of the FSGO based on the size of the organization. See USSG §8.2B1, Application Note 2 C (i – iii).

[5] The OECD Good Practice Guidance on Internal Controls, Ethics and Compliance was adopted on February 18, 2010 as an integral part of the OECD Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions as of November 26, 2009 http://www.oecd.org/dataoecd/5/51/44884389.pdf]

c. Best Practice Developments

C & E programs have been implemented in various industries at least since the mid-1980s,[6] and in specific risk areas as early as World War II. Several non-profit member organizations have developed as forums for individuals and companies with a commitment to these practices to share experiences and best practices.[7] For instance, while the FSGO are silent on whether the general counsel and the Chief Ethics and Compliance Officer (CECO) should be the same person, industry best practice developed through dialog facilitated by these organizations, points to the CECO being someone other than the general counsel.[8] While the general counsel and CECO both have compliance responsibilities, their roles are distinct and this can give rise to potentially conflicting professional obligations. For the same reason, best practice generally dictates that the CECO should not report to the general counsel.[9]

Additionally, these non-profit practitioner groups inform government bodies on practitioners' views on compliance and ethics program issues. For example, the 2004 refinements to the FSGO that added rigor and specificity to the principles were based in

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[6] The defense and aerospace industry undertook to implement business ethics and integrity practices within their ranks in the mid-1980s in response to widespread industry scandals. Many of the tenets of the Defense Industry Initiative on Business Ethics and Conduct for self-policing and voluntary disclosure were incorporated into the initial iteration of the FSGO.

[7] Society for Corporate Compliance and Ethics www.corporatecompliance.org and Ethics and Compliance Officer Association www.theecoa.org are two leading non-profit practitioner groups.

[8] The seminal study in this area was issued in 2007 by five leading non-profit ethics associations, the Ethics Resource Center, the Society for Corporate Compliance and Ethics, the Ethics Officer Association, the Open Compliance and Ethics Group, and the Business Roundtable Institute for Corporate Ethics, http://ethics.org/resource/ceco, and has been the subject of continual assessment and refinement. See also, "Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds" (RAND 2009) http://www.ethics.org/files/u5/CECO_Paper_UPDATED.pdf and "Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance Officer" http://www.ethics.org/files/u5/CECO_Paper_UPDATED.pdf.

[9] In a notable endorsement of these best practices by the U.S. government itself, guidance issued to health care organizations by the Office of Inspector General (OIG) for the Department of Health and Human Services (HHS) explicitly states that it is not advisable for the compliance function to be subordinate to the general counsel, comptroller or chief financial officer. Recent Corporate Integrity Agreements imposed by the HHS OIG on private sector organizations (e.g. Pfizer) have stipulated that the chief compliance officer be independent of the general counsel and chief financial officer.

great part on best practices in industry[10] as presented to the Federal Sentencing Commission by a 15-member Advisory Group. Similarly, the recent 2010 FSGO Amendments (effective November 1, 2010) considered and incorporated many suggestions from various practitioner groups.[11]

d. Elements of a Compliance and Ethics Program

A C & E program is a dynamic business process that implements the various elements and management steps set out in the FSGO and other best practices enunciated elsewhere in an effort to prevent and detect criminal conduct. The following are key elements that may exist in any organization's program, but in various formats and with different areas of emphasis based on a particular organization's composition and size:

- Legal and ethical risk analysis/mitigation: A process for identifying and responding to potential compliance risks. This requires an analysis of the impact and likelihood of non-compliance and the steps taken to mitigate that risk;
- Oversight from a knowledgeable governing body (board of directors in corporations), or a special oversight committee with similar responsibilities;
- Designation of a high-level manager with responsibility for the C & E program (the CECO). If that person does not have day-to-day responsibility for the program, the FSGO provide for additional responsibilities for independent reporting to the governing body by the person who runs the program on a day-to-day basis;

[10] See U.S. Sentencing Commission's website at http://www.ussc.gov/corp/advgrprpt/1007_Brief.pdf for a transcript of public hearings held by the Advisory Group and its October 7, 2003 Report to the United States Sentencing Commission.

[11] As in the past, the Sentencing Commission received and considered comment and invited testimony from representatives of the leading non-profit practitioners' groups and experts. All public comment and transcripts of public testimony sessions are posted on the Sentencing Commission's website at www.ussc.gov.

- Diligence in not delegating responsibility to those likely to engage in criminal conduct or otherwise to undermine the effectiveness and goals of the C & E program;
- Use of incentives and discipline to promote and enforce the program;
- Mechanisms for employees and agents to raise compliance concerns and receive guidance, anonymously or confidentially, without fear of retaliation;
- Standards and procedures, including internal controls, to prevent violations;
- Communications and training;
- Monitoring and auditing capable of detecting violations;
- Periodic evaluation of the effectiveness of the program;
- Keeping up with industry practices in the compliance and ethics program;
- Responding appropriately to violations, including steps to prevent recurrence;

While the FSGO do not specifically reference the need to document the program, practitioners know that the credibility of a program will always depend on documenting the steps that have been taken.

The FSGO, as the starting point for government policy on C & E programs, also reference the need for a culture that promotes ethics and compliance. As the FSGO make clear, this is to be achieved by diligently integrating the C & E program elements into the day-to-day operations of the organization. In so doing, an organization can establish, promote and enforce expectations of ethical and legally compliant conduct as essential elements of institutional culture. While many organizations have articulated their values, often in values or mission statements and codes of conduct, the challenge for many is in the translation of those statements into actual behaviors. This commitment to ethical behavior must be an integral part of the C & E program, driven consistently by leadership, starting at the top of the organization.

D. Business Organization Motivators – Beyond Mitigation of Criminal Penalties

Beyond the potential for mitigating criminal penalties, there are a number of other reasons why corporations have adopted the discipline of the C & E program methodology. For many companies it is the prudent thing to do, particularly in light of the growing message from government on its heightened expectations for the private sector.

In 1999, then-Deputy Attorney General (DAG) Eric Holder issued a memorandum to all United States Attorneys captioned "Principles of Federal Prosecution of Business Organizations." The memorandum instructed prosecutors considering whether to bring federal criminal charges against an organization or negotiating a plea agreement, to evaluate as one of the factors "the existence and adequacy of the corporation's pre-existing compliance program", specifically incorporating a reference to the FSGO.[12]

Establishing a corporate compliance program has also become a key element of the corporate director's "duty of care." In December 1996, the Delaware Chancery Court, in the case of *In re Caremark International Inc. Derivative Litigation,*[13] identified an element of directors' duties where failure could possibly result in personal liability to individual board members. The court in *dicta* stated: "I am of the view that a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may … render a director liable for losses caused by non-compliance with applicable legal standards." The ruling, subsequently endorsed by

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[12] This was updated in January 2003 by DAG Larry Thompson; in December, 2006 by DAG Paul J. McNulty; and in August 2008, by DAG Mark R. Filip. Those principles are codified in the United States Attorney's Manual, Title 9, Chapter 9-28.000, Principles of Federal Prosecution of Business Organizations. Also see FN 4, supra.
[13] *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

the Delaware Supreme Court[14], created a fiduciary obligation on the part of corporate directors to assure that a legal compliance mechanism existed within the organization. The FSGO's November 2004 amendments anticipate the full involvement of the governing body by requiring it to be "knowledgeable about the content and operation of the compliance and ethics program" and to exercise "reasonable oversight" with respect to the implementation and effectiveness of the compliance and ethics program.[15]

While the development of FSGO-style C & E programs in the private sector continues to evolve, it is clear that such measures have become well entrenched in the operations of most modern corporations. As noted above, various factors have raised the expectations of prosecutors, regulators, shareholders, the community, and other stakeholders for the diligent development of such programs.

It is important to note that the application of the FSGO is not restricted to the private sector, but directs its guidelines to "organizations" which includes private, public and non-profit sector entities. Thus, the question presented in this White Paper is:

> *Should government organizations establish formalized, targeted programs consistent with the FSGO, which draw on lessons from the private sector and are structured to prevent and detect non-compliance with laws and unethical conduct?*

E. A Limitation of C & E Programs

C & E programs are geared to provide a level of assurance that an organization is complying with externally imposed rules as well as standards that it sets for itself. However, this is not – and cannot be – a guarantee that an employee bent on engaging in illegal conduct in furtherance of the organization's business will be deterred or discovered by virtue of these programs. However, when properly implemented, the program, at a minimum, greatly increases the likelihood of preventing or detecting such violations at an early stage.

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[14] *Stone v. Ritter*, 911 A. 2d 362 (Del. 2006)
[15] FSGO § 8B2.1.(b)(2)

Additionally, even a robust program may fail to identify a key risk area and, as a result, the risk may go unaddressed. While we aspire toward the complete abatement of non-compliant activity, such a result will not always be achievable. For example, compliance risk analysis seeks to identify those risks with the greatest impact and likelihood of occurring. This involves a strong measure of management judgment which, while exercised in good faith, could be faulty. The FSGO are instructive here: "Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct."[16] It is strongly suggested that this is an important standard to be considered in the evaluation of the effectiveness of such a program and of the persons managing the program.

F. The Case for Government Agency Adoption of the C & E Methodology

a. Recent Examples

A large number of high-profile governmental failures that may have been prevented or detected through the existence of properly implemented C&E programs, are instructive. Some examples[17] help make the point.

i. The Mine Safety and Health Administration (MSHA)

On March 30, 2010, the Department of Labor's Office of Inspector General (OIG), through its Office of Audit, issued report number 05-10-001-06-001,

[16] FSG § 8B2.1.(a)(2)
[17] See Appendix A for a listing of other examples.

captioned *Journeyman Mine Inspectors [in the MSHA] Do Not Receive Required Periodic Retraining*.

It states that the Federal Mine Safety and Health Act of 1977 (Section 505) requires that "in selecting persons and training and retraining persons to carry out the provisions of this Act, the Secretary [of Labor] shall… [develop and maintain] adequate programs for the training and continuing education of persons, particularly inspectors…" The report notes that "Journeyman inspectors are required to receive one week of specified retraining each year, or two weeks every other year."

The OIG conducted the audit to answer the question: "Do MSHA inspectors receive training to effectively execute their regulatory responsibilities?"

The OIG found that during fiscal years (FY) 2007-2008, MSHA increased the number of inspectors by 26 percent and provided initial training to more than 350 entry-level inspectors. However, 56 percent of the 102 journeyman inspectors sampled had not completed MSHA's required retraining during the FY 2006-2007 training cycle. It also found that the MSHA lacked controls "to track and assure completion"[18] of required periodic retraining by journeyman inspectors, and there were no consequences for not attending retraining courses. Additionally, "27 percent of the 264 inspectors who responded to our survey believed that MSHA did not provide them with the technical training they needed to effectively perform their duties."

The OIG described the effect of this non-compliance as follows:

> *"This increases the possibility that hazardous conditions may not be identified and corrected during inspections which, in turn, could*

[18] In FSGO terms, this is the absence of monitoring compliance with a legal/internal policy requirement.

increase the risk of accidents, injuries, fatalities, and adverse health conditions for miners."

On April 5, 2010, the Upper Big Branch Coal mine explosion claimed the lives of 29 of 31 men working at this site.

It is noted that the OIG reviewed the time period of 2007–2008 and issued its report in 2010. This highlights one of the shortcomings of audit as an oversight mechanism. Without minimizing the importance of audits, they do not provide an effective control over the day-to-day activities of the agency.

Would a C & E program have prevented the deadly blast? That is impossible to answer; however, it could have provided a tool to identify the absence of journeyman training in a much more timely fashion, and at least provided an additional control in a system of safeguards designed to prevent disasters like this.

This report should also give rise to the question, what else is out there from a MSHA standpoint? If they could not conduct the task of providing the required training, then what about the more complicated process of conducting the inspections, reporting them, and taking action on the ones identified? It leaves the public only to speculate and the public should not be left with speculation, especially when it comes to health and safety issues.

ii. Center for Medicare and Medicaid Services

In October 2009, the Government Accountability Office (GAO) issued a report (GAO-10-60) concerning the contracting activities of the Centers for Medicare and Medicaid Services (CMS), an agency within the Department of Health and Human Services (HHS). The report is captioned "Deficiencies in

Contract Management Internal Control Are Pervasive." This was a follow-up report to one issued in November 2007 (GAO-08-54) in which GAO reported significant deficiencies in internal control over certain contracts used by CMS. On account of concerns expressed by various congressional representatives that the first audit implied that these weaknesses may have an effect on all CMS contracts, Congress asked GAO to perform a comprehensive, in-depth review of CMS's contract management practices.

GAO did not evaluate the culture prevailing within the CMS contract management function, though doing so could have been very telling in terms of the employees' efforts or concerns to do the right thing. GAO simply identified systemic shortcomings. Although not analyzed and reported in the lexicon of the FSGO, the findings and recommendations are aligned with basic FSGO concepts.

As a result, GAO recommended that CMS develop appropriate policies,[19] provide training, and conduct appropriate monitoring to ensure compliance with certain requirements contained in the Federal Acquisition Regulations and other internal control mandates. GAO concluded that:

> *To the extent that CMS has continuing weaknesses in contracting activities, it will continue to put billions of taxpayer dollars at risk of improper payments.*

An effective compliance and ethics risk assessment may well have identified these weaknesses well before the GAO audit did so. A risk analysis as part of a C & E program might have identified the absence of required internal contract management controls as presenting a high risk

[19] Sometimes the recommendations are stated in terms of "policies", other times they are stated as "prepare guidelines" or "establish criteria." all of which have the same impact.

to billions of taxpayer dollars and might have provided an opportunity for self-correction.

iii. The Federal Bureau of Investigation

In March 2007, the Office of Inspector General (OIG) of the Department of Justice (DOJ) issued a highly critical report regarding the Federal Bureau of Investigation's (FBI) implementation of a statutorily authorized investigative tool called "National Security Letters" (NSLs). These are demand letters provided to telephone companies, financial institutions, internet service providers and consumer credit agencies for "transactional," as opposed to "content," information. The authority for doing this is contained in five provisions spread over four statutes. While some of the authority existed pre-9/11, there was a substantial revision in the authorizing law with the passage of the USA PATRIOT Act in October, 2001.

The OIG audit was mandated by Congress and it found:

- Faulty recordkeeping understated the total number of NSLs issued by about 20%. (That number had been reported to Congress.)
- Failure to self-report non-compliance to the President's Intelligence Oversight Board as required by Section 4 of Executive Order 12334.[20]
- Use of outdated form letters.
- Letters not being retained in specific investigative files.

This resulted in congressional oversight committee hearings[21], and numerous press editorials critical of the FBI and calling for change.[22] The FBI

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[20] This section requires: "Inspectors General and General Counsel of the Intelligence Community shall, to the extent permitted by law, report to the Board concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive."
[21] See "Senators Cite F.B.I. Failures as Chief Promises Change" by Scott Shane, *NY Times*, 3/28/07.

moved quickly to fix the problems identified by the OIG. It was as a direct result of the OIG report that the FBI adopted the methodology of the FSGO in implementing a corporate-style compliance program to prevent similar shortfalls from occurring in the future.

iv. Minerals Management Service (MMS)

On September 10, 2008, the Office of Inspector General (OIG) of the Department of the Interior issued a report[23] of three separate OIG investigations into allegations against more than a dozen current and former Minerals Management Service (MMS) employees. Until the regulatory framework was restructured in 2010,[24] MMS was the Interior Department agency charged both with regulating the oil industry and collecting royalties from it.[25] There were three referrals to the DOJ Public Integrity Service, resulting in one prosecution and two declinations of prosecution. Others were submitted to the agency for disciplinary action, the outcome of which is unknown. The OIG reported that "The investigation took two years, involved countless OIG human resources and an expenditure of nearly $5.3 million of OIG funds. Two hundred thirty-three witnesses and subjects were interviewed, many of them multiple times, and roughly 470,000 pages of documents and e-mails were obtained and reviewed as part of these investigations."

The OIG found:

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[22] See "Make the FBI Follow the Law," *Boston Globe*, 3/13/2007; "Break up the FBI," *LA Times*, Opinion by John Yoo (former DOJ official), 3/21/2007; "Revise the Patriot (sic) Act," Editorial, *LA Times*, 3/26/07.

[23] http://www.doioig.gov/images/stories/reports/doc//RIKinvestigation.txt

[24] On May 19, 2010, Secretary of the Interior, Ken Salazar, announced that MMS would be broken up into three separate divisions, the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue, which will separately oversee energy leasing, safety enforcement, and revenue collection.

[25] On May 11, 2010, Secretary of the Interior Salazar announced a number of reforms as a result of the *Deepwater Horizon* disaster, including a reorganization of the responsibilities of the MMS and the agency was renamed Bureau of Ocean Energy Management, Regulation, and Enforcement.

"A Culture of Ethical Failure. The single-most serious problem our investigations revealed is a pervasive culture of exclusivity, exempt from the [Ethics] rules that govern all other employees of the Federal Government."

Specifically:

1. Three Senior Executives remained calculatedly ignorant of the rules governing post-employment restrictions, conflicts of interest and Federal Acquisition Regulations to ensure that two lucrative MMS contracts would be awarded to a company created by one of the employees.
2. Royalty in Kind (RIK) marketers, an element of MMS, effectively opted themselves out of the Ethics in Government Act, both in practice, and, at one point, even explored doing so by policy or regulation.
3. The RIK employees, instead of reporting to a Denver supervisor, reported directly to an official in Washington, D.C., where their unethical conduct was apparently invisible.
4. Between 2002 and 2006, nearly one-third of the entire RIK staff socialized with, and received a wide array of gifts and gratuities from, oil and gas companies with whom RIK was conducting official business. When confronted by OIG investigators, none of the employees involved displayed remorse.
5. The OIG discovered a culture of substance abuse and promiscuity in the RIK program and in brief sexual relationships with industry contacts. As the OIG

observed, “Sexual relationships with prohibited sources cannot, by definition, be arms-length.”

6. Two RIK employees who accepted gifts also held inappropriate outside employment and failed to properly report the income they received from this work on their financial disclosure forms.

There are two factors in play here: one is non-compliance with the government code of ethics and federal procurement rules; the other – and perhaps even more outrageous – is the perception that the rules did not apply to those RIK employees; or, in other words, a clear lack of an ethical culture supported by management and reinforced throughout the workplace.

v. State and Municipal Bonds

The following are two examples of Securities and Exchange Commission (SEC) enforcement actions regarding the failure of state and municipal entities to provide certain material information in connection with the issuance of bonds.

State of New Jersey

In August 2010, the SEC entered an Order which refers to an “Offer of Agreement” submitted by the State of New Jersey[26] (the State), which the SEC determined to accept. According to the Order, this matter involves New Jersey’s violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act in connection with the offer and sale of over $26 billion in municipal bonds from August 2001 through April 2007. The Order states in part: “In 79 municipal bond offerings, the State misrepresented and failed to disclose material information regarding its underfunding of New Jersey’s two largest pension plans, the Teachers’ Pension

[26] http://www.sec.gov/litigation/admin/2010/33-9135.pdf

and Annuity Fund ("TPAF") and the Public Employees' Retirement System ("PERS"). More specifically, the State did not adequately disclose that it was underfunding TPAF and PERS, why it was underfunding TPAF and PERS, or the potential effects of the underfunding."

The Order goes on to state that "These misrepresentations and omissions created the fiscal illusion that TPAF and PERS were being adequately funded and masked the fact that New Jersey was unable to make contributions to TPAF and PERS without raising taxes or cutting other services, or otherwise impacting the budget. Accordingly, disclosure documents failed to provide adequate information for investors to evaluate the State's ability to fund TPAF and PERS or the impact of the State's pension obligations on the State's financial condition."

After being placed on notice in 2007–2008 of the shortcomings in the disclosures, the State moved to enhance those particular disclosures, and issued new policies and procedures and instituted a mandatory training program for all State employees involved in the disclosure process "to ensure compliance with the State's disclosure obligations under the federal securities laws." The SEC accepted the actions taken by the State to bring itself into compliance with the federal law and the Order directed the State to "cease and desist" from committing or causing any violations of the relevant provisions of the Securities Act. It is noted that the SEC found the state action to be "negligent" even though the end result was a "material misrepresentation."

City of San Diego

By contrast, in November 2006, the SEC found that the City of San Diego (the City), through its officials, acted with knowledge of the City's current and projected financial issues [27] and failed to disclose that the City faced severe difficulty funding its future pension and health care obligations unless new

[27] http://www.sec.gov/litigation/admin/2006/33-8751.pdf

revenues were obtained, pension and health care benefits were reduced, or City services were cut. Despite the magnitude of the problems, the City conducted five separate municipal bond offerings, raising more than $260 million, without disclosing the known and reasonably anticipated fiscal issues to the investing public. To settle the action, the City agreed to cease and desist from future securities fraud violations and to retain an independent consultant for three years to foster compliance with its disclosure obligations under the federal securities laws.

The Cease and Desist Order states further that the Mayor resigned and the City terminated certain officials in the City Manager's and Auditor and Comptroller's offices; hired a full-time municipal securities attorney; hired individuals not affiliated with the City to act as the City's Audit Committee and charged the Committee with investigating the City's prior disclosure deficiencies and making recommendations to prevent future disclosure failures; hired new disclosure counsel for all of its future offerings, who will have better and more continuous knowledge on the City's financial affairs and conduct seminars for City employees on their responsibilities under the federal securities laws. The City also enacted ordinances designed to change the City's disclosure environment.

b. Reasons for Government Adoption of the C & E Methodology

i. Legal and Organizational Factors

The approach generally throughout this paper is to propose the propriety of C & E programs in the public sector as the right and necessary thing to do in helping to assure that the public interest is served. That said, we would be remiss not to point out that state and local agencies may be prosecuted for violations of the federal criminal law, as governments and their political

subdivisions are "organizations" within the meaning of the Federal Criminal Code. In the Commentary to the FSGO, the application notes state: "'Organization' means 'a person other than an individual.' 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, *governments and political subdivisions* thereof, and non-profit organizations." [Emphasis added]

ii. Early Identification of Problem Areas

Identifying C & E risks while they are inchoate will allow managers to address issues before they reach critical mass in terms of their effect on relevant constituencies (e.g. the safety of mine workers or the privacy of the public at large) and to minimize the effort needed to take corrective action.

iii. Compliance Assurance for Oversight Bodies and the Public

Effective C & E programs can improve the overall ethical behavior, transparency, and accountability of government by demonstrating agency ownership and commitment to conduct its business in compliance with the law and ethical standards. This will form the basis for credibly assuring oversight bodies, and the public served through that process, that the agency is exercising due diligence in carrying out its responsibilities in compliance with the law. As stated above, a C & E program does not duplicate the need for oversight and audits, but is a proactive effort to detect and prevent problems as part of an ongoing process of carrying out the organization's business.

iv. Compliance and Ethics Leadership to the Private Sector

By institutionalizing C & E methodology, government agencies will not only realize mission-related, organizational, and risk management benefits, they will also gain a deeper and experiential understanding of the requirements of such programs. This is likely to result in enhanced capabilities and effectiveness in supervising C & E programs in the private sector organizations they regulate.

v. Analysis of Compliance and Ethics Breakdowns

When non-compliance is discovered in a government agency, the framework of the C & E methodology will be extremely useful in analyzing whether there is a systemic problem (inadequate policies, training, monitoring and auditing, or ethical culture dysfunction) or an instance of individual wrongdoing or negligence.

b. Addressing Possible Concerns

i. Sufficiency of Existing Oversight

Some may argue that significant oversight mechanisms are already in place in the public sector through internal audit, external audit, inspector general scrutiny, legislative oversight, the federal government, open records laws, and investigative journalism.

However, all of these mechanisms share the fundamental disadvantage of coming after the fact – after the journeymen inspectors were not trained; after federal contracts were issued not in compliance with the Federal Acquisition Regulation, placing possibly billions at risk; after thousands of non-compliant inquiries were made in the name of national security, causing concern over

individual privacy; after a pervasive pattern of unethical conduct caused the revamping of an entire agency; or after the government offering bonds to the investing public with material misrepresentations.

While there is no guarantee that C & E programs could have cured these problems before they were discovered and investigated, these programs, at the very least, provide the tool of proactive, continuing self-evaluation and remediation of possible compliance and ethical shortcomings that well may have mitigated some of the most extreme conduct in the government workplace. An overreliance on rules and enforcement may well contribute to an entrenchment mentality that lets such conduct fester and become extreme rather than identified and addressed at a more benign stage.

It is noted that one significant aspect of holding private persons and organizations accountable – access to the courts – may not be available to a party injured by the actions of a federal or state government agency. The defense that may be raised to such an action is known as sovereign immunity.[28] While both the federal government and states have, to one degree or another, statutorily waived the defense to allow suits against the sovereign, the defense is very much alive and well.[29] Consideration of the origins, wisdom, or application of this rule is beyond the scope of this paper. However, the paper does posit that, given the extraordinary relief allowed to the government in the defense of these suits, a robust program to prevent and detect governmental violations of the law may provide some counterbalance to that privilege.

[28] See Alexander Hamilton, Federalist Paper No. 81, 1788.

[29] For an official view on entirety of sovereign immunity from the standpoint of the federal government, see http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/2mciv.htm#4-2.100

ii. Cost

While the details of the structure of C & E programs differ from one organization to another, many have adopted the principle that "compliance is the business of the business." This is an important notion from the standpoint of affecting the culture of the organization because it places the onus on the owners of responsibility for the mission to accomplish that mission ethically and in compliance with the law. It also has the effect of minimizing additional administrative costs through the leveraging of the existing management structure.

Although there may be some additional administrative expense in the initial establishment and ongoing maintenance of the program, many of these costs should be offset by: doing the job right the first time; avoiding costly investigations, litigation, legal fees, personnel changes, crisis management, reactive retraining and other fixes. By way of example, an audit conducted by the City of Austin, TX in November 2002[30] reported:

"Benefits associated with a strong ethical climate include:

- *Lower number and cost of successful legal claims against the City;*
- *Fewer complaints from the public and higher perceived quality of service delivery;*
- *Fewer lost time injuries and less sick leave usage; and*
- *Stronger commitment to the City by its employees."*

[30] See http://www.ci.austin.tx.us/auditor/downloads/au02302.pdf

G. Conclusion

As James Madison observed, those who govern are not angels but people. The underlying principle of government service is that "public office is a public trust." Government employees are trustees for the people of the authority given to them. While the exercise of that responsibility often includes the exercise of a great deal of discretion, that discretion must be exercised in compliance with the law. Unfortunately, often the actions of a few who violate that trust are imputed to the entire public sector workforce. As a result, public confidence in government's ability to control itself by managing the business of governing ethically and in compliance with the law will be diminished and may be lost entirely. Loss of confidence erodes government effectiveness and the underlying authority to operate could be jeopardized.

Government agencies should take a leadership role in ethics and compliance. Those charged with the responsibility to govern should themselves commit to establish the proactive management processes and procedures that can help assure that government acts ethically and within the same laws that govern the governed. Well-established practices and principles of compliance and ethics from the private sector would significantly support this endeavor.

APPENDIX A

CASE EXAMPLES OF GOVERNMENTAL NON-COMPLIANCE/UNETHICAL BEHAVIOR

NON-COMPLIANCE

- FEDERAL
- STATE
- LOCAL (COUNTY/MUNICIPAL)
- FOREIGN

UNETHICAL BEHAVIOR

- FEDERAL
- STATE
- LOCAL (COUNTY/MUNICIPAL)
- FOREIGN

APPENDIX B

RUTGERS CENTER FOR GOVERNMENT COMPLIANCE AND ETHICS ADVISORY BOARD

Rayman L. Solomon, Center Faculty Sponsor

Rayman L. Solomon became Dean and Professor at the Rutgers School of Law–Camden on July 1, 1998. Prior to coming to Rutgers–Camden, Dean Solomon was Associate Dean for Academic Affairs and Curriculum at Northwestern University School of Law (1989-1998).

Before that he was Associate Director and a Research Fellow at the American Bar Foundation (1980-1989). While there he was also the editor of the *American Bar Foundation Research Journal* (now *Law & Social Inquiry*). Dean Solomon graduated with a B.A. from Wesleyan University (1968) and has a J.D. (1976) and a Ph.D. (1986) in American Legal History from the University of Chicago. He served as Director of the Seventh Circuit History Project (1976-1978) and published *A History of the United States Court of Appeals, 1891-1941* (Government Printing Office, 1981). Dean Solomon served as a law clerk to the Honorable George Edwards, Chief Judge of the United States Court of Appeals for the Sixth Circuit (1978-1979). He also was a Bigelow Fellow at the University of Chicago where he taught legal research and writing (1979-1980).

Dean Solomon's areas of research are the history of the American legal profession, the history of judicial ethics, and federal court history. He is co-editor of two books: *In the Interest of Children: Advocacy, Law Reform and Public Policy* and *Lawyers' Ideals and Lawyers' Practices: Professionalism* and *The Transformation of the American Legal Profession*. In the former he contributed "*Goss v. Lopez*: The Principle of the Thing," and in the latter "Five Crises or One: The Concept of Legal Professionalism, 1925-1960." He also has published "The Politics of Appointment and the Federal Court's Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R." in the *American Bar Foundation Research Journal*, and "The Seventh Circuit's Role in Enforcement of Prohibition: Regulating the Regulators" in *Law, Alcohol, and Order: Perspectives on National Prohibition*. Dean Solomon teaches American Legal History and Trusts and Estates. He sponsored the establishment of the Rutgers Center for Government Compliance and Ethics and is a member of its Advisory Board.

Joe Murphy, Advisory Board Chair

Joe Murphy, Director of Public Policy for the Society of Corporate Compliance and Ethics (pro bono) and co-founder of Integrity Interactive Corporation, has worked in the organizational compliance and ethics area for over 30 years. Mr. Murphy practices law in the field of compliance and ethics through Joseph E. Murphy, PC.

Previously he was Senior Attorney, Corporate Compliance, at Bell Atlantic Corporation, where he was the lawyer for Bell Atlantic's worldwide corporate compliance program.

Mr. Murphy is Co-Editor of *ethikos*, a bi-monthly publication on corporate compliance and ethics. He has lectured and written extensively on corporate compliance and ethics issues, and is on the board of the Society of Corporate Compliance and Ethics (SCCE). His most recent book is *501 Ideas for Your Compliance and Ethics Program*, published by SCCE.

He is an avid ballroom dancer and is "chief cha-cha officer" of Dance Haddonfield in his home town of Haddonfield, NJ. Mr. Murphy helped to establish the Rutgers Center for Government Compliance and Ethics and is the Chair of its Advisory Board.

Donna C. Boehme

Donna C. Boehme is an internationally recognized authority in the field of organizational compliance and ethics with more than 20 years of experience in designing and managing compliance and ethics solutions. As Principal of Compliance Strategists LLC, and Special Advisor to Compliance Systems Legal Group, Ms. Boehme has advised a wide spectrum of private, public, governmental, academic and non-profit entities located in the United States, Europe, Canada, Asia, and worldwide. She serves on the respective boards of the RAND Center of Corporate Ethics and Governance, the Society of Corporate Compliance and Ethics, the Rutgers Center for Government Compliance and Ethics, and the South Texas College of Law-Corporate Compliance Center. She is currently Program Director (and past charter member) of the Conference Board Council on Corporate Compliance and Ethics. Ms. Boehme is Emeritus Member and past Board member of the Ethics and Compliance Officer Association and past Board member of the Association of Corporate Counsel–Europe. She was a charter member of the Corporate Executive Board's Compliance and Ethics Leadership Council and is a past Fellows member of the Ethics Resource Center. Her extensive on-the-ground experience includes serving as the first global compliance and ethics officer for two leading multinationals. At BOC Group (now a part of Linde), Ms. Boehme established the company's global compliance and ethics function and developed its worldwide code and program "Living

Our Values." In 2003, she served as the first group compliance and ethics officer for BP plc, establishing the company's global compliance and ethics function, infrastructure and program, including a dedicated central team and groundbreaking network of 135 senior–level business ethics leaders worldwide. Many elements of the programs developed by Ms. Boehme are regarded as best practice in the field and have been adopted in various forms by leading companies.

Ms Boehme is a contributing editor of *ethikos*, a leading business ethics publication, and has been published and quoted widely on compliance and ethics issues including in *The Wall Street Journal*, *Boston Globe*, *the Economist*, *Washington Times*, *Financial Times*, *New York Law Journal*, Reuters, and *Compliance Week*. She is the publisher of *CS Newsflash*, a weekly commentary on compliance and ethics developments around the world. A frequent speaker to industry and professional groups, she has spoken at the House of Lords on the design and implementation of global compliance programs. Ms. Boehme is a featured expert in the PBS documentary "In Search of the Good Corporate Citizen."

Earlier in her career, Ms. Boehme was in private corporate practice at Fried, Frank, Harris, Shriver & Jacobson in New York City. She holds a J.D. from New York University School of Law and is a member of the American Bar Association and the New York bar. She operates her global consultancy from her New York-area based location.

Paula Desio

Paula J. Desio is a frequent speaker and author on matters relating to business and organizational ethics. Currently, Ms. Desio is serving as a Department of Defense monitor with oversight responsibilities for the self-governance, ethics awareness, and compliance training efforts of a government contractor with multiple international locations.

She served as Deputy General Counsel to the United States Sentencing Commission in Washington D.C. from 1997 to 2007, where she focused on sentencing policies relating to corporate and economic crime. With lead staff responsibility for the policy analysis leading to the 2004 amendments to the organizational sentencing guidelines for compliance and business ethics programs, Ms. Desio conducted the Commission's multi-year outreach efforts to the business community, industry representatives, and scholars, and served as the liaison to the Commission's Advisory Group of experts during this process. From 2007 to 2009 Ms. Desio held the Chair for Ethics Policy at the Ethics Resource Center, a Washington-DC based non-profit organization, where she authored numerous policy papers, provided comment to federal agencies on proposed ethics rules and practices, and conducted training of

executives in both the public and private sectors on ethics awareness, culture building, and legal compliance issues.

From 1986 to 1996 Ms. Desio was Of Counsel to the Washington, D.C. law firm of Crowell & Moring, where she specialized in internal investigations and the defense of businesses involved in federal criminal and agency enforcement proceedings and congressional hearings, and advised clients on compliance matters. She has been actively engaged with the Defense Industry Initiatives on Business Conduct and Integrity since its formative stages. Previously, Ms. Desio prosecuted civil fraud cases on behalf of the Commodity Futures Trading Commission, and also served as a public defender in Milwaukee, Wisconsin. She helped to establish the Rutgers Center for Government Compliance and Ethics and is a member of its Advisory Board.

Ms. Desio is a graduate *cum laude* of Bucknell University, a member of Phi Beta Kappa, and holds Master's degrees in Latin American Studies and Latin American Literature from the University of Wisconsin (Madison). She received her J.D. degree from Marquette University Law School.

Emil Moschella

With over 28 years of FBI experience as an agent-attorney, Mr. Moschella retired in 1996 from the Senior Executive Service position of Chief of the Legal Advice and Training Section of the FBI. Between 1997 and 2003 he was the Director of Corporate Compliance for Horizon Blue Cross Blue Shield of New Jersey. He recently completed assisting the FBI in the implementation of its corporate styled compliance program – a first in the federal government. He is a graduate of Fordham College and Brooklyn Law School and a member of the Bar of the Commonwealth of Virginia. He has published several articles on compliance issues including "Federal Agency Compliance: Applying Corporate Lessons in Government Setting" in the June 2008 edition of the *Compliance and Ethics Magazine* and "The Wisdom of Corporate Compliance, Even in Government" as *Compliance Week Guest Columnist* on December 1, 2009. He helped to establish the Rutgers Center for Government Compliance and Ethics and is a member of its Advisory Board.

Mark Rowe

Mark Rowe is the Senior Consultant and Principal of Ethical Performance Associates, an ethics and compliance consulting firm that helps organizations align people, purpose, principles and process to create significant and sustainable value. After practicing as a corporate lawyer in London throughout the 1990s, Mr. Rowe has spent the past 10 years advising large organizations, especially global corporations, on optimizing their ethical performance and culture to enhance business performance,

manage risk and reputation, and build stakeholder trust. He applies his expertise across all aspects of developing, implementing, evaluating, and enhancing ethics and compliance programs.

Mr. Rowe helped to establish the Rutgers Center for Government Compliance and Ethics and is a member of its Advisory Board.

Previously, Mr. Rowe established and led the North American compliance and ethics advisory services practice for SAI Global (ASX: SAI), a leading provider of information services and solutions for managing risk, achieving compliance and driving business improvement. Prior roles include serving as Managing Partner of Hoffman Rowe, a consulting firm in which he collaborated with world-renowned business ethics pioneer Dr. W. Michael Hoffman, and on the staff of Bentley University's Center for Business Ethics, where he managed research, outreach and executive education activities.

Mr. Rowe has published numerous articles in leading academic and practitioner journals, and authored entries in two business ethics encyclopedias. He has provided business ethics commentary and analysis for broadcast and online media, including CNN, CNBC, and NECN. He has appeared on National Public Radio's "Marketplace" and "The Connection" shows.

As a member of Symantec Corporation's External Advisory Council, Mr. Rowe advised on the business ethics component of that company's first corporate responsibility report in 2008 (which won the Ceres-ACCA Sustainability Reporting Award for "Best First Time Report").

He holds a law degree from the University of Exeter in the United Kingdom, attended the College of Law, Chester, and was admitted to practice as a Solicitor of the Supreme Court of England and Wales (equivalent to attorney-at-law) in 1990. Mr. Rowe gained a graduate certificate in Business Ethics from Bentley University, is a Certified Compliance and Ethics Professional (CCEP) and is Certified in Healthcare Compliance (CHC). He also completed the Healthcare Compliance Certification Program at Seton Hall School of Law.

John Steer

John Steer is a Senior Partner with Allenbaugh Samini Ghosheh LLP. Before joining the firm in January 2008, he served as a member and Vice Chair of the United States Sentencing Commission from November 1999 to December 2007. Prior to these appointments by Presidents Clinton and Bush, he was the Commission's General

Counsel for more than 12 years. Mr. Steer is a recognized authority on the federal sentencing guidelines, including the principles of the guidelines that describe effective risk assessment and compliance programs for business organizations. These standards have become an international model for developing programs that help businesses establish an ethical culture and meet applicable legal and regulatory requirements. Mr. Steer led the efforts to strengthen these compliance features in 2004 and frequently lectures on these subjects.

Previously, Mr. Steer had a long career with the United States Senate, including service as Legislative Director for U.S. Senator Strom Thurmond and counsel for the Senate Judiciary Committee from 1979-1985 and as Administrative Assistant to Senator Thurmond from 1985-1986.

Mr. Steer has presented testimony on sentencing issues at several House and Senate Committee hearings, and given sentencing presentations at international conferences in Brazil and Russia (including testimony before the Russian Duma). He has also authored a number of law review and journal articles on a variety of topics related to sentencing and compliance. Mr. Steer helped to establish the Rutgers Center for Government Compliance and Ethics and is a member of its Advisory Board.