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Foreword: Twenty-Eighth Annual Corporate Law Symposium: Rethinking Compliance

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FOREWORD

Felix B. Chang †

The University of Cincinnati College of Law devoted its 28th Annual Corporate Law Center Symposium to compliance.¹ It was a timely choice, coinciding not only with an explosion of sector regulation in recent years but also with shifting market realities for legal employment and legal education. The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)² and the Patient Protection and Affordable Care Act³ are two prominent examples of major legislation that has added—and will continue to add—to compliance obligations for broad swathes of industries. Meanwhile, the financial crisis has spurred profound transformations in legal employment, including cutbacks in entry level hiring by large law firms and a concomitant surge of “JD plus” jobs in corporate compliance.⁴ In response, law schools have pirouetted (sometimes ungracefully) to establish compliance courses that position their graduates to compete for such jobs.

In the face of these changes, however, there is the potential to remake both compliance programs and compliance education. Even as new regulations are written, companies can re-conceptualize compliance in more holistic and paradigm-bending ways—rather than hiring lobbyists to wage war with regulators. By engaging with a broader set of stakeholders than traditional corporate constituencies, for example, compliance programs can better follow the law—and perhaps even anticipate the risks that regulations intend to address.⁵ Further, by espousing ethical values in day-to-day operations, firms can bolster both their reputations.⁶ This starts not just at the board room, of course, but also in the academic training of

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1. For the full agenda, see *The 28th Annual Corporate Law Center Symposium: Rethinking Compliance*, UNIVERSITY OF CINCINNATI COLLEGE OF LAW (Mar. 13, 2015), <http://law.uc.edu/corporate-law-center/2015-symposium>.

2. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

3. Pub. L. No. 111-148, 110 Stat. 2033 (2010) (codified in scattered sections of the U.S. Code).

4. See D. Daniel Sokol, *Teaching Compliance*, 84 U. CIN. L. REV. __ (2016); William D. Henderson, *From Big Law to Lean Law*, 3 INT’L REV. L. & ECON. (2013).

5. See Kristin N. Johnson, *The Limits of Compliance: Cyber Risk Regulation*, 84 U. CIN. L. REV. __, __ (2016) (adapting New Governance ideas on broadening participation in the regulatory process); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 373 (2004).

6. Déborah Philippe & Rodolphe Durand, *The impact of norm-conforming behaviors on firm reputation*, 32 STRAT. MGMT. J. 969 (2011).

the next generation of compliance officers even before they enter the workforce.

The stakes are high for getting compliance right. We are still reeling from the financial crisis, which, incidentally, was not that distant from the last round of corporate scandals in the early 2000s. Those scandals inspired Congress to pass Sarbanes-Oxley (by wide, bipartisan margins)⁷, business schools to step up ethics courses, and the market to embrace internal compliance programs and external compliance consultancies.⁸ Yet, arguably, the financial crisis proves that those efforts failed. As the leaner post-crisis legal departments and law firms give way to cadres of compliance officers, compliance itself may become the front line of defense against future economic meltdowns.

The contributions to this issue of the *Cincinnati Law Review* reflect an exuberant spirit that embraces, rather than shirks from, the challenges of these times. Collectively, the contributions rethink the implementation and teaching of compliance and advance specific recommendations on how to improve both.

In *Teaching Compliance*, Professor Sokol, an expert in antitrust, offers practical tips for the design and implementation of compliance education programs. Conscious of the business, legal, and cultural transformations that have propelled compliance to prominence, his Essay stresses both the need to actively monitor for risk and the need to understand, among other things, a firm's organizational design.⁹ This speaks to a conundrum that is at the heart of compliance: specifically, how can a firm give its compliance officers the freedom and creativity to anticipate problems even though the compliance function is subsumed within the firm's larger business operations? Vis-à-vis the *teaching* of compliance, Professor Sokol has several recommendations. Here I will focus on two. First, he argues for supplementing—or perhaps altogether supplanting—the law school casebook with business school case studies.¹⁰ This fosters out-of-the-(legal)-box thinking and helps students understand the world-views of the businesspeople driving a firm's decisions. Second, and more helpful still, Professor Sokol provides a blueprint for the compliance class, drawn from his own experiences teaching the subject.

7. H.R. 3763 (107th): *Sarbanes-Oxley Act of 2002*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/107/hr3763>.

8. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. LAW Q. 487 (2003). Even by the time of Professor Krawiec's influential article, compliance had come a long way since *Graham v. Allis-Chalmers Manufacturing Co.*, 188 A.2d 125 (Del. 1963).

9. See Sokol, *supra* note __, at __.

10. *Id.* at __.

Components include the incentives and organizational design of firms, risk analysis, and risk mitigation.¹¹ If done right, the law school compliance class can help future compliance officers encourage their firms to take on pro-compliance ethical values. Even before its appearance in print, this Essay was garnering attention in the legal academy for its insights on compliance courses.¹²

If the essence of compliance is anticipation, then an area fruitful for the exploration of compliance is data security, where the threats are ever changing and the regulatory regimes are frequently weak, disparate, and contradictory. Today's businesses face the constant and ever evolving threat of cyber attacks;¹³ additionally, the regulatory frameworks that have developed to protect the storage and transmission of personal and confidential data can vary widely by jurisdiction.¹⁴ Coincidentally, two essays in this issue consider the challenges of cybersecurity and data protection in our age.

In *Complying with International Data Protection Law*, Professor Cunningham compares the data protection laws in two major jurisdictions: the U.S. and European Union ("EU"). While the U.S. approach is fragmented, based on sector regulation of industries that have traditionally handled private data,¹⁵ the EU framework is much more comprehensive, tied together by a directive that protects the processing and movement of personal data (the "Data Protection Directive").¹⁶ The Data Protection Directive is rooted in the notion that privacy is an expressly fundamental right.¹⁷ Significantly, both the Data Protection Directive and EU Data Protection Regulation, which is scheduled to replace the directive in 2016, exert extraterritorial effects on firms domiciled *outside* the EU. This framework prohibits the transmission of personal data of EU citizens to any country or entity that fails to comply with the Directive; only 11 countries have been deemed adequate under the Directive, and the U.S. is not among them.¹⁸ Yet the EU is becoming less of an outlier

11. *Id.* at ____.

12. See Stephen Bainbridge, *Sokol on "Teaching Compliance"*, PROFESSORBAINBRIDGE.COM (June 10, 2015), <http://www.professorbainbridge.com/professorbainbridgecom/2015/06/sokol-on-teaching-compliance.html>.

13. Cyber attacks involve theft and abuse of confidential data, fraud, and other misuse. Johnson, *supra* note __, at __.

14. See McKay Cunningham, *Complying with International Data Protection Law*, 84 U. CIN. L. REV. __ (2016).

15. *Id.* at ____.

16. Council Directive 95/46/EC, 1995 O.J. (L 281) 31 (EC) [hereinafter, Data Protection Directive].

17. See *id.* at art. 5.

18. Cunningham, *supra* note __, at __. As an illustration, the Essay notes that a U.S. company might do business with a party that falls under the EU data protection laws, and, "therefore[,] cannot

in the stringency with which it protects personal data. Other countries have adopted laws patterned after the Data Protection Directive, so the EU has effectively lifted the standards for privacy protection around the world.¹⁹ Here the EU's first-mover status resembles first movers of regulation in other areas of the law,²⁰ but because of the rapid pace of innovation for the technologies which transmit personal information, resistance has dissipated quickly, and other countries are coming into conformity.

The lesson from the Data Protection Directive²¹ nicely complements Professor Johnson's essay, *The Limits of Compliance: Cyber Risk Regulation*. This Essay surveys the threats from cyber attacks and concludes that conventional methods—which rely on common law, state statutes, market solutions, and federal regulation—cannot keep pace with cyber risks.²² The threats are simply too protean and often emanate from firm-insiders.²³ To bolster compliance efforts, this Essay looks to the New Governance literature, which, among other things, (i) encourages broader participation by bringing diverse groups of market participants, regulators, and affected communities into the decision-making process and (ii) engages with creative solutions to regulatory problems.²⁴ While this literature has been around for a few decades, Professor Johnson's (re)turn to it is well-timed, as others too are pondering how broadly a company's constituents should be conceived, so as to minimize externalities and inequality.²⁵

Pushing the boundaries of compliance even further, Claire Sylvia and Emily Stabile argue in *Rethinking Compliance: The Role of Whistleblowers* that whistleblowers can enhance internal compliance programs. Sylvia and Stabile, from the prominent whistleblower law firm of Phillips and Cohen LLP, delve into the controversy over

share information without, at minimum, a legal promise to protect it." *Id.* at ____.

19. *Id.* at ____.

20. Most notably, the Foreign Corrupt Practices Act.

21. That is, a decision to go beyond the strictures of existing law can reverberate to other compliance cultures.

22. See Johnson, *supra* note __, at ____.

23. *Id.* at ____.

24. See *id.* at ____ See, e.g., Lobel, *supra* note __; IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992). See also Johnson, *supra* note __, at ____ ("Fundamentally, New Governance counterbalances the weaknesses of self-regulation by emphasizing regulated entities' accountability to the broader communities where they operate.").

25. See, e.g., ROBERT B. REICH, *SAVING CAPITALISM: FOR THE MANY, NOT THE FEW* (2015); David Millon, *Team Production Theory: A Critical Appreciation*, 62 *UCLA L. REV. DISC.* 79 (2014); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *VA. L. REV.* 247 (1999).

Dodd-Frank's whistleblower protections, which were patterned after the False Claims Act but do not require a whistleblower to report internally or initiate a lawsuit on the government's behalf.²⁶ Of course, the whistleblower model is hardly a "new" safeguard against corporate abuses; it has been around long enough to have amassed a substantial body of cases, as well as government and scholarly literature devoted to the empirical analysis of its effects.²⁷ This Essay weaves together numerous examples of where whistleblower programs not only helped to ferret out wrongdoing in individual cases, but over the long term bolstered compliance programs and ethics standards across entire industries.²⁸ Even where, as in Dodd-Frank, whistleblower rewards seem disconnected from internal compliance, they can nonetheless buttress ineffective or underutilized compliance programs.²⁹ Hence, whistleblowers are an important, if unexpected, corporate constituent that can help attain the goals of compliance programs: fidelity to the law, preventing abuses, and cultivating an ethical business culture.

Finally, this issue of the *Cincinnati Law Review* also includes the 2015 Taft Lecture, given by Professor Gerken and titled *Living under Someone Else's Law*. While the Lecture revolved around vertical federalism, a constitutional issue, the Lecture has resonances for compliance. Specifically, there may be instances in which differences in compliance regimes between two jurisdictions prove illuminating. A regime that incorporates whistleblower protections might work in the U.S., for instance, but it would be untenable in the EU.³⁰ There may be doctrinal, institutional, and cultural reasons for the differences.³¹ If we were to channel the lessons of Professor Gerken's lecture,³² then, as each jurisdiction's compliance culture

26. See Claire Sylvia & Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 U. CIN. L. REV. __, __ (2016); Dodd-Frank, § 922(a).

27. See, e.g., *Warner-Lambert to Pay \$430 Million to Resolve Criminal & Civil Health Care Liability Relating to Off-Label Promotion*, DEP'T OF JUSTICE (May 13, 2004), http://www.justice.gov/archive/opa/pr/2004/May/04_civ_322.htm; U.S. Securities & Exchange Comm'n, *Dodd-Frank Whistleblower Program*, 2015 Rep. to Cong., <http://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>.

28. See, e.g., Sylvia & Stabile, *supra* note __, at __ (discussing changes in defense contracting as a result of modernizing the False Claims Act).

29. *Id.* at __.

30. This is due to lingering trauma from Nazi and Communist eras, where informing on one's family, neighbors, and associates eroded the social fabric. See Donald C. Dowling, Jr., *How to Launch and Operate a Legally-Compliant International Workplace Report Channel*, 45 INT'L LAW. 903, 906 (2011); *Sarbanes-Oxley Whistleblower Hotlines across Europe: Directions through the Maze*, 42 INT'L LAW. 1, 11-16 (2008).

31. For instance, international harmonization is all the rage in financial regulation, but harmonization is less extant in data protection and virtually irrelevant in health care regulation.

32. Professor Gerken's Lecture teaches that spillovers are inevitable in our age of

evolves in accordance with that jurisdiction's regulations, we would hope that the differences will prod companies to think critically about pushing the parameters of their own compliance programs.

We will have to leave the debate over harmonizing compliance regimes to the comparativists. For now, this issue is a worthy start for re-conceptualizing compliance.

interconnectivity, and sometimes spillovers should be celebrated, not least for their capacity to foster discourse in our politically divided society. See Heather K. Gerken, *Living under Someone Else's Law*, 84 U. CIN. L. REV. __, __ (2016).