

## The “Right Way”: Moral Capitalism and the Emergence of the Corporate Ethics and Compliance Officer

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### **Abstract**

Under the influence of U.S. government regulations, enforcement of anti-bribery laws and embarrassing corruption scandals, major global corporations have realized that unethical conduct may affect not only their reputations but also their profits. This development has given rise to a new position within the traditional management team: the ethics and compliance officer (who differs from the established corporate social responsibility function). Based on field research in the compliance industry, this article describes how the moralization of firms has led to the emergence of a new corporate function: the ethics and compliance officer. It further describes how ethics and compliance officers learn their craft and how they cope with their role as moral compass of firms that need to compete in a global market where ethics may be viewed as a cost that inhibits profitability.

### **Keywords**

Morality, Business Ethics, Compliance, Moral Capitalism

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### **Introduction: morality and economy**

During a four-day conference of ethics and compliance professionals, held in Atlanta in 2014, I was part of a group of 50 participants who had paid an extra US\$250 each for a special half-day field visit to Coca-Cola headquarters.<sup>1</sup> Our goal was to learn about the company's compliance program. We were welcomed by the head of Coca-Cola's Ethics and Compliance Department, who reminded us of Coke's brand slogan: "The Real Thing." But the compliance chief also revealed that Coke has a second slogan: "The Right Way." She then explained how Coca-Cola, certainly the world's most well-known and long-established brand, sold in 207 countries, has become a prototype for the ethical business regime. Without "The Right Way," we were told, there could be no "Real Thing."

The example of selling Coke around the world gives us a vivid picture of the apparent fusion of global commerce and ethical practice in a multinational firm. Selling soft drinks is now an ethical project. How did this happen? How has ethics become such an integral part of modern global capitalism?

This article is about the process of moralizing capitalism and the way in which ethics and compliance officers learn their craft. In particular, I will try to use ethics and compliance as a window to understanding the ethical developments in modern global capitalism and neoliberalism as such. I will do this by first outlining the process of moralization, and then describing how morality enters the everyday world of modern corporations in the form of ethics and compliance organization. Finally, I will suggest certain avenues of how anthropologists might understand moral projects within business, viewing ethics not as a ploy or tactic, but as an essential part of today's global economy.

With every new corporate scandal, policymakers and other observers invariably call for more ethics, transparency and moral responsibility in the modern corporation. Such appeals certainly arose with Enron in 2001, the 2008 financial crisis, the 2014 Volkswagen emissions scandal, and the recent leak of the so-called "Panama papers." On first sight, it appears that morality and ethics—doing the right thing, corporate social responsibility, and so on—are something new, an innovation. Ostensibly, we would then have to explain how ethics has recently *penetrated* the operations of the firm. We would be describing a process of "moralization." Such a discussion would be somewhat

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<sup>1</sup> Earlier versions of this paper were presented at the panel on policy language held at the 2014 American Anthropological Association meetings and at the panel on business ethics at the Swedish Anthropological Association meetings in 2015. I wish to acknowledge the valuable comments by participants at these meetings, as well as by the two anonymous reviewers from the *JBA*. Financial support for my research on compliance was provided by a grant from the Swedish Research Council (Vetenskapsrådet).

misleading, however. In fact, discussions of the market economy's moral character and the influence of moral and ethical considerations in market practice have a long history (Hirschman 1982; Fourcade and Healy 2007). One might instead remark on the increasing *salience* of moral and ethical considerations as an integral part of business practices.

Social anthropology offers an alternative approach to the issue of whether moral and ethical considerations are a recent addition to business life. Anthropologists begin with the premise that all economic systems have moral components: there are socially approved and disapproved ways of producing, distributing and consuming resources, and in every society, there are certain goods, services or exchanges that ought not, indeed must never, be commodified (gifts and parental care for example). Anthropologists studying the norms and limits of exchange in primitive or peasant societies have relied on the concept of "moral economy." Breaching this moral economy, as we learn from the works of James Scott (1976, 1985), E.P. Thompson (1971), Karl Polanyi (1956), Marshall Sahlins (1972), and many others, can lead to sanctions, conflict, or even social revolt. All economies are thus moral economies in so far as they rely on moral precepts and norms for their functioning (this does not rule out calling them "political economies" as well). Norms of reciprocity (Gouldner 1960; Mauss 1967) are the most well-known of these moral precepts. But norms of "fair exchange," "accountability," "trust," or "efficiency" can operate as well. Such norms certainly exist in the modern redistributive welfare state, where citizens contribute to the collective in the form of taxes so that certain vulnerable groups—as long as they are legally or morally entitled—can obtain essential services. Breaches of this modern moral economy, in the form of tax evasion, bribery, or welfare benefits fraud, are more than just legal violations; they carry moral weight.

Now the term "moral economy" means very little unless we can specify what an immoral or amoral economy might look like. Maybe an economist, using a theoretical model of exchange and cost/benefit, could construct such a model. Perhaps this model might be based solely on mutual advantage or contract. But, as an anthropologist, I cannot think of any economic transaction that would be devoid of moral precepts, moral expectations, admonitions against moral breach of standards and rules, notions of fair play, efficiency or even "honor among thieves." Research on fiddles and cheats at work in the UK, or the culture of thieves in Russia, describes the moral elements within these shadow economies. There is honor, moral honor, even among thieves and swindlers. Contracts may be legal documents, but they are also moral ones, which is why they must be signed, or at least affirmed with the proverbial handshake.

While debate over capitalism's moral dimensions goes back several centuries (Hirschman 1982), some discussions have assumed that capitalist economies, with their ceaseless accumulation and dispossession

(Harvey 2004), are somehow devoid of morality. Today's anti-capitalist activists often talk as if they want to restore a moral order that capitalism has destroyed, invoking images of community, equality and solidarity that ostensibly existed in the recent past. This kind of rhetoric has existed for over two centuries, as Hirschman pointed out (see also Fourcade and Healy 2007). The question here is not whether capitalism as a system should be norm-based, that is, more than just the sum of contracts and exchanges. Rather, it is about what kind of norms should operate. For proponents of the market economy, the morality of the capitalist firm should be restricted to its moral obligations to shareholders; hence, Milton Friedman's famous dictum (1970) that "the social responsibility of business is to increase its profit."

The idea that capitalism is without morality, and that the penetration of ethics is somehow new, is specious. Readers of this journal who sit for just a few minutes in any group of modern capitalists, be it a board meeting, a sales conference, or in a bar after work, will quickly identify a variety of moral discourses, especially centered on the proper way to do business. The morally "proper" way, as our business colleagues would have it, may not be the legal way, of course, but there is certainly a moral discourse involved. The ideology of business ethics assumes some kind of overlap between legal norms and a moral code operating within the firm and its employees. This overlap would be embodied in a company code of conduct, for example. Once in a while, however, the moral code and the legal code clash. And we obtain the stories of how certain firms and/or managers, in their own moral enclave, swindled, cheated or bribed.

This clash between the ideal and the actual, between the informal norms and formal structure, between the moral and legal—this is the stuff of anthropology. But from a business ethics perspective, it poses a different sort of problem. There is apparently, a right and wrong way to be a capitalist. In ideal terms, the right way to be a capitalist involves, firstly, following established laws and regulations. But it also includes following certain accepted moral and ethical codes (the right culture) and making ethically justifiable or accountable decisions.

This discourse of the right and wrong way to do business is not new. It has existed long before the founding of the discipline of Business Ethics, which itself is now decades old. As Andrew Stark notes in an article from 1993, "there are more than 25 textbooks in the field and 3 academic journals dedicated to the topic. At least 16 business ethics research centers are now in operation" (quoted in Hoffman et al. 2014: 669), and one major textbook on Business Ethics is now in its fifth edition (ibid.)

With the publicity of various corporate scandals of the 21<sup>st</sup> century, where the Volkswagen emissions scandal in 2015 and the Panama Papers leak are but the most recent additions, the urgency of ethics within

businesses seems to have become more pressing. Mark Schwartz, a leading business ethics scholar and co-editor of a major textbook (Hoffman et al. 2014: 676) notes that "the range of illegal and unethical activity taking place is extensive and includes corruption, bribery, receiving and giving gifts and entertainment, kickbacks, extortion, nepotism, favoritism, money laundering, improper use of insider information, use of intermediaries, conflicts of interest, fraud, aggressive accounting, discrimination, sexual harassment, workplace safety, consumer product safety or environmental pollution' (Schwartz 2013).<sup>2</sup>

What we might call an "ethical turn" in modern business is not simply a result of scandal or pressures for increased transparency. State authorities are also taking their tasks more seriously. Hence, modern business enterprises now risk prosecution by the U.S. or UK governments for corruption or tax evasion, and these legal risks are aggravated by reputation nightmares that can be magnified by social media in a matter of hours. Corporations have thus painfully recognized that they need to acknowledge both moral and legal guidelines. They need to respect laws simply in order not to risk prosecution. But they also need to be transparent and accountable to preserve their public image. They need internal codes and standards in order to eliminate temptations to unfair competition and to protect fragile corporate reputations from bad publicity and lawsuits. Moreover, corporations need employees who understand these laws, guidelines, codes and standards so that they can act appropriately. Managers and employees need to learn that failing to respect these laws, guidelines, codes and standards may have immense consequences. Acting immorally may mean gigantic monetary penalties for the company, or even jail time for managers or executives. Capitalism, still ruthless and cutthroat as it is, is now an openly moral, or perhaps "moralized," economy. There are good and bad ways to do business; there is fair and unfair competition; there are level and uneven "playing fields." And, at the state level, there is an increasing frequency of "enforcement actions" by the U.S. Department of Justice or the UK Serious Fraud Office. And thanks to government surveillance, the whistleblower or the Wikileaks, the bad guys can occasionally get caught and punished. They have realized a need for a special kind of person who can impart to others "the right way" to do business.

The intensification of global trade and financialization over the past two decades has been one of the factors behind this ethical turn. The change is centered on the state's more active pursuit of illegal corporate behavior and corruption, especially as corporations pursue global profits and boardrooms become dominated by financial institutions rather than by individual founder-owners. These governmental campaigns for more

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<sup>2</sup> Schwartz and other business ethics scholars cite a host of other ethical issues connected with life in organizations, which are not necessarily a concern to ethics and compliance officers: for example, moving production overseas, or pursuing affirmative action policies.

ethics in business are pushed by non-state actors with moral or transparency agendas, such as environmental NGOs, financial transparency NGOs, or the UN Global Compact for CSR. More important, however, is the fact that firms themselves now realize the penalties that can be incurred when accused of unethical behavior—penalties that carry with them not just legal sanctions but losses due to “reputation risk.” In short, firms that act unethically can not only face prosecution and fines. They can see their stock value decline by billions of dollars (Volkswagen); they can go bankrupt from astronomical fines and legal costs; and their CEOs can go to prison (Arthur Anderson, Enron, and others).

This threat from both prosecution and reputation has resulted in the emergence of a particular specialist within the firm—the specialist in charge of respecting the gamut of legal, ethical and moral rules and regulations set by others and by the management; a specialist who ensures proper conduct, integrity, and whose job it is to enhance the firm’s moral and ethical fiber, both within the organization and in its relations with other firms and with society. The duties of this specialist go beyond the legal office (the general counsel) that most firms have. It is more than just legal advice to the board of the kind: ‘Will we go to jail if we do this?’

### **“Do the right thing”**

I am instead talking about a relatively new kind of function, known as the “ethics officer,” “ethics and compliance officer,” or “chief ethics and compliance officer” (abbreviated ECO, CCO, or CECO, with the field often called E&C). The job of the ECO, unlike the general counsel, is not simply to avoid prosecution or keep executives, managers, or sales staff out of jail. It is to encourage employees to do the right thing. The E&C staff should not be confused with the CSR team, which relates to the firm’s link with society; nor do they necessarily handle issues of corporate citizenship, even though these specialists may be found in the same department. The ethics officer certainly evaluates risk, as does the financial officer, but for the E&C officer it is “reputation risk” rather than financial risk which is at stake, and particularly, the risks to reputation caused by breaches of integrity by employees, sub-units or contractors.

The ECO is thus considered to articulate the moral core of the company, its mission, or “values.” If capitalism is now acknowledging or even promoting its morality, it is the ethics and compliance officer who is at the forefront of this campaign. For the researcher, the compliance officer can thus be seen as a window towards understanding contemporary capitalist morality. In a world of demands for accountability following revelations of scandal, where firms are being accused of (or admit to) swindling and bribing for hundreds of millions of dollars, of covering up illegal or unethical transactions, of simple bad conduct, the firms need to have a sub-unit that can pursue or assure some

level of integrity, the "right way." They need a unit that establishes, promotes, and then monitors the relevant laws, guidelines, codes and standards that everyone must adhere to, even third-party suppliers. This activity is called the "compliance function," and it is headed by a compliance officer. Let us therefore look more closely at the ethics and compliance officer.

E&C officers have now taken their positions inside the firm's infrastructure, alongside Human Resources, the Legal Office (General Counsel), and the Internal Audit office. The formerly tripartite executive known as the C-suite (chief executive, financial, and operation officers) is now augmented by the chief compliance officer. The compliance function in a firm is often subsumed under what are called the "soft areas" of business operations, known as Governance, Risk, and Compliance (GRC). GRC contains functions such as CSR, diversity management, and risk assessment, including reputational risk, as well as ethics and compliance issues.

The term "compliance" takes on different connotations in various languages, sometimes remaining in English (in Denmark and Germany), but on other occasions translated as the French *conformité*, Romanian *conformitate*, or Swedish *efterlevnad* (lit. live-after/according). As a profession and field of discourse, ethics and compliance have certainly become popular. One can find a [compliance dictionary](http://compliancedictionary.com) on line; *The Wall Street Journal* now has a weekly "Risk and Compliance" blog. And with the hundreds of ethics and compliance jobs advertised on-line, we are left with a single conclusion: compliance has arrived.<sup>3</sup>

### **The world of compliance**

Over the past two years, largely through attending training sessions, conferences, and unstructured interviews with compliance officers, I have tried to learn what it is like to be an ethics and compliance officer in the post-Enron era.<sup>4</sup> Like any ethnographer entering a new "tribe," my initial task was to try and decipher the language of compliance by listening and conversing with trainers, presenters at conferences, leaders of compliance associations, and especially vendors selling compliance "tools" (for instance, software/consulting). I have therefore attended compliance conferences and instructional seminars of the Ethics and Compliance Officers Association and the Society for Corporate

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<sup>3</sup> LinkedIn search criteria yield the following under "Ethics and Compliance": 1172 positions open, "ethics and compliance" + specialist: 32515 positions; "chief compliance officer": 370 positions. (Oct. 19, 2015). Monster.com had 915 jobs listed under "ethics and compliance."

<sup>4</sup> Enron, by the way, had what at the time was a highly praised code of conduct, which was later available for sale on eBay, in mint condition, for US\$15; former Enron officers now, reborn as ethical guardians, often speak at compliance and fraud examiner conferences.

Compliance and Ethics. I have endured endless power-point checklists of ethical do's and don'ts by lawyers, accountants, fraud investigators, trainers, and company compliance officers. I have been to training courses and seminars, generally costing as much as US\$1200 per day, and obtained limited access to magazines with subscription rates of US\$1000 a year. I also read websites and magazines such as *Compliance Insider*, *Compliance Week* and *Compliance Professional*, textbooks such as *Compliance 101*, and training brochures such as "Dealing with your GRC demons," and "Fighting Compliance Fatigue." I have participated in compliance simulation games and perused brochures and software proffered me by compliance vendors and consultants.<sup>5</sup> And to participate, I also wrote articles in compliance publications/websites about how we anthropologists view the concept of culture (Sampson 2014a, 2014b). My research was piqued by the fact that one of the most common expressions used in the field is that of "the culture of compliance." For compliance professionals, this "culture" combines values, attitudes and practices. "Building a culture of compliance" requires engaging employees with the company values and creating a climate of trust; hence the mantra, launched by the CEO of Ford Motor Company: "Trust is the New Black".

What encompasses this domain of Ethics and Compliance? As most compliance specialists underscore, it has a dual character. It consists, first, of respecting externally (external to the company) imposed laws, regulations and standards ("what we have to do to keep us out of jail"). Typically, these compliance obligations have to do with financial reporting to regulatory authorities, obeying anti-bribery laws, showing that the firm has a compliance policy, and conforming to industry standards. This legal/regulatory framework—whether national, EU, or industry-based—involves penalties for not complying. Compliance in this sense carries no connotation that the firm, team, or manager agrees or supports the laws or rules to which he or she is complying. At the firm level, compliance is expressed through training and respecting the company codes of conduct, in areas such as conflict of interest, "facilitation payments," or hospitality.

Beyond mere compliance, however ("doing things right"), E&C also has a further, normative aspect of ethics, to "do the right thing." Ethics and Compliance officers, therefore, are supposed to pursue an ethical mission: they are the ethical watchdogs of their companies, ensuring that employees, managers, and even the board follow the company's code of conduct, and that potential abuse is detected before the company is subject to investigation or its offices raided by the FBI (or, as one

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<sup>5</sup> For one such game, called the Global Business Ethics Challenge, see <http://impactonintegrity.com/wp-content/uploads/2015/05/IOI-GBEC-2015-English.pdf>. Tools and training are supplied by large accounting firms such as PWC and KPMG, and by specialist ethics and compliance firms such as Red Flag or LRN. A large compliance gathering would have about 100 such vendor booths.

company counsel described it, "before being visited by people carrying guns and with initials on the back of their windbreakers"). A breach of ethical standards that becomes public knowledge (or is leaked by a disgruntled, whistle-blowing employee) brings with it reputation damage. Customers may now assess the moral quality or image of people with whom they do business. In such cases, clients, customers, or partners may decide to take their business elsewhere. Well-known examples of compliance breaches here are exposés of dangerous working conditions in Bangladesh textile factories or the VW misrepresentation of its diesel emissions. In this light, ethics and compliance is therefore intimately involved with risk assessment, and the principal risk here is reputational risk.

Among compliance officers, in ethics training and at meetings of compliance professionals, the prevailing understanding of unethical behavior is that it is largely about "good people doing bad things." They do bad because they did not *know* it was bad. In this self-understanding, the sociopaths have largely been weeded out by the Human Resources Department, before being hired or along the way. In this understanding, the firm has the occasional bad apple, but bad apples are not the source of ethical breaches. The explanation for breaches is a culture of non-compliance, a culture whereby top management has not communicated its integrity standards strongly enough: top management has not had the proper "tone at the top." Or perhaps employees are afraid to report ethical abuse because there is no encouragement from management or no safe, anonymous whistleblower channel. From a compliance perspective, the "good people doing bad things" discourse means that explanations for occurrence of bribery, corruption, slush funds, personal trips, speed payments, conflicts of interest, double bookkeeping, or embezzlement can be attributed to poor communication from the top, inadequate incentives to avoid or report bad behavior, or to simple temptation. These are the notorious grey zones. It is these grey zones that can be ironed out if the firm has a "robust ethics and compliance program" (to use the common phrase) with clear messages and continuing training. In this optic, people in the modern firm are basically competent and good, employees are ethical, and ethics and compliance officers the most ethical, the very conscience of the company. This is perhaps why, at a recent gathering of E&C officers, all 1,500 of us stood up for a minute and simply *applauded ourselves* for pursuing this struggle to do good. It is why a leader of one compliance organization insisted to me that ethics and compliance officers "lose sleep at night"—not because they are ambitious for profits, but about doing the right thing. E&C officers are the embodiment of this new ethical turn in modern business. They are apparently burdened by their moral mission.

### **Origins of ethics and compliance regimes**

How did all this moralization of capitalism get started? In the U.S. and Europe, it appears that the impetus for the moral company comes from two well-grounded fears: fear of government prosecution and/or fear of loss of reputation in a world where social media are so powerful. In the United States, the rise of the compliance industry is generally attributed to the U.S. Government's 1991 "Federal Sentencing Commission Guidelines," and specifically Chapter 8, which covers sentencing for corporate/organizational crimes, and which were revised in 2004 as a result of the Sarbanes-Oxley Act.<sup>6</sup> The Federal Sentencing Guidelines specify that an organization or company convicted of violating federal criminal or financial statutes can receive a reduced penalty if it demonstrates that it had a "robust compliance program." The Sentencing Guidelines thus mandated that firms be ethical, and specifically, that they establish "an organizational culture that encourages ethical conduct".

According to the Guidelines (section 8B2.1), such a robust compliance program must have seven basic elements:

- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
- (2) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program (i.e. board responsibility).
- (3) Avoid using any individual whom the organization knew, or should have known, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.
- (4) Communication and training of employees in the compliance and ethics program.
- (5) Monitoring and auditing to ensure the compliance program is followed, including whistleblower arrangements.
- (6) Incentives to act in a compliant manner, with sanctions and appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
- (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct.

Under U.S. Federal Law, a company caught, for example, bribing a foreign

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<sup>6</sup> See Chapter Eight at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf>. For an overview, see Findler and Warnecke (2008).

official to obtain a contract would receive a certain number of points on the government's "culpability index." However, its sentence would be reduced if it could show that it had set up a viable ethics and compliance program; a company flouting or not having such a program would receive more culpability points and risk additional financial penalties, fines, or even imprisonment for the guilty CEO (see sections 8C24(d) and 8C25(b)).

Using the compliance program as a lever, the federal government, the Securities and Exchange Commission, and the U.S. Department of Justice are now empowered to negotiate criminal sentencing agreements. These Deferred Prosecution Agreements and Non-Prosecution Agreements can be used with companies suspected of bribing, tax evading, making illegal contributions, slush funds, price fixing, and other crimes. Under such arrangements, a fine of several millions of dollars can be reduced to a few thousand dollars. In addition to this "carrot," there is also a "stick": a strengthened Government Whistleblower Program grants generous rewards to employees who reveal crime in their companies, up to 30 per cent of the total amount of the violation. Under this program, the U.S. government has paid out millions of dollars to individual whistleblowers, including a US\$30 million award (in September 2014) and US\$10 million in April 2016.<sup>7</sup> In 2014, the Government Whistleblower Program received 3,600 such whistleblower tips, rising to nearly 4,000 in 2015.<sup>8</sup> Since August 2011, 22 whistleblowers have received US\$54 million in rewards.<sup>9</sup>

The Federal Sentencing Guidelines, now enhanced with new laws on financial reporting, CEO personal responsibility, and whistleblowing reward incentives (the Sarbanes-Oxley and Dodd-Frank Acts) along with enhanced enforcement of the Foreign Corrupt Practices Act—and now in the UK, the UK Anti-bribery Act—have led to a new emphasis on ethics and compliance within corporate management in both the U.S. and abroad. According to most compliance experts, the initial mood was one of "compliance" rather than "ethics." That is, it was based on formally complying with the laws and regulations in order to avoid prosecution. Compliance was based more on a fear of doing things wrong rather than on a moral awakening to do things right. Companies began to realize that they needed to ensure that their employees acted ethically, that they would follow rules, regulations and codes of conduct, that they would report violations of these through internal hotlines, and that managers

<sup>7</sup> SEC Announces Largest-Ever Whistleblower Award, Sept. 22, 2014.

<https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290>

CFTC Announces Whistleblower Award of More Than \$10 Million, April 4, 2016.

<http://www.cftc.gov/PressRoom/PressReleases/pr7351-16>.

<sup>8</sup> See <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>

<sup>9</sup> *Ibid.*

would not retaliate against them. As compliance departments were established, the ethical dimension began to make its impact.

Today, most major companies now have E&C departments who conduct risk assessments, formulate codes of conduct, ensure that these codes are actually read and respected by employees, and who evaluate potential ethical dilemmas that might face their company. Siemens has over 600 compliance officers, Coca Cola 500, United Technologies 500, Johnson and Johnson 240. The role of Siemens is prominent here, precisely because the company was found guilty of corruption under the Foreign Corrupt Practices Act, with a fine of US\$800 million (including disgorgement of profits).<sup>10</sup> Today, Siemens' compliance program—with its slogan of “Prevent, Detect, Respond” on its web site—is considered a model to be followed. According to the Siemens website, it received 653 compliance complaints or queries in 2014, of which 195 resulted in disciplinary action.<sup>11</sup>

Who are these compliance officers? Of those I have interviewed at conferences and heard speak at workshops, both instructors and professionals seeking certification, the vast majority are lawyers who have worked within the firm. Others are audit officers, fraud investigators, and HR professionals. Unlike law, finance, management or accounting, ethics and compliance is a new field, which is not (yet) a formalized field of study at most business schools so that, at best, the new compliance officers has had a course in Business Ethics at college. Ethics and Compliance is thus learned on the job, or through in-house training, or short courses and conference seminars.

A compliance officer must acquire a complex package of skills: knowledge of laws, regulations and codes of conduct; awareness of risky business practices in the branch of business they are in (pharmaceuticals, for example, would have different risks from defense contracting, retail sales, or financial services). In addition, they need to know how to communicate ethics to the rest of the employees without being patronizing or intimidating. They need to make sure that their employees know the compliance framework, and that they themselves are acting in an ethical manner. However, more than these organizational skills, ethics officers are supposed to have certain personal qualities. Most of them are younger women (below 45) trained in law, and in this new field they must learn to assert their ethical authority over older men, especially engineers, financial officers, and those in the sales force. This more

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<sup>10</sup> Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (<https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105-html>); Siemens to Pay \$1.34 Billion in Fines (*New York Times*, Dec. 15, 2008). The Siemens penalties also include repayment of illicit profits (disgorgement), such that the most cited penalty amount for the Siemens case is 800 million dollars.

<sup>11</sup> See <http://www.siemens.com/about/sustainability/en/core-topics/compliance/management-facts/>

established group may find ethics and compliance an unnecessary burden, a cost of doing business "out there," "in the real world." The job of the compliance officer is to implant a culture of ethics in the organization. Hence, they must possess, and reflect, a high degree of integrity. They must act by example.

### **Expansion and professionalization**

Beginning with financial services and the rest of the private sector, public organizations in fields such as health, education, city administration and utilities have developed their own ethics and compliance programs. The impetus here is not so much ensuring profitability, or avoiding financial or reputation risk, but to improve the workplace climate, prevent losing federal grants or contracts and prevent litigation by disgruntled employees, clients, patients, or other user groups who might feel mistreated or abused. The Health Care Compliance Association (HCCA), bringing together both public and private healthcare providers, was established in 1996, and now has over 3000 members. Many HCCA formed the core of what would become the Society for Corporate Compliance and Ethics, now with 15,000 members.<sup>12</sup>

With fear of prosecution and of reputation risk, the compliance field has expanded to pursue professionalization, beginning and advanced training, compliance officer certification, and other indices of credentialization typical of any new profession. There are now competing compliance officer associations in the United States and abroad with thousands of members. There are frequent ethics training courses, and an entire certification system with programs enabling one to become a Certified E&C officer at beginning, advanced, sectoral, and international levels. There are E&C software companies (one of which, appropriately, is called "Red Flag") selling a diverse range of services: due diligence investigations to vet third party contractors, training programs for anti-bribery law, employee monitoring systems to ensure that employees have actually read the company code of conduct and not just clicked through it, and so on. There is now an ISO standard for compliance programs, 19600-2014, as well as an anti-bribery ISO, no. 37001 currently in its final approval stages.<sup>13</sup> A few universities and business schools now offer a Master's degree in Ethics and Compliance, while compliance professionals can read various blogs and magazines, such as *Compliance Insider* or *Compliance Week*, or the Foreign Corrupt Practice Act blog ([fcpablog.com](http://fcpablog.com)) to learn about the newest compliance enforcement actions. Compliance

<sup>12</sup> See <http://www.hcca-info.org>. For another example, see the State of Illinois guide to health care compliance at [http://www.icaahn.org/files/HealthTech\\_Management\\_Services/Field\\_Guide\\_to\\_Healthcare\\_Compliance\\_Manual\\_FINAL\\_01062016.pdf](http://www.icaahn.org/files/HealthTech_Management_Services/Field_Guide_to_Healthcare_Compliance_Manual_FINAL_01062016.pdf)

<sup>13</sup> See <https://www.iso.org/obp/ui/#iso:std:iso:19600:ed-1:v1:en> and <http://www.iso.org/iso/iso37001>

association meetings that I have attended have had from 500 to 1,300 attendees with dozens of presentations and workshops. Smaller training courses lasting four or five days and costing about US\$1,500 have had 30-60 participants. At each of these meetings, participants can earn credits or points toward E&C certification which can be placed on a résumé. The E&C field is now so specialized that there are separate ethics and compliance meetings for those working in higher education, energy/utilities, and health care.

Compliance is now what we anthropologists might call an “assemblage” (Ong and Collier 2005 ), although I would rather term it a “package” of norms and practices—a package that travels (Sampson 2010, 2015). The traveling is facilitated by compliance officer organizations that market their ethical project as good for business, and that promote the need for skills and competencies in ethics and compliance and, therefore, a certification regime. The package is also promoted by the vendors, who market ethics and compliance tools as a risk-reduction solution in an environment where large multinational companies need to control the practices of all their employees, and where noncompliance can be extremely costly.

Governments are also promoting ethics and compliance, and highlighting the essential roles and responsibilities of the compliance officer. To this end, the U.S. Department of Justice offers an anti-corruption resource guide for firms, along with its official reports on corruption prosecutions and publicizing whistleblowing stories and statistics.<sup>14</sup> The OECD, World Bank debarment program, and the UK Serious Fraud Office, which enforces the comprehensive UK Bribery Act, are all starting similar compliance programs encouraging firms to come forward and self-disclose. Firms themselves are doing their utmost to avoid, preempt, or reduce federal fines for financial irregularities. Compliance is hot.

On the other hand, compliance officers also note that there are still those who view ethics and compliance as an obstacle to doing business. The E&C industry’s task is to convince skeptical businesses, especially small firms, that investment in ethics is good business. One survey, for example, concluded that firms with ethics programs made sixteen per cent more profits over a ten-year period than firms without them (Ethics Resource Center 2014). Some of the skepticism comes from within the ranks of E&C professionals, who explain that the image of ethics as “just talk” has limited its impact. It is only when ethics is applied, they say, using tools and skills inside an organization, and applied by the competent ethics and compliance officer, that ethical precepts become genuine compliance. The role of ethics and compliance professional

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<sup>14</sup> A Resource Guide to the U.S. Foreign Corrupt Practices Act (<https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>)

associations, then, is to promote their members as business professionals, rather than as ethicists wagging their fingers and telling sales teams or engineers that "you are not allowed to do that." The task of compliance officers is to avoid this kind of stigma, even while they themselves insist that they must have a higher ethical sensibility. At one compliance panel that I attended, for example, a compliance officer working for a travel and tourist firm explained that she herself could never receive a free trip. She would feel compromised. Her fellow travel agents, of course, took several such trips a year as part of their work, but as a compliance officer such perks would be off limits.

As a relatively new profession within the business community, with compliance sometimes being imposed on companies following a plea bargain, E&C officers must also be able to sell their financial value to management. Compliance officers must ensure that they can enter the C-suite, that the board takes them and their tasks seriously, in a situation where the board only wants them to "put out fires." This trend, sometimes called "Compliance 2.0," is much discussed in the compliance training literature (Greenberg 2014). Hence, one of the major challenges discussed by E&C organizations, trainers, and professionals is to show others that E&C is not simply mere ethics—that is, doing the right thing—but *that it is good business*. This view is usually promoted with examples of "the costs of noncompliance": the spectacular fines or jail terms imposed by the government on wayward companies, or the hundreds of millions spent in penalties and legal costs to fight misconduct accusations in federal courts.<sup>15</sup>

Inside the firm, however, compliance officers are often without sufficient resources to ensure that their programs will actually work. The monitoring, record keeping, training, and updating of employees on the latest laws, standards, codes, or regulations—the policies and procedures—can be costly in employee time and operating expenses. Several codes of conduct or policies may be operative at the same time. Changes in a single area, such as "Gifts and Hospitality," need to be transmitted, and translated down to front line employees in all the branches of a firm that may have thousands of employees and hundreds of subcontractors.

In a complex, global business climate, compliance officers complain about being unable to keep up with the daily changes in laws, regulations, standards and codes, much less reflect on the ethical and compliance risks they entail. When requesting additional resources—for example, new data processing or document management systems—they need to reaffirm

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<sup>15</sup> Avon Corporation, for example, was assessed US\$135 million for bribes in China to obtain licenses. (See <http://www.fcpaprofessor.com/avon-resolves-long-standing-fcpa-scrutiny-byagreeing-to-135-million-settlement>.) Yet Avon did not even make it to the "top ten list" of anti-bribery enforcement, with Siemens at US\$800 million; see the "FCPA Professor" blog at <http://www.fcpaprofessor.com/fcpa-101#q17>

their position internally, to show that ethics and compliance also produces a return on investment similar to that added by the legal office, IT, or HR.

### **The moral compass**

The ethics and compliance officer is not simply another part of the firm's management team. More than other employees, and resembling accountants, the E&C officer has an obligation to adhere to *public values* of trust and honesty. Like accountants, they are supposed to represent the highest ideals *of their profession*, respect *public values* of accountability and trust vis-à-vis the authorities, while at the same time being *loyal to the company*. Greenberg (2014) thus speaks of the "privatisation of compliance," in so far as compliance officers become tools of government anti-bribery enforcement. The ethics and compliance officer now has a responsibility to government as well. Ethics and compliance is now devolved from the government to the ethics and compliance department and the E&C officer.

The chief compliance officer is supposed to have independence within the firm. However, there are pressures and costs. The CCO herself may be vulnerable to government investigation and may be compelled to reveal misconduct. The CCO does not have the kind of attorney-client privilege that the general counsel has with the board. The career and legal risks here are obvious. When such conflicts of interest occur, a company accused of financial crimes can elect not just to fire their E&C officer for incompetence, but can even take her to court. E&C officers even have a special job insurance to protect them against litigation, as they do not qualify for the standard director's and officer's liability insurance (known as D&O). To add to these pressures, the government can also impose fines if they view a CCO as having acted in an illegal manner for not revealing company misconduct to SEC investigators.<sup>16</sup> Pressures indeed.

### **"Culture of compliance" and "Tone at the top"**

With these pressures, how do E&C officers demonstrate their moral compass? How do they convert cold-blooded conformity to laws, regulations, rules and standards—compliance—into "doing the right thing"? One way is by speaking the right way. Two major tropes in the compliance industry, tropes which occur repeatedly, are "culture of compliance" and "tone at the top." I have chosen these the two phrases because, in hours and hours of compliance meetings and pages and pages of articles, they were uttered most frequently and in various contexts.

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<sup>16</sup> The U.S. Securities and Exchange Commission imposed a \$25,000 fine on a compliance officer for poor implementation of compliance, i.e., failing to prevent embezzlement by a firm's president; see Killingsworth (2015).

Search for these two terms on Google, and we obtain up to 400,000 hits for each of them.

The culture concept is a pervasive part of organizational and management thinking. In everyday management consulting, and at meetings of those who teach or are learning about the compliance profession, culture is viewed as a set of values, attitudes and practices. As one compliance officer insisted, "we are in the behavior business." From a compliance perspective, cultures can therefore be "strong" or "weak," "proper" or "improper." Instituting an ethics and compliance program, therefore, is viewed as an intervention, a culture change. A statement about culture also involves invoking a company's "vision" with catchwords such as "excellence," "quality," or "communication." In one seminar that I attended, the compliance trainer asked our group: "How many of you in this room have Integrity as a value?" With culture being so important, the compliance officer's task is to promulgate these key values to the employees and engage them in the vision, a process often referred to as "onboarding." Ethics and compliance is thus a kind of vehicle that one enters, sometimes reluctantly.

Compliance professionals are well aware that organizations based on rules and regulations alone do not create an engaged work force. It is the organizational culture—"the way we really do things around here," to use a catch phrase—that governs how employees act in their everyday practice. This culture as practice trickles down from middle and senior management in the form of behaviors to be imitated or as informal instructions as to how (or how not) to really get things done. The ethics and compliance officer interferes in this trickling down process by promoting codes of conduct and clarifying the grey zones..

In organizations, the culture is grounded in the way employees are rewarded or punished by superiors when they meet or breach key values. Thus, compliance officers are aware that simply diffusing the code of conduct will not in itself create the desired culture. Something more is needed: employee engagement. Compliance officers thus talk of creating what they call "a strong culture of compliance." One of the most common expressions was "making the culture part of your company's DNA"—certainly a strange mix of nature and nurture.

Embedding these values in employees of a global company is certainly a challenge. There are differences of language, skill, and attitudes among those working for global firms. Engagement and loyalties vary among the dedicated managerial staff, the front-line sales force, the temporary and part-timers, and the outside contractors. Compliance officers speak of how difficult it is to reach those who are in the field, typically the sales force which is paid on commission, and which finds itself encouraged or even forced to cut corners (by giving bribes, and so on) in order to make sales or import goods. "How do you walk away from a sale?" they lament. "How can you let your imported goods sit there in

customs?" Issues like these arise continually between compliance officers in the home office and the field staff "out there" in the world.

Ethical commitment is impossible without management commitment, the proverbial "tone at the top." Lack of tone at the top was the cause of Enron's demise: it had an award-winning code of conduct and an exceptionally competent board, but there was no management commitment to ethics. The tone at the top mantra is another way of saying that top management must show a genuine commitment to ethics and compliance in order for employees to engage with the company's ethical code. Besides tone at the top, firms also need a "message in the middle," or "tone in the middle," such that middle managers and field staff will be involved. In this optic, ethics and compliance is not just the E&C officer's responsibility alone. It is everyone's responsibility, beginning with senior management. One of the challenges for the E&C officer is thus to prevent an "E&C silo" in the organization. As one compliance officer explained: "You have to think of yourself as a citizen of your organization." A company legal officer intoned: "I think we have a Doctor Phil moment here. It's all about relationships."

How do compliance officers actually learn to implement an ethical culture in their organizations? How do they make sure that there is a tone at the top? One way is by cautionary tales: At training sessions, some lasting a few hours, others for as long as five days, we hear what happened to firm A when its hospitality payments got out of control, to firm B when its Chief Financial Officer was arrested for breach of the Foreign Corrupt Practices Act, when firm C entered the European market and ran afoul of EU privacy laws, or when a whistleblower revealed to the SEC that his company D was fudging its books. Besides cautionary tales about the costs of noncompliance, these training sessions consist of sets of checklists. There are lists of what to remember, what to do, how to do it, what to look out for, how to involve the sales force, how to involve middle managers, how to get the board to take your work seriously, and, most importantly, how to diffuse ethics and compliance so that it becomes an integral part of the company's culture. In the meantime, the most recent corporate scandal (VW at the time of writing) becomes a teachable moment.

Accomplishing these goals is a difficult task for the compliance officer. For most of them, it is not their first job, but it is their first job in compliance. Compliance requirements and compliance teams are also new and expanding. There is no older generation of compliance officers to learn from about how it was "in the old days." At a recent annual meeting of the Society for Corporate Compliance and Ethics, the 1,300 attendees were presented on stage with four individuals who, it was said, "were the founders of the compliance profession." These founders were young enough to be still working, for compliance is barely 20 years old, and it has only taken off only in the last decade. One of these "founders"

exclaimed: "Accounting and law are thousands of years old. You people are pioneers."

All modern firms and public organizations must deal with ever changing government regulations, new demands for product quality and control, and ambitious personnel who have their own career aspirations. For this reason, compliance officers are constantly seeking out the latest pedagogical tools, courses, software to make their jobs easier, to simplify the kinds of data or measurements needed (the search for "metrics"), and to demonstrate to senior management that they are indeed doing their jobs right and generating revenue. The softness of ethics and compliance makes it difficult for E&C officers to demonstrate their value. They need help. And there are numerous vendors who can offer such help, from software to in-house training courses to due diligence assistance. For hundreds or thousands of dollars, these vendors will not only offer training, they will design a complete compliance program, and operate the company's whistleblower hot line, taking over the compliance function in some cases. Without being bombastic, we can call this the "outsourcing of ethics."

### **Conclusion: moral capitalism?**

With the ethics officer and compliance discourse, we have an assemblage in the making. We are witness to new relations between employees and their firms, relations based not on contracts and performance, but on degrees of ethical adherence to codes, laws and standards. Employees in modern capitalist firms and in public organizations must be flexible and career oriented. But they must also be loyal and engaged. The compliance officer must act ethically—not only vis-à-vis the firm in which she is employed, but possibly to the United States Department of Justice. The activities of the firm must now be grounded not only on profitability but on a code of conduct, on morally sanctioned actions. We are witnessing the construction of a moral universe inside the firm—its moralization. Ethics and compliance is the right thing to do; and the ethics and compliance officer the moral compass.

Listening to the manager from Coca Cola tell us what she called "War Stories from compliance," learning that Coke was both "The Real Thing" and "The Right Way," and that Coke was now spreading its ethics and compliance culture to all its partners in the 207 countries in which it operates, one can only conclude that capitalism and morality now share the same bed.

That morality and ethics now pervade modern capitalism hardly means that capitalist practice has become ethical. Incidents of outrageous corporate scandals, bribery, and corruption have not abated. We can only guess what the Panama Papers will reveal as the 11 million documents are examined. A US government prosecutor for anti-corruption, speaking

at an anti-corruption review conference (in October 2014) complained that the number of firms that continue to pay hundreds of millions of dollars in bribes is simply “stunning.” A conspiracy theory of Ethics and Compliance would say that ethics and compliance is just talk and window-dressing, if not smoke and mirrors.

Yet the conspiracy approach is a little too neat. Modern capitalism is constructing its own morality with its own theory of human agency, with “good people doing bad things,” and its own theory of building “strong cultures” and “cultures of compliance.” As modern firms demand a specific kind of worker with a specific kind of skill set, it needs workers with a particular kind of *moral skill set*, those who know the costs of violating laws, regulations, and codes. It needs workers who can identify those grey zones and risk areas that might cost the company a lot of money or loss of reputation, and loss of their jobs or even jail time.

We often believe that the entrance of moral considerations into social life is some kind of positive sign, that morality is some kind of brake on ruthlessness. In this optic, capitalism can be softened around the edges with a bit of corporate social responsibility, a code of conduct, and an anti-bribery policy. It devolves on the ethics and compliance officer to carry out this “softening” task. Capitalism is not moral, certainly, but it has become moralized. The ethics and compliance officer is the agent of moralization, the one who has to insert a culture of compliance into the company’s DNA. It is a difficult task indeed.

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