EFFECTIVE COMPLIANCE PROGRAMS AND CORPORATE CRIMINAL PROSECUTIONS

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INTRODUCTION

Corporate compliance programs play a substantial role in federal criminal law. Compliance programs are internal mechanisms implemented by companies to detect and prevent criminal conduct from occurring within the corporation.1 The basic elements of such a program include: a formal code of conduct, a compliance office and officer, and a telephone hotline for employees.2 The existence of an “effective compliance program” sometimes precludes criminal prosecution of a corporation after its agent has broken the law.3 Further, if the corporation is indicted for and convicted of the crime perpetrated by its agent, having such a compliance program can lead to a sentence downgrade under the United States Sentencing Guidelines (Sentencing Guidelines).4

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1 See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004).
4 See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2004).
The purpose of the compliance program sentence downgrade structure is to provide corporations with an incentive to self-policing, thereby alleviating some of the regulatory burden of crime deterrence from the state. As a result, deterrence shifts from the criminal law itself to the corporation’s internal governance. This Note will argue that the compliance program sentence downgrade structure does not effectuate this deterrence purpose and that sentence reductions are being given away without a commensurate reduction in crime. This Note will demonstrate how using the existence of a compliance program as a sentence downgrade factor in a corporate prosecution poses several problems for the federal criminal justice system.

The law creates distorted incentives by offering corporations a sentence reduction for their compliance programs, which thus

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5 See Krawiec, Future Disclosure System, supra note 2, passim.
6 This fundamental problem exists aside from the practical challenge of judging the actual effectiveness of any compliance program. This Note assumes that any compliance program offered by a defendant corporation for purposes of the Justice Department guidelines or the Sentencing Guidelines meets the “effectiveness” test. While it is beyond the scope of this Note to answer the question of whether it is ever possible to accurately assess the effectiveness of a compliance program, it does bear mentioning. For example, Enron Corp., before its collapse, had a compliance program in place “that was regarded as state-of-the-art.” See John Gibeaut, Junior G-Men: Corporate Lawyers Worry That They’re Doing the Government’s Bidding While Doing Internal Investigations, 89-JUN A.B.A. J. 46, 50 (2003) (describing the difficulties in assessing the effectiveness of compliance programs). Walsh & Pyrich, in their proposal to allow effective compliance programs to serve as an affirmative defense to criminal liability, suggest an eight-step test for demonstrating that the corporation’s program meets the “reasonabl[e] diligence” test for effectiveness. The program must

1. be of adequate duration;
2. be approved, implemented and supported by the highest levels of the corporation;
3. address the problem areas exemplified by the wrongdoing at issue;
4. be tailored to fit the particular corporation’s culture as well as the relevant industry;
5. clearly communicate the corporation’s intention to comply with the law and announce employee penalties for prohibited acts;
6. be communicated to employees and incorporated into their everyday working environment;
7. involve efforts to enforce the policy and discipline wrongdoers; and
8. be periodically reviewed and updated.

Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul? 47 RUTGERS L. REV. 605, 685-86 (1995). These eight steps fall short from addressing some of the problems posed by effective implementation of a compliance program. Adoption of this type of standard for measuring effectiveness would allow compliance programs that are effectively drafted to pass muster regardless of how well they operate in practice. Writing in the United States Attorneys’ Bulletin, Philip Urofsky proposes what appears to be a more effective test for evaluating compliance program effectiveness:

1. the program is an off-the-shelf program or is specifically tailored to detect and deter conduct within this corporation;
2. the corporation has devoted sufficient resources, including audit and investigative staff;
3. it has conducted adequate and periodic training;
4. it provides for reporting to the highest levels of management;
5. it has imposed discipline upon officers, employees, and agents found to have violated its compliance policies.
encourages corporations to implement less-than-ideal programs. In doing so, it may lead corporations to expend resources in an inefficient manner, by funding compliance programs that are expensive to operate, undermining the desired result of deterring criminal activity within the corporation.

This Note will examine the role of compliance programs during federal criminal prosecutions of organizations, focusing on their role under the Sentencing Guidelines. It will analyze the inherent weaknesses of a judicial process that evaluates a corporation’s compliance program, and will examine the incentives that exist under the Sentencing Guidelines structure for companies to implement sub-optimal compliance programs. Additionally, this Note will discuss the contexts in which corporations use compliance programs.

It is the position of this Note that the goals of corporate prosecutions would be better served by de-emphasizing the legal role given to compliance programs today. The companies primarily affected by this proposed change would be those with “window-dressing” compliance programs that meet the letter of the law, but are otherwise ineffective. These corporations are the target of this proposed change since their compliance programs inefficiently use resources and provide only questionable benefits to themselves and society. Without a potential sentence downgrade available, these corporations would have two choices: improve the effectiveness of their compliance programs (resulting in improved crime deterrence), or eliminate their compliance programs altogether (resulting in an efficiency gain). This increased deterrence or efficiency would be a marked improvement over the status quo.

Part I of this Note will trace the history of corporate compliance programs in the federal criminal justice system from the time they were first enshrined in the Sentencing Guidelines. Part II will review the problems posed by considering compliance programs during sentencing. Several commentators have suggested an alternate approach, which allows corporations to use compliance programs as an affirmative defense to criminal liability.7 Part II will also address the weaknesses

Philip Urofsky, Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs, U.S. ATT’YS’ BULL., Mar. 2002, at 19, 25, http://www.usdoj.gov/usao/cousa/foia_reading_room/usab5002.pdf. Urofsky suggests that the AUSA present the ineffectiveness of the compliance program to defense counsel as a rebuttable presumption, and ask “[i]f the program was properly designed, supported by corporate management, and properly implemented, what went wrong?” Id. at 25. While this approach may ultimately lead to an informed judgment on the effectiveness of the compliance program, it places a heavy burden on the prosecutor to evaluate what is still a poor proxy for organizational blameworthiness. See infra note 33.

7 See generally Walsh & Pyrich, supra note 6; Kevin B. Huff, Note, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 COLUM. L. REV. 1252 (1996) (proposing an affirmative defense to criminal liability based on the
inherent in this proposed approach. Finally, Part III will propose a change in the Sentencing Guidelines: the elimination of “effective compliance programs” from the Guidelines altogether. Part III will also address why de-emphasizing corporate compliance programs, rather than elevating their importance, will better achieve the goals that the proponents of the affirmative defense model seek to promote. It will describe how the elimination of compliance program language will result in either net deterrence gains or net efficiency gains for some companies, without a significant loss of deterrence for others. Finally, it will discuss the place of compliance programs in “corporate ethos” and other similar standards of liability.

I. COMPLIANCE PROGRAMS & FEDERAL CRIMINAL LAW

A. Compliance Programs Defined

An “effective” compliance program is an internal mechanism implemented by companies to detect and prevent criminal conduct from occurring within the corporation. Such a program operates continuously throughout the corporation. Though the corporation can tailor the program to the unique dimensions of a specific division, it should be a broad, prophylactic measure that anticipates, detects, and prevents any criminal activity that might take place. Beyond this basic definition, the Sentencing Guidelines present a more detailed model of an effective compliance program.

8 In federal criminal trials, the effectiveness of a company’s compliance program is judged according to factors enumerated in the Sentencing Guidelines. See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004). The task of evaluating whether a corporation’s compliance program operated as well in practice as it was intended is a time-consuming job, and as such, is an overly resource-intensive exercise to impose on prosecutors and judges. Requiring prosecutors and judges to evaluate the effectiveness of a compliance program is not an efficient use of resources, and detracts from consideration of the crime itself. See discussion infra note 33 (discussing the resource limitations that lead to a very low number of corporate prosecutions each year). This evaluation also vests discretion in prosecutors who may not have the requisite knowledge to judge the costs and benefits when choosing whether or not to prosecute a specific company. It asks them to use a questionable tool—the Sentencing Guidelines’ conception of an effective compliance program—to exercise their discretion. See, e.g., V.S. Khanna, Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?, 37 AM. CRIM. L. REV. 1239, 1271-72 (2000) (questioning whether courts and prosecutors are good at making the complex determination of whether a compliance program is actually “effective”, and suggesting that if they are not, corporations will have an incentive to create “window dressing” compliance programs while still engaging in criminal activity).

9 See, e.g., Krawiec, Future Disclosure System, supra note 2, at 496.

10 Id. (describing the detection of prohibited conduct through monitoring and auditing systems as being one of the goals of compliance programs).

11 See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (2004). All of the factors listed in
In addition to the three basic elements mentioned above (a formal code of conduct, a compliance office and officer, and a telephone hotline for employees), the corporation should also assign responsibility for the compliance program at a high level within the organization. It should not hire managers that have a history of illegal activity or actions

the Guidelines for evaluating a compliance program focus on its general implementation:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) 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. (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program. (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities. (B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents.

(5) The organization shall take reasonable steps— (A) to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; (B) to evaluate periodically the effectiveness of the organization’s compliance and ethics program; and (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) 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, including making any necessary modifications to the organization’s compliance and ethics program.

Id.

12 Id.
inconsistent with effective compliance with the law. The compliance program should be consistently enforced throughout the corporation and the corporation should regularly communicate its standards and procedures to employees. For example, Boeing revised its compliance program in the wake of several ethical missteps. The recommendations for improvement, proffered in a legal report commissioned by the company, included a series of improvements to Boeing’s existing program. Among these recommendations was the establishment of policies prohibiting new employees who had recently worked for Boeing’s competitors from working in positions that give the appearance of impropriety. The legal report also instructed the company to track these new employees for three years to prevent both the employee and Boeing from entering compromising positions.

Though the decision to implement a compliance program is usually made by the corporation itself, corporations must sometimes implement compliance programs as part of criminal sentences. This measure is required to ensure that the corporation’s own internal structure deters future violations of the law. In order to examine the interaction between corporate compliance programs and the criminal law, the next two parts of this section will review the standard of liability faced by corporations when their employees commit crimes. It will also examine how the sentence downgrade available in the Sentencing Guidelines affects this potential liability.

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13 Id.
14 Id.
15 Amalia Deligiannis, Executives Blamed for Boeing’s Ethical Missteps, CORP. LEGAL TIMES 18 (Apr. 2004).
16 Id. (listing the ten major points recommended for improving Boeing’s compliance program, a program that was already considered to be state-of-the-art in many respects).
18 See, e.g., United States v. C.R. Bard, Inc., 848 F. Supp. 287 (D. Mass. 1994); see also United States v. Tyson Foods, Inc., 191 F. Supp. 2d 142 (D.D.C. 2002). Such court-imposed compliance programs are not always effective in deterring future criminal activity because the mere presence of a compliance structure within the corporation does not ensure that its purpose is faithfully executed by corporate officers and managers. Id. at 143; see also United States v. Tyson Foods, Inc., No. 4:01-cr-061, 2003 U.S. Dist. LEXIS 20174, at *1 (E.D. Tenn. 2003). In the second case, Tyson Foods was indicted for aiding and abetting the bringing of aliens in to the United States, and aiding and abetting possession of false Social Security cards. Id. at *33. This new indictment, four years after the original sentence which required implementation of a compliance program, seems to indicate that the program did not achieve its intended effect.
B. The Vicarious Liability Standard

Under the current federal vicarious liability standard, corporations can be held liable for the criminal acts of their employees and agents. If an employee breaks the law while acting within the scope of employment, and the act in question was initiated for the benefit of the corporation, then the corporation itself is liable for the underlying offense committed by its employee.

The origins of corporate liability for the criminal actions of an agent can be traced to the tort law doctrine of respondeat superior. The justification for a vicarious liability standard in the criminal law is analogous to the justification for respondeat superior in tort law: since the employee’s act is done for the corporation’s benefit, justice requires that the corporation be held liable for damages caused by the employee’s conduct. The principles of agency law also support the

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20 See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095, 1102 (1991) (describing how courts generally hold conduct to be “within the scope of employment” even if it was expressly prohibited by corporate policies); William S. Laufer, Corporate Bodies and Guilty Minds, 43 EMORY L.J. 648, 655 n.32 (1994) [hereinafter Laufer, Corporate Bodies] (“The term ‘scope of employment’ includes ‘acts on the corporation’s behalf in performance of the agent’s general line of work.’” (quoting United States v. Automated Medical Lab., Inc., 770 F.2d 399, 407 (4th Cir. 1985))).
21 See Laufer, Corporate Bodies, supra note 20, at 493-94; see also, Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction: III. STANDARDS OF LIABILITY, 92 HARV. L. REV. 1243, 1247 (1979) (describing the three essential elements for conviction as (1) the commission of a crime, (2) the act was within the scope of employment, and (3) the agent intended to benefit the corporation. In crimes requiring specific intent, the intent of the agent is imputed to the corporation).
22 N.Y. Cent. & Hudson River R.R., 212 U.S. at 493:
   It is now well established that in actions for tort the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. . . . And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct.
23 Id. at 494-95. The Court went on to describe why the same rationale should apply in the criminal context:
   Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises. It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.
standard: when the corporation delegates responsibility to its agent, it should be responsible for the results of that delegation. 24 Underlying vicarious corporate liability is the premise that the law should allow a corporation, which is a product of the law and has the ability to break the law, to be held liable for its criminal acts. 25

In practice, federal prosecutors bear a light burden when proving that an agent’s act fell within the scope of employment and that it was designed to benefit the corporation. 26 If the agent is convicted and the prosecutor chooses to indict the corporation, a conviction of the corporation is likely to follow. 27 Since the elements required to convict a corporation for its agent’s job-related criminal acts are relatively straightforward, the vicarious liability standard is by nature a very broad standard of criminal liability. 28 Facing potentially substantial fines, the corporation should have a strong incentive to take internal steps on its own to deter unlawful acts. The extent of this deterrence will depend on how much the potential liability is mitigated by the various sentence downgrade factors in the Sentencing Guidelines. 29

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Id. This justification for the vicarious liability standard should not be confused with the broader justifications for prosecuting corporations. Though some of those justifications for corporate criminal prosecutions may have been developed subsequent to the Court’s decision in New York Cent. & Hudson River R.R., the question of why corporations should be prosecuted at all must be answered before determining the appropriate standard for prosecution.

24 See, e.g., Laufer, Corporate Bodies, supra note 20, at 654 (explaining how the vicarious liability standard survives because of the lack of any other theory of liability that would ensure that criminal liability extends to corporations and satisfies the requirements of criminal law).

25 Id. at 653-54.

26 This burden is light because as long as the actions were not adverse to the interests of the corporation, the burden will be met. It does not matter whether the corporation actually benefited from the actions, or whether the agent explicitly intended to benefit the corporation. See, e.g. Tania Brief & Terrell McSweeny, Corporate Criminal Liability, 40 AM. CRIM. L. REV. 337, 343 (2003); see also Bucy, supra note 20, at 1102-03 (stating that since the requirements have been weakened by court decisions, a corporation will be criminally liable for almost any criminal act committed by an agent within the scope of the agent’s employment).

27 See Brief & McSweeny, supra note 26, at 341-42 (stating that in federal prosecutions, corporations can be convicted even though they have implemented programs to deter violations of the law, and regardless of the agent’s position within the corporation). Conviction is likely because of the broad scope of the vicarious liability standard and the meaning that courts have given to the elements “within the scope of employment” and “designed to benefit the corporation.” Id.

28 See id. at 343.

29 See discussion infra Section I.C (discussing the sentence reduction offered for an effective compliance program, and the resulting changing in incentives that this reduction provides for corporations).
C. The Role of Compliance Programs

Compliance programs play a significant role in the sentencing phase of a corporate criminal prosecution. The original Sentencing Guidelines chapter on “Sentencing Organizations” provided a sentence downgrade for the existence of an “effective compliance program.”

Even where a corporation’s compliance program failed to prevent the commission of the criminal act, such a program still secured a sentence reduction for the corporation. That sentence reduction could be quite substantial, affording the corporation up to a fivefold decrease in fines in some instances.

Additionally, the existence of an effective compliance program may have an effect on the company at an earlier stage, precluding indictment altogether. If the federal prosecutor, within the scope of her discretion, finds the compliance program effective, it can lend weight to her decision not to file any charges against the corporation.

31 This is due to a recognition under the Guidelines that even the most effective compliance program cannot perfectly deter all criminal conduct. See Brief & McSweeney, supra note 26, at 359-60. Conceding that imperfections in compliance programs may be realistic, such a result also exposes a weakness of using compliance programs as a proxy for the corporation’s efforts to deter crime. The approach forces prosecutors and judges to ask the delicate question: how much crime can a compliance program fail to deter before it is deemed ineffective? See generally RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING 585 (1994).
32 Frank O. Bowman, III, Drifting Down the Dnieper with Prince Potemkin: Some Skeptical Reflections About the Place of Compliance Programs in Federal Criminal Sentencing, 39 WAKE FOREST L. REV. 671, 678 (2004) (describing how in a hypothetical conviction of a 5,000 employee corporation, where an employee commits an offense that involves several sales managers and the loss is $10 million, having an effective compliance program and self-reporting of the crime could reduce the corporation’s fine range from $20-40 million to $4-8 million).
33 In 1999, a set of guidelines issued by the Justice Department provided federal prosecutors a list of eight factors that Assistant U.S. Attorneys (AUSAs) were instructed to consider before filing charges against a corporation. See Holder Memo, supra note 3. The eight factors to be considered are, in summary: (1) nature and seriousness of the offense; (2) pervasiveness of the wrongdoing; (3) history of similar conduct; (4) corporation’s disclosure of the wrongdoing; (5) existence/adequacy of the compliance program; (6) remedial actions taken; (7) collateral consequences; and (8) adequacy of non-criminal remedies. Id. at Attachment § II. In 2003, the Justice Department adopted a similar, nine-part test as a replacement. See Thompson Memo, supra note 3. The only substantial change in previous factors given was the addition of a ninth: the adequacy of prosecution of individuals responsible for the criminal act. Id. at Attachment § II(8). In both sets of Guidelines, the existence of an effective compliance program is one factor to be considered by the AUSA. See Holder Memo, supra note 3, at Attachment § II(5); Thompson Memo, supra note 3, at Attachment § II(5). No definition of what constitutes an “effective compliance program” is provided by either set of Guidelines, but such criteria are readily available in the Sentencing Guidelines. This Note infers that it is reasonable to expect that AUSA’s would refer to the Sentencing Guidelines if such factors are used when they are deciding whether to seek an indictment. The Prosecution Guidelines give compliance programs a role in the decision of whether to file charges against the corporation. Thus, the existence of an effective compliance program may have a significant impact during the initial stage of an investigation when prosecutors decide whether to indict, an all-or-nothing decision. Any one of the nine factors, including the existence of an effective compliance program, can tip the balance in either
evaluation of the corporation’s general preventive measures as part of the sentencing process stands entirely apart from the corporation’s specific actions surrounding the crime itself. Instead, it is a broader inquiry into the corporation’s governance and the measures the corporation has taken to detect and prevent criminal wrongdoing.\textsuperscript{34}

On November 1, 2004, an amendment to the Sentencing Guidelines went into effect, increasing the significance of compliance programs at the sentencing stage.\textsuperscript{35} The new addition requires a direction for the AUSA since there is no weight assigned to the factors by the Prosecution Guidelines. See Urofsky, supra note 6, at 19-20. Though compliance programs may enable a corporation to escape prosecution altogether, the lack of declination data prevents a detailed analysis of this part of compliance program law. However, it may still be possible to draw some general conclusions about the parallel effects of including compliance programs in the Sentencing Guidelines and Prosecution Guidelines. Compared to most other categories of federal crimes, such as narcotics offenses, prosecutors initiate relatively few prosecutions of individuals—and even fewer of corporations—each year for white-collar crimes. See, e.g., Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 487-88 (1998). Several possible reasons exist for this small number. One is the tension between the limited resources available to federal prosecutors, and the sizeable resources available to white-collar defendants. See, e.g., id. at 487-88 (“Criminologists have long lamented the resources white-collar criminals have at their disposal: adroit legal counsel, political connections, social legitimacy, alternative enforcement paths (civil and regulatory routes), and finances that allow them to outspend prosecutors.”); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 310 (2004). Another reason is that under the current Justice Department Prosecution Guidelines, a corporation will only be charged when prosecution of the individuals responsible is not sufficient for the Department’s purposes. See Thompson Memo, supra note 3, at Attachment § II(8); see also Jay C. Magnuson & Gareth C. Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913, 935 (1987):

> [A] prosecutor must determine whether the conduct would call for condemnation by society through its criminal laws. Further, the prosecutor must determine whether or not a particular prosecution would have the desired deterrent effect. If neither retribution nor deterrence are achievable, it is questionable as to whether a prosecution should take place.

This additional step may not be considered necessary in many cases. A third possibility is that since a corporation cannot be imprisoned, it is not as attractive a target for a prosecutor’s energy as an individual defendant. See Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship”*, 76 ST. JOHN’S L. REV. 979, 988 (2002). The author suggests that prosecutors weigh the corporation’s cooperation after the crime was committed more heavily than other factors, and that such cooperation can save the corporation from prosecution even in the absence of a compliance program and where its top management was involved in the criminal activity. Id. at 994-95. Simons suggests that an incentive is created for “vicarious snitching,” where corporate directors are faced with a choice of protecting executives implicated in the criminal activity, or of demonstrating the corporation’s willingness to cooperate by (among other things) making swift management changes and sharing the very documents that incriminate the former managers. Id. at 1008-16. Regardless of the actual reason for the small number of indictments and convictions, it seems clear that given the selective nature of these prosecutions, AUSAs must carefully consider which corporations offer the best deterrent value before filing charges. See Thompson Memo, supra note 3, at I.B.

\textsuperscript{34} See Baker, supra note 33, at 316-17 (describing the operation of compliance programs within the corporation).

\textsuperscript{35} See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004) (including detailed descriptions of what constitutes an “effective compliance program” for the purposes of sentence downgrading).
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corporation to actively foster a climate that encourages compliance; a “check the box” compliance program is theoretically no longer sufficient to secure a sentence downgrade. The amendment provides that a compliance program will now only be considered effective if “it promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” This modification essentially restates the original purpose of including compliance programs in the Guidelines: encouraging a culture of compliance within corporations. Verification of this “stricter implementation,” however, is itself merely one check box among many in the Sentencing Guidelines.

The Sentencing Guidelines create an incentive to implement an “effective compliance program,” which allows for a potential reduction of fines resulting from employee criminal activity, by offering a sentence downgrade to corporations that have implemented such a program. Undoubtedly, some companies will not have the resources

38 Compliance programs play a related role during the plea bargaining process. Criminal prosecutions involving corporations often end with plea bargains rather than at trial. See U.S. SENTENCING COMMISSION’S 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 97 (2002), http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm [hereinafter 2002 SENTENCING STATISTICS]. In 2002, 94 percent of organizations were sentenced based on a guilty plea, as opposed to a guilty verdict at trial. Id. In these cases, the Sentencing Guidelines served as a tool for assessing the reasonableness of the joint sentencing recommendation. One such case is United States v. C.R. Bard, Inc., 848 F.Supp. 287 (D. Mass. 1994). Defendant, corporation Bard pleaded guilty to 391 felonies, including conspiracy, mail fraud, submitting false statements to the FDA, shipping adulterated medical devices, and others. The company, which was fined over $60 million, did not have a corporate compliance program, and the court noted that “there was a corporate culture in which nobody felt that he or she could publicly go to the FDA without a well-founded fear of retribution by Bard.” Id. at 291. “Bard has admitted there was a conspiracy of members of its corporate management to commit many federal felonies.” Id. at 291 n.5. In addition to fines and various other measures, the plea agreement required the company to create a new corporate compliance program, and to create a Regulatory Compliance Committee of the Board of Directors. Id. at 292. The existence of an effective compliance program is one of several factors that will be considered during plea bargaining, just as if the corporation was convicted at trial.

39 This incentive is unlikely to be affected by the U.S. Supreme Court’s decision that struck down the sections of the Sentencing Reform Act that made the Sentencing Guidelines mandatory. See United States v. Booker, 125 S.Ct. 738 (2005). The case did not implicate sentence downgrade factors like the one for an effective compliance program, but focused instead on the constitutional issues raised by sentence upgrade factors. Id. Sentences will now be reviewed on the basis of their reasonableness, id. at 765-66, and Appellate courts have developed tests limiting the circumstances in which sentencing courts may depart from the Guidelines. See, e.g., United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), which enumerates the circumstances under which a post-Booker sentence is unlawful:

First, and most obviously, a sentencing judge would violate the Sixth Amendment by making factual findings and mandatorily enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant. . . .

Second, and less obviously, a sentencing judge would commit procedural error by
to do so, and will choose to continue operations without a formal compliance structure.40 The rest will implement a program (if they have not done so already) designed to achieve one or both of the following goals: meeting the Sentencing Guidelines’ requirements for “effectiveness”; and actually deterring criminal activity within the corporation. Section II describes how these goals may sometimes conflict, leading corporations to implement sub-optimal compliance programs. Thus, it is important to understand whether the decrease in the law’s deterrent effect as a result of this downgrade is offset by a reduction in criminal activity stemming from compliance programs implemented under the Sentencing Guidelines.

II. PROBLEMS POSED BY CONSIDERING COMPLIANCE PROGRAMS

A. Incentives and Disincentives of Compliance Programs

Under the vicarious liability standard, corporations have an incentive to shield themselves from criminal liability by taking measures to prevent criminal acts committed by their employees.41 Corporations therefore also have an incentive to implement compliance

*mandatory* applying the applicable Guidelines range that was based solely on facts found by a jury or admitted by a defendant. The Court in its Remedy Opinion made clear that, even though the resulting sentence would not violate the Sixth Amendment, the judge would have erred by mandatorily acting under the now-excised requirement of subsection 3553(b)(1). . . .

Third, a sentencing judge would commit a statutory error in violation of section 3553(a) if the judge failed to “consider” the applicable Guidelines range (or arguably applicable ranges) as well as the other factors listed in section 3553(a), and instead simply selected what the judge deemed an appropriate sentence without such required consideration.

Fourth, a sentencing judge would also violate section 3553(a) by limiting consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guidelines range, as required by subsection 3553(a)(4), based on the facts found by the court. This type of error was also presumably a basis for the remand in Fanfan’s case. All of these potential errors, if available for review on appeal, would render a sentence unreasonable, regardless of length, because of the unlawfulness of the method of selection.

Id. at 114-15 (emphasis added). The Justice Department has taken the position that the Guidelines should be adhered to strictly by courts. It has instructed federal prosecutors to ask judges to continue following the Guidelines and to report judges that do not to the Department. See Laurie P. Cohen, Justice Department is Pressuring Judges on Sentencing Guidelines, WALL ST. J., Feb. 2, 2005, at A4. Given the relatively narrow circumstances under which the Second Circuit permits departures from the Guidelines, it seems to be of one mind with the Justice Department.


41 See discussion *supra* Section I.B (discussing the broad potential exposure corporations face under the vicarious liability standard).
programs, since such programs are designed to deter criminal activity within a corporation. But these two motivations may diverge because the Sentencing Guidelines offer a sentence downgrade for companies that have merely implemented any compliance program. Thus, the ends served by the vicarious liability standard itself and the sentence downgrade may be at odds with each other.

Corporations adopt compliance programs for several reasons. One reason is that there is a chance that if an employee commits a criminal act, the corporation will not be indicted because of the existence of the program. Another reason is the potential savings of millions of dollars in fines if the corporation were convicted and sentenced under the Sentencing Guidelines. However, the high costs of developing and implementing a compliance program make it a difficult option for smaller corporations.

There is conflicting evidence concerning the effect of the Sentencing Guidelines on a corporation’s decision to adopt a compliance program. There is also data that shows that there is no correlation between compliance programs and employee behavior at all. Thus, if the purpose of the Guidelines is to encourage the adoption of these programs in order to promote good corporate citizenship and deter criminal activity, then the actual incentives and disincentives that the Sentencing Guidelines create must be examined.

Court decisions and academic literature commonly state that the Sentencing Guidelines created a strong incentive for corporations to implement compliance programs. However, most of the literature asserting this claim bases that observation on the stated objectives of the Sentencing Guidelines themselves, rather than on empirical studies of compliance program implementation. This circular logic, which
suggests that the Sentencing Guidelines created an incentive to implement compliance programs because that was the goal of the U.S. Sentencing Commission, does not, in any way, further our understanding of the effects of the sentence downgrade. The quantitative and qualitative observations that have been collected since adoption of the sentence downgrade, which are discussed later in this section, are more germane to this inquiry. They indicate that the compliance program sentence downgrade has two substantial weaknesses: it creates a problem of “overenforcement” and it forces companies to choose between complying either with the spirit of the law or the letter of the law.

Some data suggest that the Sentencing Guidelines did influence corporations’ decisions to implement compliance programs.\(^49\) Contrarily, the Sentencing Commission’s own Advisory Committee described some equally strong disincentives that were created as a result of the compliance program downgrade factor. Chief among them was the possibility that information generated by the compliance program will ultimately be used against the corporation, either by the

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government or in civil suits.\textsuperscript{50} Thus, the more effective the corporation’s compliance program, the more likely that any violations will be exposed to law enforcement officials and potential civil litigants.

This pseudo self-incrimination represents the first weakness in the Sentencing Guidelines and results from a distortion in the incentives to implement a program that is actually effective. The very measures that a corporation takes to ensure compliance with the law also increase the chance that violations are detected, thereby increasing the firm’s potential criminal liability.\textsuperscript{51} This paradoxical effect creates a disincentive to implement any compliance program at all, a hindrance reinforced by the difficulty in actually securing a sentence downgrade for having an effective compliance program.\textsuperscript{52} This increase in potential liability is an example of “overenforcement” that will lead to under-deterrence by the corporation,\textsuperscript{53} and is also likely to give corporations pause before they even implement an extensive compliance structure. Consequently, the risk of incurring increased liability leads the corporation to either choose not to implement a compliance program at all or to implement one in less than good faith.\textsuperscript{54}

For the corporation that decides to implement a compliance program despite these disincentives, there is a second potential distortion—if it hopes to gain the benefits of having an effective compliance program, the corporation must meet the multi-part test

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\item[\textsuperscript{50}] Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, United States Sentencing Commission, 6 (October 7, 2003), http://www.ussc.gov/corp/advrprpt/AG_FINAL.pdf [hereinafter Advisory Group Report] (describing this phenomenon as the “litigation dilemma,” where the information generated by the compliance programs will be used by other potential litigants against the corporation). This dilemma not only affects the corporation’s incentives to implement compliance programs, but also its incentives to self-report violations. The Advisory Group conceded that this problem could not be solved within the Organizational Sentencing Guidelines themselves, and referred the matter to Congress and other policy makers for further consideration.
\item[\textsuperscript{51}] See Nunes, supra note 48.
\item[\textsuperscript{52}] See discussion infra Section II.B.
\item[\textsuperscript{53}] Richard A. Bierschbach & Alex Stein, Overenforcement, 93 Geo. L.J. (forthcoming Nov. 2005) (manuscript at 43-44, on file with author) (describing that based on this “liability enhancement effect,” there is a disincentive for firms to self-police ex post, and they will have a more difficult time credibly enforcing internal compliance measures ex ante); see also Richard J. Werder, Jr., A Critical Assessment of Intracorporate Loss Shifting After Prosecutions Based on Corporate Wrongdoing, 18 Del. J. Corp. Law 35, 48 (1993) (“[L]oss-shifting actions . . . create additional costs and inconvenience for corporations involved in criminal conduct. In this sense, they may be regarded as imposing a penalty supplementary to that imposed by criminal law.”); Bruce H. Kobayashi, Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations, 69 Geo. Wash. L. Rev. 715, 737 (2001) (“The analysis of optimal penalties for corporations is altered if prevention expenditures also increase the probability that the firm will be punished. In many cases, expenditures by the firm aimed at monitoring and preventing crimes committed by its agents will also produce an increase in the probability that the firm will be punished . . . .”).
\item[\textsuperscript{54}] See Bierschbach & Stein, supra note 53 (manuscript at 43-44).
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prescribed by the Sentencing Guidelines.55 This structure created by the Sentencing Guidelines is discussed as part of an “Incomplete Contracts Governance Theory.”56 The Sentencing Guidelines are an example of negotiated governance, where the regulated parties, i.e. the corporations, are given a voice in regulatory implementation. In this instance, it is the incompleteness of the law that gives corporations their voice. The Sentencing Guidelines do not prescribe every detail of compliance program design and implementation, leaving that task to each individual corporation.57 In doing so, the Guidelines create a possibility for opportunistic decisions by corporations. Those corporations may implement “window-dressing” compliance programs to reduce criminal liability for the corporation instead of installing truly effective programs.58

This inherent weakness in negotiated governance systems is difficult to avoid, and only a public choice theory alternative that rejects private influence in the regulatory process altogether has been offered as a remedy.59 Nevertheless, one advantage of the Incomplete Contracts Governance Theory is that as the regulated entities fill in the gaps, courts and agencies can reject interpretations that are inconsistent with the law itself.60 But this mechanism has not been available in the context of corporate crime. The virtual absence of cases that present courts with the task of evaluating the effectiveness of a compliance program61 means that there simply is not any established precedent to guide corporations and the compliance industry.62

A possible response to this lack of judicial guidance for compliance program design would be for the Sentencing Commission to offer its own, more detailed instructions on program design. However, compliance programs are complex by nature, and must respond to the unique demands of various industries. The more detail that the Sentencing Commission provides for program design, the more likely that some corporations’ compliance needs will diverge from the Guidelines’ prescribed design. In short, corporations must be allowed to design programs that will best meet their specific, individual needs, which the law cannot hope to anticipate. By developing a complex test

56 See Krawiec, Future Disclosure System, supra note 2, passim.
57 Id. at 516-17.
58 Id. at 494 (describing the opportunity created for opportunistic behavior that allows the company to capture any social gains that result from the incomplete nature of the law).
59 Id. at 490.
60 Krawiec, Future Disclosure System, supra note 2, at 536.
61 See discussion infra Section II.B.
62 Id. The small number of organizations found to have an “effective compliance program” since the passage of the Organizational Sentencing Guidelines does not provide much guidance to prosecutors and courts given the broad variety of industry-specific differences that must be considered when evaluating these programs.
that courts must use to make an effectiveness determination, the Guidelines force a corporation to choose between designing its program to best deter crime or to best satisfy the wording of the Guidelines. In cases where the two designs diverge, the deterrence goals of the law are thwarted by the law itself. Therefore, in a negotiated governance system where each corporation’s optimal approach to deterrence will be different, it seems that the law should prescribe as little detail as possible.

A recent study of compliance programs demonstrated the problems that result when corporations adopt the compliance program structure prescribed by the Sentencing Guidelines. The study determined that there are four potential orientations that a compliance program can have: “compliance-based”, “values-based”, “external stakeholder”, and “top management protection.” It found that in over half of the firms surveyed, the compliance approach predominated over the other orientations. The Sentencing Guidelines encourage the compliance-based approach because the elements used to determine whether a convicted corporation will receive a sentence downgrade are designed around compliance-based factors.

Empirical data suggests, however, that values-based compliance programs are more effective at deterring unethical conduct. Values-based and compliance-based objectives are not mutually exclusive as it is possible to design a program that incorporates elements of both. Nevertheless, since the Sentencing Guidelines do not encourage values-based objectives, and since compliance programs tend to be designed and implemented by legal personnel with an occupational focus on compliance, there is a structural bias against including values-based objectives in corporate compliance programs. Because of this Sentencing Guidelines-influenced bias, corporations tend to implement

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64 See Treviño, Managing Ethics, supra note 2.
65 Id. at 135 (describing the compliance-based approach as focusing on “preventing, detecting, and punishing violations of the law”).
66 Id. at 135 (describing the values-based approach as concentrating on “defin[ing] organizational values and encourag[ing] employee commitment to ethical aspirations”).
67 Id. at 138 (describing the external stakeholder orientation as focusing on keeping customers, suppliers, and the community in which the corporation operates satisfied).
68 Id. at 139 (describing the top management protection approach as resulting in compliance programs that simply protect the corporation’s top management from blame when the company experiences ethical or legal failures).
69 See Treviño, Managing Ethics, supra note 2, at 137.
70 Id. at 137-38.
71 Id. at 138 (“It is clearly most important to have a program that employees perceive to be value-based. In these six companies, if employees perceived a values-based program, each of the seven outcomes studied was significantly more positive . . . ”).
72 Id. at 139.
73 Id. at 146.
sub-optimal programs whose primary goal is meeting the required elements dictated by the Guidelines, rather than promoting a values-based approach or deterring criminal activity in the most effective manner.\footnote{See, e.g., Krawiec, Future Disclosure System, supra note 2, at 491-92.}

The Sentencing Guidelines therefore have a potentially damaging influence on the structure of the programs that companies adopt. Both the overenforcement weakness and the negotiated governance weakness described above indicate that corporations have strong incentives to design compliance programs that are sub-optimal. An examination of the incentives and disincentives leads to two related conclusions. First, there is insufficient evidence showing that the Sentencing Guidelines have positively affected corporations in their decisions to implement compliance programs. Second, there are substantial incentives under the current regime to implement compliance programs that are sub-optimal. These programs do not serve their intended purpose, and yet they still consume the resources of companies that adopt them. The goals of federal criminal law would be better served by eliminating the incentive to adopt these sub-optimal compliance programs, leading either to better deterrence of crime or more efficient use of corporate resources. These theories must be examined against the data that does exist on the actual impact of the Sentencing Guidelines on corporations.

B. Empirical Data - Where Are the Compliance Programs?

While there is a dearth of empirical data on the effect of the Sentencing Guidelines on compliance program adoption, what data has been collected seems to bear out the problems of distorted incentives discussed above. The few published studies offer some insights into how compliance programs have fared under the Sentencing Guidelines. A study published in 1999 found that of the 254 Fortune 1000 firms responding to the survey, 98% stated that they addressed ethics and conduct issues in some type of formal document, either a policy manual or a code of ethics.\footnote{Weaver et al., supra note 46, at 285.} Only 21% of those firms adopted their

\footnote{[T]he indicia of an effective compliance system are easily mimicked and true effectiveness is difficult for courts and regulators to determine, particularly ex post. As a result, firms engaged in legally prohibited, but potentially profitable, conduct can reduce or eliminate firm-level liability (and give the appearance of legitimacy to corporate stakeholders and the marketplace at large, thus reducing market sanctions for failures to comply with expected behavioral norms) by mimicking an effective compliance system, without reducing the incidence of prohibited conduct within the firm.}
ethics/compliance codes after the implementation of the Sentencing Guidelines. Unfortunately, similar data is not available for smaller firms, which account for three quarters of organizations sentenced under the Sentencing Guidelines. But at least among large corporations, compliance programs predated the Sentencing Guidelines, rather than the other way around. Given the high rate of pre-Guidelines compliance program adoption, the next point to consider is how the Sentencing Guidelines have affected their operation.

A 1999 empirical study of the effect of the Sentencing Guidelines on corporate sentencing illustrates some of the problems that arise in evaluating the use of compliance programs. The study compared 328 pre-Guidelines sentences from 1988 with 324 post-Guidelines sentences from 1987-1992. Regrettably, the data was too limited and ambiguous for the authors to draw any empirical conclusions about the effect of the Sentencing Guidelines on either compliance program implementation or effectiveness. But its authors were able to make some useful observations based on the equivocal data. They suggested that with better data, it would be possible to determine whether the Guidelines were increasing the number of compliance programs implemented and whether the compliance programs were decreasing the rate of violations. However, the authors explicitly pointed out a further complication in linking the adoption of the Sentencing Guidelines to any change in violations: firms now have an incentive to adopt compliance programs that do not effectively reduce violations, yet can still secure a sentence downgrade for the corporation. This paradox occurs because the criminal act that occurred in spite of the corporation’s compliance program is indicative of the program’s failure. It also results when the law prescribes too much compliance

76 Id. at 286.
77 See Bowman, supra note 32, at 686.
79 Id. at 443 (observing that depending on which post-Guidelines data set is used for analysis—compliance program numbers reported by probation officers or by courts—there has either been an increase or no change in the number of sentenced corporations with compliance programs).
80 Id. at 445-46. The authors described some other problems presented by the lack of data, including controlling for changes in compliance program technology, and changes in the rates of overall violations and overall compliance activity. Id.
81 Id. at 446. The authors stated:

[T]he new guidelines introduced the confounding change of granting a substantial discount from the corporate fine for compliance programs that by definition did not work in the particular case but nonetheless were deemed “effective” by the sentencing judge. Now firms have some incentive to adopt compliance programs that do not work in terms of reducing violations, simply to earn a discount from the expected fine. If, at that same time, the overall expected sanction level, the technology of compliance, and the supply of offenses all remain unchanged, then firms have no additional incentive to
program design detail, forcing companies to choose between adhering to the letter of the law or the spirit of the law.\footnote{Id.}

If it is not possible to directly determine whether the Guidelines have led to more effective compliance programs, sentencing data may indirectly indicate their effectiveness. In 2002, only 162 organizations were sentenced under the monetary fine guidelines of Chapter Eight of the Sentencing Guidelines.\footnote{Data was only reported on 143 of these cases. The total number sentenced was 252, but 90 were not classified due to missing guidelines application data or inapplicable guideline provisions. See \textit{2002 Sentencing Statistics}, supra note 38, at 98.} None of these organizations received a downgrade for having an effective compliance program.\footnote{Id.} In fact, none of the organizations were found to have any compliance program at all, effective or otherwise.\footnote{Id.} Similarly, of the 92 organizations sentenced in 2001, two had implemented compliance programs that the courts judged ineffective; the rest did not have compliance programs at all.\footnote{Id.}

This data leads to two possible conclusions. One is that there are very few instances of crimes taking place within a corporation in spite of its compliance program. This would indicate that there are really only two categories of corporations: those with effective compliance programs, and those without any compliance program. However, this conclusion is counterintuitive, considering the existing incentives for adopt programs actually to reduce the incidence of violation but only to obtain the discount. Under these circumstances, an observed increase in the incidence of compliance programs among convicted firms may imply that compliance programs are being adopted only for the fine discount and not because they actually reduce the incidence of violation.

\textit{Id.} The authors continued: 
At this point, our observations on this subject are merely suggestive. Aside from the data problems and inconsistencies, the careful study of compliance effects will require a far more sophisticated modeling of the problem. However, this would appear to be a fruitful direction for future research.

\textit{Id.; see also} Kimberly D. Krawiec, \textit{Organizational Misconduct: Beyond the Principal-Agent Model}, 32 Fla. St. U. L. Rev. 571, 592-93 (2005), \textit{available at} http://law.bepress.com/cgi/viewcontent.cgi?article=2293&context=expresso [hereinafter Krawiec, Misconduct] (describing two additional studies that indicated that the Sentencing Guidelines may give companies an incentive to adopt “window-dressing” compliance programs).

\footnote{See discussion supra Section II.A.}

corporations to implement sub-optimal programs.87 It would imply that in the vast majority of the thousands of cases where individuals are indicted for white-collar crimes, the corporation had not implemented a compliance program. Examples such as Boeing and Enron, where corporate crime occurred in spite of a compliance program, run counter to this conclusion.88 Another possible conclusion is that a class of companies with sub-optimal compliance programs exists, but when the programs fail to deter crime, the corporations are not indicted.89 Unfortunately, data is not available to test this conclusion.

The Sentencing Commission classified 40.5% of the 102 organizational convictions in 2002 as fraud crimes.90 That same year, there were 7,012 individual and organizational fraud sentences overall.91 Since fraud crimes often take place within a business context, it would be helpful to know how many corporations that could have been prosecuted were not indicted because of the existence of compliance programs. Presumably, the decision not to indict follows the Department of Justice Guidelines for Federal Prosecution of Business Organizations (Prosecution Guidelines).92 If every organization that had a compliance program avoided indictment because the Prosecution Guidelines directed the prosecutors’ declination choices,93 it would seem that the weaknesses of these programs are never exposed since they are not vetted by the courts. As the Justice Department does not release any of the data that it keeps on declination decisions, the information necessary to understand the role that compliance programs play under the Prosecution Guidelines is not available.94 The absence of any defendant corporations in 2002 with compliance programs that were held to be ineffective raises the troubling question of how many sub-optimal programs are currently being overlooked by the law.

Anecdotal evidence describes how even carefully designed compliance programs can fail to deter criminal activity within a

87 See discussion supra Section II.A.
88 See Deligiannis, supra note 15 (describing the ethical lapses that took place at Boeing in spite of the company’s compliance program). A more plausible explanation in these cases is that compliance programs are not particularly effective at changing employee behavior. See, e.g., Krawiec, Misconduct, supra note 81, at 592 (summarizing the results of several empirical studies of this aspect of compliance programs).
89 See discussion supra note 33 (reviewing the impact of compliance programs and other factors effecting prosecutors’ declination decisions).
90 2002 Sentencing Statistics, supra note 38, at tbl. 51.
91 Id. at tbl. 12.
92 See Thompson Memo, supra note 3.
93 Id.
94 See Bowman, supra note 32, at 685. The author does not believe that the inclusion and definition of compliance programs in the Sentencing Guidelines and Prosecution Guidelines has had any appreciable effect on how they are considered by prosecutors; the seven-element test for “effectiveness” may actually make it harder for a prosecutor to decline to indict. Id.
corporation. For example, Boeing implemented an extensive corporate compliance program prior to 1998, which included a worldwide hotline for employees, extensive ethics training, and placement of ethical advisors in each of the corporation’s operating divisions. The corporation nonetheless experienced three separate incidents of employee legal and ethical infractions from 1998 to 2001. One of these infractions caused the corporation to lose seven government contracts, the right to bid on three others, and a bidding suspension for three of the corporation’s operating units. Those lapses occurred despite having a compliance program acclaimed as a model for corporate America. Apparently the failure in the compliance program, if there was one, came from insufficient management support, which is certainly a difficult factor for prosecutors and courts to evaluate. If even state of the art compliance programs do not effectively deter criminal activity within the corporation, and if incentives exist for companies to adopt sub-optimal programs, then perhaps the emphasis placed on these programs by the Sentencing Commission is unwarranted.

III. PROPOSAL: REMOVING COMPLIANCE PROGRAMS FROM THE U.S. SENTENCING GUIDELINES

A. Eliminating Compliance Program Language

The distortions in incentives that lead companies to either adopt sub-optimal compliance programs, or none at all, lead to the conclusion that compliance programs do not belong in the Sentencing Guidelines. This conclusion is reinforced by the significant financial

95 See, e.g., Steven Andersen, Hidden Troubles: Despite More Rigorous Compliance Programs, Corporate Fraud Still Thrives, CORP. LEGAL TIMES, April, 2004 (describing the comments of several corporate investigators and attorneys who state that many compliance programs are still insufficient or “window dressing”); see also Bowman, supra note 32, at 681 (“[T]he sellers of compliance consulting services don’t waste any ink on the claim that compliance programs work. Instead, they sell fear—fear that ‘the feds are gonna getcha,’ fear that the Guidelines will produce crippling fines, and fear that individual managers or directors may face criminal or civil liability if compliance programs are not instituted.”).
96 Deligiannis, supra note 15.
97 Id.
98 Id. (quote from former Sen. Warren Rudman, the attorney leading the external investigation called for by Boeing’s board).
99 Id.
100 See Bowman, supra note 32, at 689-90. After analyzing some of the weaknesses inherent in the Sentencing Guidelines’ treatment of compliance programs, Bowman concludes they while they may be of dubious benefit, they should nevertheless remain in their current role. But his analysis did not give full consideration to the distortions in incentives described supra Section II that lead companies to either adopt less-than-effective compliance programs, or none at all.
burden of maintaining a compliance program placed on small corporations, which collectively make up three quarters of the firms sentenced under the Sentencing Guidelines. A decade of experience with the Sentencing Guidelines’ inclusion of compliance programs should provide sufficient empirical data to re-evaluate their role, and that data itself leads to the conclusion that while compliance programs may be useful in deterring crime, the Sentencing Guidelines themselves are not a positive influence on their effectiveness.

The U.S. Sentencing Commission rejected both a “just punishment” regime and an “optimal deterrence” regime when it drafted the Sentencing Guidelines, choosing instead to avoid imposing an overarching principle on the Guidelines and their operation. Nevertheless, the compliance program sentence downgrade portion of the Guidelines, as enacted, necessarily takes a deterrent approach by encouraging corporations to adopt compliance programs, thereby (theoretically) deterring criminal activity. The goal of giving sentence reductions to corporations for implementing effective compliance programs is to encourage them to reduce crime through self-policing. For the inclusion of compliance programs to serve its

These additional considerations lead this Note to the opposite conclusion about the wisdom of retaining the compliance program language in the Guidelines. A recent article addressing many of the same questions as this Note also arrives at the conclusion that the dilution of the strict liability regime through a move to “internal compliance-based liability” is “unjustified by either theory or empirical evidence.” See Krawiec, supra note 81, at 615. But it goes on to suggest that given political and practical realities, a return to a strict liability regime is unlikely. In reaching this conclusion, the article rejects a regime where courts, agencies, and prosecutors conduct a fact-based inquiry into the effectiveness of either the company’s compliance program or its “organizational culture and management commitment to ethical behavior.” Id. While the complexity of evaluating the general effectiveness of a compliance program may pose substantial problems for a courts and juries, see discussion, infra Section III.B.2, the interaction between management, the compliance program, and the specific criminal acts in question may not be. By removing the compliance program language from the Sentencing Guidelines, companies will be given the incentive to implement socially optimal levels of compliance. See Krawiec, Misconduct, supra note 81 at 576-77. Regardless of whether the existence of a compliance program is permitted as a defense at trial, see discussion, infra Section II.B.1, the main benefit of removing compliance program language from the Sentencing Guidelines is to eliminate the distorted incentives that result from enumerating a constrictive set of factors that companies must adhere to. The gains resulting from this return towards a pure strict liability regime are potentially significant enough that they should not be dismissed as unattainable.

101 See Bowman, supra note 32, at 686.
102 See Krawiec, Future Disclosure System, supra note 2, at 498. The “just punishment” model would have been modeled after the Sentencing Guidelines for individuals, and would have incorporated elements that measure organizational culpability. On the other hand, the “optimal deterrence” model would have incorporated a deterrence regime based on the principles of law and economics. The regime that was eventually adopted was chosen because it was intended to encourage corporations to adopt internal compliance structures. Krawiec describes the lobbying efforts of the Business Roundtable as having a significant impact on the ultimate form that the Organizational Sentencing Guidelines took. Id.
103 Id.
104 See, e.g., Advisory Group Report, supra note 50, at 3-5. The Report describes the progress
intended function, the Guidelines must both encourage the adoption of those programs, and, more importantly, allow for effective self-policing.\textsuperscript{105} If these goals are not achieved, then the Guidelines will only result in the imposition of costly and complex compliance structures on corporations without any commensurate benefit to society.

The quantitative and qualitative data reviewed in Section II paints a discouraging picture of the effectiveness of compliance programs in achieving the goals of the Sentencing Commission. It suggests that when corporations do adopt compliance programs, there are strong incentives for those programs to be sub-optimal. Based on this data, the elaborate Sentencing Guidelines structure for evaluating compliance programs and proving their effectiveness should be eliminated. However, this does not mean that compliance programs should have no role in corporate governance. Fostering a culture of ethics and compliance with the law within corporations is a laudable goal, and it can still be achieved by the Sentencing Guidelines. Achieving this goal will require a less structured approach, one which will eliminate the incentives for “window-dressing” compliance programs while retaining the incentive for compliance in general.

If the primary goal of the Sentencing Commission is to deter criminal activity as much as possible, then the vicarious liability standard itself is sufficient to achieve this goal. Convictions are readily obtainable under the standard, and its broadness has a tremendous deterrent value.\textsuperscript{106} Giving corporations a sentence reduction for compliance programs erodes the deterrent value of the vicarious liability standard. Once the incentive shifts from implementing programs that effectively deter crime\textsuperscript{107} to instead trying to satisfy a predetermined (and admittedly fallible\textsuperscript{108}) set of requirements,\textsuperscript{109} corporations will be led to implement sub-optimal programs.\textsuperscript{110} This result undermines the

\textsuperscript{105} See U.S. SENTENCING GUIDELINES MANUAL, ch. 8 intro. cmt. (1998).
\textsuperscript{106} See, e.g., Krawiec, Misconduct, supra note 81, at 575 (“[S]trict vicarious liability systems may force the adoption of the socially optimal level of internal organizational enforcement and deterrence mechanisms (internal compliance structures). This is because when an organization bears all of the costs of any harm it causes, it has an incentive to reduce the incidence of such harm up to the point where the costs of such reduction equal the benefits.”)
\textsuperscript{107} Presumably, this would be a “values-based” compliance program. See Treviño, Managing Ethics, supra note 2.
\textsuperscript{108} See Advisory Group Report, supra note 50.
\textsuperscript{109} This type of program is characterized by the “compliance-based” approach. See Treviño, Managing Ethics, supra note 2; see also discussion supra Section II.A.
\textsuperscript{110} Id.
very aim of corporate self-policing that compliance programs should achieve.

If the Sentencing Commission is concerned with over-deterrence, there are more effective methods for coping with the problem than introducing the distortions inherent in the compliance program model. Reducing the maximum fines that a corporation faces is but one possibility.\textsuperscript{111} On the other hand, the Sentencing Commission’s primary goal might be to focus punishment on those corporations that are most blameworthy (an approach closer to the “just punishment” regime rejected by the Commission\textsuperscript{112}). In this case, a more accurate proxy for organizational blameworthiness than the existence of a Guidelines-approved compliance program will result from a factual inquiry into the corporation’s acts and policies surrounding the crime at issue.

Consider the following hypothetical, which analyzes actions taken by three fictitious companies after the compliance program language is artificially eliminated from the Guidelines. The first company (A) has an objectively effective compliance program, that in addition to meeting the Guidelines’ criteria for effectiveness, is actually effective in the context of the company’s operations. The second company (B) has implemented a “window-dressing” compliance program that meets the letter of the Guidelines’ law, but is not specifically designed by the company to be effective in practice. The third company (C) has chosen not to implement a compliance program at all.

When the compliance program sentence downgrade is removed from the Guidelines, a corporation that has implemented a program will potentially face stiffer fines if convicted. The prospect of a more severe sentence can be an incentive for a company to take measures to ensure that employee criminal activity is deterred. Company A’s compliance program already meets this goal, so it has little incentive to change its position in response to a change in the Guidelines; its program is already an effective shield against criminal liability. Company C may not change its position either, since it was already facing the higher fines because of its choice not to implement a program; its potential criminal liability has not changed. So far, eliminating the compliance program sentence downgrade appears to have a minimal effect on companies like A and C.

Company B is the main target of the proposal to eliminate the compliance program sentence downgrade. With the incentive to implement a “window dressing” program removed, the company faces a choice: improve its program so that it operates as effectively as company A’s, or eliminate the program and take its chances like

\textsuperscript{111} See, e.g., Bierschbach & Stein, supra note 53; Khanna, supra note 8, at 1271; Advisory Group Report, supra note 50.

\textsuperscript{112} See Krawiec, Future Disclosure System, supra note 2, at 498.
company C. If company B chooses to improve its compliance program, then the deterrent effect of the less-diluted vicarious liability standard will have been effective in increasing the prevention of employee crimes. On the other hand, if the company eliminates the program, it can devote the resources previously consumed by the program to other productive uses within the company, thus leading to increased efficiency. Assuming that the “window dressing” compliance program was ineffective in practice, then the net gain from eliminating the sentence downgrade becomes either one of deterrence or of efficiency to company B, without a substantial change in the deterrent effect on companies A and C. It is because of this net gain to society that the downgrade should not be replaced with another one based on different factors; it should simply be removed from the Guidelines altogether.

B. The “Corporate Ethos” and Affirmative Defense Models

1. The “Corporate Ethos” Model

Rather than relying on an affirmative defense to criminal liability, several proposals suggest that the vicarious liability standard should be replaced altogether with one that would require prosecutors to prove an additional “fault” or an organizational mens rea element. This approach recognizes the existence of a corporate culture and will apart from that of its individual employees, and posits that the law should encourage corporations themselves to abide by the law. By

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113 See, e.g., Kobayashi, supra note 53, at 736 (describing the increase in agency costs that results in a vicarious liability regime when corporations must monitor employee behavior through compliance programs).

114 See, e.g., Andersen, supra note 95 (describing failures of compliance programs to deter criminal activity).

115 See, e.g., Bucy, supra note 20; Laufer, Corporate Bodies, supra note 20.

116 See Bucy, supra note 20, at 1123; see also William S. Laufer & Alan Strudler, Corporate Intentionality, Desert, and Variants of Vicarious Liability, 37 AM. CRIM. L. REV. 1285, 1299 (2000) [hereinafter Laufer, Corporate Intentionality] (“[P]rosecutorial policies and guidelines increasingly acknowledge an organizational liability that is separate and apart from an imputed liability that accompanies vicarious fault.”).

117 See Bucy, supra note 20, at 1127.

One can draw several clear conclusions from these works on corporate culture: (1) each corporation is distinctive and draws its uniqueness from a complex combination of formal and informal factors; (2) the formal and informal structure of a corporation can promote, or discourage, violations of the law; and (3) this structure is identifiable, observable, and malleable. In light of such conclusions, a standard of criminal liability that fails to recognize the unique character of corporations or fails to promote law-abiding behavior by such corporations is unjustified.

Id.
recognizing a distinct corporate culture, and by requiring an examination into that culture before convicting a corporation, this approach contains a retributive element. Only corporations that encourage unlawful behavior, or at least do not actively seek to prevent it, should be subject to criminal liability. This approach requires a test for determining which corporations are and are not blameworthy.

Requiring a showing of organizational fault leads to the temptation to increase the emphasis on compliance programs. Given the difficulties inherent in proving an organization’s mens rea, it is natural to search for common clues that would point to a corporation’s fault relating to its employee’s crime. But as compliance programs are poor proxies for the corporation’s blameworthiness, they would not be an effective factor to consider under a “corporate ethos” or similar approach.

In a “corporate ethos” framework of criminal liability, the most effective way to judge a corporation’s behavior and culture is through a fact-specific inquiry into the corporation’s actions, policies and customs, rather than through a check-list of corporate policies like compliance programs. This style of inquiry avoids the weaknesses

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118 Id. at 1182 (stating that the criminal law should punish morally culpable behavior, but only when it is committed intentionally).

119 Id. at 1128-46. Bucy suggests that in order to determine whether the corporation has a corporate ethos that encourages unlawful behavior, the factfinder should examine circumstantial evidence in the following areas of the corporation’s internal structure, both formal and informal: hierarchy; corporate goals; the education of employees about legal requirements; monitoring of compliance with legal requirements; investigation of the offense in question; corporate reaction to past violations and violators; incentives through compensation for legally appropriate behavior; indemnification. Id. These factors are similar to those included in the Justice Department’s Prosecution Guidelines, adopted several years after publication of Bucy’s article. See Thompson Memo, supra note 3.

120 See Bucy, supra note 20, at 1128 (stating that the factfinder will have to rely on circumstantial evidence from a variety of sources to establish the corporate ethos or mens rea).

121 See discussion supra Section I.C.

122 One commentator suggests that by offering the compliance program sentence downgrade, the Sentencing Guidelines implicitly endorse this “corporate ethos” approach. See Jennifer Moore, Corporate Culpability Under the Federal Sentencing Guidelines, 34 ARIZ. L. REV. 743, 791 (1992). This assessment recognizes that the result of basing corporate fault on a compliance program rather than an inquiry into the corporation’s policies and customs could have adverse results, especially if “the effective program to prevent and detect violations were a pro forma matter, which could peacefully coexist with corporate policies and customs that encourage crime.” Id. Further experience with the operation of the Sentencing Guidelines in practice was suggested in order to test this concern. Id. Given the distortions that have been recognized in the compliance program approach, perhaps this concern was well-placed, and perhaps any “corporate ethos” approach should steer clear of using compliance programs as a proxy for corporate blameworthiness. See discussion supra Section II.A.

123 Bucy seems to endorse this approach to understanding the corporation’s blameworthiness within her proposed framework. For instance, one of the areas that should be considered by the factfinder is whether the corporation educates employees about legal requirements. This is one function served by a typical code of conduct within a corporate compliance program. But rather than simply asking whether such a code existed, Bucy suggests a more thorough approach, which
inherent in a mechanical approach to judging compliance programs and allows corporations the freedom to tailor their programs more effectively to their industries and business models. Compliance programs should not be discouraged, but they should never be prescribed in a manner that compromises their effectiveness. The best way to determine if a corporation is blameworthy, whether under the current vicarious liability regime or a corporate ethos approach, is to examine its individual policies and practices. The law should not ask whether the corporation adopted a relatively rigid framework prescribed by the Sentencing Commission. It should ask whether the corporation’s actions were, in general, reasonable efforts to ensure compliance with the law.

2. The Compliance Program Affirmative Defense

The problems posed by codifying compliance program structure into the criminal law would be magnified if the programs took on additional weight in the trial process. This would be especially true if adoption of a compliance program served as a complete defense to criminal liability. Several commentators have suggested that the existence of an effective corporate compliance program should be allowed as a complete affirmative defense to corporate criminal liability under the current vicarious liability regime. This approach would create several new problems for effective prosecutions including the difficulties resulting from assigning juries—instead of sentencing courts—the role of judging program effectiveness; the loss of flexibility

requires one to ask the following questions:
- Are the appropriate employees informed of regulatory changes that affect their duties?
- Are the new regulations explained in a comprehensible manner? Do middle management executives hold regular meetings to discuss problems of compliance? Is the corporate legal staff available for discussions on compliance? Does middle management have specific training programs in the areas of ethics and government regulation?

Bucy, supra note 20, at 1135. Laufer recognizes the weakness of compliance programs and other types of primary action as well. In his proposal for incorporating a “constructive corporate fault” element into the Sentencing Guidelines, he suggests that such primary action should be merely a starting point for the inquiry into corporate intentions. See Laufer, Corporate Bodies, supra note 20, at 728-29.

124 See Treviño, Managing Ethics, supra note 2 (describing the reduction in compliance program effectiveness caused by a compliance-based approach).

125 See Walsh & Pyrich, supra note 6, at 676; see also Huff, supra note 7. Huff suggests a more moderate approach than allowing corporations a complete affirmative defense to criminal liability. The “Relevant Factor Approach” would permit juries to consider the existence and effectiveness of a compliance program in determining whether the employee acted to benefit the corporation. Id. at 1292. While this approach is a middle ground between current law and compliance programs as an affirmative defense, it nevertheless raises the same problems as the model suggested by Walsh & Pyrich.
for prosecutors as they consider indicting a corporation; and the poor value of compliance programs as a proxy for organizational fault.

First, the burden of judging whether a compliance program is effective would be shifted from the prosecutor and sentencing court to the factfinder. While evaluating the actual effectiveness of these programs is generally problematic,\textsuperscript{126} it would be even more so for a jury, given the complexity of resolving the structure of the compliance program itself with its implementation.\textsuperscript{127} Second, it is tempting to infer a good-faith effort to prevent crime from the existence of a compliance program, but it avoids the unpleasant reality that the program did not deter the criminal activity that took place.\textsuperscript{128} Unless one assumes that every criminal violation that takes place in spite of an “effective” compliance program is the act of an uncontrollable rogue employee, this affirmative defense model is likely to be under-inclusive.\textsuperscript{129} In light of the evidence about the existing incentives to implement sub-optimal compliance programs, the uncontrollable employee assumption is questionable at best.\textsuperscript{130}

Third, adopting such an affirmative defense approach would reduce the flexibility currently built into the system. This flexibility allows prosecutors to evaluate whether it would be more effective to seek the corporation’s cooperation in the investigation of the individual wrongdoers or whether prosecution of the corporation itself would be

\textsuperscript{126}See discussion supra note 6.

\textsuperscript{127}See Donald C. Langevoort, Monitoring: The Behavioral Economics of Corporate Compliance with Law, 2002 COLUM. BUS. L. REV. 71, 114 (2002). Langevoort states that a checklist of features that would characterize an effective compliance program as used by the Sentencing Guidelines is unlikely to go to the heart of effective compliance, and runs the risk of substituting for more careful analysis in such a way that firms gain credit for good compliance simply by introducing an off-the-rack set of visible (but weak) procedures. An in-depth inquiry would require extensive and subjective expert research into the culture and operations of the firm, with severe credibility problems when translated for purposes of adjudication.

\textit{Id.} Langevoort suggests using an industry-best practices analysis for evaluating compliance programs instead of requiring judges to perform a de novo review of each company’s program. \textit{Id.} at 115.

\textsuperscript{128}See discussion supra Section II.A (comparing the effectiveness of “compliance-based” programs encouraged by the Sentencing Guidelines and “values-based” programs that were found to be more effective at deterring criminal activity).

\textsuperscript{129}But see Advisory Group Report, supra note 50, at 37:

It is obviously unrealistic to expect that the organizational sentencing guidelines will deter \textit{all} corporate crime. No set of sentencing incentives and penalties can, in every case, overcome the impact of corporate culture and individual greed, fear, or arrogance that drive corporate misfeasance. The fact of this misconduct, then, does not necessarily indicate that the organizational sentencing guidelines are deficient.

\textsuperscript{130}See discussion supra Section II.A; see also Laufer, Corporate Intentionality, supra note 115, at 1301 (describing how a due diligence defense based on the existence of a compliance program would give corporations less of an incentive to craft and implement programs that are as effective as possible).
the most effective alternative for deterring future criminal conduct. Compliance programs would shift from being one of several factors that affect the decision to prosecute and the corporation’s sentence to serving as a complete defense. In other words, it would not only render moot the compliance program language in the Prosecution Guidelines, it would also reduce the corporation’s incentive to cooperate with prosecutors. The corporation’s criminal liability would often hinge solely on whether its compliance program met the Sentencing Guidelines’ standard for effectiveness. This could also increase the number of “window-dressing” compliance programs used to avoid liability, as companies are given the incentive to put all of their deterrence efforts into one approach that they hope will later serve as an affirmative defense. If corporations would have an incentive to invest all of their deterrence resources into this area, it may dissuade them from cooperating with prosecutors when individual employees are indicted.

Finally, the mens rea that is thought to be approximated by the existence of a compliance program is not analogous to the traditional notion of mens rea applied in individual criminal prosecutions. The existence of an effective compliance program, and the extent to which it is implemented, are suggested as good measures of whether the corporation is a good candidate for punishment, a measure equivalent to mens rea in the context of individual crimes. This approach might be effective if the law encouraged corporations to implement the most effective compliance programs possible, but this is not currently the case. By specifying a series of elements that a corporate compliance program must include in order to meet Sentencing Guidelines requirements, the incentive is distorted, pushing corporations to implement sub-optimal programs. The very existence of this skewed incentive undermines the suggestion that a corporation’s compliance program is an adequate proxy for its blameworthiness.

By eliminating the compliance program sentence downgrade from the Sentencing Guidelines, these distorted incentives can be minimized. Unfortunately however, this step would deprive the proposed

131 See Thompson Memo, supra note 3.
132 See id.; see also U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004).
133 See Walsh & Pyrich, supra note 6, at 689-90.
134 This assumption is based on the same incentives to implement sub-optimal compliance programs discussed supra Section II.A.
135 See, e.g., Richard S. Gruner, Risk and Response: Organizational Due Care to Prevent Misconduct, 39 WAKE FORorest L. Rev. 613, 634 (2004); Walsh & Pyrich, supra note 6, at 677 (“Allowing a corporation to escape liability if it can demonstrate an adequate, effectively operating compliance program is consistent with the traditional notions of allocating criminal responsibility.”).
136 See discussion supra Section II.A.
137 Id.
affirmative defense model of the very thing it requires: a framework for evaluating compliance program effectiveness. \footnote{See Walsh & Pyrich, supra note 6, at 685 (describing the eight-step checklist, similar to that of the Sentencing Guidelines themselves, for courts to evaluate compliance program effectiveness).} This paradox points to a fundamental flaw in the affirmative defense model. For the model to succeed, it requires the very type of framework that has undermined the incentive for corporations to implement truly effective compliance programs. For the affirmative defense model to work as its authors intend, they will have to develop a more robust test for corporate fault than the existence of a compliance program. \footnote{The foundation for such a test is certainly available. See, e.g., Bucy, supra note 20; Laufer, Corporate Bodies, supra note 20.}

**CONCLUSION**

Under the Sentencing Guidelines, the federal criminal law is quite solicitous of corporate compliance programs. The implementation of a compliance program that meets these Guidelines can substantially reduce a corporation’s sentence when convicted for the crimes of its agents, or can even help avoid indictment altogether. However, the manner in which the Guidelines have addressed compliance programs has created unwanted distortions and disincentives.

The underlying policy justifications for the Guidelines’ treatment of compliance programs are sound: encouraging companies to foster a culture of compliance with the law, and deterring criminal conduct by employees. But the data suggests that these goals are not being met. Virtually none of the organizations sentenced under the Guidelines had effective compliance programs, \footnote{See, e.g., 2002 SENTENCING STATISTICS, supra note 38, at 98.} and the data strongly suggests that the Guidelines actually encourage corporations to adopt sub-optimal programs. \footnote{See discussion supra Section II.A.} Meanwhile, small companies, not large corporations, are pressed to bear the burden of expensive programs that substantially drain their resources, while providing only questionable benefits. \footnote{See Bowman, supra note 32, at 686.}

In light of the past decade’s experience with the Guidelines, a more effective way to address the original goals of the Sentencing Commission would be to remove compliance programs from the Guidelines altogether. There are better mechanisms for ensuring that companies that make genuine, good faith efforts to deter criminal activity—whether they do so with compliance programs or not—than to focus on the structure and implementation of their compliance
This does not mean that prosecutors and judges should not examine a corporation’s compliance practices at all. On the contrary, a fact-specific inquiry into those practices is perfectly reasonable under a “corporate ethos” liability regime. But as an incentive-creating mechanism for promoting good corporate citizenship and for deterring criminal activity, mandated or strongly encouraged compliance programs will not reach the goals for which they were intended.

Removing compliance programs from the Sentencing Guidelines is a complex process, although that very process was recently used to amend the Guidelines’ treatment of compliance programs. It is time for the Sentencing Commission to take another look at its decision in 2004 and amend once again, this time in a manner that would more closely harmonize the Guidelines with their purpose, by removing compliance programs altogether.

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143 See discussion supra Section III.A.
144 An entire compliance industry has developed in the wake of the inclusion of the sentence downgrade in the Sentencing Guidelines. See Baker, supra note 34, at 316. It is likely to lobby for the retention of the downgrade. The process of amending the Sentencing Guidelines itself also takes 180 days after the amendment is approved by the Sentencing Commission. See Paula J. Desio, Introduction to Organizational Sentencing and the U.S. Sentencing Commission, 39 Wake Forest L. Rev. 559, 563 (2004).