
TEMPLE LAW REVIEW

© TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF
HIGHER EDUCATION

VOL. 90 NO. 4

SUMMER 2018

SPEECH

COMING OF AGE: THE NEW FACE OF INTEGRITY COMPLIANCE

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Leonard McCarthy delivered the keynote speech for Temple Law Review's 2017 symposium titled "The Caremark Decision at 21—Corporate Compliance Comes of Age." The following transcript has been edited lightly for publication.

WHAT IT TAKES

It is a great privilege to speak to you at Temple University Beasley School of Law, whose Center for Compliance and Ethics is advancing compliance as a discipline, science, and way of life. To Jon Smollen, thank you for inviting me, as this is a moment to match pursuit of good practice with sound theory. The direction and control of corporations and institutions are critically important in managing livelihood and wealth. By certifying corporate compliance with standards of propriety, we define the rules of engagement.

REFLECTION ON TODAY'S EVENT

The curious legacy of *Caremark*¹ is how one opinion can shape an industry through answering a negative. I was struck by the interplay between concepts such as the duty to monitor and the duties of care, good faith, and loyalty. While the resultant measures and obligations can be a bit of an egg dance, the

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1. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (ushering in a new era of corporate compliance by recognizing directors have a duty to monitor a corporation's activities through adequate internal information and reporting systems).

awareness they created spurred corporate compliance into an irreversible practice. But let's step back.

A GLOBAL PERSPECTIVE

We face enormous challenges: corruption is still the hot-button issue that bedevils everything. There is what Paul Volcker calls a deficit of public trust.² The phrase "Democracy Dies in Darkness"³ seems to take on new meaning in parts of the Middle East, Eastern Europe, Asia, Latin America, and Africa, where people are often deprived of access to facts, respect, and accountable government.

Many countries claim to embrace top-notch corporate governance codes, principles, and systems, yet qualify as fallen angels, captured economies, or states in conflict. Disjointed regulatory frameworks around the world still perpetuate deficiencies that complicate our ability to forecast and mitigate the impact of financial risk. And central to the solution is the corporate world. In short, we can do better!

WHAT HAPPENS IN PRACTICE

Testifying before the U.S. Congress last year, the chairman and CEO of Wells Fargo committed the bank to "[c]reating a new enhanced branch compliance program that will be dedicated to monitoring for sales practice violations by conducting data analytics and frequent branch visits."⁴

"The news about questionable sales commissions by SAP . . . was brought to my attention by my daughter Kristina," the chairman of the company was quoted as saying recently.⁵

I am mindful that in corporate law many get blamed for the sins of the few. Yet, as contrasting and isolated as these examples may be, they beg questions: How effective are managements and boards in preventing misconduct? And how do we sharpen integrity compliance and risk management in business?

I recall a discussion some years ago at a World Economic Forum event in

2. See Press Release, The Volcker Alliance, Paul A. Volcker Announces Formation of a Nonpartisan Initiative to Address Eroding Public Trust in Democratic Governments (May 29, 2013), http://www.volckeralliance.org/sites/default/files/attachments/Volcker-Alliance_Press-Release_28May2013.pdf [perma: <http://perma.cc/P75V-SZCA>].

3. This phrase has risen to recent prominence with the *Washington Post's* decision to adopt "Democracy Dies in Darkness" as its slogan. See Paul Farhi, *The Washington Post's New Slogan Turns Out to Be an Old Saying*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html?utm_term=.e8742824747a [perma: <http://perma.cc/85JR-JAHT>].

4. *An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 114th Cong. 74 (2016) (statement of John Stumpf, Chairman and Chief Executive Officer, Wells Fargo & Co.).

5. Dave Chambers, *We'll Publish Gupta 'Kickback' Findings, Software Giant Promises*, TIMES LIVE (Sept. 23, 2017, 10:45 AM), <http://www.timeslive.co.za/news/south-africa/2017-09-23-well-publish-gupta-kickback-findings-software-giant-promises/> [perma: <http://perma.cc/T7PZ-S23A>].

Dubai with executives of European companies about increased corporate governance and a rigorous compliance regime for family businesses in the Middle East and state-owned enterprises in Asia. The response was a shrug.

In the real-world, companies make offshore payments to government ministers for consultancy services, corruptly fund offset agreements in arms acquisitions, facilitate economic sanctions busting and large-scale tax frauds, and design intricate intercontinental, cross-border money-laundering schemes.

Corporations on the wrong side choose money before ethics; their organizational business culture allows unethical behavior to thrive. In most jurisdictions many companies are still exposed to liability for their failure to maintain sufficient internal controls to prevent bribery.

On a positive note, increased public scrutiny and intensity of shareholder expectations must ultimately unlock a new wave of corporate right-mindedness, where noncompliance becomes the exception.

THE HIGHEST RISKS

Many years ago, an accountant in Africa quipped that risk equals opportunity minus compliance divided by accountability. I wonder whether some instances of the corporate failures we see could be ascribed to this adage.

I agree with the opinion of experts that the defense, energy, minerals, telecommunication, and drug sectors are vulnerable to the same type of risk elements: humongous contracts, government as a counterpart, a desire to keep things secret, and a plethora of middlemen. Collectively, these elements generally mean bigger risk. The combination of politically influenced state enterprises, choice of local partners in empowerment transactions, fees to business-growth partners, and government payments, is a trademark red flag. The risk crescendo hits companies when, as a CEO of a multinational company once told me in the aftermath of a settlement, company leadership has to go out and tell thousands of its employees that “compliance trumps profits.”

WHAT LAWS AND CASES TEACH US

An analysis of corporate governance failures over the past decade, from Enron⁶ to Odebrecht,⁷ show two common features: someone misrepresented something and someone else covered it up. This thread is also evident in the Security Exchange Commission’s list of twenty-five fraudulent actions within the past three months as of the date of this speech.⁸

6. See Charles M. Elson & Christopher J. Gyves, *The Enron Failure and Corporate Governance Reform*, 38 WAKE FOREST L. REV. 855, 859–68 (2003) (outlining several “red flags” missed by the Enron Board of Directors leading up to one of the most notable corporate scandals in U.S. history).

7. See *Odebrecht Case: Politicians Worldwide Suspected in Bribery Scandal*, BBC NEWS (Dec. 15, 2017), <http://www.bbc.com/news/world-latin-america-41109132> [perma: <http://perma.cc/AJ6V-GJRX>].

8. See Press Releases, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/news/pressreleases> [perma: <https://perma.cc/LP93-TFAX>] (last visited July 14, 2018) (listing various fraudulent actions and SEC investigations).

A review of the multibillion-dollar global settlements in criminal and civil matters involving banks and financial institutions during the last decade highlights the dominant presence of fraudulent misrepresentations and the abuse of the financial system by external forces in a significant majority of cases.⁹

In 1992, when we were looking at a new world, a legal giant asked me whether I had read the *Nippon Papers* case.¹⁰ Today, with the multipronged approach executed through the SEC, FCPA enforcement,¹¹ Dodd-Frank,¹² and Sarbanes-Oxley,¹³ the US is probably ten years ahead of the pack.

Instances of scandal in other jurisdictions that have brought about a turnaround effect on corporate compliance or have the potential to do so are Siemens (Germany),¹⁴ Petrobras (Brazil),¹⁵ Kobe Steel (Japan),¹⁶ Daimler Chrysler (United Kingdom),¹⁷ BNP Paribas (France),¹⁸ and 1MDB (Malaysia).¹⁹ Their experience must rub off.

9. See generally John W. Schoen, *7 Years on from Crisis, \$150 Billion in Bank Fines and Penalties*, CNBC (Apr. 30, 2015, 2:32 PM), <http://www.cnbc.com/2015/04/30/7-years-on-from-crisis-150-billion-in-bank-fines-and-penalties.html> [perma: <http://perma.cc/KB76-YASJ>] (presenting a brief overview of various fraudulent banking activities and their resulting fines or lawsuits since the 2008 global financial crisis).

10. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (holding that wholly extraterritorial conduct could not form the basis of a criminal antitrust prosecution brought against a Japanese corporation).

11. See Foreign Corrupt Practices Act, Pub L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.).

12. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C.).

13. See Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18 U.S.C.).

14. See Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 20, 2008), <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html> [perma: <http://perma.cc/SK4Y-57PG>].

15. See Chad Bray & Stanley Reed, *Petrobras of Brazil to Pay \$2.95 Billion over Corruption Scandal*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/business/dealbook/brazil-petrobras-corruption-scandal.html> [perma: <http://perma.cc/D9CU-LKRD>].

16. See Stephen Stapczynski, Ichiro Suzuki, & Masumi Suga, *Japan's Kobe Steel May Have Faked Data for Over a Decade*, BLOOMBERG (Oct. 17, 2017, 4:11 AM), <http://www.bloomberg.com/news/articles/2017-10-17/kobe-steel-is-said-to-have-likely-faked-data-for-over-a-decade> [perma: <http://perma.cc/E2H2-LPM5>].

17. See *Daimler Settles US Bribery Charges*, GUARDIAN (Mar. 24, 2010, 5:34 PM), <http://www.theguardian.com/business/2010/mar/24/daimler-settles-us-bribery-charges> [perma: <http://perma.cc/F26X-TDFX>].

18. See *BNP Paribas Faces \$246M Fine in Currency Scandal*, BBC (July 17, 2017), <http://www.bbc.com/news/business-40635070> [perma: <http://perma.cc/4VHL-4NHP>].

19. See *1MDB: The Case that Has Riveted Malaysia*, BBC (July 22, 2016), <http://www.bbc.com/news/world-asia-33447456> [perma: <http://perma.cc/58R2-ZGNX>]; *Jeff Sessions Calls Malaysia's 1MDB Scandal 'Kleptocracy at Its Worst'*, REUTERS (Dec. 5, 2017, 2:19 AM), <http://www.reuters.com/article/us-malaysia-scandal-doj/jeff-sessions-calls-malaysias-1mdb-scandal-kleptocracy-at-its-worst-idUSKBN1DZ0MX> [perma: <http://perma.cc/N4UB-H2GB>].

WHAT'S HAPPENING HERE AND AROUND THE WORLD

The Wolfsberg Anti-Corruption Guidance²⁰ and the Equator Principles,²¹ admittedly arising in different arenas, are examples of bringing collective commitment and action to bear upon a global problem.

Clean business is smart business, says Bob Zoellick.²² Companies like Raytheon and PepsiCo have been credited by Transparency International for shining a torch onto a new pathway for anticorruption.²³

Siemens continues to derive the fruits of a fifteen-year global Integrity Initiative.²⁴ Cisco Systems revised its Anti-Corruption and Bribery Policy²⁵ and Louis Berger reported that it invested in a new corporate model, global accounting system, a compliance and ethics department, and an independent audit committee.²⁶

J.P. Morgan devotes a chapter of its anticorruption policy to suppliers,²⁷ Goldman Sachs has a Code of Business Conduct and Ethics,²⁸ Standard Chartered conducted a Sustainability Review,²⁹ and Citi launched a Tech for

20. *Wolfsberg Anti-Corruption Guidance*, WOLFSBERG GRP., [http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg%20Anti%20Corruption%20Guidance%20Paper%20August%202018-2011%20\(Published\).pdf](http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg%20Anti%20Corruption%20Guidance%20Paper%20August%202018-2011%20(Published).pdf) [perma: <http://perma.cc/BC7M-SEBV>] (last visited July 14, 2018).

21. See EQUATOR PRINCIPLES, <http://equator-principles.com/best-practice-resources/> [perma: <http://perma.cc/KT7F-6MJT>] (last visited July 14, 2018).

22. See Robert B. Zoellick, President, World Bank Grp., Remarks for International Corruption Hunters Alliance (Dec. 7, 2010), <http://www.worldbank.org/en/news/speech/2010/12/07/world-bank-group-president-robert-b-zoellick-remarks-international-corruption-hunters-alliance> [perma: <http://perma.cc/529W-E84G>] (discussing Robert Zoellick's clean business philosophy).

23. See *Transparency International-USA Honors President Jimmy Carter and PepsiCo with Integrity and Corporate Leadership Awards*, BUS. WIRE, (Dec. 2, 2015, 9:15 AM), <http://www.businesswire.com/news/home/20151202005146/en/Transparency-International-USA-Honors-President-Jimmy-Carter-PepsiCo> [perma: <http://perma.cc/4N2D-GQLV>]; *Transparency International-USA Honors Raytheon for Anti-Corruption Efforts*, RAYTHEON UK, (Nov. 25, 2014), http://www.raytheon.co.uk/news/feature/transparency_international.html [perma: <http://perma.cc/D9FW-8CXX>].

24. See Press Release, World Bank, Siemens Selects Initial Projects for US\$100 Million Integrity Initiative (Dec. 9, 2010), <http://www.worldbank.org/en/news/press-release/2010/12/09/siemens-selects-initial-projects-for-us100-million-integrity-initiative> [perma: <http://perma.cc/49NK-PCFR>].

25. See *Cisco's Anti-Corruption and Bribery Policy*, CISCO.COM (last updated Jul. 17, 2017), https://www.cisco.com/c/dam/en_us/about/doing_business/legal/docs/anti-corruption-bribery-policy.pdf [perma: <http://perma.cc/PA4X-VXJD>].

26. See *Louis Berger's \$25M+ Global Restructuring and Reform Investments Since 2010*, LOUISBERGER.COM, <http://www.louisberger.com/news/louis-berger-25m-global-restructuring-and-reform-investments-since-2010> [perma: <http://perma.cc/342X-NV8Q>] (last visited July 14, 2018).

27. See *JPMorgan Chase & Co. Supplier Anti-Corruption Policy*, JPMORGANCHASE.COM (Feb. 23, 2015), <http://www.jpmorganchase.com/corporate/About-JPMC/document/supplier-anti-corruption-policy20150223.pdf> [perma: <http://perma.cc/8V59-Q25W>].

28. See *Code of Business Conduct and Ethics: Our Shared Responsibility to Our Clients, Colleagues and Communities*, GOLDMAN SACHS, <http://www.goldmansachs.com/investor-relations/corporate-governance/corporate-governance-documents/revise-code-of-conduct.pdf> [perma: <http://perma.cc/9GKH-THRT>] (last visited July 14, 2018).

29. *Sustainability Review 2013*, SC.COM (2013), <http://www.sc.com/sustainability->

Integrity program,³⁰ to showcase a renewed commitment to rise above the pitfalls of the last decade.

There are encouraging signs in the U.K. as its Bribery Act³¹ embeds itself, Germany who has been credited for leadership in the EU, and Switzerland where there is a new impetus for international cooperation. Japan will have to step up to the plate to deal with integrity failures in their private sector, and Brazil's Attorney General has shown how one person can change the compliance architecture of a country.³²

THE HALLMARKS OF GOOD COMPLIANCE

A credible compliance function should have independent standing vis-à-vis senior executives and a direct line reporting in major corporations, to ensure that the voice of warning is not drowned out. Healthy companies have good internal sanctioning and corrective regimes in place to send a clear message to staff about what it means to live their values. Those who are in the business of advising others should focus on what often causes the most damage: willful blindness, the failure to supervise and prevent misconduct, conscious disregard of misconduct, contrived ignorance, the effect of up-the-chain accountability, and a need for disclosure of materially adverse events. A proactive approach to compliance that progressive compliance officers advocate is to ask: "What will our company look like if the U.S. Justice Department or the U.K.'s Serious Fraud Office come knocking?"

THE NEXT THEATER OF ACTION

The job of those in control functions in corporations is to assert due diligence, assess material integrity risk, pinpoint interventions, and report their concerns to senior management at the earliest available opportunity. The specter of personal liability looms large in the future. In-house counsels and compliance officers will need to be unpopular and unafraid, and act with forethought and intention.

For the night watchmen of companies, "four eyes" should graduate into the "six eyes" when it comes to corporate compliance: skepticism, anticipation, inquiry, rigor, judgment, and excellence. The *Banking Code and Culture* study by the Group of Thirty³³ illustrates how behaviors, mindset, values, and ethics are

review/2013/pdf/2013-Sustainability_Review.pdf [perma: <http://perma.cc/XGX4-BMBD>].

30. See Press Release, Citigroup Inc., Citi Announces the Citi Tech for Integrity Challenge (Feb. 7, 2017), <http://www.citigroup.com/citi/news/2017/170207b.htm> [perma: <http://perma.cc/7KQN-4VDG>].

31. Bribery Act 2010, c. 23, §§ 1–20.

32. See Mauricio Savarese & Sarah DiLorenzo, *Attorney General: Brazil's Temer Leads Criminal Organization*, U.S. NEWS (Sept. 14, 2017, 8:56 PM), <http://www.usnews.com/news/world/articles/2017-09-14/brazils-temer-charged-with-obstruction-of-justice> [perma: <http://perma.cc/25SQ-3BAR>].

33. *Banking Conduct and Culture: A Call for Sustained and Comprehensive Reform*, GROUP30.ORG (July 2015), http://group30.org/images/uploads/publications/G30_BankingConductand

amalgamated in the culture of a bank, and hold enormous value for the financial industry.

I looked at a margin agreement of a retirement account recently and the scrutiny of the beneficiary's credentials under the U.S. Patriot Act³⁴ (that was signed into law exactly sixteen years ago on October 26, 2001) jumped at me. My point is that the legal trend here and elsewhere will be to expand "failure to prevent" offenses, especially in light of shareholder activism, pressure by investors, and a more transparent world.

In describing his optimism, whether from nature or nurtured, Nelson Mandela urged us to "keep[] one's head pointed towards the sun, one's feet moving forward."³⁵ I hope *Caremark* keeps on shining.

Culture.pdf [perma: <http://perma.cc/LR4K-6AEQ>].

34. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

35. NELSON MANDELA, *LONG WALK TO FREEDOM* 341 (1st ed. 1994).