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FINANCIAL COMPLIANCE PROGRAMS, THE VOLKSWAGEN SCANDAL, ANDTWO FINANCIAL COMPLIANCE SCENARIOS

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ABSTRACT

In this article, a compliance program is defined and its characteristics are explained. The types of compliance programs are highlighted, including a command-and-control program, a rules-based program, a principles-based program, and a culture-based program. The Volkswagen scandal is explained, where a brief history of the scandal, a discussion of Volkswagen's anti-pollution system and the responsible parties, and finally whether Volkswagen's existing compliance program was relevant is provided. The paper observed that if the defeat device was promoted as a trade secret, Volkswagen middle management and individual contributors would likely have never revealed its existence, thinking that their silence manifested company loyalty. Suppliers and outside counsel would not have disclosed the secret because of signed non-disclosure agreements and attorney-client privilege, respectively. In essence, the presiding compliance program at Volkswagen may not have been a relevant factor in understanding and appreciating employee and contractor silence. Finally, two compliance scenarios are analyzed, revealing under what circumstances an individual may become a whistleblower.

Keywords: Command and Control Compliance, Compliance Violations, Culture-Based Compliance, Reputational Risk, Rules-Based Compliance, Volkswagen Scandal, Whistleblower Protections.

INTRODUCTION

In this article, a compliance program is defined and its characteristics are explained. The types of compliance programs are highlighted, including a command-and-control program, a rules-based program, a principles-based program, and a culture-based program. The Volkswagen scandal is explained, where a brief history of the scandal, a discussion of Volkswagen's anti-pollution system and the responsible parties, and finally whether Volkswagen's existing compliance program was relevant is provided. The paper observed that if the defeat device was promoted as a trade secret, Volkswagen middle management and individual contributors would likely have never revealed its existence, thinking that their silence manifested company loyalty. Suppliers and outside counsel would not have disclosed the secret because of signed non-disclosure agreements and attorney-client privilege, respectively. In essence, the presiding compliance program at Volkswagen may not have been a relevant factor in understanding and appreciating employee and contractor silence. Finally, two compliance scenarios are analyzed, revealing under what circumstances an individual may become a whistleblower.

DEFINITION AND TYPES OF COMPLIANCE PROGRAMS

Westphal defined a compliance program as a "set of internal policies and procedures that you put into place to help your organization comply with the law."[1] An effective compliance program can enhance the operations of an organization, increase the quality of care, reduce costs, and identify issues before the issues become systemic and expensive to correct.[2]

According to Suich, there are the following three types of compliance programs:[3]

- Command and control compliance programs;
- Rules-based compliance programs; and
- Speak-up, culture-based compliance programs.

Additionally, there are principles-based compliance programs that are based on general guidelines rather than a detailed recipe.[4]

The idea behind a command-and-control compliance program is to command individuals within an organization to do something by creating a law, rule, or policy that makes it illegal or a violation and to delegate authority to regulating bodies to enforce the law, rule, or policy via fines and penalties.[5] The four elements of a command-and-control compliance program are:(1) arrangement of personnel, (2) information management, (3) procedures, and (4) equipment and facilities essential for the commander to conduct operations.[6] Command-and-control compliance programs are based on a military approach to compliance, where individuals must follow orders from a

[1]Heather Westphal, Compliance Program Basics, *Office of Inspector General* (Jan. 7, 2012), *available at* https://oig.hhs.gov/newsroom/oig-podcasts/compliance-program-basics/#:~:text=At%20its%20most%20basic%20level,care%20and%20reduce%20overall%20costs.

[2]*Id.*

[3]Joseph Suich, How to Develop a Values-Based Compliance Culture, *Power Magazine* (Jun. 1, 2017), *available at*https://www.powermag.com/how-to-develop-a-values-based-compliance-culture/.

[4]Mary Jo Climie, Rules- or Principles-Based Compliance Programs:Which Is Better?, *LinkedIn.com* (Sep. 5, 2023), *available at*https://www.linkedin.com/pulse/rules-principles-based-compliance-programs-which-better-climie/.

[5]PIDS Staff, A Law of Nature: The Command-and-Control Approach, 3 *Economic Issue of the Day* 1 (Apr. 2002), *available at*https://sswm.info/sites/default/files/reference_attachments/PIDS%202002%20Standards%20in%20Command%20and%20Control.pdf.

[6]Global Security Staff, Command and Control, *GlobalSecurity.org* (n.d.), *available at*https://www.globalsecurity.org/military/library/policy/army/fm/60/chap1.htm#:~:text=A%20command%20and%20control%20system%20is%20the%20arrangement%20of%20personnel,the%20commander%20to%20conduct%20operations.

commander who is in charge of a compliance program.[7] Although a command-and-control compliance program is generally perceived to be inefficient, Cole and Grossman articulated conditions where command-and-control programs may be efficient.[8]In a rules-based compliance program, compliance is predicated on legal, regulatory, and policy constraints, sometimes at the expense of moral and ethical principles.[9] A rules-based compliance program is limited by the fact that it might be:[10]

- A best guess of the future and may not include new situations;
- Under inclusive by not catching things that the rule-maker may want to include, or over inclusive by adding unintended things when used in specific contexts;
- Impacting behavior does not depend on the rule but rather on the organization's approach to regulation or its incentive structure for compliance.

In contrast to a rules-based compliance program, a principles-based compliance program is characterized by:[11]

- Generalized, over-reaching requirements that are flexible and can rapidly adjust to a changing business environment;
- Qualitative terms (e.g., "fair," "reasonable," or "suitable") versus bright-line rules (e.g., "within five business days");
- Expressing the reasons behind the rule;
- Having broad applications in different scenarios; and
- Being behavioral standards.

One could argue that the principles-based compliance program is a generalized rules-based compliance program.

Finally, a speak-up or culture-based compliance program begins with transparent policies andexpectations while engaging employees by leveraging metrics anddata analytics, sharing lessons learned, and keeping training fresh in the minds of individuals.[12] According to Suich, culture rather than a rule book or a code or behavior permits employees to speak up when something is not right.[13] Culture can direct compliance above and beyond the compliance team by ensuring that an entity avoids the big misses that may adversely affect an organization's finances and reputation.[14] In other words, cultural-based compliance programs may encourage individuals to do the right things rather than doing things right.[15]

Now that the various compliance programs have been defined and characterized, the essay will segue into the Volkswagen scandal of 2015. It will answer the question of what people knew regarding Volkswagen's fraudulent software application that provided false data when the company's diesel cars were being tested for emissions compliance. As of December 31, 2022, the Volkswagen Group employed over 675,000 people, of whom over 293,000 worked in Germany.[16] Hundreds of thousands of Volkswagen employees likely knew nothing about the emissions defect. If anything, only a few hundred, if not only a hundred or fewer individuals, were involved in the production of the software defeat device. It should also be understood that separate divisions could have had different compliance programs, presuming that Volkswagen corporate did not mandate only one compliance program. The firm has 675,000 employees and is large enough for this possibility to occur.

CHARACTERISTICS OF A COMPLIANCE PROGRAM

According to the United States Sentencing Guidelines for Organizations (Guidelines), the seven essential requirements of a compliance program are to:[17]

1) Establish standards and procedures to prevent and detect criminal conduct;
2) Ensure that the organization possesses an effective compliance program, where the program has reasonable oversight and is periodically evaluated for safeguarding its effectiveness;
3) Employ reasonable efforts to include all company members, including individuals who may have engaged in illegal activities or conduct inconsistent with the compliance program.
4) Use reasonable steps to communicate with all employees and contractors about the compliance program and conduct effective training programs;
5) Warrant that the compliance and ethics program is followed, periodically evaluate its effectiveness, and provide an anonymous and confidential mechanism where employees can report or seek guidance on potential or actual criminal conduct;
6) Promote and enforce consistently throughout the organization via incentives and disciplinary measures to prevent or detect criminal conduct; and
7) Take reasonable steps to respond appropriately to criminal conduct and prevent future criminal conduct by periodically assessing the risk of criminal conduct.

Compliance Program Rules

According to Miller, the goal of a compliance program is to ensure that its culture encourages the prevention, detection, and resolution of possible violations of law or corporate policy.[18] The rules that a company's compliance program should strive to enforce include:[19]

- Annual ethics training as a condition of employment;
- Employees are encouraged to discuss workplace issues with their immediate manager or supervisor;
- The company maintains a neutral ombudsman program so that employees have an alternate, safe haven communication channel to relay workplace issues;
- The firm possesses a 24-hour, 7-day-a-week telephone line supported by an independent organization where employees may voice their concerns and where the firm's Office of Ethics evaluates these issues;

[7] *Id.*
[8] Daniel H. Cole & Peter Z. Grossman, When Is Command-And-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative RegulatoryRegimes for Environmental Protection, *Maurer School of Law: Indiana University* (1999), *available at*https://www.repository.law.indiana.edu/facpub/590/.
[9] TosinUmukoro, Making the Shift to Principles-Based Compliance Programs, *CEP Magazine* (Sep. 2021), *available at*https://compliancecosmos.org/making-shift-principles-based-compliance-programs#:~:text=In%20contrast%20to%20a%20principles,of)%20moral%20and%20ethical%20imperatives.
[10] *Id.*
[11] *Id.*
[12] Joseph Suich, *supra*, note 4.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Volkswagen Staff, 2022 Group Management Report, *Volkswagen Group* (Dec. 31, 2022), *available at*https://annualreport2022.volkswagenag.com/group-management-report/sustainable-value-enhancement/employees.html.
[17] United States Sentencing Commission Guidelines Manual 2021, *United States Sentencing Commission* (2021), *available at*https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.
[18] Geoffrey P. Miller, *Law of Governance, Risk Management and Compliance* (Wolters Kluwer Kindle Ed. 2020).
[19] Molly Greville, Corporate Governance vs. Compliance, *Athennian* (n.d.), *available at* https://www.athennian.com/post/corporate-governance-vs-compliance.

- The compliance monitoring and auditing function varies according to new regulatory requirements, changes in business practices, and other considerations;
- The firm gives managers reports from tracking and oversight systems that collect data in determining key compliance indicators to ensure that employees are following external laws and internal company policies so that potential violations are flagged;
- The entity should expend significant resources to ensure that skilled and highly qualified individuals are hired;
- Potential employees are screened for drug usage in the process of performing background checks;
- The background investigation verifies employment history, education, and a criminal background check for felonies and misdemeanors at the county, state, and federal levels;
- If appropriate, the firm should check for professional certifications, licenses, motor vehicle records, and credit history.
- The firm's compliance program demands that employees promptly report potential violations of law or corporate policies so that the company may take the appropriate disciplinary action;
- The compliance program recognizes that each situation is unique, even though the disciplinary action should be consistent; and
- The compliance program recognizes that identified violations may happen because of gaps in corporate policies, practices, or internal controls. If so, the compliance program should be dedicated to preventing future violations.

External versus Internal Norms

Externally created norms are direct rules that include government regulations and indirect pressure from outside media.[20] Externally created norms can alter a company's internal policies, foster an entity to follow industry practices, or sway the affiliation between thecompany and its business partners.[21] In contrast, an internally created norm includes policies and rules created within an organization by shareholders, the board of directors, and senior management to attain corporate objectives.[22] These policies may consist of setting standards for establishing company ethics. Internally created norms only exist within a given entity.[23]

The thing to notice is that externally created norms can alter internally created norms because externally created norms because they exist outside the organization. Second, because internally created norms only exist within an organization, they can be viewed as optional. On the other hand, companies must ensure that they adhere to government laws and regulations at both the federal and state levels. Thus, externally created norms can be thought of as mandatory, provided the source of the norm is a law or regulation. Finally, internally created norms are strategic because they implement the vision of the organization while affecting its approaches and progress, whereas externally created norms are tactical because they focus on immediate changes that are necessary to satisfy legal requirements.[24]

Reputational Risk

Kenton defined a reputational risk as a "threat or danger to the good name or standing of a business or entity."[25] Reputational risks can happen directly due to company actions, indirectly because of employee actions, and tangentially through third parties, such as joint venture partners or suppliers.[26]To minimize reputational risk, firms must have good governance, transparency, and be socially responsible and environmentally conscious.[27]

The issue with reputational risk is that it can seemingly occur out of nowhere and without warning. Every company, both large and small, is subject to reputational risk. It can threaten the survival of the largest and best-run firms, can annihilate millions or billions of dollars of market capitalization or possible revenue, and may result in a change in top management. Reputational risk may happen because of the actions of errant employees (e.g., fraud due to excessive trading) or may occur in a region far away from headquarters. Sometimes, reputational risk can be mitigated with prompt damage control measures, while in other instances, the damage can last for years (e.g., activists targeting gas and oil companies). The problem with monitoring reputational damage is that it may demand constant monitoring of both paper and online media. Online reputational management software via a software dashboard may assist entities track what consumers say and feel about a particular brand on review sites, social media, and search engines.

One example of reputational risk that "went south" occurred in 2016 when some retail bankers from Wells Fargo employees opened up millions of unauthorized accounts.[2829] Because of the scandal, John Stumpf, the Chief Executive Officer (CEO), and others resigned or were fired.[30] Federal regulators subjected the bank to heavy fines and penalties, and several large customers decreased, suspended, or discontinued their business dealings with Wells Fargo.[31] The reputation of Wells Fargo was tarnished, and it took many years to rebuild.Another more recent example of the effects of experiencing a reputational risk occurred at Anheuser-Bush. Several individuals who were responsible for the Bud Light brand decided to put an image of Dylan Mulvaney on a Bud Light can.[32] Mulvany is a trans woman. Many existing Bud Light customers rejected the brand and refused to purchase the beer.[33] One may agree or disagree with the decision of existing Bud Light customers to boycott the brand, but the fact is that the action reduced Bud Light's revenues by tens of millions of dollars.[34]

Although a compliance program can serve as a framework to reduce reputational risk, the reality is that reputational risks are hidden, and very hard to predict.[35] As Donald Rumsfeld once said before Congress, there are the known known's, the known unknowns, and

[20]Indeed Editorial Team, What Is an External Control? Definition and Examples, *Indeed*(Oct. 8, 2022), *available at* https://www.indeed.com/career-advice/career-development/external-control#:~:text=They%20include%20direct%20rules%2C%20such,company%20and%20its%20business%20partners.
[21]*Id.*
[22]*Id.*
[23]*Id.*
[24]*Seegenerally, Id.*

[25]Will Kenton, Reputational Risk: Definition, Dangers, Causes, and Example, *Investopedia* (Dec. 5, 2022), *available at* https://www.investopedia.com/terms/r/reputational-risk.asp.
[26]*Id.*
[27]*Id.*
[28] Wells Fargo Staff, Making Things Right for Customers – Customer Redress Review Program, *Wells Fargo, NA* (n.d.), *available at* https://www.wellsfargo.com/help/customer-redress/.
[29]CFPB Staff, Wells Fargo, NA, *Consumer Financial Protection Bureau* (n.d.), *available at* https://www.consumerfinance.gov/enforcement/actions/wells-fargo-bank-2016/.
[30]Wells Fargo staff, *supra*, note 28.
[31]SEC, Wells Fargo & Company, *United States Securities and Exchange Commission* (n.d.), *available at* https://www.sec.gov/Archives/edgar/data/72971/000119312517118654/d375947ddefa14a.htm.
[32]Amanda Holpuch, Behind the Backlash Against Bud Light, *The New York Times* (Nov. 21, 2023), *available at* https://www.nytimes.com/article/bud-light-boycott.html.
[33]*Id.*
[34]*Id.*
[35]Robert G. Eccles, Scott C. Newquist, & Roland Schatz, Reputation and Its Risks, *Harvard Business Review* (Feb. 2007), available at https://hbr.org/2007/02/reputation-and-its-risks.

the unknown unknowns.[36] Unfortunately, reputational risks seem to be unknown unknowns. If there is a way to identify reputational risk, one must think outside the box, way outside the box. Even so, it is entirely possible that reputational risks will raise their ugly heads at the most inopportune moments when they are least expected. To discover potential reputational risks, one must be able to think negatively without being negative. The problem is that the individual who performs such an exercise may be thought of by their peers as being negative and not a team player. Not many people can perform the exercise in a corporate environment due to their desire to become successful at the company. It is the nature of the beast and the role.

Paying a Government Official's per Diem and Travel Expenses

The issue is whether it is legal for a bid winner to pay for a government official's travel and related living expenses on a per diem basis. If the answer to the question is no, the government official must bear the travel and related living expenses, and likely be reimbursed by the federal government.

If the individual is a federal government employee, the government can reimburse them according to the Federal Travel Regulations contained in Title 41 of the Code of Federal Regulations, Chapters 300 through 304.[37] These regulations put into effect the statutory requirements and Executive branch policies when federal civilian employees travel at government expense.[38] The standard per diem rate is $157.00, where $98.00 is for lodging and $59.00 is for meals and incidentals (M&IE).[39] It should be noted that there are 316 non-standard areas (NSAs) have per diem rates that are more than the standard rate.[40] It should be remembered that Federal Travel Regulation (FTR) permits actual expense reimbursement when per diem rates are not sufficient to cover necessary expenses.[41]

The federal government covers travel expenses, provided that they are the most economical and expeditious means of transportation available and appropriate to the individual's condition of health as decided by the state agency. The means of traveling are common carriers (air, rail, or bus), privately owned vehicles, or commercially rented vehicles and other special conveyances.[42] If air travel is necessary, coach fare is preferred unless first-class air travel is authorized in advance by the appropriate federal agency and provided that:[43]

- Less than first-class accommodations are not available on a scheduled flight in time to achieve the purpose of the travel;
- First-class accommodations are necessary when the government official is handicapped or otherwise impaired, and other accommodations are impractical;
- Less than first-class accommodations on foreign carriers that do not provide adequate sanitation or health standards; or
- First-class accommodations would result in economic savings for the federal government.

If the foreign official is a representative of a government other than the United States, the per diem rates of the foreign country may apply. However, the firm could be liable under the Foreign Corrupt Practices Act (FCPA) if the foreign per diem rate is significantly more than the per diem rates specified by the General Services Administration (GSA). If the government official is an employee of a state government, then the state government laws would apply.

Suppose the company pays the travel, lodging, meals, and incidental expenses of the government official. In that case, there is the possibility that government official could be unjustly enriched, particularly if the firm pays the government official directly. The government official could pay these expense in their name and then submit the receipts to the federal government for repayment. This action could put government officials at risk of violating federal law. Second, the per diem rate paid by the company could be significantly more than the GSA guidelines. For example, if the per diem rate paid by the firm was $700.00, this amount would be substantially more than the amount specified by the federal government ($157.00 per diem). Third, if the per diem rate paid by the firm was excessive, the Department of Justice (DoJ) could construe that the excess per diem rate was a bribe. Finally, if the bid winner paid for the travel expenses of a government official, the firm would have no way to ensure that the government official would not petition their government to reimburse them.

Furthermore, it would make a difference if the contract expressly required that the firm to paya government official's travel expenses and a per diem amount when they visited the winning bidder's site to properly understand how to operate or test the equipment prior to shipment. As stated in the scenario, it would be a proper business purpose. However, the travel and per diem expenses should be pre-approved in the contract by the government official's agency to prevent violations. The amounts stated in the contract should be no greater than those specified under the law. If there were any issues of impropriety, the firm could point to the contract with the agency to absolve itself from legal liability, provided that the amounts in the contract were reasonable.If there is any comfort that the firm could arrive from the contract containing the amount and type of travel arrangements, it would be because the organization was diligent in its efforts to be transparent in its dealings with the government agency. There is less legal risk to the firm if the government official pays their travel and per diem expenses and then is reimbursed by the government agency. Even so, if it is customary for the company to pay the travel and per diem expenses of the government official, it might be advisable to pay the bill. It might be a gesture of goodwill as long as it does not precipitate adverse legal action in the future.

THE VOLKSWAGEN SCANDAL

In this section, the essay briefly discusses the history of the Volkswagen emissions scandal and attempts to answer who was responsible for the compliance debacle.

Brief History of the Volkswagen Scandal

In 2013, the International Council on Clean Transportation (ICCT) hired the West Virginia University Center for Alternative Fuels Engines and Emissions (WVUC-CAFEE) to test diesel automobiles

[36]DOD Staff, DoD News Briefing - Secretary Rumsfeld and Gen. Myers, *United States Department of Defense* (Feb. 12, 2002), *available at* https://web.archive.org/web/20160406235718/http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636.

[37]GSA Staff, FY 2023 per Diem Highlights, *General Services Administration* (2023), *available at*https://www.gsa.gov/system/files/FY_2023_Per_Diem_Rates_Highlights_.docx#:~:text=FY%202023%20Results%3A&text=All%20current%20NSAs%20will%20have,M%26IE%20rate%20unchanged%20at%20%2459.

[38]*Id.*

[39]*Id.*

[40]*Id.*

[41]*Id.*

[42]LII Staff, 20 CFR § 416.1498 - Whattravelexpenses are reimbursable, *Legal Information Institute* (n.d.), *available at* https://www.law.cornell.edu/cfr/text/20/416.1498#:~:text=Reimbursable%20travel%20expenses%20include%20the,costs%20due%20to%20special%20circumstances.

[43]*Id.*

sold in the United States.[44] The researchers employed a Japanese on-board emission testing system that revealed a significant presence of nitrogen oxide (NO_X) in several vehicles manufactured by Volkswagen.[45] In May 2014, the ICCT published the WVUC-CAFEE) results, reporting them to the California Air Resources Board (CARB) and the Environmental Protection Agency (EPA).[46] In September 2015, the EPA stated that Volkswagen had violated the Clean Air Act (CAA) by employing illegal software in their diesel automobiles.[47] With the announcement, regulators from various countries also started investigating diesel vehicles manufactured by Volkswagen.[48]The company's stock price dropped by a third. Martin Winterkorn, the Volkswagen CEO, and other senior brand or research development managers resigned or were suspended, respectively.[49]

In April 2016, Volkswagen declared that it planned to spend €16.2 billion, or $18.32 billion, to rectify the scandal,[50] but in June 2016, the company agreed to pay $14.7 billion to settle the civil suit in the United States.[51] In January 2017, Volkswagen pleaded guilty to criminal charges, and signed an agreed-upon Statement of Facts that established how management had asked engineers (presumably, some hardware and software engineers) to develop the defeat devices that would hide the fact the company's diesel engines would not pass U.S. emissions tests.[52] In April 2017, a federal court ordered Volkswagen to pay a $2.8 billion criminal fine.[53] As of March, 2020, the scandal had cost Volkswagen approximately €31.3 billion or $34.69 billion in fines, penalties, financial settlements, and buyback costs.[54] It should be remembered that various state government and private legal actions are still being processed in the United States and the European Union.

Volkswagen's Anti-Pollution System and the Responsible Parties

Generally, diesel engines are more fuel efficient because they emit less carbon dioxide (CO_2) than engines that burn gasoline., but they release about 20 times more NO_X, unless the air pollutant compound is treated.[55] In an attempt to manufacture a clean diesel engine with fewer air pollutants, Volkswagen selected the "lean NO_X trap" for its Golf and Jetta models. However, the solution was a fuel-rich exhaust gas that lowered fuel economy.[56] When the company could not satisfy EPA emission standards, the entity created a defeat device, which would satisfy the EPA standards when the engine was tested, but failed when the car was on the road.[57] The defeat device detected when a car was tested by observing the steering wheel position, vehicle speed, the length of time that the engine was operating, and the barometric pressure.[58] Under the correct conditions, the defeat device was activated.

In October 2015, *Der Speigel* reported that at least 30 managers were aware of the defeat device for many years.[59] The question now arises: how many programmers knew of the existence of the defeat device, including the software developers who created it? Based on the author's personal experience as a software developer, it is likely that up to ten software developers programmed and quality assured the software application. As for the programmers who were aware of the defeat devices, it seems likely that only a handful of software developers were cognizant of its existence. It should be remembered that the software application's existence was probably deemed highly confidential to prevent and reduce information transference. The software application was likely sold to the software staff as a trade secret thatshould never be revealed to anyone outside the company. In other words, probably less than a hundred people knew that the defeat device existed.

The Compliance Program in Effect

In understanding the compliance program in effect at Volkswagen, the company likely encouraged its employees to voice their concerns, provided that the subject was not a trade secret. If the defeat device was framed as a trade secret, the general compliance program at Volkswagen would not have been material. A trade secret is "information, including a formula, pattern, compilation, program, device, method, technique, or process that: [(1)] Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and [(2)] Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[60]

Trade secrets are kept secret by convincing people that revealing them is against the law and punishable by termination and possible criminal penalties resulting in years of imprisonment. When considering the 30 or more managers who may have known about the defeat device software, middle managers likely believed that it was a trade secret, whereas senior managers, either at the division or corporate level, probably knew, or should have known, that it was

[44]Paul Lienert, & Timothy Gardner, Volkswagen's 'Clean Diesel'StrategyUnraveled by Outside Emissions Tests, *Reuters* (Sep. 21, 2015), *available at*https://www.reuters.com/article/us-usa-volkswagen-emission-idUSKCN0RL2EI20150922/.

[45]MasatsuguHorie, &Craig Trudell, This Japanese Emissions Test Equipment Maker Humbled Mighty Volkswagen, *Bloomberg* (Oct. 1, 2015), *available at*https://www.bloomberg.com/news/articles/2015-10-01/this-japanese-emissions-test-equipment-maker-humbled-mighty-vw.

[46]Reuters Staff, Timeline:Volkswagen's Long Road to a U.S. DieselgateSettlement, *Reuters* (Jan. 11, 2017), *available at*https://www.reuters.com/article/us-volkswagen-emissions-timeline-idUSKBN14V100/.

[47]Clive Coleman, VW Could Face Long Legal Nightmare, *BBC News* (Sep. 24, 2015), *available at*https://www.bbc.com/news/business-34352243.

[48]*Id.*

[49]Ashish Jha, Volkswagen's Diesel-Gate:What It Means for the Company – and for India, *The Indian Express* (Oct. 9, 2015), *available at*https://indianexpress.com/article/explained/volkswagens-diesel-gate-what-it-means-for-the-company-and-for-india/

[50]William Boston, Bad News?What Bad News? Volkswagen BullishDespite Emissions Costs, *The Wall Street Journal* (Apr. 28, 2016), *available at*https://www.wsj.com/articles/volkswagen-says-diesel-car-buy-backs-to-cost-almost-9-billion-1461831943.

[51]Chris Isidore, & David Goldman, Volkswagen Agrees to Record $14.7 Billion Settlement over Emissions Cheating, *CNN Business* (Jun. 28, 2016), *available at*https://money.cnn.com/2016/06/28/news/companies/volkswagen-fine/.

[52]Theo Leggett, VW Papers Shed Light on Emissions Scandal, *BBC News* (Jan. 12, 2017) *available at*https://www.bbc.com/news/business-38603723.

[53]Christina Rogers, & Mike Spector, Judge Slaps VW With $2.8 Billion Criminal Fine in Emissions Fraud, *The Wall Street Journal* (Apr. 21, 2017), *available at*https://www.wsj.com/articles/judge-slaps-vw-with-2-8-billion-criminal-fine-in-emissions-fraud-1492789096.

[54]Reuters Staff, Volkswagen Says Diesel Scandal Has Cost It 31.3 Billion Euros, *Reuters* (Mar. 17, 2020), *available at*https://www.reuters.com/article/idUSKBN2141JA/.

[55]Economist Staff, The DieselgateDilemma, *The Economist* (Jan. 12, 2016), *available at*https://web.archive.org/web/20200919195249/https://www.economist.com/science-and-technology/2016/01/12/the-dieselgate-dilemma.

[56]*Id.*

[57]Jack Ewing, Volkswagen Engine-Rigging Scheme Said to Have Begunin 2008, *The New York Times* (Oct. 4, 2015), *available at*https://www.nytimes.com/2015/10/05/business/engine-shortfall-pushed-volkswagen-to-evade-emissions-testing.html.

[58]Lucas Mearian, EPA Details How VW Software Thwarted Emission Tests, *Computerworld* (Sep. 24, 2015), *available at* https://www.computerworld.com/article/2986355/epa-details-how-vw-software-thwarted-emission-tests.html.

[59]Dietmar Hawranek, AbgasaffäreDutzende Manager in VW-Skandalverwickelt (in English, Dozens of Managers WereAware of the DefeatDevice), *Der Spiegel* (Oct. 14, 2015), *available at*https://www.spiegel.de/wirtschaft/unternehmen/volkswagen-dutzende-manager-in-vw-skandal-verwickelt-a-1057741.html.

[60]LII Staff, Trade Secret, *Legal Information Institute* (n.d.), *available at* https://www.law.cornell.edu/wex/trade_secret.

illegal. Suppliers would have kept the defeat device secret because they likely signed non-disclosure agreements with Volkswagen. Attorneys hired by Volkswagen would have never disclosed that the defeat device was illegal due to attorney-client privilege.

On the other hand, few, if any, Information Technology (IT) professionals have the financial resources to withstand legally the violation of a trade secret. Furthermore, IT professionals are usually not legally astute, so they may not have known that the whistleblower option existed. If there was a compliance program present at the time and the defeat device was promoted as a trade secret, then the de facto compliance program could be construed as a command-and-control program. Under the assumption that the defeat device was a trade secret, a command-and-control compliance program seems viable.

Conclusion

The likely scenario is that the compliance program that was generally present at Volkswagen at the time that the defeat device was created was not necessarily material, mainly if the software application was framed to the IT staff as a trade secret. The answer to the question as to how so many people have gone along with something that was so obviously wrong is that the software application was likely promoted as a trade secret. If middle management and the IT staff were told that they were part of an elite team, they would be prone to say nothing to anyone outside the company. It is a reasonable explanation.

TWO COMPLIANCE PROGRAM VIOLATION SCENARIOS

In this section, two compliance program violation scenarios are discussed. The first scenario describes under what conditions an employee is protected under Section 806 of the Sarbanes-Oxley Act (SOX) of 2002 or the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010. In the second scenario, circumstantial evidence is presented where the circumstances therein could point to a questionable Section 806 violation.

When Is a Whistleblower Protected under Section 806 of Sarbanes-Oxley?

The subsection argues that Reuters is not protected under either the Section 806 of SOXor Dodd–Frank. The analysis employs the IRAC methodology, where the scenario facts are presented first before the IRAC argument begins.

Scenario Facts

Delicious Foods, LLC is family-owned and operates a series of fast food restaurants.The company was established in 1962 by Dennis Jordan. Denise Jordan, his granddaughter, now manages the business. About half of the company's 65 employees are members of the Jordan family. The company does not have a formal sexual harassment program. Every July, the company holds a barbecue for employees and their families at the Jordan estate. One of the activities is a pin-the-tail-on-the-donkey contest held in the Jordan backyard, where male and female contestants usually wear bathing suits because they are invited to swim in the pool. Robert Reuters is a cook and not a member of the Jordan family. Although he is an excellent cook, he has a bad attitude and is often late for work. A few weeks after the festivities, he came to chat with Denise in her office to complain about the contest. He said it degrades both women and men because they are usually wearing bathing suits. Reuters also observed that some people feel ashamed and unappreciated. Denise thanked Robert for his feedback and sent an announcement to the employees that the pin-the-tail-on-the-donkey event is canceled for next year, and will be replaced by a trivia competition. Several months later, Denise fired Robert based on his tardiness record and his attitude regarding his job. Robert filed a complaint with the Equal Employment Opportunity Commission (EEOC).

Issues and Rule

The issues are as follows: (1) whether Delicious Foods retaliated against Reuters when he was terminated from the company, and (2) whether Delicious Foods harassed and discriminated against some of its employees when it held an annual pin-the-tail-on-the-donkey contest at its annual employee barbeque. The applicable rule is that it is an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[61][62]

Analysis of the Scenario

The issue is whether Jordan retaliated against Reuters when he informed Jordan that some employees felt ashamed and unappreciated, and that the beauty contest was degrading. Under 42 U.S.C. § 2000e–2(a), employers may not discriminate in hiring or at work due to an individual's race, color, religion, sex, age, disability, or national origin. Under Meritor, employers may also not discriminate due to a hostile work environment of sexual harassment. Furthermore, it is illegal for an employer to retaliate if someone raises issues of discrimination. The issue is whether Reuters was terminated due to his conversation with Jordan or his poor attitude and continued tardiness.Before proceeding with the argument, it is important to understand that Reuters was not protected under SOX because Delicious Foods is a private company, and not a publicly traded company. Also, Reuters was not covered under Dodd-Frank because he did not originally report the alleged discrimination to the Occupational Safety and Health Administration (OSHA). However, Reuters is covered under the EEOC because Delicious Foods has 65 employees, which exceeds the minimum requirement of 15 employees for EEOC coverage to occur.

After Reuters informed Jordan that some employees believed that the pin-the-tail-on-the-donkey contest was shameful, unappreciated, and degrading, Jordan thanked Reuters for the information and immediately announced that next year the pin-th-tail-on-the-donkey contest would be replaced with a trivia competition. This fact indicates that Jordan likely believed that Reuters's complaint might be correct. If so, it was better for the company to substitute a trivia competition for the pin-the-tail-on-the-donkey contest. Jordan took positive steps to remove the potentially discriminatory pin-the-tail-on-the-donkey contest, and substituted a neutral activity that was unlikely to have a discriminatory impact, such as a trivia contest about old television

[61] 42 U.S.C. § 2000e–2(a).
[62] LII Staff, 42 U.S. Code § 2000e–2 - UnlawfulEmployment Practices, *Legal Information Institute* (n.d.), *available at* https://www.law.cornell.edu/uscode/text/42/2000e-2.

programs or movies, assuming that the television programs or movies did not contain sexually abusing content.

Even though the EEOC strongly recommends that employers provide harassment prevention training for their employees, it is not required by federal law. The importance of harassment training is evident from outcomes in Kolstad, Swinton, and Clark. These cases show that there are legal risks when an organization does not possess an anti-harassment program and training. However, on a state level, some states, such as California and Illinois, mandate that employers have an anti-harassment program. The fact pattern did not specify the state where Delicious Foods did business. If the scenario stated the firm's physical location,performing an analysis using state law in conjunction with federal law would be possible.

Given that Reuters filed an EEOC complaint, he filed a signed statement asking the EEOC to take remedial action. In general, it can be presumed that Reuters filed his compliant within 180 days of either the date the activity took place or the date of Reuters's conversation with Jordan, subject to a ruling from the EEOC. The 180-day deadline can be extended to 300 calendar days if a state or local agency enforces a state law prohibiting employment discrimination, using the same basis as the EEOC complaint. The scenario provided no information about whether Reuters file an employment discrimination suit in his home state.

The EEOC may investigate Delicious Foods for a violation. It could also investigate its employees who may be engaged in harassment or discrimination. The EEOC might attempt to settle the case before the issue is investigated or taken to trial. The government agency has a mediation procedure in which Reuters and Delicious Foods can use a neutral mediator to determine if a reconciliation can be achieved. Although a mediator cannot make a binding decision, the mediator can help the two parties settle. If the mediation fails, the EEOC will likely proceed to investigate the complaint formally. Raising a discriminatory issue with an employer does not immunize an employee against termination under some circumstances. Given that Jordan immediately announced that a trivia competition would be substituted for the pin-the-tail-on-the-donkey contest, it would be difficult for the EEOC or Reuters to show harassment and discrimination continued after his conversation with Jordan. The scenario also stated that Reuters had a poor attitude regarding his job and was tardy on numerous occasions. Reuters was terminated months after he alerted Jordan regarding how other employees felt about the pin-the-tail-on-the-donkey contest. No other facts in the scenario indicated how the other employees felt about the pin-the-tail-on-the-donkey contest. This means that the presence of the facts above and the lack of additional facts tends to break the causal link, if it existed at all, between Reuters's conversation with Jordan and his termination.

Conclusion of the Scenario

Thus, Reuters will not be able to demonstrate that Delicious Foods engaged in harassment and discrimination against its employees in general and Reuters in particular.

When Is a Whistleblower Protected When They Are Not the Individual Discriminated Against?

In this subsection, the conclusion is that there is a high likelihood that a Section 806 violation occurred. As in the previous scenario, the analysis employs the IRAC methodology.

Scenario Situation

James Pitt is an internal auditor at Softech, a company listed on the New York Stock Exchange (NYSE) that produces video gaming software. During an internal audit, Pittfound what he thought was evidence that a Softech sales official gave an improper gratuity to a foreign official in exchange for an import license. Pitt's team reported the issue in an internal audit report. However, Jennifer Swift, the head of internal auditing,refused to classify the matter as a critical audit finding that would be passed on to the board of directors' audit committee. SwifttoldPitt that the issue had been previously investigated by an outside law firm which concluded that the issue was unsubstantiated. Pitt then approached Swift's supervisor, general counsel Earnest Cooper, complaining that Swift was refusing to act on information whichcould cause Securities and Exchange Commission (SEC) or Department of Justice (DoJ) enforcement actions or possibly shareholder lawsuits for not disclosing material information in SEC filings. Earnest stated he would investigate the matter.About two hours later,Swift angrily called Pitt, accusing him of usurping her authority. Swift's action, plus other problems, triggeredPitt to experience depression and anxiety that resulted in requiring psychiatric help and medication . Pitt's situation took a dramatic turn for the worse when Pitt was asked to organize the internal audit department's semi-annual symposium be held off-site. Three weeks before the symposium, Pit found out that his secretary had not yet found a place to hold the event. Enraged, Pitt burst into anger, rebuking his secretary, claiming she was incompetent and unreliable.

Several other employees were present at the time and observed that Pitt had been abusive. Pitt had always been quite polite in dealing with other members of internal auditors' department.The human resources director investigated the affair, concluding that Pitt had breached Softech's code of conduct, recommending that Pitt be terminated. Pitt was fired and given three months' severance pay. Pitt then filed a whistleblower lawsuit under the Sarbanes-Oxley Act.

Issue and Rule

The issue is whether Pitt was covered under Section 806, the whistleblower protection law of SOX, when he filed a whistleblower lawsuit under SOX. Section 806 of SOX prevents publicly traded companies, including any subsidiary or affiliate whose financial information is contained in the consolidated financial statements of such company, from terminating, harassing, or discriminating against any employee who reports (1) mail fraud, (2) wire fraud, (3) bank fraud, (4) securities fraud, or a violation of (5) any rule or regulation of the SEC or (6) any provision of federal law relating to fraud against shareholders, to a federal or law enforcement agency, Congress, or an internal supervisor.

Analysis of the Scenario

John Pitt, an internal auditor at Softech, an NYSE-listed company, found evidence that he believed showed that a DytTech salesperson gave an improper gratuity to a foreign official so the company could obtain an import license. Pitt's team properly reported the issue in an internal audit report. However, Connie Swift, the head of the internal audit department, declined to recognize the issue as a "critical audit finding" that should be raised to the board of directors. Presumably, Pitt talked to Swift about the matter because Swift told Pitt that it had already been investigated by an outside law firm that could not substantiate the claim. If Swift's statement was correct, another internal auditor, likely unknown to Pitt, previously discovered and reported the issue. Also, the issue was apparently of sufficient severity, because Swift and Softech's general counsel hired an outside legal team to investigate the matter.

However, Pitt likely did not believe Swift's explanation because he likely spoke with Cooper, Softech's general counsel and Swift's supervisor, complaining that Swift refused to act on the potential illegal activity. Cooper gave Pitt no indication that outside counsel had been previously hired. Although Cooper could have remained silent, he was likely unaware of the situation because he told Pitt that he would look into the matter. About an hour later, Swift called Pitt and accused him of undermining her authority. This fact indicates that Cooper spoke to Swift for less than an hour. The conversation was likely cordial and inquiring. At this stage, depending on what Swift said to Pitt, Swift likely harassed Pitt by objecting to the fact that Pitt spoke to Cooper. Although one could construe that Swift violated Section 806 of SOX, an alternative explanation could be that Swift was just upset that Pitt went up the corporate hierarchy with the issue. At this stage, it is unclear which explanation is correct.

The scenario then stated that Pitt began to experience "sleeplessness, anxiety, and depression, requiring psychotherapy and mood-enhancing medication," presumably from other events happening at the company. These other problems are noticeably not specified in the scenario. These unknown events give the impression that they occurred because Pitt felt harassed and discriminated against at work. Another explanation could be that there were other issues outside the workplace that were causing his sleeplessness, anxiety, and depression. Even so, if Pitt's sleeplessness, anxiety, and depression were causally connected to the possible illegal activities of one of Softech's salespeople, it would constitute prima facie evidence that a SOX Section 806 violation was occurring.

Presumably, several months later, Pitt, who was responsible for organizing the audit department's annual summer outing, discovered that his personal secretary had failed to book a venue for the event. The fact that Pitt was tasked in organizing the event may indicate that the company was not discriminating against him because his duties were not curtailed. When Pitt's secretary did not book a venue, it could have been a deliberate attempt to embarrass Pitt, or it could have been a simple mistake by Pitt's secretary. More facts are needed to make the determination.Pitt expressed raging anger towards his secretary in front of five or six employees, berating her for her incompetence and unreliability. When Pitt was incensed with the situation, he should have expressed his frustration privately instead of openly. By doing so, it would not have appeared to others that he was being abusive. Pitt could have felt that he had been set up to fail, which would explain, but not excuse, his behavior. Presumably, at least one of the five or six employees who saw Pitt explode reported him to Softech's director of human resources, who conducted an investigation. The result of this investigation was that Pitt had violated Softech's code of conduct.Pitt was then terminated and given two month's severance pay. The fact that Pitt received two month's severance pay is significant because he should have likely been terminated without severance unless it was corporate policy to provide a certain amount of severance under the circumstances. Pitt then filed a whistleblower lawsuit under SOX.

Conclusion of the Scenario

The scenario contains substantial circumstantial information subject to various interpretations, where the facts could indicate a set of coincidental circumstances or a possible Section 806 violation. It is presumed that in filing the SOX lawsuit, Pitt's complaint accurately described (1) Swift's refusal to investigate his concerns, (2) Swift's conversation with Pitt after he spoke with Cooper, (3) Pitt's sleeplessness, anxiety, and depression, (4) the problems that Pitt experienced before he publicly blew up at his secretary, (5) Pitt's conversation with his secretary, (6) human resources' investigation and its results, and (7) Pitt's termination from Softech.

Pitt likely filed an Occupational Safety and Health Administration (OSHA) complaint under SOX. If Pitt had filed a Dodd-Frank complaint, he would not be protected against a retaliatory act. Swift's conversation with Pitt, the possible problems that occurred thereafter, the secretary's failure to book a venue for the audit department's annual outing and other issues could be construed to be corporate discriminatory behavior. It can be assumed that Pitt filed his complaint prior to 180 days after the SOX violation occurred or when Pitt became aware of the possible violation. The latter is more likely than the former. However, the scenario stated that Pitt filed an SOX lawsuit, indicating that he may have previously filed an OSHA complaint. No facts are given supporting the presumption that Pitt had earlier filed an OSHA complaint.Assuming that Pitt filed an OSHA complaint, OSHA may begin an investigation. If the evidence supported Pitt's claim of retaliation and a settlement could not be reached, OSHA would issue an order that would (1) demand that Softech reinstate Pitt as an internal auditor in the same position he held before he was terminated, (2) pay back wages with interest, and (3) compensate Pitt for special damages, attorney fees, expert witnesses, and the cost of litigation. OSHA's findings would be the final order of the Secretary of Labor unless Softech appealed the order within 30 days.

After OSHA has issued its findings and order, either Pitt or Softech may request a full hearing before an administrative law judge of the Department of Labor (DoL). The decision of the administrative law judge may be appealed to the DoL Administrative Review Board (ARB). If OSHA does not issue a final agency order within 180 days of Pitt's complaint, Pitt may file the complaint in the appropriate United States federal district court. As the defendant, Softech does not possess the legal right to file a removal motion to a federal district court.It should be noted that Pitt's secretary could file a harassment complaint against Softech and Pitt because at the time of Pitt's angry remarks against the secretary, Pitt was a Softech employee in good standing. If so, the event would be subject to discovery. If there was a SOX violation, Pitt's harassment and discrimination could be revealed upon discovery. If so, Pitt would have additional reasons to counter-sue Softech under SOX.

Assuming that OSHA decided not to pursue Softech, Pitt's case against the firm would likely be taken up by an attorney, specializing in litigating SOX violations. Because Pitt was an internal auditor, he likely would not have the financial resources to successfully pay for the litigation. The attorney would accept the case on a contingency basis, where the attorney would receive a third of the damages paid by Softech, and Pitt would receive the remainder. The case would likely not go to trial, but probably be settled for an undisclosed amount of money.Thus, Pitt whistleblower complaint is likely covered under Section 806 of SOX, where the result of his legal action will probably result in a financial settlement.

SUMMARY AND CONCLUSION

The point of this article is to help the reader understand under what conditions a financial compliance violation occurs. The article discussed financial compliance in general, defining a compliance program, listing the types of compliance programs, and describing compliance program characteristics. The essay then highlighted the Volkswagen scandal, followed by an analysis of two scenarios where the facts indicated that there may or may not have been a violation. The idea behind the thew scenarios was to demonstrate that concluding that there is a Section 806 violation is highly fact-driven, where the facts can lead a regulator to deduceone way or the other.

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Donald L. Buresh earned his Ph.D. in engineering and technology management from Northcentral University. His dissertation assessed customer satisfaction for both agile-driven and plan-driven software development projects. Dr. Buresh earned a J.D. from The John Marshall Law School in Chicago, Illinois, focusing on cyber law and intellectual property. He also earned an LL.M in intellectual property from the University of Illinois Chicago Law School (formerly, The John Marshall Law School) and an LL.M. in cybersecurity and privacy from Albany Law School, graduating summa cum laude. Dr. Buresh received an M.P.S. in cybersecurity policy and an M.S. in cybersecurity, concentrating in cyber intelligence, both from Utica College. He has an M.B.A. from the University of Massachusetts Lowell, focusing on operations management, an M.A. in economics from Boston College, and a B.S. from the University of Illinois-Chicago, majoring in mathematics and philosophy. Dr. Buresh is a member of Delta Mu Delta, Sigma Iota Epsilon, Epsilon Pi Tau, Phi Delta Phi, Phi Alpha Delta, and Phi Theta Kappa. He has over 25 years of paid professional experience in Information Technology and has taught economics, project management, negotiation, managerial ethics, and cybersecurity at several universities. Dr. Buresh is an avid Chicago White Sox fan and keeps active by fencing épée and foil at a local fencing club. Dr. Buresh is a member of the Florida Bar.

LIST OF ABBREVIATIONS

Abbreviation	Description
CAA	Clean Air Act
CEO	Chief Executive Officer
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
DoJ	Department of Justice
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
FCPA	Foreign Corrupt Practices Act
FTR	Federal Travel Regulations
GSA	General Services Administration
Guidelines	United States Sentencing Guidelines for Organizations
ICCT	International Council on Clean Transportation
IT	Information Technology
M&IE	Meals and Incidental Expenses
NO_X	Nitrogen Oxide
NSA	Non-Standard Areas
NYSE	New York Stock Exchange
OSHA	Occupational Safety and Health Administration
SEC	Securities and Exchange Commission
SOX	Sarbanes-Oxley Act of 2002
WVUC-CAFEE	West Virginia University Center for Alternative Fuels Engines and Emissions

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