

Preface

Congratulations, you have been named as the newest compliance officer. (Or, even better, you have managed to survive—indeed, excel—as an institutional compliance officer for a decade or more!) The door nameplate, the business cards, the company newsletter photograph, and the welcome luncheon are all in place. These are the perks of the position; however, as so often in life, there are also drawbacks. By way of example, you may have heard that the compliance officer of the modern corporation often is underappreciated. He or she may be undervalued, misunderstood, unfairly regarded as little more than a “cost center,” and treated like a soccer goalie—largely overlooked until a mistake is made and a scapegoat is sought. The person in this position may be targeted by aggressive, jurisdiction-expanding regulators or subpoenaed by hostile litigants before the trial of civil tort cases. This is all in the unwritten job description.

Against this unspoken but well-understood backdrop, what is the motivation—or even allure—for so many to enter into, and remain a part of, this highly competitive field? The typical answer involves the desire for a challenging and interesting environment, where one can be a steward of the law and keep the organization, as well as its executives and employees, out of harm’s way. Put another way, the stated desire is to “do the right thing” on the front end. That usually means proactively detecting and minimizing problems, working collaboratively to “fix” issues once they are detected, making sure that the same problems do not happen again, and obviating new problems from ever happening in the first place.

These are certainly laudable motivations. However, the bedrock reality remains: In an ever-increasing, highly regulated, greatly litigious atmosphere, championing the compliance function is becoming increasingly demanding. Furthermore, the costs of making a mistake, being wrong, or just not caring (i.e., negligence, recklessness, willful blindness, deliberate avoidance) are elevating the stakes to new record levels, from business-inhibiting to business-ending.

Therefore, although there is certainly personal career satisfaction to the high-energy compliance officer—the type of person who enjoys a stimulating environment and a constant stream of energizing tasks—the compliance function has evolved into so much more than just that. It has evolved to the point of justifying the penning of a book dedicated solely to the day-to-day compliance challenges, as well as the possible solutions to those challenges. The compliance function truly is the tip of the spear when it comes to a company’s compliance consciousness and moral compass.

Today's earnest compliance officer stands to benefit from reflecting on General Douglas MacArthur's timeless and vastly adaptable words to the cadets of West Point in 1962 when he delivered his inspirational and celebrated speech on "Duty, Honor, Country." His crisp, vivid language, although directed to the young soldier, should serve as a lighthouse to the compliance officer, especially one faced with the strains of duress, temptation, and tribulation:

"[Duty, honor, country,], [t]hey teach you to be proud and unbending in honest failure, but humble and gentle in success; not to substitute words for actions, not to seek the path of comfort, but to face the stress and spur of difficulty and challenge; to learn to stand up in the storm, but to have compassion on those who fall; to master yourself before you seek to master others; to have a heart that is clean, a goal that is high; to learn to laugh, yet never forget how to weep; to reach into the future, yet never neglect the past; to be serious, yet never to take yourself too seriously; to be modest so that you will remember the simplicity of true greatness, the open mind of true wisdom, the meekness of true strength."

This book is for the present-day compliance officer. One of the authors once served in the role of a compliance officer at a large, multinational public corporation and has been writing, studying, and teaching compliance for more than four decades. He is joined by two other prominent, highly regarded authors who once were "in the trenches" prosecuting serious compliance failures in federal court as Assistant United States Attorneys. Today, they draw on their experiences to advise large and small, national and international, public and private businesses on how not to repeat the mistakes of others (and on what to do when mistakes inevitably happen). Together, the three co-authors are true thought leaders in the compliance space. They each routinely serve as counselors, advisors, speakers, authors, teachers, and points of contact to those mission-driven to uphold the law, learn about the law's evolution, and understand its likely future course in the world of compliance and internal investigations.

The authors' assignment here was relatively simple and their marching orders were easy to follow: Leave the massive treatise-sized expositions to others; instead, prepare a user-friendly, subject-rich book to serve as a first-line consultation resource for most modern-day compliance issues. In doing so, the authors exchanged exhaustive details and conceptual nuances for hands-on experienced insights in a readable form, applying their skilled expertise that was forged out of many years of experience. When a particular section does not yield complete and comprehensive answers to every compliance question, this is largely intentional. The objective, after all, is to point the way and provide the requisite big-picture overview needed prior to embarking on any deeper endeavor.

This book originated from an American Bar Association (ABA) Annual Meeting presentation on compliance, sponsored by the ABA Criminal Justice Section. There, Professor O'Reilly listened attentively to Andrew S. Boutros, T. Markus Funk, and other presenters on issues related to developments in the quickly evolving world of corporate social responsibility and supply chain integrity. At this point, a light bulb went off: Like vitamins, these pearls of wisdom and insight needed to be bottled and circulated to others for their benefit and enjoyment. From this inspiration, the book was born.

Of course, the authors are solely responsible for the opinions expressed in the pages that follow. However, readers with white-collar criminal defense experience will hear the echoes of that no-nonsense field in these writings. The authors are pragmatic practitioners who have labored in the real world much more than they cogitated in the ivory

tower. To this end, the authors have assembled the larger pieces of the compliance puzzle in the hopes of aiding the current (and next) generation of compliance officers on the journey before them (and the responsibilities that come with it).

Professor Jim O'Reilly thanks his students from the University of Cincinnati, especially Bennett Allen, Kellie Ann Kulka, and Marina Schemmel. His former colleagues and friends in the consumer goods field contributed excellent feedback, but he bears the responsibility for any shortcomings. The very capable ABA Press editor Kimberley Rosenfield has been a steady guide to Professor O'Reilly at each stage of this project, and the authors greatly appreciate her assistance.

Profiled by the *Chicago Sun-Times* for facing “some of the toughest, most sophisticated cases at the Dirksen Federal Courthouse,” the exceptional Andrew S. Boutros is the National Co-Chair of the White Collar, Internal Investigations, and False Claims practice at Seyfarth Shaw LLP. Andrew has been a decidedly trusted, heavy-lifting contributor and steady voice in many of the chapters that follow. Formerly a federal appellate law clerk and federal prosecutor with numerous awards and high-profile cases to his name, Andrew now represents clients in their most sensitive white collar matters, internal investigations, and complex litigations. He does all this while also teaching a course on criminal prosecutions and investigations at the University of Chicago Law School. Andrew was an early pioneer in the Foreign Corrupt Practices Act (FCPA) space, wrestling with its many compliance and enforcement wrinkles and developments well before that statute was as famous, popular, or even feared as it is today. Equally, as a defense attorney and FCPA forerunner, he conducted investigations across continents, designed compliance manuals, and advised on the thorniest of regulatory issues while leading teams of attorneys in the process. Early on, he mastered corporate deferred and non-prosecution agreements as an alternative to traditional enforcement when these tools were still in a toddler-like state, while also playing an important role in developing some of the foundational terms that govern the modern-day pre-trial diversion agreement.

Andrew thanks the students from the trendsetting Kirkland & Ellis Corporate Lab at the University of Chicago Law School as well as Robbie Kendall, the tremendous University of Chicago Law School administrator who keeps the Corporate Lab's engine well-oiled and fine-tuned. He also offers thanks to Professor Maureen Mosh, a talented litigator and recent addition to the Corporate Lab's faculty. Andrew also wishes to thank Professors David Zarfes and David Finkelstein, the Corporate Lab's visionary leaders and two of the leading lights in the law academic community. Both Professors Zarfes and Finkelstein have been tremendously generous with their insights, wisdom, and talents, which arise out of many years of battle-tested and successful private practice experience. Collectively, the Corporate Lab provided research and writing efforts that contributed handsomely to this project.

A mighty and prodigious thought leader on this project has been the remarkable T. Markus Funk. Markus is a Partner at Perkins Coie who served as a Chicago federal prosecutor, U.S. Department of Justice Section Chief in the Balkans, federal district and appellate law clerk, and law professor at Oxford University, Northwestern University, and the University of Chicago (among others). He co-founded his firm's Corporate Social Responsibility and Supply Chain practice (the first such practice among the AmLaw 100), is the founding chair of his firm's Africa practice, and was named “Lawyer of the Year” (2014), “Top 10 Attorneys in Illinois” (2014), “Best Overall Litigator” (Colorado 2016), and “White Collar Lawyer of the Year” (Colorado 2015). During his time in public service, Markus and his team prosecuted Operation Family Secrets, which National Public Radio

lauded as “one of the most important criminal investigations ... in American history” (the movie *Casino* featured the charged criminal activities). Markus, a Chambers-rated, world-traveling compliance and investigations master, also holds the distinction of being the only person to have received both the U.S. State Department’s highest general service distinction and the U.S. Department of Justice’s highest trial performance award. Markus thanks Chin Sue Virnich for her capable (not to mention patient) assistance. He also appreciates the various publishers with whom he has worked over the years for their permission to reproduce and adapt some of his earlier works.

We were very fortunate to have several cooperating experts contributing chapters to this work. The exceptional Perkins Coie team of Craig Allely, Rick Oehler, Todd Hinnen, and Hartmann Young (who recently joined GE’s in-house team) generously lent their industry-leading “from-the-trenches” insights in the areas of products liability, import/export, data privacy & security, and government contracts. Professor Elizabeth Tippet of the University of Oregon contributed her wealth of expertise on the modern phenomenon of whistleblower law. Sarah deFrancesca of the Cooley firm’s health care practice brought us insights from her years of expert counseling in the health care compliance space. Former litigator Sarah Lewis researched aspects of our environmental and government contracting chapters with her characteristic clarity and depth of research understanding.

We encourage readers to send feedback and suggestions for future improvements to this text by e-mail to james.oreilly@uc.edu, mfunk@perkinscoie.com, or aboutros@seymourfarth.com. Thank you.

—Professor James O’Reilly