Public Roundtable on Antitrust Criminal Compliance
Thursday, April 9, 2018

TRANSCRIPT PART ONE

ANN O'BRIEN: The way today will work is we'd like this to be a roundtable. It's a U table, but we'll call it a roundtable. We left it as a U, because we'd like your participation today. So after some brief marks from our AAG, we will hear from Kathleen Grilli from the Sentencing Commission and then go into a series of panels with two breaks. So everyone is aware, there's a camera here, but they are live-streaming just to our field offices in San Francisco, Chicago, and New York. So you're not live on TV.

There will be a transcript of this event, which will be on the website afterwards, and we want to encourage active participation today. Just to be mindful of the time for each panel, but we'll leave time for questions. We welcome questions, and we also have an email box afterward for follow-up questions and comments. So without further ado, our AAG, Makan Delrahim.

MAKAN DELRAHIM: Thank you. Thanks, Ann. I was told to stand up, so I hope you don't mind. I feel like it's an oral argument or something. Thanks for holding this and organizing this to Marvin and everybody on our team, but especially thanks for all of you who have come to participate in this roundtable or U-shaped table, without whom we wouldn't be having a lively discussion.

The Antitrust Division is hosting this at the Main Justice Building, where an inscription along the Constitution Avenue entrance reminds us every day as we come to work that, "Justice alone sustains society." The task of sustaining our society, however, should not and does not rest entirely on the shoulders of the Justice Department's prosecutors. We all have a vital role to play to maintaining a just society. Public servants administer the law, but our system of justice requires that citizens also do their part to live up to the obligations that our legal system imposes.

That brings me to the subject of today's event, compliance. When businesses and their employees and their executives fully understand and respect the law, the result is a more just society. The more we are able to deter antitrust violations, stopping them before they start, the better off we all are, consumers, employees, and businesses. The Antitrust Division's enforcement of criminal law should not be, and thanks to many of you in this room, is not the first line of defense in preventing anti-competitive conduct.

Criminal law is and should be the last resort. The first line of defense are the companies and the parties themselves and their counsel, who are focused on compliance. The antitrust practitioners, who will speak on today's panels, are a distinguished group. They have devoted significant time and effort to considering compliance issues, and many of them bring different perspectives to the roundtable.

That is critical because antitrust compliance today is a global issue. Companies must be ever-mindful of the very legal systems in all of the many places where they do business. So we are happy to have participants from multinational companies, international organizations, and foreign enforcement agencies, including our friends from the United Kingdom, Canada, and Hong Kong. We look forward to learning from all their experiences that will be shared here today.

Before I turn to the panelists, though, I'd like to share a few thoughts on why the Division is holding this event and why we think compliance is an important topic for us to discuss. That's because we believe that compliance is a win-win situation for corporations and consumers and for the Department of Justice and its supporting taxpayers.

First, when corporations promote antitrust compliance, they win by building reputations for good corporate citizens. They also limit their legal exposure by preventing conduct from occurring in the first place. Or by quickly detecting it if it does occur. The rewards of compliance are significant, particularly because antitrust penalties are expensive and can be imposed by multiple jurisdictions.

Second, when companies comply with the law, consumers win. Our antitrust laws promote competition, resulting in better goods and services at lower prices. Antitrust compliance programs promote robust competition in a free market economy, which benefits consumers by encouraging innovation and economic growth.

And third, when compliance programs work, antitrust enforcers win. Most importantly, so do the American taxpayers who foot the bill for the Justice Department's enforcement efforts. Every time a compliance program stops a crime from being committed, the Division is able to conserve its scarce taxpayer resources.

So the best outcome for everyone and for competition is when an antitrust compliance program prevents a company from engaging in unlawful conduct in the first place. While this is a worthy goal, I understand that even the best compliance program may not be able to prevent every violation. But a good compliance program should prepare a company to deal with these unfortunate occurrence. If the company does violate the law, a well administered program should be able to detect the violation early on and put an end to it.

When the conduct discovered is criminal, early detection can allow the company to apply for leniency under the Division's well-established leniency program. It may also qualify for leniency in another jurisdiction affected by the conduct. Today dozens of jurisdictions have competition leniency programs, and qualifying for leniency results in a net positive outcome.

In the United States, it can allow a company to not only avoid criminal prosecutions for its role in the antitrust offense, but as a result of ACPERA, which I had the great privilege to work on 14 years ago during my last service of the Division, the company may be able to avoid paying treble damages in the follow on civil cases. The company's cooperation facilitated by a comprehensive compliance program also helps the division hold corporate and individual co-conspirators accountable.

I'm hopeful that this roundtable will help the Division gain additional insight into effective ways to promote antitrust compliance. I'm also hopeful that it will help us continue to deepen our thinking on how compliance programs should affect sentencing outcomes. To that end, I'm particularly grateful to Kathleen Grilli, the General Counsel of the U.S. Sentencing Commission, who will talk about the history and framework of the U.S. Sentencing Commission's effective compliance policy guidelines.

I encourage the audience, which includes some of the Division's talented career staff, to participate and ask questions during today's panels. This dialogue will undoubtedly inform the Division's consideration of compliance policies in future cases. Compliance matters to the people and corporations that must abide by the antitrust laws. Compliance matters to the Antitrust Division's prosecutors, who are bound to enforce the law. And it matters to our society as a whole, which benefits from the innovation that results from the functioning free market and from open competition. Thank you all for being here today. And I hope you'll find this roundtable as productive as we will find it. Thank you.

ANN O'BRIEN: We're very lucky to have Kathleen Grilli here today. When I started thinking about putting this together, she was the first person that I called, because literally no one knows more about the organizational guidelines than Kathleen. Kathleen was appointed as the General Counsel of the U.S. Sentencing Commission in 2013, but before that, she served as Deputy General Counsel from 2007 to 2013, having joined this Commission back in 2003. And whenever any of us in the Antitrust Division have a question about the organizational guidelines, we know if we call the Sentencing Commission hotline, it is in fact Kathleen who will answer that question. So I now just starting going directly to her.

While we have a lot of topics to talk about within compliance, I thought it would be good to start with the effective compliance guideline to set a framework. And Kathleen is going to walk us through some of the history, and no one knows it better than Kathleen, because she's been there for the various revisions, the history of the guideline, and the reality of how the guideline is applied. I've asked her to give some thought to how it applies in our cases. So thank you, Kathleen.

KATHLEEN GRILLI: Thank you. Well, I was delighted when Ann called me. I have to tell you that one of the best things about being the General Counsel of the U.S. Sentencing Commission is to go out and speak to people on compliance and ethics. And the reason that the rest of the time the topic that I'm talking about when I go out and speak to people about guidelines is sentencing.

Sentencing is not as happy a topic as deterring crime. So I'm happy to be here with you. I was not at the Commission back in 1991 when the organizational guidelines were first promulgated, but a few years ago in conjunction with one of our Commissioners, Judge Ketanji Jackson, I wrote a paper on the history of the organizational guidelines and had the opportunity to go back through the written history. And it's fascinating to me.

But I don't want to drone on and on too much about that history, because I do want to talk a little bit about antitrust compliance programs as it relates to the guidelines and/or the Department's antitrust leniency program, because Ann specifically asked me to talk about that. But let's set the stage a little bit on the guidelines and how Chapter 8 came into being.

In the early 1980s, there were a lot of corporate scandals. The prevailing view, at least of Congress, was that corporate crime was a cost of doing business. There were no real compliance and ethics officers the way we have here today. There were no professional organizations focused on compliance and ethics, no business certifications. There was one voluntary

association of defense contractors that was seeking to promote business ethics, although Ted does tell me that— Ted Banks and I were speaking ahead of time—does tell me that there is some history back in the ‘70s and ‘80s where there were compliance programs, but they weren't called that.

But this is the climate in which the guidelines came, or the Sentencing Commission, came into effect. So in 1984, Congress passed what was a landmark piece of legislation, the Sentencing Reform Act, and the Sentencing Reform Act created the Commission and gave the Commission the statutory mission of creating guidelines for use in criminal cases.

Now when people first looked at that, they thought well, criminal cases for individuals, but the fact of the matter that Congress was very clear in the Sentencing Reform Act, the penalties for organizations were to be included as well, because that legislation for the first time ever created probation as a criminal sanction for organizations.

So the Commission started working on this in 1986, but rapidly came to the conclusion that crafting guidelines for organizations was going to be extraordinarily complicated, and they had a 13 or 15-month deadline to deliver the individual guidelines to Congress. So after conducting a few public hearings, they decided to set aside the task of developing organizational guidelines until after the promulgation of the guidelines for individuals.

Those took effect in 1987, and after they took effect, the Commission turned its attention towards Chapter 8. Now the Commission conducted a lot of hearings. They put out a lot of notices in the Federal Register. They received a lot of public comment, and ultimately they came to the conclusion that the best way to deter corporate crime was to involve the corporations themselves to self-police. And I think we can all agree that is much easier for the organization to uncover crime in its organization than it is for the government to do that.

And so that's where the idea behind §8C2.5, this carrot and stick approach that it's referred to came, with guidelines taking— It would mitigate culpability if there was a compliance program, if you self-reported, if you cooperated, et cetera, et cetera, and increase penalties or increase fines if you were a bad actor or you have bad actors involved, those kinds of things. And so self-policing was the idea.

And that idea came out relatively early in the development of the guidelines. It was refining the issue that became a bit of a problem. Now this approach was not without detractors at the time. There were many people who were very skeptical about this self-policing concept, and frankly, given the business community's push-back on the organizational guidelines, it's amazing that we sit here today, and see what we do see, because behind the scenes, the business community was pushing hard against the administration, the Department of Justice. They were trying to convince the Commission not to make mandatory guidelines. At the time, the guideline system was presumptive. They were worried about the impact on the corporate sector. Probation was described as a death sentence for organizations. And so there was a lot going on there. But the Commission went ahead, and in 1991, Chapter 8 took effect.

So let's fast forward to 2004, which is the next time that the Commission amended Chapter 8. I will note Chapter 8 is one of the least amended chapters in the guidelines. It's only been amended three times substantively, which is amazing for a 25 plus year history. So in 2004, a new Commission comes into play. And they start looking and thinking about what it is that they are going to be doing next, or what it is that they need to do.

And they start hearing about Chapter 8, and I will say this many of our commissioners are federal judges and/or practitioners. But if you don't practice in the area of white collar or if you don't have organizational cases on a regular basis, you don't know about Chapter 8, or you know a little bit about it, but you don't know much.

And so these commissioners were absolutely amazed to hear about the impact the Chapter 8 had had on the business community. And it was seen in a variety of ways. It was seen in the prosecutorial policies of the Department of Justice. It was seen in policies that other regulatory agencies had adopted, which took the elements for an effective compliance program out of the manual and incorporated it into their own policies.

There was this new job description that was created, Ethics and Compliance Officer. But the business community also told this Commission, you've been very successful in inducing organizations directly or indirectly to focus on and create programs to prevent and detect violations of law. However, changes can and should be made to give organizations greater guidance regarding the factors that are likely to result in effective programs, to prevent and detect violations.

So what did the Commission do? The Commission created an ad hoc group. I was actually talking to Alex beforehand, and she actually worked with some of the members of that ad hoc advisory group. They created this ad hoc advisory group that was composed of representatives from the Department of Justice, including your former Attorney General Eric Holder, Mary Beth Buchanan, who was, I think, in Pennsylvania at the time, members of the private business sector.

And we asked them to look at Chapter 8 and see how the Commission could improve it. And one of the things that this ad hoc advisory group told the Commission was we need to better address the role of organizational leadership to ensure that compliance programs are valued, supported, periodically re-evaluated, and operate for their intended purpose. And they should also be updated to reflect the best practices in the compliance field.

One of the debates back then was the role that ethics played in compliance programs. And so the result of that was in 2004, the Commission promulgated changes to Chapter 8, which also included the creation of a more visible standalone guideline §8B2.1, which basically pulled out of the commentary in Chapter 8, which was already existing, the hallmarks of the seven steps for an effective compliance program.

But they beefed up those requirements. They expressly mentioned ethics. They emphasized the importance of organizational culture. They talked about the importance of risk assessments, the express governing authority responsibilities. They strengthened all the program elements.

And the other thing that they did, which I think is important for our discussion today, is that they changed an automatic preclusion that had existed in the guidelines for involvement of high level authority for small organizations. And they made it a rebuttable presumption. Again, part of that was to address concerns about small and mid-sized organizations and the fact that in a small organization, it's almost always likely that a high level person would be involved, and how can we encourage them to have compliance programs. So that was one of the answers.

Now, in drafting the requirements for effective compliance and ethics programs, the Commission used very broad language. It was not specific on a number of things. It's not specific on what the risk assessment requirements are, how often you have to do them. It's not specific about what standards and procedures an organization has to have. And that was intentional.

The one thing that we have learned at the Commission in the course of drafting over the last 30 some years, both the organizational and the individual guidelines, is too much specificity ends up in people grabbing onto that specific thing that we've said and saying, well, we don't meet that, or the court saying they don't meet that, so it doesn't apply. And so the Commission intentionally used very broad language, because we knew that there's a wide range of organizations that are subject to its reach.

If you look at the definition of organization in the United States Code, it means anything that's a non-person. Well, we know that the guidelines define the sort of the things that are organizations and under the reach of Chapter 8. It's a small organization. It's a partnership. It's a limited partnership. I mean, there's a variety of things.

So the Commission's goal in 2004 was to encourage flexibility and independence by organizations in designing the program that's best suited to their particular circumstances. It was a roadmap, and the idea, again, was to encourage compliance to deter crime. I mean, this was what they wanted to do.

In 2010, we made some minor changes again to Chapter 8, and I have to say at the time, we had a commissioner whose husband was in private practice. And the commissioners, I don't think as they were sitting at the table debating the change that they were going to make, and we did have a lot of input from the public, that that was the year that the most commented amendment was the Chapter 8 proposed amendment. The Commission considers all that public comment, and they read all their public comment, and they made changes to what they published in light of the public comment that they received.

But we had a commissioner whose husband was in private practice, and no sooner had the amendment been promulgated, his phone started ringing off the hook. He said, what are you guys doing? I mean, the commissioners really, sometimes they think this stuff is important, and we take it very seriously, and they consider the public comment, but how the business community reacts to it is still a surprise to me after all these years.

I mean, the first experience I have with Chapter 8 was going out to speak to the Society of Corporate Compliance and Ethics. And it was a room with 1,500 people who were all interested

in the sentencing guidelines and what we did. So these things are very carefully thought out by the Commission.

So in 2010, the thing that I want to talk about today, the one thing I want to talk about is it changed the exception to the general prohibition about compliance program credit when a high level or substantial authority personnel are involved.The change was specifically made to respond to concerns that the Commission was hearing that that general prohibition was operating too broadly and that internal and external reporting of criminal conduct could be better encouraged by providing exception.

I highlight that because I think that's very important to talk about in the context of antitrust, and I'm going get to that in a minute. But let me just tell you a little bit about what we do know at the Commission. One of the Commission's other responsibilities besides promulgating and amending the guidelines on a regular basis is collecting data. We serve as a clearinghouse for data on federal sentencing. And judges are required to provide us with five documents for every criminal sentencing, be it an individual or a corporation. And those are the charging document, the plea agreement if there is one, the pre-sentence report, the statement of reasons and the judgment and commitment order.

We receive those documents from the courts, and we code and collect information on that. And so I can tell you a couple of things as we sit here today about organizational cases, since the inception of the organizational guidelines and organizational cases last year and antitrust. And that is that since 1993, when the Commission started collecting data, there have been 4,558 organizations sentenced under the guidelines.

I think that number is great, and the reason I think that number is great is on a yearly basis, we have about 86,000, if not more, individual sentencings. So that's a very small number of organizations that are convicted and sentenced in federal court over the last 26 years. Only 10 have received the credit under the guidelines for having an effective ethics and compliance program.

Now sometimes, when I say that number, only people are like, that's terrible. And I say, no that's great. That means an effective ethics and compliance program is working and your organization is not been criminally sentenced. So I think that number is just wonderful. Thanks.

Last year, there were 131 organizational cases, and only seven of those were for antitrust violations. And for antitrust cases, the average fine imposed was $18,119,863. That was not the highest average, by the way. I think fraud last year had the highest average, and in fact in the slides that are on the website that I sent, you have all this data showing you last year's numbers.

62% of the organizational cases sentenced last year got probation. And I have to say very honestly despite this notion that probation is a death sentence, it hasn't worked out to be true. And I'm actually surprised that number's not higher, because the requirements in the guidelines under §8D1.1 are so broad as to when the court should impose probation, that they should almost impose it in every case, unless the organization is going to cease to exist after the sentencing.

Why? Because if you're imposing restitution, you should have probation. If you're imposing a fine, that they're not going to pay right away, you should have probation. If you're not imposing a fine, you should have probation. I mean, there's so many reasons why under §8D1.1 you should have probation. I'm actually surprised it wasn't higher.

And actually for antitrust offenders last year, it was lower because only three out of the seven sentenced were placed on probation. In the overall organizational guideline packet, 22% of the offenders got court ordered compliance. Again, I'm a little surprised at how low that number is. It was a little higher for antitrust, because 28% had a compliance program ordered for them.

So where does that leave us? Well, let me just start off by telling you that I'm the General Counsel of the US Sentencing Commission, and this history information that I provided to you, I got from the Commission, but I was never an antitrust prosecutor. And I never did antitrust defense work. So what I know about antitrust is limited to what I have read, what Ann and I have talked about. I don't know how antitrust cases are investigated and/or defended. So the opinions I am going to give to you right now are my own, based in part on some things that I have read in preparation for today and in the past.

In 2014, Joe Murphy, who, those of you in the compliance field probably know him well, Joe Murphy, who is with the Society of Corporate Compliance and Ethics and actually goes out and has internationally spread the word about the federal sentencing guidelines. He wrote a letter to the Commission in response to our federal register notice about what should the Commission be working on in the economic crime arena.

And in that letter, Joe opined that the antitrust leniency program was problematic for the development and the promotion of effective compliance and ethics program. And he explained that compliance and ethics programs have been endorsed by both the business community and the Department of Justice with the exception of the antitrust division, he says. And he says, and again, I want to make sure, I'm not here to offend my host. I'm just here to talk about what has been said to us about antitrust and sort of what I learned when I did a little research on this.

The Department says antitrust violations are unique, and so you all have this one size fits all policy of you give leniency to the first one in the door. He thinks that's problematic. He thinks that that has worked to stifle the development of compliance and ethics programs in the field of antitrust.

But he was writing his letter to the Commission, and so he was saying Commission, you need to address this problem, and I thought to myself, well, I think there's a fundamental problem there, because the Department of Justice is in the executive branch, and I'm in the judicial branch. And let's make no mistake about it. I don't tell them what to do. And they don't tell me what to do either.

He goes on in the letter to explain what it is that the Commission did wrong and how we could fix things. And so I'll talk to you a little bit about that. And then I'm just going to leave all of you with a question or a thought on whether this is something that needs to be looked at, because I

will tell you this. The Commission has a statutory responsibility to amend and revise the guidelines periodically in response to comments and data coming to its attention.

And so if somebody wrote a letter to the Commission tomorrow and said this is a problem, and we need to think about it, and it resonated with our current commissioners, because, again, the Commission, they change periodically, they have staggered six year terms. It might resonate with this Commission. I don't know.

But here's what Joe said that the Commission did wrong. So the Commission said that back, well, in the antitrust guideline, which for those of you who practice antitrust work, may know it's §2R1.1, we have a special instruction for organizational fines, which basically says after you've gone through the Chapter 8 sort of calculations, and you've figured out the culpability score for this organization, it gives you multipliers, a minimum and maximum multiplier.

But Chapter 8 tells you if there's a special instruction elsewhere in the manual, you follow that special instruction. And antitrust, in our special instruction, we say that the minimum and maximum multiplier can be no less than 0.75. Well, when I look at that table, and I figure out well if a company starts with a culpability score of five, and it has an effective compliance program that gets reduced by three, so that the multiplier under the guidelines should be 0.60 to 1.20, which basically means we have in crafting that special instruction, we have diminished the impact of getting the reduction for an effective compliance program. And it becomes even worse if the organization also self-reports, cooperate, et cetera, because there, they're supposed to get eight points off their culpability score, and they're definitely not getting the full credit under the guidelines calculation of fines.

So that's thing one that Joe said we did wrong. The next thing was in our definition of substantial authority personnel, which is in §8A1.2, and in fact when Ann and I talked about what I should talk about this afternoon, she mentioned that. And in that, we define substantial authority personnel, and we say, in a parenthetical example – An individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or improve significant contracts.

Now from what I'm told, that goes to the heart of what an antitrust violation is. And so the fact that we have that language in the guidelines actually suggest that in most instances an antitrust case is going to involve a substantial authority personnel, and then the presumption kicks in, and it's a problem.

And the final thing that Joe says that we need to think about is we need to make clear in the guidelines, that notwithstanding the antitrust department's leniency program, if you have an effective compliance and ethics program, you should get that credit. There certainly is something to think about there. The Commission was well aware of the Department's antitrust leniency program.

And I will say this about the department. For decades, that program has been touted by the Department. And when the Commission was crafting the guidelines, the Chapter 8 guidelines in 1991, the Department took a consistent position with the position that it takes today, which is the

first one in the door is the one that gets the break. They were very clear about that. The Department was also very clear about concerns about antitrust fines back when the Commission was promulgating Chapter 8.

There is a long history of documents and letters that were written by the antitrust division and/or other representatives of the Department of Justice expressing these concerns to the Commission. So the Commission was certainly aware of those. But I guess I'm going to leave you with-- How much time do I have?

OK, so as I was reading all of this, and as I was thinking about what I would say to you today, it occurred to me that this is something that we ought to be thinking about, because if the underlying idea behind the federal sentencing guidelines was deterrence of crime, and if, and I believe based on the remarks I heard today. And frankly, this is a consistent position of the Department in its U.S. Attorney manual when it talks about white collar crime. We all are invested in the idea of deterring crime.

But if a program has been adopted, such that it gives everybody else the idea that compliance programs don't matter in the antitrust arena, maybe we ought to sit back and think about that. I leave you with that question. I don't know what the answer is. And again, as I said, I'm not an expert in antitrust by any way, shape or form. And so I don't know if some of the fundamental reasons that the Antitrust Department expressed back in the 90s, which it continues to express today, whether they still hold true.

I do know some of the things that they expressed concern about in the 90s were making sure that antitrust fines weren't reduced. Well, when we're talking about the average fine being $18 million, and way back when the guidelines were first promulgated, the guidelines said the fine can't be anything more than $100,000. I don't think we need to worry about that.

I don't know what the prevalence of the antitrust crime is given the statistics that I cited to you earlier. They're not as prevalent as let's say a fraud case. But I think there are arguments to be made. Certainly provoked some thought in me as I was preparing for this, is that a large scale fraud case, a large scale bribery case, a large scale antitrust case, they all have an impact on our economy and all of us.

So I wonder if we shouldn't sit back and think about that. Now, I say this to you. Again, I don't know if the Commission will act on this. All I do know is that we have a responsibility on an annual basis to consider comments that come to our attention and to think about these things, and it has been my experience after 15 years at the Commission, that sometimes what resonates with one group of commissioners may not resonate with the next, or there may be something that gains traction.

So I leave that to you all to decide whether you think this is important enough to bring it to the Commission's attention. And then some day in the future, I may be back here talking to you about changes brought about by your comments. I think I'm done.

ANN O'BRIEN: Does anyone have any questions? If you do, if you want to approach the mic, or if any of our panelists have questions. We have a couple minutes.

[Hearing no questions.] It's because you were so thorough. I think Kathleen has probably bought me some work in future to receive some of those comments. But this is the purpose of today is to have a discussion. I think what Kathleen shared with us certainly helps us frame the discussion that we'll have both with our next panel of inside counsel and our outside counsel panel. So thank you very much, Kathleen.

KATHLEEN GRILLI: Thank you.

JENNIFER DIXTON: Thank you all for joining us for our first panel this afternoon, Framework for Antitrust Compliance: A View from In-house Counsel. I'm Jennifer Dixton. And I'm from that competition policy and advocacy section here at the Antitrust Division. Our distinguished panel of in-house counsel are going to provide their insight on antitrust compliance, the format of some of their compliance programs, and best practices. And we'll reserve some time at the end of each question for questions from the audience. So as Ann said, please feel free to ask them. And there's a mic there for you to participate.

But first I would like to introduce to our distinguished panelists here, starting with Anne Riley. Anne is coming to us as chair of the International Chamber of Commerce, and she was instrumental in producing the International Chamber of Commerce's antitrust compliance tool kit that some of you may be familiar with. It was published in 2013, and also the SME compliance tool kit that was published shortly after that in 2015.

She's chair of the ICC UK competition panel and vice chair of the ICC Global Commission on Competition. She is also a non-governmental advisor to the European Union DG Comm for the international Competition Network. And she has been a lawyer, antitrust lawyer for quite some time. She's been at Royal, Dutch Shell in-house since 1992 as Shell's group antitrust counsel.

And next to her, we have a Joel Poppen. Joel is Senior Vice President of Legal Affairs and General Counsel and Corporate Secretary for Micron Corporation. And he's responsible for all of Micron's global, legal, intellectual property, ethics, and compliance, government affairs and security functions. And he's been with Micron since 1995.

Next to Joel, we have Jillian Charles, who actually worked with me at the Antitrust Division before she went over to Eaton Corporation, where she is a Senior Counsel for Competition, International Trade, and Investigations. In this role, Jillian advises senior executives on strategy for managing legal and business risk related to antitrust, competition, international trade, and other regulatory areas. And she's also responsible for conducting investigations related to violations of law and Eaton policy. And as I said before that, Jillian was at the Antitrust Division in the legal policy section, and she also had other roles in the Division.

And finally we have Aimee Imundo. is at GE. She is the Global Executive Counsel for Law and Policy, and she's based here in Washington, DC, where she has been GE's primary counsel on antitrust compliance for over 20 years. Her practice includes responsibilities for a counseling,

transactions, litigation, investigation, training on compliance on a global basis. Also, among her accomplishments, Aimee contributed a chapter to the ABA antitrust sections handbook, antitrust compliance perspectives and resources for corporate counselors.

So I'd like to thank them all for taking the time this afternoon to talk with us. We very much appreciate it. And I'd like to address my first question to Joel, but I invite the other panelists to also comment once Joel's done answering. So Joel, many compliance resources, including the sentencing guidelines, say that it is critical to have support antitrust compliance from the top down. And the Division also recognizes that this is a key feature of compliance programs.

And we were wondering what steps your company takes to promote a culture of compliance within the company and to make sure that senior and middle management show commitment to compliance?

JOEL POPPEN: Well, thank you, Jennifer, and thank you for having me. Let me start with a little bit of disclaimer, I think those of us who work in-house are really good at saying that we're talking on behalf of ourselves and not our company, and certainly that's what I'm doing today. In terms of the question, let me start where we think about compliance in some respects starting and ending that is our code of conduct.

A code of conduct basically provides the platform for all of what we do on the compliance front. Tone, at the top is certainly critical, and starting at the very top with our board of directors, we do training on our code of conduct on antitrust compliance with our board and report in to the audit committee with respect to our compliance programs on quarterly and an annual basis in terms of the state of our program.

So certainly our board knows what we expect of them and of the company. Level down at the CEO level, maybe most important in terms of setting a tone for the entire company and the workforce, in our case 34,000 employees around the globe. Our CEO provides an introduction to the code of conduct, provides a video introduction to the training that we do on the code and on other compliance materials, so that people can both see and hear him talk about how important it is to the company.

Level down from that at the executive level. Similar training, similar expectations, and a couple of other things that we do to sort of make sure that the executives are bought in. One is around a quarterly requirement to report, typically in connection with earnings in our 10Q and 10K filings, whether they're aware of anything, whether they're compliant, whether they've reported everything that they know of. Part of it's a reminder, and part of it is to make sure that they understand the expectation with respect to them, and maybe equally or more important is an economic incentive, which is to the extent that we have executive incentive programs. Those don't pay out unless you've taken all of the training and met all of the requirements.

That certainly tends to be the reason why the executives do what they're asked to do on the compliance front. I think for us, we think of tone, as much around town in the middle and tone at the bottom as tone at the top, and have learned over time that a lot of what happens in the

company is modeled after the leader and supervisor level across the middle of the company, and how critical it is that they do what's expected.

Our code of conduct lays out pretty explicitly what we expect of leaders. In terms of that, and it's to set an example of ethical behavior, ensure that their employer reports understand how to follow the law, our code of conduct, and other applicable policies. They monitor reports, their reports, their employees, to make sure that they are complying, enforce the standards in our code, and support team members who raised concerns about perceived wrongdoing.

So make clear to everyone, and by the way, everyone has to take the code of conduct or has to take the training and has to certify on an annual basis. So everyone sees that, and I think understands that. The other thing that we try to make clear is that the culture of both reporting and listening, relative to how we think about compliance, and you need to speak up, but you also need to listen particularly at the leader level, so that you're hearing what goes on.

The only other thing that I'd mentioned is culture at every company is very important, Micron included. We have values, like virtually every organization has. At the very top of our values, we have an introductory statement that's meant to reflect everything that's expected across those values, and the first line is that we do everything with unwavering integrity. And the whole idea is that it's sort of table stakes. Everything we do is around integrity and is at the front of all that we talk about. So I'll quit with that and pass it on to somebody else.

JENNIFER DIXTON: Anne, did you want to maybe tell us how the ICC tool kit treats this idea of promoting compliance from the top down and how it addressed it?

ANNE RILEY: Thank you. First of all, just wanted say that I'm representing the International Chamber of Commerce here, not my own company. And to those of you who don't know, just a couple of words on ICC, if I may. By the way, I'm not actually chair of the ICC. That's my ICC boss over there, – Paul Lugard. But I am the chair of the ICC's task force on antitrust compliance and advocacy.

And we in ICC represent over six million businesses, both large and small, in over 100 countries throughout the world. We really believe very passionately in antitrust compliance, and indeed, in all areas of legal and ethical compliance. And actually, fundamentally, we believe that businesses really want to comply with the law, and a lot of research on that has been done by a number of antitrust agencies around the world, verifying that companies really want to comply.

And so we in ICC started a discussion with agencies around about eight years ago. We started first with DG COMP, just to get a dialogue on the importance of encouraging compliance. And I want to say right up front the ICC has never pressed for antitrust compliance programs to be taken as a mitigating factor. I mean, obviously, that would be nice, and it would encourage a lot more compliance. But we really just wanted a dialogue between business and agencies on the need to encourage compliance and have compliance advocacy. So it started to be a dialogue that everyone was having.

I have to say eight years ago, there was a little bit of skepticism around the table with some agencies, not all. I would definitely exclude, for example, the Canadian Competition Bureau and the UK CMA, amongst others. And the advocates of compliance are now joined by agencies like the Hong Kong Competition Authority. There was some skepticism with some agencies saying well you know compliance isn't a problem for agencies, because we've got our enforcement tools, and we've got our leniency programs. So this really is just a business problem, so you go off and do what you need to do, and don't talk to us.

But we carried on talking to the agencies, and it we started with the fact that the fundamental public policy driver of antitrust should be the desire to have real compliance (so no infringements), and not just for enforcement, detection and punishment. Those are important, and really have their place. But the true policy goal is to achieve real compliance in practice. In other words, to have no need for enforcement because people want to comply with the law.

That should be the nirvana that we're trying to aim towards. Anything that we can do to achieve that would be great. DG COMP did give a little bit of a challenge and said, well if business thinks it's so important to push compliance, why don't you do something yourself?

So in 2013, the ICC published this [held up the ICC Antitrust Compliance Toolkit]. It's a bit of a tome actually. It's 11 chapters. It is pretty comprehensive. But I have to say, even though I was one of the principal writers and editors, it is a bit indigestible. I believe in telling it the way it is. So we went around the world and tried to encourage businesses to read this, and they went "oh, it's ever so long".

So in 2015, we published a 12-page simple Toolkit -- excuse me, I have to show you [held up the SME Toolkit] -- with cartoons. —In 2016 I represented the ICC at the Malaysian Competition Commission second conference on antitrust, and they had a panel on compliance programs, which Rose Webb from the Hong Kong authority, was also speaking on. It became clear that around 97% of business in Asia are actually small and medium sized enterprises, and about 97% or 100% of those SMEs don't understand what antitrust is about. Now that may be a big shock to antitrust agencies, but not everybody understands antitrust law.

So the next thing we're working on, when I see if I've got my next prop here, is a tool kit for trade associations [held up the cover page of the new Toolkit for Industry Associations], which will probably be even shorter and have more cartoons. We are also planning an antitrust story book for children ….I'm a big proponent on getting them young..

But more than anything, I just want to focus on the fact that we think it's not about programs. It's not about process. Those are important, too, as is enforcement. It's really about encouraging values, encouraging ethics, getting people to know about the right thing to do. And if you think about that, you will get societal change in the end. That's it.

JENNIFER DIXTON: Thank you very much. Would any of our panelists like to comment on Anne's comment?

AIMEE IMUNDO: I might add something, just on the point about culture change. So we talk about culture change a lot, how do you get compliance to be part of our culture. I'm so glad that nobody said, oh you have to get leadership to talk the talk, and they have to walk the walk. But people talk that way still.

And so I guess I would say that if you're going to have your leadership kind of talking the talk and walking the walk and talking the walk, you have to also think on the other end of it in that, if you actually have talked the talk, and then you walk the walk. It's a really nice thing to actually talk about walking a walk. I think I've got that right. That is to say nothing breeds success like failure. So there is a situation, I know that there's often an instinct, oh let's not talk about that.

But in fact, I think that you can really drive culture change if you bring folks in, leadership in to develop a narrative around, there was a hard situation, I made some hard choices, it was hard for all of us. And yet, we made tough choices, and we get to hold our heads up about having the story, about being willing to do that.

And we've done that at times. Pulling in leadership, getting them to sit for a high production value video, you know, about that story, about the ethics, about the integrity. And you know, people grab that narrative, because typically if there's been an ethics compromise, people are suffering. There are people involved, who maybe are hiding, and the people at the next desk feel betrayed, or if they thought it was a while before somebody caught it, they feel left in the air.

And if you can put together this narrative, we suffer through something, we made this change, it was painful, but here we are now together, leadership feels great about it. It's a great narrative. And it's such a better narrative than the lawyers told me to do this, and I did it. The end. Nobody gets inspired by that narrative. But the narrative kind of, you know, integrating the fact, the reality when there's a compromise. I think it's a great way to kind of drive culture change to get people to hold onto a more inspirational narrative.

JENNIFER DIXTON: Jillian, did you have anything to add? OK, great. My next question is actually for Jillian. I'd like to talk to you a little bit about the structure of your compliance program, and just tell us generally how one identifies antitrust risk for a company, how the compliance program is structured a the way to address the risk, and what types of activities are really covered. And also is antitrust training part of a larger compliance policy program in general, or is antitrust, at least, for you, in sort of a separate standalone type program?

JILLIAN CHARLES: Thanks. So I will do the same disclaimer. It's tough for us in-house counsel to show up anywhere and separate ourselves from our companies, but we must. So often you hear my opinion based on my experience over time in the many places that I've done this.

So to answer your question shortly, yes and yes and yes. So it gets really complicated, but one of the first things I want to say about what our program might look like or what an antitrust compliance program might look like is that I am deferring a discussion, which I think this whole conference sort of begs, which is what really does antitrust. What goes into the pocket of antitrust compliance as different from antitrust law?

I get to defer it because I'm in-house. I encourage my law firm folks out there to maybe touch on it some. I defer it because I will say this about it. Being in-house, compliance and law are so tightly wound in what we do, particularly in the area or antitrust. I distinguish that from my other area of practice in trade, where shipping something in and out of the country. I couldn't tell you how to do it as an international trade lawyer. But I do know what to do when there's a spill, when we fail to do it accurately. I know what law's impacted and how to do it.

I think in antitrust and antitrust compliance as it were, those things are so tightly wound, it's hard to sort of pull those strings apart very clearly. So I say all that say I'm not having that discussion today, but maybe someone else will.

In terms of what it means to find risk in-house, I Joel, we like you all, sort of start with our code of conduct. Our code of conduct embeds antitrust into the code of conduct. Compliance with the antitrust law is embedded into our code of conduct. It's item principle five. If you go to our website, you can just see it. It's right there in public.

We hand it out to everyone, so walking in the door, you know that this thing called antitrust, which as an employee at any level, you may not understand, or fully understand, you know that that's part of what is expected of you in terms of doing business right. And so on the first day, you get that as part of your-- You get a one pager on what it is that is antitrust law, and what we care about, and what you should do if you see certain issues arise.

But in terms of finding the risk, I think where we go to is where almost all of us do it in one way, shape, or form, depending on who we are as a company. We have a risk assessment process. What that process looks like varies by company. I would argue even within an individual company, like a company like ours that is spread worldwide, is making very different products in each of our business divisions. That risk assessment process has to be tweaked, has to be scaled. It has to be customized.

But the important thing is that it has to have a circle. You have to both seek the risk, identify the risk, publicize the risk, mitigate the risk, and check again. And so, the effectiveness of that, when you do it, how often you do it, what it looks like, how complicated it is, is it in a computer, how many people do you get involved in that conversation, I think it all just— It varies. And again, I would say it can even vary within the company, and I dare say within a region.

One of the things that I think is really important is to, as you're doing a risk assessment, is to reality test it. There's third party data out there that might suggest that this issue is important in this region. This region is a high risk for this problem generally. As antitrust lawyers, as compliance people, as subject matter experts, we have to be taking that in and putting that glaze over what we're seeing.

So for example, if one of my regions come back and doesn't raise a risk in an area that I fully expected to see, that's a dialogue that has to be had. So I think the risk assessment process, and I'm going to put it in quotes, is what it is that's right for you, but it's an ongoing iterative process to be truly effective and practical.

I want to add a couple of things that are just, as I would say, wearing my in-house hat, what I think is practically important. I think it's knowing your business. I think Aimee, part of what you were touching on about, sort of-- I can't even say it, because I'm going to get all dyslexic, mixed up. But talking about how to walk that walk, right.

You've got to know your business. You've got to really, as a lawyer, understand both at the high level, strategically what's going on and what's about to go on, what's coming around the corner. But also, sort of culturally, what's going on. Is the business not doing very well? Is there sort of a down in the dumps feeling? What impact might that have on your sales team? Is there a great deal of pressure to sell more, sell fast, do it with fewer people?

There are all kinds of things, both at the sort of business and operational level, as well as the, for lack of a better term, cultural level, that could be going on in your business that becomes really relevant. And of course, we should say this. We shouldn't have to say this, but you have to know the law and the enforcement priorities. And I think the latter is often more important, because let's face it, antitrust law is not exactly the most fast moving area of law in terms of development and changes. But enforcement priorities change. I mean we saw that last fall with how we talked about and think about antitrust enforcement with respect to the employment law area. So that builds into your risk assessment, your training program, your mitigation program. That enforcement priority as well.

And then I think the final thing, this issue of what do you cover, I think is always a challenge for a company the size of ours, all of ours up here on this stage frankly. Eaton's a global company. Like all of us, we have over 100,000 employees. They're sitting in 60 different countries. We are active doing business in 175 different countries.

And our code of ethics says that our employees are responsible for adhering to the law in every place that we do business. So that makes for a very complicated, or not, if you think about it, complicated or not approach to how we manage this. But what's important is all of that plus this.

Who are you talking to as you're doing your compliance and training and so on? Is it the highest level manager who's in charge of strategy? Is it the sales team who is out there facing the customer day by day? Is it the person setting the price, or is it the person pushing the price? The person who's got to bring in the sale. Where is the person sitting? How do I talk to the person sitting in the US versus the person sitting in China, versus the person sitting in Brazil, about compliance and antitrust issues?

All of this sets a stage for how we do our work. And it goes back to the point that it really has to be customized even within your company. And then finally, integrating as we do, integrating things with other compliance areas. There are lots of, I call it, neighboring infractions and jurisdictions, like FCPA, I think like trade. There are lots of places where antitrust compliance and lots of converts, if you will, who can go off and sell the compliance message when I'm not there and spot the issues when I'm not there.

I don't think that's enough though. I think you take advantage of those opportunities, so there's a standard corporate compliance training on antitrust that comes through, in our case, our ethics

and compliance arm is actually separate from law. It comes to ethics and compliance. My role in law is to back that up with completely customized information, training, and management of risk that is geared to the business, to individuals, and the regions.

So, yes, put it together, and yes, take it apart, because ultimately, that's the way to make it effective. And I could go on, but I'm going to stop.

JENNIFER DIXTON: Thank you. Would any of our other panelists like to add?

JOEL POPPEN: I'll add something on identifying risk front. We have formal processes, like most companies do, relative to corporate enterprises, management programs, and in parallel with that, legal risk assessments. I think, what maybe is even more effective for us or at least as effective, is a less formal, that goes largely to legal models.

If you think about in-house legal minds, they're an older traditional model of trying to build almost a law firm like, within the company. We've started to talk about that in terms of being more legal services and less around the business of the company. So similar to what Jillian was saying. I think where we think we provide the most benefit is it in an embedded way where we get lawyers as close as we can to the business, in terms of being partners, whether it's business units or sales or manufacturing operations.

Part of it is we don't want to wait for them to come to us with a question, because they may ask the question, or the question may be framed in a way where we know it already happened by the time they asked us. By being a partner, we have insight into what they're thinking about and what they're doing, so that we can be on the preventative front end of things to help them find ways around it or through it, rather than being the “no group.” We can be the be “yes but”, or “here's how” group if we're embedded in a way where we can be a part of that.

ANNE RILEY: Just very quickly, a top tip to the agencies, if I may, on antitrust compliance risk. I think the agencies really need to understand that there is no such thing as zero risk. It isn't realistic for agencies to think that 100% of the population will comply with 100% of the laws 100% of the time. Just ask yourself, have you ever double parked or run a red light? And I think you'll realize that it's human nature to do the wrong thing at least sometimes. There will always be risk.

So all you can expect companies to do, what you should expect companies to do is learn from mistakes, and do better next time. I think when considering what an effective compliance program is, an effective program should be one that manages risk, addresses risk, and tries to help you do better.

JENNIFER DIXTON: Thank you. That sort of segues nicely into my next question actually. We recognize even the best compliance programs may not always prevent every violation, certainly. I wanted to ask Aimee Imundo a little bit more about what procedures and incentives do you think encourage the reporting of violations? What tools have been most effective, in sort of addressing them once there is one identified?

AIMEE IMUNDO: So this is a tough area. I think one of the themes that might emerge from the in-house perspective, is how tough detection is. But I also appreciate the other theme that you raised that we will without doubt come back to you, which is that even the best compliance programs don't mean that you are in zero violation. So there can be a good program, and you still have violations.

Detection is not the same thing as prevention. And so I know you're asking some of the tools and techniques, again, around detection. But I just want to take this chance to really echo what Anne said. I think probably all of us think that it is the desired state is total prevention, which again, you can never get there, but a lot of energy will go to prevention. So I'm working my way back around to your actual question, Jennifer.

Your question was about how you detect a little bit, how you get people to come forward, as one method of detection. And just like what with the leniency programs, which I know around the world, the global enforcers talk about how important leniency programs are for learning about violations. It's important inside as well.

So you need to think from two directions, one, how people are going to report, and two, what they're going to report. Our practice is not siloed by substantive area, whether something is cartel. It's not like my red phone rings with a cartel question, and the blue phone rings with a merger question, and the pink phone rings with sort of a joint venture question.

The fact is the questions come in. And your business people don't know what bucket it goes into. It's into us, and indeed something that's in one bucket in one country will be in a different bucket in another country. And so just as Jillian said and Joel said, a lot of this is about giving legal advice. So you give enough legal advice, and you try to integrate antitrust kind of checkpoints and risk assessments into business practices as a way to try to flush out, if you will, the need for legal advice, wherever it comes in that kind of chain of events that will lead to a business arrangement.

Any kind of an arrangement, a legitimate business arrangement, where competitors are involved, there's always going to be a risk of spillover. So can you train people well enough on the legitimate aspects of whatever that business model is that some kind of a red flag goes off in their head to say hey this seems not quite right. You know, they're doing this joint venture, and everything is great, and this is the joint venture, where I'm doing the peanut butter, and they're doing the jelly, but they just said they were going to start making peanut butter, and they asked me to stay out of peanut butter in China. And that just feels weird. I'm going to call antitrust counsel. You know, something that starts is completely legitimate can spill over.

So what people report is really important. And I should also say that these are just my opinions also, even though I've had the same client for 20 years. I talk to everybody in this room, and I learn from all of you. It's my opinion that the things that you learn from employee hotlines, there's a lot of noise in the system. You may get a few gems, but you also get a lot of what I would call personnel related or sibling rivalry type questions, you know. The person in the next cubicle got a bigger turkey than I did for Christmas. Surely this is a violation of law, kind of question. You get a lot of that through employ hotlines.

But anonymous hotlines are now a fact of life, after Sarbanes-Oxley, and it's an option in Europe, where there are some tougher rules around that. It needs to be an option. And in addition to employee hotlines, which are helpful. Then the other part is making sure that people understand why they need legal advice, and that they know who to call, whether that's going to be a compliance person, or whether that's going to be a substantive antitrust expert.

And I just again sort of ask people to relate to the challenge of this. Say you have a company with 100,000 people in 60 countries, you might say, if you hadn't worked in the field, you might say there's no excuse that all 100,000 of those people should not know exactly who [INAUDIBLE]. They should know to call Jillian. They should know, all 100,000 of them. If you did a survey, and you asked the 100,000 people in 65 countries what their name is, I guarantee you 10% of those would come back with the wrong answer, because people misunderstood, they misspelled, they read it too quickly, they never responded.

So it's a fact that even just the building block of do people know who to call is something that you've got to consider when you try to set up thinking about the big picture that people are able to report, even if it comes in the form of asking a question. Great, you learned terrific things, and you get [INAUDIBLE] people are free to ask questions, and they know when they should be asking questions. What to report, how to report, who to report to, and that's just on top of your hotlines. It's very rare. I started with the phone. You don't get the red phone.

It's very rare that I've even heard of kind of whistleblower type complaints where a person phones in saying, hey, there's an international conspiracy going on here. I'm a part of it. I know all about it. I just can't sleep with myself at night anymore. No. It's going to be more of a question, hey, I had this thing with the peanut butter in China, and that just feels wrong. It's more that is the reality of the type of the calls they get there. Those are some of my thoughts.

JILLIAN CHARLES: To just piggyback on what Aimee's saying in terms of getting information in, right, and so you think about the risk assessment program, and you think about info in. One of the other things that we all, I'm sure, in our separate worlds, I certainly encounter it in my world is the importance of aligning ourselves with the other functions, who touch on other kinds of risks or who support compliance in different areas.

So while the red phone may not ring when it ought to or may ring to the wrong person, audit is out there auditing. They're auditing for lots of things. And those audit reports become sometimes opportunities for you to find information that you might not have. And so for me, I view the roll of antitrust, particularly antitrust. I keep harping back on that because I touch on compliance and other areas, but I find that antitrust, you know, there's a single lawyer if you're lucky in your company that has that in their wheel house. That's it.

And compliance talks about it generally, don't fix prices, don't allocate markets, and that's why I had my earlier comment about what is compliance really. It's more than that. So then you have to look at your other arms of your company including finance, audit, HR. All of these people are sources of information in the risk identification management and mitigation process.

And so teaming and aligning with them and having good relations, including baking cookies and offering it up to the audit team when you want them to go off and really do your work, because you don't have time to fly to wherever to do it with them is important in sort of making sure you get that, if you don't get the phone ringing at the right time, you're still getting the data in.

JOEL POPPEN: I agree. A couple of other thoughts. One is that I think in some respects, reporting starts around culture. So unless you have a culture that promotes doing the right thing and telling people that not only is it OK, but there is an expectation to report, it it's hard to generate that. You then have to have the systems that they talked about, and I think Aimee talked about the hotlines, so to the extent that they want to be anonymous, they have the ability to do that. They have to have a non retaliation policy that you both have and exercise, so that you really do live up to if you report, you will not receive ill treatment based on that.

The other thing I'd add in terms of reporting is we think about almost like [INAUDIBLE]. Law school was a long time ago for me. But I remember that hearing that you need to be able to spot issues and the unfortunate for me in law school, you then had to talk about those issues, as opposed to just spotting them.

But we train up people who are within the organization that we think of issue spotters where we ask them to sort of be our eyes throughout the company, looking for things that could be antitrust or other compliance issues, and bring those to us, either on an anonymous basis or on a direct basis, but it allows us to when we're not there, when we're not in the room, to have someone who's sensitive enough to it that says, hey there might be something there, I'm going to ask legal about it, so that we have sort of an army of people helping us on that front.

JENNIFER DIXTON: Anne, I wanted to ask you a little bit more about the tool kit and the SME guidance that the ICC put out. Do you have any thoughts on how that type of guidance has helped improve, or how it's affected compliance training?

ANNE RILEY: A couple of things to say. I don't know how the ICC guidance has affected SME training and values, but I hope positively because the ICC has had over 100 engagements around the world spreading the message. Our SME Toolkit includes the Warren Buffett quote: “it takes 20 years to build a reputation, but just five minutes to ruin it, and if you thought about that, you would do things differently”.

So what ICC wants to do is to get people thinking about how to do the right thing, and what we try to emphasize is that every single business person is also a customer. They are either a customer in their business or a customer in their own home life. And do they want to be cheated when they go to the grocery store and find the milk or bread is double the price because people are fixing the price? No, they don't.

So ICC tries to get the message down to an incredibly simple level, - what it means to “do the right thing”, and then we say : “look at look at the values that your company wants to demonstrate... Even if you're a one man band of just two or three employees, do you want to be seen as an honest dealer in the market, or do you want to be seen as a crook and somebody who's dishonest?”

And that's why I say in the ICC, we focus on the fact that most businesses, and most people really want to do the right thing. I mean, OK, you're going to get some hardened criminals everywhere in the world. You're going to get some psychopaths and some sociopaths, but you need to understand that most people actually want to do the right thing. What the ICC has tried to do through the SME tool kit is keep the message simple.. But in the smaller toolkit is to focus on the desire of companies to behave ethically.

So we say, look at your core values, honesty integrity, respect for people. Those are typical values that companies could have. And then try to equate those with doing the right thing. Just one other thing that I think I should say, and I think the other panelists have been mentioning this, is that we encourage companies, both large and small, to think about compliance holistically.

I think one mistake that potentially may have been made by antitrust authorities around the world in the past is to think about antitrust compliance as being in some ivory tower, away from real life. It isn't. Companies also have to comply with anti-bribery and corruption, FCPA, trade and sanctions compliance, data privacy, anti-money laundering – the list goes on. So everything needs to be brought together and dealt with in a holistic way, which also means I think - going to your question to the audience before - that agencies should be working together to think not about silos of compliance but how to deal with compliance in a holistic way from an agency perspective.

JENNIFER DIXTON: Does anyone want to add to Anne's comments? I'll move onto my next question then. I'd like to address it to Jillian, but invite everyone to comment. What tools do you use, or how do you get management, top management in the company to direct resources toward antitrust compliance since it is part of much bigger compliance picture?

JILLIAN CHARLES: Of course, the goal is you want to avoid antitrust problems and antitrust violations, and as an in-house person, those of us on this panel, we understand. We're always counting up how much we saved, how much money, how much spend did we have, and how did we make it go down. It's really hard to measure risk avoidance. And so that's always going to be the challenge for those of us in-house if we want to talk about our practice that way.

But once you have the culture of ethics and compliance, then the other thing that I think supports the work that I see in antitrust is a learning culture, a culture that says here is why this is important. This is what you as a business person needs to know, and I tend to shop antitrust to leadership around, you need to know this. You need to be able to see this and count this as part of the variables that you think about as you look around the corner.

But it would not be smart for me to sit here and tell you that I spend all day, all the time trying to scare my business leaders into worrying about antitrust all the time. Their job is to make widgets and sell widgets, and their stakeholders are to shareholders. And I have to be practical in how I approach it.

So one of the things, if we're talking particularly about getting leadership attention, not just support for compliance culture, but really attention around something, because of course, if I'm

doing a really good job, maybe and the teams of lawyers and compliance people are doing a good job, then maybe you haven't seen a problem or a big problem in a while. So there's a tendency to say that that's managed, and you leave it alone.

So what do you do? If you've got a culture of learning, then I like to put it in terms of, did you see what happened to that company down the road? Did you see what's going on over there? I love when the press releases come out from the agencies. I take it up. I snap up the quotes. I love when the complaints have enough detail that I can finally say, this is what price fixing looks like in the real world. This is how the peanut butter and jelly scenario turned into a real antitrust problem. This is how a gun jumping problem, this is what it looks like.

There's nothing better to say that antitrust compliance, if you will, for the purposes of this conference, but antitrust more broadly, for a CEO and other leaders, there's nothing better than to simply say, this is not dead, because guess what, this is what happened last week. This is the complaint that happened last week. And while I do sort of vibe off the fact that everyone wants to believe that they don't want that to happen to them. So let's learn from it.

Many times and we're standing in front of a room, training on something, and oddly enough, most business people think training solves all problems. I actually don't agree with that. But so many times a problem is identified, and then the solution is well train. OK, so the way you train maybe is to get people talking about it and seeing it as something real, something present, and something that is possible, if not for us, than for others.

And another way to think about, I try to make it practical, because, again, they're making widgets, so please make widgets. But also when I tell a story about a case that's come out or something that's been announced, I always ask, is that like anything we do, does that ring a bell for you? Because coming back to this notion of what is coming into us, what do we know about, we have to lead people to think about it. We're not there. I'm one person. I'm not in 100 and how many other countries.

So how do I get my people to understand and spot the issues and talk about it and not think the absence of it within our blue company means it doesn't exist? It's by saying it's out there. Let's talk about it. Let's see if any of this is connected to us. Let's see if any of this rings a bell to you. This is what it looks like over there. How does it look over here?

And that's really to say, to answer this question, the only way I make my leadership pay attention be on the obvious big ways is to say, let's keep it practical. You're not an antitrust lawyer. That's why you've hired me, right? Let me keep it really practical and just show you an example of what that looks like today, now, under this administration, in this day and age. That's how I tackle it.

JOEL POPPEN: I'll add one carrot and one stick, maybe one stick, one carrot, in terms of getting and keeping management focused on the need and worry about antitrust. On the sticks, I absolutely agree, to the extent that others have problems is a great thing to point out relative to this is what can happen to you.

I would say even better than that or even more effective than that is the bittersweet problem of having gone through something, which you can then use as hitting very close to home, in fact, hitting home, which allows you to tailor it very closely to the business, and to make it personal in a way that it's people that other people know and work with. And I think that had a much greater appreciation for. It's not this theoretical thing that happens to others. It can happen to anyone if you're not careful.

On the carrot side, I think if you look at sort of the progress with respect to CSR corporate social responsibility and sustainability, there's an increasing focus on companies being rewarded for being good corporate citizens and for doing the right thing. So one of the carrots I think is to the extent that you're a compliant and ethical company, there's now both greater expectations by customers and investors that you be one of those, but also greater recognition by them and by others that companies that do well in terms of compliance are also going to do well financially and have a much better path in front of them in terms of the business. So they get rewarded for that. And I think that's sort of a carrot way to think about what one of the ways that you can get management focused on it.

JENNIFER DIXTON: Well we're nearing the end of our time. So I'm going to ask a final question I'd like all of our panelists to have a chance to respond, and then see if there's any questions from the audience. As you know the Antitrust Division has not advocated for a credit during sentencing for having an effective compliance program. And short of crediting all compliance during that process, regardless of value, we want to know what, if you have any views on what the Division generally could be doing to promote antitrust compliance. And I open it up to all of you if you have any suggestions for us in that area. Yes, thank you, Anne.

ANNE RILEY: Actually just to give a little bit of credit, if I may to the DOJ and FTC. One great thing that I think guys did in October 2016 was issue antitrust guidelines for HR professionals. They were so well written and so simple to read. I really take my hat off to you. More of that, please, because it's really useful. And the easier that you make it for in-house counsel to spread the message, the more compliance you're going to get, not of the 50 page guidelines, but a few 12 pagers would be much appreciated. I'm not asking for cartoons, but you never know.

AIMEE IMUNDO: So I'll just be willing to start, so kind of the policy question. So first of all, doing something like this, of course is terrific. I think it's a great topic for us to be talking about, and really hats off to Kathleen, as well, for being willing to give us some of that background, and just kind of ask some of the questions. And it's a longstanding question. As long as I've been doing this, there's been this question about should credit be given or not given, and I thought you just asked the question really beautifully, beautifully balanced way. You set it up really well. And so thank you for that.

I do want to say, there's this theme of detection. So I think all of us here sitting on this side of the table are very focused on prevention. Detection is also super important, but it's really, really hard, and I have a few ideas of how we can kind of help each other on the detection side, but just on the policy side, I guess I would love to see some kind of policy statement that gives us more to work with on the prevention side.

So many global regulators have now come out with, you know, fairly specific descriptions of their expectations for what a good compliance program should look like, not a pro-forma, not a check the box. Many, at least a half a dozen, serious regulators have come out with statements that are thoughtful, that make sense, sentencing guidelines also lay out some of the expectations.

Give me a talking point that I can use with management on that. I push it all day, every day. And we, and I'm sure everyone here tries to put together programs where we read those standards, do we reflect those standards. What do I say to management when we won't get credit for that? Now I understand in the US, the leniency program is itself its own reward if you can detect first. But if you detect it, if your phone call is five minutes after the first guy, does that really mean your program is not effective?

And I guess I would just quote Rod Rosenstein gave a talk at the White Collar Institute just last month, and he said a few things that I think maybe we'll all agree with, just on this notion that a program, if you have not-- if something goes wrong, it doesn't necessarily mean your program is not effective. Corporate America is often the first line of defense for detecting and deterring fraud. Meaningful compliance measures helped the department preserve its finite resources. I agree with that, that we're allies.

We want to reward companies that invest in strong compliance measures. I say, great. The challenge is especially acute in large and diverse organizations. I empathize. I reflect every day on the challenges we face with 115 employees in the Department of Justice. Things go wrong in every organization.

So I think those comments are realistic. Things go wrong in every organization. So the more that you can help me articulate the case to management about the investment on the preventative side I think that will go toward the common goal of preventing. And then in terms of some more specific things, like Anne just mentioned, my specific, more specific thoughts go to helping out on the detection side.

So over the years, there have been a few speeches given usually by criminal [INAUDIBLE], where they talk about key features of international cartels or red flags around international cartels, and I will say those things are fantastic, because they give us something to go and look for. They help us with risk assessments. That even give us anecdotal stories to tell as part of a compliance story.

There have not been many speeches like that lately, and to the extent that more speeches like that, more roundtables like this perhaps, that can help us to develop better detection tools, of course, without revealing covert methodologies that are in exclusive domain of enforcers, we don't want that, of course. But the more that we can share best practices on detection, I think that would be very much welcomed by the in-house community, because it really reminds us we're on the same side.

We get it. The leniency program, we get it. We want to detect. And if that could also lead to something, the release of some evidence. Now I'm about to reveal myself as the old timer I am. The remember that ADM tapes, when the ADM videotapes were released to the public, what you

had is you have the video evidence of a cartel in progress, people around a meeting room, and when a knock came at the door, the cartelists were joking about how it was an enforcer. I can't tell you how effective that was for me to show to my folks and talk about the arrogance that you saw in that room really pulled people up on their heels.

And it was a terrific compliance tool. So if there is more like that, I'd love to see that. So those are just some ideas both on policy and practicalities.

JILLIAN CHARLES: I am just going to sort of, without sounding like a whiny baby here, I mean the notion that for the large multinationals in complex businesses, producing variant products, so different markets all the time, different countries, so many people. It strikes me as quite an odd position to say that if there is a miss, it means my program isn't a good program. It just doesn't even go with reality at all. It's just completely and utterly impractical in a lot of ways.

And so we know we live with that world on the antitrust side. Mind you on the FCPA side, trade almost every other area I touch in terms of compliance, it is not my reality. It's only in antitrust. And so I agree, I understand the history of why, indeed I think I was here, when we were digging in on having it that way. But I think that there has to be-- Clearly this conference suggests that we need to talk about whether we've now-- I don't know if the word is matured or evolved or whatever, insert the right adjective. To think about what this really means.

Business has changed. How we do business has changed. Companies change. How we put them together has changed. And so I think it's right to think about whether or not we ought to be thinking about, get into the actual qualitative nature of the program as opposed to the notion that we've got a failure, you can't get credit for that program. It just doesn't jive with anything that's real.

I will say the other thing is for what it's worth, sometimes I feel as I stand in front of rooms doing my best job at training folks, that sometimes you wonder if you're not simply educating your folks, who are determined to do bad, just how well they can do it if they did these other things and avoided the attention. So in some ways, some of the most effective programs just actually lead to those who are determined to be offenders to go deeper and deeper underground.

I don't have any numbers to prove that, but one sometimes has that feeling. So I agree that these conversations are important. The third thing I'd add in this area is sort of what I touched on before. If your company is not-- I mean, let's face it, most of us are not dealing with cartels every day, all day. That's not my full time job. I'm not an expert cartel spotting, detecting, or any of that. That's what we're trying to not be.

So then, coming back to my point, how do I make my business understand that though we are not in that present day situation today, it is still real, you should still be concerned about it? Like I said, I love your detailed complaints. I love anything that allows me to pull something from 2017, 2018, that's real and say this is real. This is what's happening. I like the Europeans [INAUDIBLE] for closing investigations with explanations, so that I can take something away.

For in-house people, what we're looking is to take the theoretical and translate it to practical and real. Amongst ourselves as antitrust lawyers, we can have these esoteric theoretical discussions. My job is to take all of this and make it practical, real, and livable. And I need real examples, and I need real guidance. And that's where I think the enforcement agencies can really help us do a better job than we're already doing.

ANNE RILEY: OK, very briefly if I may, just to go to what the agencies could do better, and we've had some good examples of what you do well. I think that's right. Agencies can learn from other agencies, so there's been some fantastic work doneas I mentioned earlier by the Canadian Competition Bureau on what good compliance looks like, and some fantastic advocacy done by others, such as the CMA.

But agencies should learn from other agencies - even within this building! In the UK, there was a huge movement towards compliance in anti-bribery when the UK Bribery Act came in. And the reason was Section 7 of the Act describes what adequate procedures to achieve compliance and provides a defense. Now I'm not saying that you should go necessarily as far as that, but it actually really brought up the level of ABC compliance in practice.

And antitrust, I fear, is becoming a poor relation of anti-bribery compliance. Just look at the FCPA enforcement in this agency. . But if you look at the things that the FCPA enforcers in the DOJ have done, look for example at the Morgan Stanley case - the US DOJ looked at Morgan Stanley and the individual infringer, and said, you've trained this guy 32 times. You've sat down with him. You've eyeballed the guy. And still he went and did and broke the law. So the DOJ did not prosecute Morgan Stanley, due to their real and genuine compliance efforts .

But you need to talk to other agencies and other compliance enforcers, and help us then by giving us some guidance. Thank you.

JOEL POPPEN: Real quick, in a slightly different direction. I worry about attorney client privilege in a couple of contexts. We think that some of the best compliance related work that we do is having a culture where employees know that they can come talk to us about anything and can be honest about what's going on.

They don't know a lot about the law, but they watch enough TV to know about this privilege thing, and so they feel comfortable as long as they know about that, that they can speak openly and honestly with us. Two things I worry about in the context, one, and I realize that jurisdictions around the world think differently about privilege. But to the extent that outside counsel privilege is different from in-house counsel privilege, I get a little bit personally offended about that, that somehow something's different about being an external lawyer as opposed to being an internal lawyer, putting aside that there sometimes is business loaded in with it. I get that.

The second is that in the context of leniency or other things, where there is a requirement or an expectation, that you waive privilege. I think there are real downstream harms that could be associated with that, and just need to be thoughtful about whether that short term benefit of that has the long term compliance benefit that I think that we all ought to be worried and concerned about.

JENNIFER DIXTON: Thank you. I just want to check with the audience to make sure that there were no questions for our panel before we conclude. OK. Well thank you. I want to thank everyone here today for participating. This talk was very, very helpful to us. I know you all have busy schedules. So thank you for taking the time to speak with us here today. And right now, we have a 10-minute break. Thank you.