



The I.C.E. Method:

How Understanding the Symbiotic Relationship Between Investigations, Compliance, and Ethics ("I.C.E.") Will Help You Retake Corporate Culture



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I. Executive Summary

A federal investigation or a regulatory action can consume an entire company. Even when the company is exonerated, tremendous damage is done. The investigation becomes the tail that wags the dog, fingers are pointed over who is at fault, employee morale declines, and performance suffers. Remember the legal battle that ensued when the rock band Queen accused hip-hop star Vanilla Ice of copying the bass line from the song “*Under Pressure*” in “*Ice Ice Baby*”? Think of it this way: By using **I.C.E.**, or **investigations, compliance, and ethics**, programs proactively and positively, you’ll relieve your company of being “under pressure” by avoiding or being prepared to respond to a federal investigation.

Approaching investigations, compliance, and ethics in a holistic manner prevents policies from being reactionary and, in fact, provides an opportunity for growth. By implementing the I.C.E. approach to corporate governance, letting ethics or *ethos* drive your culture rather than corporate catastrophes, you will stop the tail from wagging the dog. This in turn will elevate your company to a position that maintains integrity and prevents misconduct or immediately exposes the rogue employee engaged in misconduct. Thus, internal moral and external reputation can be enhanced by a strong I.C.E. program.

The I.C.E. Method’s purpose is to empower all executives, but particularly General Counsels and Chief Compliance and Ethics Officers, as they lead others in their company to combat possible fraud, waste, and abuse.

The I.C.E. Method offers a holistic approach to corporate governance that views compliance and ethics programs, and the tools such programs utilize like internal investigations and internal audits, as an opportunity to lean in to vibrant corporate culture. Too often, compliance is just a cumbersome function that the rest of the company has to tolerate.

Deployed properly, I.C.E. can expose opportunities for better performance, and better performance is a valuable commodity in any industry.

This article will highlight some of the current and persistent enforcement trends relating to I.C.E., including the False Claims Act (FCA), the Foreign Corrupt Practices Act (FCPA), and the Consumer Financial Protection Act (CFPA). These laws are broadly applicable. The I.C.E. Method is particularly relevant as the Department of Justice (DOJ) continues to focus on Corporate Compliance. On February 8, 2017, the DOJ released its new “Evaluation of Corporate Compliance Programs” addressing key topics that the DOJ Fraud Section considers when evaluating programs during a possible investigation. All professionals, from the banking industry to higher education, can glean insight from their application in case law. The thematic overlap between each area of I.C.E. is evident and reflects the federal government’s preference for an integrated approach to corporate governance that is based on the symbiotic relationship between investigations, compliance, and ethics.

II. The I.C.E. Method

Drafting corporate governance documents and policies is only the first step. The real work and the real effects are achieved when those policies are implemented by leveraging the words of those documents consistently and impartially to create a culture where good conduct is valued and rewarded. A marginally effective code of conduct can utter the right words to set the right tone at the top. But for the tone at the top to become ubiquitous, an opening letter in the Code of Conduct from the CEO just gets the ball rolling. **Everyone — the Board of Directors, Corporate Executives, General Counsel, Chief Compliance and Ethics Officer, Human Resources, Internal Auditors, Business Managers, and Government Affairs Professionals — must embrace and operationalize that tone.**

Every employee needs to understand that ethical conduct is good business. When good conduct is rewarded and misconduct is discouraged by compensation and performance measures, employees will seek to integrate ethical behavior in carrying out their duties, whether their particular duty is putting a rivet in the right place in the right way or representing the company to Congress seeking to achieve the company’s public policy objectives. For your company to truly succeed, key employees and line employees must know the ethical obligations applicable to your company, operationalize your compliance program, and learn from every investigation – whether internal or external. **The best way to implement I.C.E. is to build on what works in your culture.** Employees will embrace programmatic and procedural upgrades that seem familiar and play to existing strengths. Performance expectations, policies, and procedures that are understandable and backed by practical management will deliver results. Consult employees at all levels and request suggestions for internal improvements.

III. Enforcement Trends — Investigations

Companies should not assume that federal investigations will decrease under the new presidential administration. A business-oriented administration led by former corporate executives will leverage federal law to reduce fraud, waste, and abuse.

Certain general principles continue to hold water, regardless of the shift in federal government priorities. For example, the federal government will continue to investigate and hold your company responsible not just for its conduct but for corrupt practices by vendors in your company's supply chain. As corporations have become more compliant, the federal government has shifted its attention to the conduct of vendors and joint venture partners, particularly outside the United States.

The [SEC emphasized](#) the importance of monitoring and vetting all members of the supply chain when it charged Alcoa Inc. with FCPA violations in 2014. In [United States v. Alcoa World Alumina LLC](#), the global aluminum production company's subsidiary hired a consultant for Middle Eastern business who bribed Bahraini officials.¹ The Co-Director of the SEC Enforcement Division, George Canellos, stated, "It is critical that companies assess their supply chains and determine that their business relationships have legitimate purposes."² Extending your company's compliance program to its supply chain will prove invaluable to avoiding violations. Additionally, and more systemically, these programs have the ability to shape companywide ethics and ethos.

Due diligence, hotline response and internal investigations should be tailored to ensure that your company does not initiate relationships with problematic vendors or joint venture partners and that if a vendor or partner engages in misconduct it is quickly discovered. It is important for your General Counsel to oversee the investigation process to ensure preservation of the attorney-client privilege.

a. Attorney-Client Privilege: The KBR Case

The attorney-client privilege can protect documents developed in an internal investigation by non-attorney investigators, even when a disclosure has been made subject to reporting requirements. In *In re Kellogg Brown and Root, Inc.*, the D.C. Circuit Court of Appeals held that KBR was not required to produce in discovery reports from an internal investigation on the grounds that they were protected by the attorney-client privilege.³ The court reasoned that because the documents involved communications from an investigator acting at the direction of in-house counsel, the investigator "effectively step[ped] into the shoes" of the in-house counsel.

The district court granted the relator's motion, concluding that the privilege did not apply in the first place to the documents at issue, because KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."⁴ The D.C. Circuit held that KBR's assertion of the privilege was "materially indistinguishable" from the assertion of privilege upheld in *Upjohn*.⁵ The D.C. Circuit vacated the district court's discovery order, finding that, as in *Upjohn*, KBR initiated the internal investigation to gather facts and ensure compliance with the law after being informed of alleged misconduct.

In re Kellogg Brown and Root, Inc. emphasized that the attorney-client privilege was available to protect internal investigation materials because a significant purpose of the internal investigation was to obtain legal advice on alleged corporate misconduct. This case makes it clear that General Counsel may work with and even delegate investigatory tasks to non-attorneys during an internal investigation, but General Counsel must oversee the investigatory process so that it is conducted with the ultimate objective of obtaining legal advice. In addition, counsel must issue an *Upjohn* warning at the outset of the investigation. The *Upjohn* warning informs employees and interviewees that they are not personally represented by company counsel and provides notice that the internal investigation has legal implications despite the involvement of non-attorney investigators. These warnings also typically explain that the company may choose to share the content of the interview with others, including the government. This case, however, is a reminder of the need to approach internal investigations cautiously and in a manner to maximize protection of the attorney-client privilege.

b. Prosecution of Individuals: Yates Memo

In 2015, Deputy Attorney General Sally Yates issued a guidance memorandum, the "[Yates Memo](#)," directing DOJ attorneys to prioritize criminal and civil sanctions against individuals involved in corporate wrongdoing. The memo states specifically that corporations will not receive credit for cooperation unless the corporation shares with DOJ *everything* it knows about individual misconduct.⁶ The Yates Memo calls for this type of enforcement at the individual level in an attempt to force changes regarding corporate misconduct, deter illegal activity, and promote confidence in the U.S.

¹United States v. Alcoa World Alumina LLC, Criminal Case No. 14-7 (W.D. Pa. 2014) (Plea Agreement).

²SEC Press Release, SEC Charges Alcoa with FCPA Violations (Jan. 9, 2014). For more information, see <https://www.justice.gov/criminal-fraud/case/united-states-v-alcoa-world-alumina-llc-court-docket-number-14-cr-00007-dwa>.

³In re Kellogg Brown and Root, Inc., 796 F.3d 137 (D.C. Cir. 2015).

⁴United States ex rel. Barko v. Halliburton Co., 37 F. Supp. 3d 1, 5 (D.D.C. 2014).

⁵In re Kellogg Brown and Root, Inc., 756 F.3d 754, 757 (D.C. Cir. 2014).

⁶Memorandum from Deputy Attorney General Sally Quillian Yates on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015).

justice system. The Yates Memo provides DOJ attorneys with six steps for pursuing individuals involved in corporate wrongdoing:

(1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

Obviously, the Yates Memo has far-reaching implications for every internal investigation of systemic misconduct. Counsel now needs to be involved early to consider privilege issues and whether individual employees need their own counsel.

While the new administration may or may not walk back the Yates Memo, Assistant United States Attorneys (AUSAs) around the country widely concur with its principles and likely will continue to seek information on individual misconduct in order for a company to win cooperation credit.

IV. Enforcement Trends — Compliance

The DOJ's overall objective in enforcing the FCPA is to reduce the corrosive effects of corruption on private entities and public institutions. FCPA compliance, even if brought about through an enforcement proceeding, can increase a company's potential for growth and positive change. **When a Corporate Compliance Program is implemented on the heels of an investigation, it can be limited to the nature of the investigation and may contain defensive policies. Corporate psychologist and co-founder of the Johnson & Johnson Human Performance Institute, Dr. James Loehr, wrote, "We tend to thrive when we see opportunities for growth, not when we are in a defensive mode."**⁷ Drafting and implementing a Corporate Compliance Program during business-as-usual periods frees the policy from the pressures and constraints of reacting to a federal investigation. It creates an opportunity for growth based on your company's long-term business objectives and its unique ethos.

a. Elements of a Corporate Compliance Program

The U.S. Sentencing Guidelines set forth the essential elements for a corporation to receive credit for its compliance program, which at its core must "exercise due diligence to prevent and detect criminal conduct."⁸ The DOJ has boiled down those elements in recent Deferred Prosecution Agreements to say that an effective Corporate Compliance Program will include: (i) risk assessment; (ii) commitment from senior leadership; (iii) clear and visible written policies and procedures, ethics policy, and internal controls applicable to individuals at all levels of the company; (iv) compliance infrastructure, enforcement mechanisms, and disciplinary guidelines; (v) effective communication and training on policies, standards, and procedures; (vi) oversight, independent monitoring, and auditing; and (vii) periodic review and testing.

b. Duty to Disclose: Escobar

In 2016, the U.S. Supreme Court set forth a new standard of proof for implied certification liability under the False Claims Act and, in doing so, emphasized the importance of compliance monitoring and periodic review. In [Universal Health Services v. Escobar](#), the Court held that a knowing failure to disclose a violation of material statutory, regulatory, or contractual requirement pursuant to a government contract can create liability under the False Claims Act.⁹ The requirement must be material to the government's decision to pay, but it need not be an express condition of payment. "Minor or insubstantial" instances of noncompliance will not give rise to liability under the False Claims Act. To impose liability under the implied certification theory, the claim for payment must make "specific representations about the goods or services provided," and the representations must constitute "misleading half-truths." **This case shows that internal compliance monitoring and periodic review must be a priority.** It is important to cross-check invoice templates that reference statutes, regulations, or contracts against the practices to which those references relate.

c. Tone at the Top

In the September/October 2013 issue of the Society of Corporate Compliance and Ethics' magazine, then-U.S. Attorney Loretta Lynch discussed tone at the top and the well-known [Morgan Stanley](#) so-called declination case.

The tone at the top truly sets the parameters for whether one has an effective or ineffective compliance program. And by effective, I don't mean a program in a company where there is never any wrongdoing, because that

⁷Jim Loehr, *The Only Way to Win: How Building Character Drives Higher Achievement and Greater Fulfillment in Business and Life* (2012).

⁸U.S.S.G. §8B.2.1(a) (2010).

⁹*Universal Health Services v. Escobar*, 136 S. Ct. 1989 (2016).

company does not exist. If there is one message I'd like to leave with corporate America, it is that the government actually does understand that things can and will go wrong, even where there is a strong compliance program. Every company develops issues. It's how you deal with them that defines your corporate culture and informs me if you are serious about fixing the problem and preventing it from recurring going forward.¹⁰

...[W]hat set Morgan Stanley apart was that, after considering all the available facts and circumstances, the government concluded that Morgan Stanley was a company that had done all that it could. It had a compliance program specifically tailored to its business risks, with commitment to compliance from the very top of the company, that itself did not tolerate wrongdoing.¹⁰

It goes without saying that the Board of Directors, Executive Management, and the Chief Compliance Officer set the corporate governance tone. However, the way in which that tone resonates throughout all levels of the company will impact your company's ability to work with federal investigators, instead of reacting to them.¹⁰

V. Ethics — Values, Not Rules

The companies widely recognized as having top-tier compliance programs implement a values-based approach, as opposed to an overly rules-based approach, thereby creating a culture where employees evaluate ethical dilemma through a lens of whether the conduct is honest and serves the best interest of the company, their fellow employees, its customers, and the government.¹¹ **Tony West, Executive Vice President of Government Affairs and General Counsel at PepsiCo, posits that sustainable ethical culture is at the core of financial returns over time. In an interview at Ethisphere's 8th Annual Global Ethics Summit, West identified the importance of a culture of integrity in attracting young talent, and in earning and maintaining the trust of the "societies and communities in which [companies] operate." Communities award that trust to companies visibly founded upon "a core of sustainable, ethical business practices."** Thus, it is no wonder PepsiCo was named one of the World's Most Ethical Companies for its 10th straight year. Elsewhere, West points out this sustainable ethical culture consists of a set of values, not a set of rules. In this regard, sustainable ethical culture is a form of *ethos*.

a. Ethos – Beyond the Code of Conduct and Professional Ethics

The company's code of conduct and the external codes of conduct established by law and professional licensing organizations will state specific ethical standards. An ethical duty can be articulated. But not every action can be anticipated. Overly specific codes too often are observed in the breach – "Well, it didn't say I couldn't do that." A company's ethos extends beyond its code of conduct and its employees' professional requirements.

Ethos encompasses ethics, compliance, investigations, corporate culture, shareholder outreach, litigation strategy, the body of employee policies, representations to the government, public statements, client service or product quality, and community involvement. Ethos does not lend itself to precise language; however, it is readily felt by those within the company and is easily discernible to those outside. Ethos is most closely related to ethics, yet it permeates all elements of I.C.E. Ethos is manifested within your company through interactions among employees, between management and employees, and in the internal response to employee and management requests and concerns.

b. Importance of Ethos

A company that prioritizes the creation of a shared ethos experiences positive effects in areas both readily quantifiable and not. Dr. James Loehr has consistently shown that a company's ethos and the character of its employees have a measurable impact on a company's business objectives and on its financial performance. In addition to business and financial goals, ethos impacts the stability of your company. **Loose ethics and deficient ethos foment whistleblowers and cause talented employees to leave the company.** If employees, officers, or executives are not given a way to express concerns internally, they will ventilate concerns externally. Some may report to an industry-specific enforcement entity or the DOJ of their own volition. Others may disclose the concern and supporting materials during a federal investigation. Additionally, ethics and ethos determine how robust your company's compliance program is and how diligently it is implemented. That in turn can affect the gravity of a federal investigation, or potentially, whether the federal government decides to investigate in the first instance. During an investigation, ethics and ethos become evident to the federal government through onsite visits and witness interactions.

Companies should remain aware that federal agencies with civil penalty authority will continue to use that authority to issue multimillion-dollar fines against corporations for the illegal and unethical acts of their employees. **Although the future of the Dodd-Frank Wall Street Reform and Consumer Protection Act is uncertain given the new administration and Congress, it is noteworthy that the Consumer Financial Protection Bureau (CFPB) has fined corporations for violating Dodd-Frank because of unfair, deceptive, or abusive acts or practices and**

¹⁰Society of Corporate Compliance and Ethics' Magazine, Compliance & Ethics Professional, In the Spotlight: Loretta Lynch (Sept./Oct 2013) (emphasis added) available at <https://www.justice.gov/sites/default/files/usao-edny/legacy/2015/04/06/cep-2013-09-turteltaub-lynch.pdf>.

¹¹Additional Ethical Company Honorees: Johnson Controls, Inc.; International Paper Company; MasterCard; Oshkosh Corporation <http://worldsmoethicalcompanies.ethisphere.com/honorees/>.

ordered corporations to hire independent consultants to, among other things, assess a company's policies and procedures for addressing possible violations and consumer complaints. This continued potential regulatory oversight underscores the importance of allowing good corporate ethos to permeate the entire organization.

VI. Conclusion

The way your company manages investigations, compliance, and ethics can all be represented in your corporate policies, and each can be advanced through internal procedures that are applied in a consistent and even-handed way. But the *ethos* of your culture ultimately creates a compliant environment.

The following action items are initial steps that can help you identify opportunities for improvement: compare internal policies with an eye for redundancy or outdated provisions; review employee training manuals and employee handbooks and identify areas to introduce and emphasize aspects of the I.C.E. concept; provide character training and development workshops for employees; survey employees anonymously on the effectiveness of current policies and procedures; introduce the I.C.E. concept at a board meeting and request input from the directors; work with a law firm to gauge workplace ethos; and, really, to listen to complaints – whether they come from the hotline, are reported to a manager or appear in the media (including social media).

In spite of uncertainties in the political realm, certain general policies will likely still apply to federal investigations of companies. **A Corporate Compliance Program that recognizes ethical behavior will make your company more productive, not less productive, and will in turn emphasize company growth and individual responsibility for ethical behavior.** Ethics and ethos, while perhaps the most challenging to implement and control, is the internal thread—the DNA of a company—connecting day-to-day employee interactions with executive management's tone. As such, ethics and ethos are evidenced by corporate management over time. Each of these aspects of corporate management acts upon and influences the other. By integrating the primary three functions, Investigations, Compliance and Ethics, any company will be able to create powerful and transformative governance. New opportunities for growth emerge when a company identifies and properly implements the relationship between these areas. Think *I.C.E. I.C.E. Baby*, and feel the pressure lift.

About the Author

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