# Compliance & Ethics Professional

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## A global compliance career

### an interview with Sally March

Director, Drummond March & Company, London

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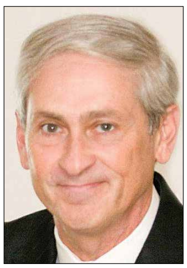
by Jeffrey M. Kaplan

# The velocity and trajectory of C&E program law

There is, of course, a vast amount of law that relates to compliance and ethics (C&E) programs, but the core of such law consists of cases, rules, and guidance documents that—through the "stick" of harsh enforcement and the "carrot" of leniency—encourage companies to implement effective C&E programs, for example, the Federal Sentencing Guidelines for Organizations (the Guidelines) and their progeny.


Kaplan

This area of law tends to develop slowly. For several years after Guidelines were implemented in 1991, very few "mega fines" were imposed. But a look at the "top ten" list of federal corporate criminal fines at the end of last year[1] shows a striking upward trajectory. Indeed, while only one of these fines was from the entire decade of the 1990s, five were from 2012 alone!

There is every reason to believe that this trend will continue. Fines increasingly provide a non-trivial source of revenue for revenue-hungry governments. This can be seen as a "demand side" approach to corporate crime enforcement, and it is an approach that we should expect to see spread from the U.S. to other revenue-hungry governments.

Moreover, this trend toward more frequent imposition of very large fines could impact other areas of C&E program law. One of these concerns the fiduciary duty of directors and officers of companies that have had compliance disasters. The foundational case here (at least in the U.S.) is, of course, the Delaware Chancery Court's 1996 *Caremark* opinion which noted "the potential impact of the [Guidelines] on any business organization" and further stated that "[a]ny rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions that it offers."[2]

At the time *Caremark* was decided, the Guidelines were still fairly new and their impact could indeed be described in terms of what was "potential." Today, however, massive fines are no longer a mere possibility and (at least based on anecdotal evidence) directors are apparently being sued more often than before. Additionally, given the new era of the mega fine, we could also see more lawsuits against executives for allegedly making false claims that their companies have effective C&E efforts where shareholders suffer as the result of such deceptions.[3] We may also see more publicly disclosed cases where organizations received credit for effective "pre-existing" C&E programs, as in the Morgan Stanley enforcement decision of last year[4] (if for no other reason than to justify the imposition harsh fines when companies don't have such programs). ✳

*Jeffrey Kaplan (jkaplan@kaplanwalker.com) is a Partner with Kaplan and Walker, LLP in Princeton, NJ.*

1. This list can be found at http://conflictofinterestblog.com/2013/01/a-record-year-for-corporate-criminal-fines.html.
2. *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).
3. *Richman v. Goldman Sachs Group, Inc.*, WL 2362539 (S.D.N.Y. June 21, 2012).
4. See Department of Justice press release: "Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA." April 25, 2013. Available at http://www.justice.gov/opa/pr/2012/April/12-crm-534.html