



**COMPLIANCE  
SYSTEMS**  
LEGAL GROUP

# Leveraging Data Analytics

Skate to Where the Puck Is Going

Jay Cohen

Win Swenson

Scott Avelino

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# Agenda

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- CEFLI's Antitrust Policy.
- Introduction of Webinar Faculty.
- Presentation.
- Q & A.
- Administrative Reminders.

# Webinar Faculty

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**Scott Avelino**  
*Principal*  
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**Jay Cohen**  
*Senior Advisor*  
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**Win Swenson**  
*Partner*  
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# Compliance Programs and The Law

## Corporations: “No Soul to Damn, No Body to Kick”

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- Before 1991, which of these was not an actually imposed corporate penalty?
  1. Corporation sentenced to three-year term of “imprisonment.”
  2. Fine less than the cost of complying with the law.
  3. Executives ordered to work unpaid for a charity for one year.
  4. Corporation ordered to endow a chair in ethics at a university.
  5. All are real.

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# US Sentencing Commission Mandate: Address This Issue

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- Key Facet of US law:
  - Corporations are “vicariously liable”
  - They “stand in the shoes” of their employees who engage in misconduct

## This Means: Very Different Types of Companies Can Be Held Liable

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**WORSE**

**BETTER**



# Federal Sentencing Guidelines – An “Effective Compliance and Ethics Program”

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- Risk assessment for compliance/ethics risks
- Risk-based standards, procedures and controls
- Senior management role and Board oversight
- Chief Ethics and Compliance Officer
- Care in delegating authority (only to ethical employees)
- Ethics/Compliance communications and training based on roles/risks
- Internal reporting and advice systems – including a helpline
- Auditing, evaluation
- Discipline and incentives that align with E/C standards
- Response – investigation, remediation, and disclosure

## Federal Sentencing Guidelines – How much Difference In a Fine Can They Make?

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- Two companies, same offense, but one with mitigating factors (compliance program, cooperation, no senior personnel) and the other without:
  - a) 4 to 1
  - b) 12 to 1
  - c) 40 to 1
  - d) 80 to 1

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## The Reaction

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- House Judiciary Committee Chair and Ranking member: **“Don’t do it.”**
- DOJ: **“If you do it, we will likely go to Congress to stop it.”**
- Business Roundtable: **“Make it optional – so courts can ignore.”**

## DOJ's Commitment to Compliance Grows

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- 2017, 2019, 2020: DOJ issues *Evaluation of Corporate Compliance Programs*.

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- 2017, 2019, 2020: DOJ issues *Evaluation of Corporate Compliance Programs*.
- 2020: Antitrust Division:
  - Adopts its own *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*.

## DOJ Policy Is Now Straightforward:

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- Companies must present compliance programs in all corporate cases
  - Good Program = No Prosecution
  - Deferred Prosecution Agreements
    - Compliance Conditions
    - Monitor
  - Do It Yourself, or We'll Make You do it later.

## Director and Officer Liability: Directors Have A Duty

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The Delaware Chancery Court in *Caremark* (1991):

- Directors have a fiduciary duty to ensure systems to provide “timely, accurate information sufficient to allow ... informed judgments concerning ... the corporation’s compliance with law....”
- Any “rational director” would take account of the benefits of having a compliance program set forth in the recently promulgated “[Federal Sentencing Guidelines](#).”

## More Recent Cases

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- *Stone v. Ritter* in (2006): Directors owe a duty to act in good faith to ensure existence of a compliance program.
- *Marchand v. Barnhill* (2019): The “board failed to implement any system to monitor Blue Bell’s ... compliance.”
- *In re Clovis Oncology, Inc. Derivative Litigation* (2019): “The “board ignored red flags of non-compliance.”

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- *In re Clovis Oncology, Inc. Derivative Litigation* (2019): “The “board ignored red flags of non-compliance.”
- NOTE: Will plaintiffs try similar breach of fiduciary duty claims against directors of mutual companies? Stay tuned.

# The Idea That Compliance Should Count Catches Fire

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- Explosion of whistleblower protection laws – Dodd Frank, SOX, state laws
- Explosion of compliance program defense or mitigation internationally – from UK Bribery Act to new laws Europe, Asia and even places like Russia.
- Compliance program upheld as a corporate defense in sexual harassment lawsuits (see S. Ct. cases in *Burlington Industries* and *Faragher* and progeny).
- Compliance performance increasingly becoming a factor in executive compensation and clawbacks.
- ISO 19600 standard promulgated for compliance management.

# Insurance Regulators Increasingly Have Similar Expectations

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- SEC Division of Examinations 2021 Priorities – “It is important to emphasize that compliance programs, CCOs and other compliance staff play critically important roles at firms. Indeed, culture and tone from the top are key.”
  
- NY DFS –
  - “Federalization” of leadership and staff.
  - Superintendent Lacewell – “The boards and senior management of every financial institution must foster a strong culture of compliance. Compliance officers need to be independent – fully supported and properly resourced.”
  
- NAIC – Corporate Governance Annual Disclosure Model Act:
  - Code of ethics.
  - Prompt internal reporting of violations to “an appropriate person.”
  - Accountability for adherence to the Code.

## The Next Chapter in This Historical Trend: Expectation of Better Programs

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While the number of legal contexts in which compliance programs matter has been exploding, it's the constant raising of the bar for compliance programs that matters most. Expectations are going up.

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- The DOJ Evaluation Criteria – a story of listen, learn and expect. Three iterations so far.
- Antitrust Division adopts these heightened criteria.
- Federal Sentencing Guidelines have been updated twice to reflect best practice concepts (2004, 2010).
- Plaintiffs' Whistleblower firms are watching and learning too – looking to exploit gaps against best practices.
- EEOC new guidance on retaliation sees it as far more nuanced than blatant retaliation. (See <https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm>)

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**Skate To Where The Puck Is Going,  
Not Where It Is:  
Evolution of Data Analytics**

# Why Data Matters

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- We've invested in establishing a compliance program.
- How do we know whether it's working?

# Forms of Measurement

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## ■ Processes

- Training completion percentages
- Number of hotline calls (including nature, source, etc.)
- Investigations performed (e.g., opened, closed, time to completion)

## ■ Outcomes

- Number of compliance violations
- Number of negative positive/negative audit findings
- Percentage of favorable/unfavorable survey results

# Process vs. Outcomes

- Athletes do not win medals for their hours of training, but for their performance at races
- Marketing departments are not credited for how many mailers they send, but on the amount of incremental sales that result
- Recovering from addiction is not measured by the number of therapy sessions, but by the continuity of sobriety

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## INSIGHT: Measuring Process Versus Outcome

Aug. 28, 2018, 9:36 AM Listen Print Email

Former Justice Department compliance counsel Hui Chen recommends an outcome-based approach to measuring compliance program efficacy.

 **Hui Chen**  
Hui Chen, Esq.

**Companies**

- [Pfizer Inc](#)
- [Microsoft Corp](#)

**Topics**

- [patient outcomes](#)
- [medical records](#)
- [patient safety](#)
- [criminal fraud](#)
- [surgical services](#)
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A few years ago, a close family member was to have a major surgery. In our search for surgeons and hospitals, one important factor we considered was safety records. The Leapfrog Group, a U.S. national nonprofit organization focused on measuring hospitals' patient safety record, compiles data from nearly 2,000 hospitals. Hospitals are graded on their safety performance based on a composite of metrics, for both process and outcome. Process measurements relate to the efforts hospitals make to enhance safety: handwashing practices, systems for preventing medication mistakes, communication among medical staff, etc. Outcome measures actual safety events: infections, surgical errors, patient falls, etc. As family members of a patient, we realized that outcome was much more important to us than process: We were far more concerned about the risk of infection than about how the hospital gets its staff to wash their hands.

The focus on outcome is what typically drives performance: Athletes do not win medals for their hours of training, but for their performance at races; marketing departments are not credited for how many mailers they send, but on the amount of incremental sales increase resulting from the campaigns; recovery from addiction is not measured by the number of therapy sessions, but by the continuity of sobriety.

# Traditional Auditing to Continuous Monitoring

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- Manual → Digital
- Sample → All transactions
- Periodic → Continuous
- In-Person → Remote

# Case Study: AB InBev (2016)

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September 2016

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[BUSINESS](#)

### SEC Says Anheuser-Busch InBev Indian Unit Made Improper Payments to Officials

SEC says joint venture used third-party sales promoters to make improper payments

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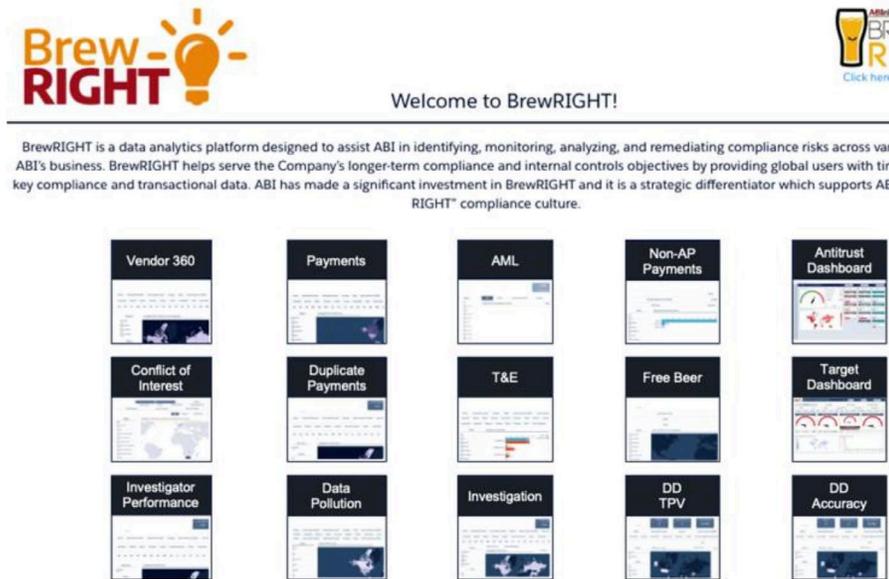
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RISK & COMPLIANCE JOURNAL

### Anheuser-Busch InBev's BrewRight: How It Works

Analytics platform lets employees spot risks tied to corruption and money laundering, catch duplicate payments and track beer giveaways



A screenshot from the BrewRight platform.

PHOTO: ANHEUSER-BUSCH INBEV SA

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[RISK & COMPLIANCE JOURNAL](#)

## Corporate Compliance Programs Hit Refresh With Data-Analytics Tools

Authorities show leniency to companies with data-driven anticorruption systems

## Other Examples

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### ■ Microsoft

- “A Microsoft subsidiary in Hungary last year agreed to pay \$25 million after probes by the Justice Department and U.S. Securities and Exchange Commission found it had used discounts on software licenses to fund bribes intended for foreign officials.”
- “During the course of the investigations, the software company began building a cutting-edge compliance analytics system that allows Microsoft to flag risky partners and deals. Authorities acknowledged the company’s expanded use of data analytics and transaction monitoring helped the subsidiary secure a lower fine and a more lenient settlement agreement.”

# Other Examples

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## ■ Alexion

- “Alexion eventually chose a product from Lextegrity Inc., a startup founded by a former Pfizer Inc. compliance officer, that allows it to marry its compliance policies and procedures around health-care professionals with streamlined approval and work flow... The software creates a cloud-based repository for some of Alexion’s most high-value compliance data.”

### Alexion’s Remedial Efforts and Cooperation

33. In determining to accept the Offer, the Commission considered remedial acts undertaken by Alexion and cooperation afforded to the Commission staff.

34. Alexion’s cooperation included providing regular briefings to Commission staff regarding the facts developed in its internal investigation in multiple countries and the forensic accounting review that Alexion undertook, and identifying and providing translations of key documents.

35. Alexion’s remediation included strengthening and expanding its global compliance organization; enhancing its policies and procedures regarding payments to third parties, including the implementation of a centralized system to track and monitor third-party payments; revamping its HCP engagement process and oversight; enhancing its internal audit function; conducting proactive compliance market reviews; and improving training provided to employees regarding anti-corruption.

## Other Examples

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### ■ Albemarle

- “Albemarle tapped its own information-technology resources and a data scientist to create a bespoke data-analytics program... The company uses third-party software to monitor for policy violations in employees’ travel and entertainment expense reports and has patched together a series of dashboards using data-visualization software to incorporate data from systems monitoring things such as third-party risks and whistleblower tips.”

## June 2020: DOJ Evaluation Criteria Focus On Data Analytics

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- Policies searchable and searches “tracked” for insight.
- Risk assessment not a “snapshot” but relies on the flow of “operational data and information across functions.”
- Data Resources and Access – “Do compliance and control personnel have sufficient ... access to ... data to allow for ... effective monitoring and/or testing of policies, controls and transactions?”

## Regulators Expect To See Data Analytics In Our Compliance Programs

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- Deputy U.S. Assistant Attorney General, September 2019 – “We are now approaching enforcement around a data-driven approach” and “our prosecutors are going to inquire about what the company has done to analyze or track its own data resources.”
  
- NY DFS Cyber Insurance Risk Framework, issued in 2021, shall include, “rigorously measuring insured risk by using a data-driven approach to assess potential gaps and comparing this information with analysis of past claims to identify risk.”
  
- FINRA –
  - September 2018 – Technology-Based Innovations for Regulatory Compliance (“RegTech”) in the Securities Industry.
  
  - June 2020 – Artificial Intelligence (AI) in the Securities Industry.

# If You Do Not Use Data Analytics, Your Regulators Will!

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- SEC has “vastly increased use of data and data analytics to detect and investigate misconduct.”
  - Market manipulation
  - Earnings management
  - Protection of retail investors – SEC “will also conduct enhanced transaction testing.”
  
- FINRA: Board of Governors just approved “an advanced analytics strategic initiative to enhance the tools and technologies [that] will allow FINRA to identify potential misconduct more quickly.”
  
- NAIC: “Real-time monitoring would replace the retroactive nature of current regulation. Sensing technologies, predictive analytics, and other tools will enable rapid regulatory action.”
  - Market conduct
  - Consumer Protection
  - Solvency
  - Rates and Forms - SERFF

# Key Steps

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## ■ Identify risks to measure

- High value
- Very specific
- Available data
- Start small and accept imperfection

## ■ Identify and process data

- Identify functional partners (IT, Finance, HR)
- Identify data sources
- Explore options to leverage existing data collection
- Explore options to automate data processes
- Harmonize data

## Key Steps (cont'd)

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- Determine use cases / audiences
  
- Determine packaging / visualization / presentation needs
  
- Apply analytics
  - Risk assessment / risk scoring
  - Investigations
  - Audits
  - Continuous Monitoring

# One Insurance Company's Quest to Follow the Puck

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This company reorganized every aspect of its compliance program and reporting around risks, as well as activities:

## Risks

Consumer Conduct  
Privacy  
Corruption  
Supply Chain  
Culture and Ethics  
Regulatory  
Expansions and Investments  
Financial Crime

## Four Questions

What are our biggest compliance risks?  
What are the key risk drivers?  
How do we manage them?  
How are we doing?

## The Same Approach Was Applied to Each of These Risks

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1. Identification/Assessment of the risk and its mitigating controls.
2. Classification and recording of risks and controls in a consistent format.
- 3. Key Risk Indicators (KRIs) – what shows how well (or poorly) each risk is controlled.**
- 4. Data and analytics to track performance against these KRIs – how will we know?**
5. Monitoring and oversight plan for each risk.
6. Reporting.

# This Remains An Ongoing Process

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## Challenges

Business Buy-in

Staff Experience and Expertise

Limited support to develop new Compliance-only data

Minimal budget and IT resources for Compliance-only tools

“Shoot the puck”

## Response

Worked with Audit Committee Chair

Leveraged business Data Analytics team

Business data and analytics  
“The Customer Experience”  
Loss Ratios and the Three Cs – Claims, Cancellations, Complaints

Looked to partners in IA and ERM - GRC and other shared resources

Small wins and affordable improvements  
Eliminate silos, inconsistencies and duplication  
Control Sharefiles, spreadsheets, Access  
Prioritize

## Conclusion - This Is Where The Puck Is Going

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- Chief U.S. Ethics and Compliance Officer at Walmart: “You need attorneys, auditors, data scientists, folks that understand both HR and the business.”
- WSJ, Monday, February 22, 2021 – Bank of New York Mellon, working with Alphabet Inc., has developed machine-learning technology to predict when Treasury market trades will fail to settle, providing a warning and chance to correct.
- Delaware Chancery Court, December 31, 2020 - Failure is better than inaction, “The mere implementation of an unsuccessful program cannot support liability...Implementing a particular fraud reduction software demonstrates attention to risk, rather than disregard of it.”

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&

A

# Thank You

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## CEFLI Reminders

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- Please monitor the **Events** page of **CEFLI.org** for upcoming events.

## CEFLI Upcoming Webinars

- April 21: Market Conduct – Compliance Risks Revisited, Wolters Kluwer
- May 19: DOJ Guidance for Compliance Programs, Deloitte
- June 16: SEC Regulation Best Interest – The Future of Examinations, Faegre Drinker

## CEFLI Summit Meeting *(a virtual event via Webex)*

- April 6: The State Insurance Regulatory Perspective – A Discussion of Marketplace Compliance Challenges

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**Thank you for Joining Us Today!**