



Historical Perspective on the E&C Practice

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This overview of significant events in the recent history of ethics and compliance is offered in support of preparation for the LPEC certification exam and is not intended to be all inclusive.

The Era of Government Contracting Fraud

The current era of ethics and compliance can be said to have started with the era of government contracting fraud.

In 1975, a congressional sub-committee was investigating allegations of foreign bribery against two oil companies and two defense contractors. As a result of their work, the **US Foreign Corrupt Practices Act (FCPA)** was passed in 1977 and was the first effort by any nation to criminalize bribery of foreign officials to secure or retain business. It required companies to maintain adequate books, records and internal controls to prevent unlawful payments.

In the early 1980's, the defense industry was found to have been vastly overcharging the Pentagon for government purchases of equipment and hardware. President Reagan established the **Packard Commission** to investigate the abuses. In 1986, the Commission issued its report and recommendations, and significant changes were made in terms of the appropriations process and oversight. One recommendation of the commission was that defense contractors should adopt ethics programs.

The **Defense Industry Initiative (DII)** was voluntarily established as a nonpartisan and non-profit organization by defense industry contractors in 1986 to promote business ethics and conduct within the industry. The DII became a model for similar organizations in other industries.

An Effort to Expand Director Responsibility

In the mid-1990's, the shareholders of Caremark International alleged that the company's board of directors breached the duty of care in their failure to establish effective internal controls. In 1996, the Delaware Chancery Court issued what has come to be known as the **Caremark Doctrine or Decision**. The decision found that the directors had a *duty of care and loyalty* to maintain rigorous internal controls. The court also determined that directors may be held personally liable should the board fail to act in circumstances in which due attention would have prevented a loss.

The next significant event was the promulgation of **Chapter 8 of the Federal Sentencing Guidelines by the US Sentencing Commission** in 1992. The guidelines grew out of the Federal Sentencing Guidelines that were established in the mid-1980's to provide guidance for judges to use in determining sentences for criminal offenses. Chapter 8 represented an attempt to extend the same kind of consistency in penalties and sanctions to the corporate sector using a reward and punishment approach. Common criteria for robust and effective ethics and compliance programs were established with organizations encouraged to tailor programs to their business. The guidelines also put forth standards for directors and executives to take an active role in managing ethics and compliance programs and for promoting and demonstrating ethical culture. The guidelines have continued to evolve through amendments over the years.

Turbulent Times and the Changing Regulatory Environment

In the early 2000's, the finance and investment world was shaken by corporate fraud by companies such as Enron, Tyco and World Comm. As a result, congress passed the **Sarbanes-Oxley Act of 2002 (SOX)**. SOX mandated financial reporting transparency and corporate governance in public companies with intent to protect against financial fraud and mismanagement and held boards, corporate leadership and accounting firms accountable. It also mandated that companies establish a process for receiving anonymous complaints and provided for whistleblower protection.

In 2007, the subprime mortgage crisis and unregulated use of derivatives gave rise to a global financial meltdown that worsened in 2008. Congress passed the **Dodd-Frank Wall Street Reform and Consumer Protection Act** in 2010. The legislation targeted sectors of the financial system that were believed to have caused the 2008 financial crisis, including banks, mortgage lenders, and credit rating agencies and placed the regulation of the financial industry in the hands of the government. Dodd-Frank also strengthened the whistleblower program promulgated by SOX.

During the subsequent decade the criminal division of the Department of Justice has periodically issued guidance to its prosecutors related to evaluating the design, implementation and effective operation of ethics and compliance programs. **In 2017, the DOJ issued guidance** related to corporate compliance programs emphasizing the importance of behavior of senior and middle management and their support of the compliance program; structure and resources of the compliance programs; and suitability of the design, accessibility and integration of policies.

In **April 2019**, the DOJ directed prosecutors to consider whether the compliance program is well-designed (tailored to risks and having other foundational program elements); applied earnestly and in good faith; and works as intended and designed.

In **June 2020**, the DOJ issued guidance that focused on the importance of ensuring programs are adequately resourced and empowered; based on a model of continuous improvement; designed to include a deeply embedded risk assessment process; driven by a learning mindset; focused on third party risks; and reliant on a structured approach in mergers and acquisitions.

The Globalization of Ethics and Compliance

The **UK Bribery Act** of 2010 represents a continued evolution of global legislation to combat corruption and bribery. It criminalizes bribery, bribing of foreign government representatives, and failure by private companies to prevent corruption. It also makes it an offense to be bribed and includes near-universal jurisdiction, allowing for the prosecution of a company with links to the UK.

In 1999, the Organisation for Economic Development (OECD) issued the **Convention Against Bribery of Foreign Officials** (amended in 2009). The convention established legally binding standards to criminalize bribery of foreign public officials in international business transactions and provided for a host of related measures that make it effective. The Convention is significant because it was the first and only international anti-corruption instrument focused on the "supply-side" of the bribery transaction. In 2010 the OECD published the **Good Practice Guidance on Internal Controls, Ethics and Compliance**.

Although OECD guidance is aspirational and voluntary, it is broadly supported globally and is an important reflection of the internationalization of ethics and compliance standards.

The **International Organization for Standardization (ISO)** has published a number of standards that relate to various aspects of ethics and compliance program development and management, including such areas as compliance management, anti-bribery, and risk management.

ESG and the Future of our Practice

ESG stands for “Environmental, Social and Governance” and pertains to the impact a company has on its employees, customers, and the communities where it operates.

Environmental criteria consider how a company performs as a steward of nature. *Social criteria* examine how the company manages relationships with employees, suppliers, customers, and the communities where it operates. *Governance criteria* deals with a company’s leadership, executive pay, audits, internal controls, and shareholder rights.

ESG was originally a reflection of investor interests in influencing a company to make decisions more in alignment with the broader interests of the environment, society, and sound governance principles. Today the concept is continuing to evolve in the context of corporate purpose and a need for companies to develop and execute strategy in ways that resonate with their core purpose and the impact they have on the world. Ethics and compliance programs have shared interests with ESG and likely will play an important role as the movement continues to grow.

The graphic below depicts some examples of connectivity and overlap of ESG concerns and ethics and compliance risks.

ESG	Ethics & Compliance
Environmental: <ul style="list-style-type: none"> • Climate Change • Hazardous Waste • Sustainability 	<ul style="list-style-type: none"> • Carbon Emissions • By-product Disposal • Use of Protected Materials
Social: <ul style="list-style-type: none"> • Data Privacy • Discrimination • Human Rights 	<ul style="list-style-type: none"> • Protection of Personal Information • Equal Employment • Child Labor
Governance: <ul style="list-style-type: none"> • Fraud • Corruption / Bribery • Culture 	<ul style="list-style-type: none"> • Anti-money Laundering • Business Facilitation Payments • Business Ethics