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THE BENEFITS OF SUSTAINABILITY AND INTEGRATED REPORTING: AN INVESTIGATION OF ACCOUNTING MAJORS' PERCEPTIONS

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ABSTRACT

Companies of all sizes embrace sustainability in an effort to preserve resources for future generations while continuing to create value for current generations. Even though companies tend to publicize their sustainable efforts in promotional materials, in the U.S. and many other nations, formal reporting is generally not required and relatively few companies issue sustainability reports. This is beginning to change. Investor demand for comparable, relevant, and reliable sustainability information and the continuing development of global reporting guidelines motivate and support this trend. Currently, most companies that report on sustainability publish stand-alone reports. However, a trend toward integrating sustainability reporting with financial results is emerging and is supported by the International Integrated Reporting Council's (IIRC) efforts to develop a global integrated reporting framework. Both stand-alone and integrated sustainability reporting require the involvement of accounting professionals. Accounting majors, many of whom have grown up in an environment that strongly values ecologically, ethically, and socially responsible corporate behavior, represent the future accounting professionals.

This study investigates accounting majors' perceptions regarding sustainability and integrated reporting and focuses on the perceived benefits to multiple stakeholders, the scope and type of information companies should report, the reporting time frame, and the need for globally accepted reporting standards. The study finds that overall, accounting majors tend to support sustainability reporting of multiple performance indicators relating to environment and safety, employees and community, and corporate governance both in terms of current year and comparative information. Students tend to perceive sustainability reporting as more beneficial to large than to small and midsize companies. Students also tend to believe that high-quality sustainability reporting standards, mandatory reporting, and the adoption of an integrated reporting format will enhance annual reporting. The results from this study provide important insights into the perceptions of future accounting professionals, whose support will be necessary to assist companies in reporting useful comparable information about their comprehensive impact on people, the environment, as well as profit.

INTRODUCTION

During the past decade, a continually increasing number of entities have started formal reporting of their sustainability-related activities. These reports commonly are referred to as sustainability, sustainable development, corporate social responsibility (CSR), or environmental, social, and governance (ESG) reports. While some reports focus primarily on a company's environmental impact (sometimes referred to as "green reporting"), most sustainability reports also focus on social and corporate governance issues. Stakeholder demand for sustainability-related information, not regulatory requirements, appears to motivate this reporting trend.

The majority of companies that currently issue sustainability reports follow the guidelines provided by the Global Reporting Initiative (GRI), which allows for a choice among three reporting levels that differ with respect to the types of issues and the number of parameters – referred to as performance indicators - that must be reported. The GRI guidelines continue to evolve and the 4th generation of the guidelines was recently released (GRI, 2013). Although GRI guidelines can be applied globally across many different industries, other guidelines, some applicable to specific nations/regions or industries, exist as well. This makes inter-company comparability difficult.

Currently, most companies that formally report their sustainability activities issue stand-alone reports that are not integrated with their annual financial or 10-K statements. However, a movement toward combining sustainability reporting with companies' financial results is gaining momentum; this is referred to as "Integrated Reporting" (IR). Some companies, such as Nova Nordisk, Sony, and Hyundai Engineering, already issue integrated report. This movement is supported by the International Integrated Reporting Council's (IIRC) efforts to develop a globally applicable IR framework.

Sustainability and especially integrated reporting can be very useful to external stakeholders such as investors and customers, but it can also be extremely beneficial to internal users by enhancing the company's ability to effectively and efficiently achieve long-run goals. Relevant, reliable, comparable, and thus useful sustainability and integrated reporting require commitment by an organization's key personnel and by those responsible for the reporting process. While companies tend to rely on accounting professionals to support their sustainability reporting function, IR requires even stronger support from accounting professionals. Accounting professionals are more likely to be supportive if they understand the long-term benefits of high-quality and comparable sustainability and integrated reporting and believe that reporting sustainability information is important. In addition, consensus is necessary regarding the scope, type, and comprehensiveness of the information that will be beneficial to stakeholders to enable them to assess a company's comprehensive impact on the environment and on people and not just profit.

Accounting majors represent the future accounting professionals. Many of the current accounting majors have grown up in an environment that strongly values ecologically, ethically, and socially responsible corporate behavior. Their support is necessary to help continue to motivate the trend toward sustainability and integrated reporting and lead to a future in which organizations routinely report their comprehensive performance and their impact on profit, people and planet, also referred to as the "Triple Bottom Line."

This study investigates accounting majors' perceptions regarding sustainability and integrated reporting. The study focuses on the perceived benefits to multiple stakeholders, the expected scope and type of issues reported, the reporting time frame, and the need for high-quality global sustainability and integrated reporting standards.

The study finds that overall students majoring in accounting tend to support both sustainability and integrated reporting. In fact, assuming that a high-quality framework for integrated reporting is developed, the vast majority of the students participating in the study felt that companies should issue integrated, instead of stand-alone, reports and that this would enhance the value and comparability of annual reporting. The students also tended to perceive that reporting of multiple performance indicators relating to environment and safety, employees and community, and corporate governance both in terms of current year and comparative year information is important. Students tended to perceive that sustainability and integrated reporting were more beneficial for large than for small and midsize companies. This study provides important insights into the perception of future accounting professionals, whose support will tend to be critical to the success and usefulness of comprehensive and unbiased sustainability and integrated reporting.

BACKGROUND LITEREATURE

Sustainability-related concerns represent a global issue of long-standing nature. In 1987, the World Commission on Environment and Development (also referred to as the Brundtland Commission), formally defined sustainability development as a “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (United Nations, 1987, 37).

As the world population increases and the availability of natural resources decreases, concern for the preservation of resources accelerates. For example, according to the World Resource Institute, during the past decade, water use has increased twice as fast as the world population (World Resource Institute, 2011). To help alleviate the long-term global consequences associated with resource shortages, organizations of all types and sizes have embraced actions that help maximize value while minimizing their negative impact on the environment, the availability of natural resources, and thus on society. For instance, many organizations have implemented sustainability-related programs that reduce waste and harmful emissions, conserve energy, reduce the use of scarce resources, improve employee health and wellbeing, and support community projects. In fact, global investment in new clean energy rose from $50 billion in 2004, to $260 billion in 2011 (Bloomberg, 2012).

Current Regulatory Environment – Sustainability Reporting

The need to preserve natural resources for future generations represents a globally critical issue. Governmental and non-governmental entities address the related issues to varying degrees through rules, regulations, and guidelines. In many countries, governmental units have implemented sustainability-related requirements and programs such as setting maximum emission levels, providing funding for environmentally and socially beneficial programs, and requiring that organizations report their activities and results to regulatory agencies. Legal and regulatory guidelines and requirements pertaining to formal reporting of sustainability-related activities vary considerably among nations and may be set by governmental or non-governmental organizations. Reporting requirements for nations that are part the European Union typically are based on laws. For example, the revised Danish Financial Statements Act mandates that all large companies disclose CSR information; this has led to a significant increase in sustainability reporting in Denmark (KPMG et al., 2013). In some countries, such as South Africa, sustainability reporting is mandated by stock-market regulators (KPMG et al., 2013).

In the U.S. and in many other nations, sustainability reporting is primarily voluntary and unregulated. While some laws exist that require sustainability-related disclosures, they tend to address only specific issues and/or pertain to particular industries. U.S.-based governmental and non-governmental entities that currently address some aspect of sustainability/CSR reporting include the U.S. Securities and Exchange Commission (SEC), U.S. Congress, the Environmental Protection Agency (EPA), and the Forum for Sustainable and Responsible Investment (US SIF).

U.S. Regulation – Sustainability Reporting

During the past few decades, the SEC issued several rules and interpretations that address disclosure of environmental issues. For example, in the 1971, the SEC issued an interpretative release that encouraged companies to disclose the financial impact of environmental laws. The release, however, did not mandate such disclosures until the 1980s and focused primarily on the financial aspect of an organization's impact on people, the environment and the community.

SEC Regulation S-K, which public companies that report to the SEC must comply with, requires disclosures relating to environmental rules and regulations. Specifically, section 101, "Description of Business," states that: "Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries." (SEC, n.d. paragraph 229, item 101 (c) (1) (xii)). In addition, regulation S-K requires that SEC-reporting companies disclosure material environmentally-related legal actions (SEC, n.d., paragraph 229, item 103). Another SEC Rule that became effective for 2010 fiscal periods requires that companies disclose in their proxy statements information about risk management relating to the company's compensation and corporate governance (SEC, 2009). Thus, current SEC rules focus on disclosure of environmental-related expenditures, environmental-related risk such as litigation, and compensation and governance-related issues. Furthermore, SEC disclosure rules and regulations only pertain to SEC registered public companies.

Some rules and regulations pertain to specific industries. An important example is the Environmental Protection Agency's (EPA) requirement to disclose information about greenhouse gas emissions. The rule that was issued in 2009 and amended in 2011, applies to suppliers of fossil fuel and industrial gas, direct emitters of greenhouse gases, and manufacturers of heavy-duty and off-road engines and vehicles. Only companies that exceed certain emission thresholds must comply with these disclosure requirements and file annual reports with the EPA (EPA, 2011).

While rules and regulations pertaining to sustainability-related events are still evolving, currently effective rules and regulations tend to focus on financial aspects and on risk factors that may adversely affect companies' financial results. In addition, these rules and regulations are not generally applicable to the majority of business and governmental entities; some pertain to only public companies, and some pertain to certain types of industries.

This lack of general reporting requirement must be addressed by regulators and the accounting profession. Globally, significant progress has been made to develop frameworks and principles that companies can use to comprehensively disclose their impact on people, the environment, as well as profit.

Sustainability Reporting – Current Status

Concern about organizations' impact on the environment and on people encourages companies to implement and expand sustainability programs. Companies routinely publicize their sustainability efforts to customers and other stakeholder via their corporate websites, in promotional materials and other media, and typically are focusing on positive performance.

However, stakeholders increasingly expect that companies formally and comprehensively report on their sustainability efforts. According to Ernst & Young, one of the largest global accounting firms, "Shareholder proposals now call for sustainability reports from company suppliers, and ask for more disclosure on how companies are managing specific environmental and safety risks" (EY, 2012a). This appears to be a continuing and increasing trend. Analysis of shareholder-initiated proposals shows that in 2011 approximately 40% of the proposals related to environmental and social issues; this represents a significant increase over the 30% in 2010 that dealt with these issues (EY, 2012b). Ernst & Young expects that during 2013, sustainability reporting/enhanced reporting will be among the five most common shareholder-initiated proposals (EY, 2013).

The response by the investment community also supports the trend toward sustainability reporting. The Forum of Sustainable and Responsible Investment (referred to as the US SIF), reports that currently more than $3 trillion dollars are invested in sustainability and corporate responsibility funds (US SIF, 2012). Sustainability indices, such as the Dow Jones Sustainability Indices, which track sustainability leaders both globally and based on specific geographic regions, have been developed and are utilized by investors (Dow Jones Indices, n.d.).

Today, a continually increasing number of companies formally report on their sustainability efforts. While in the 1990, few companies issued sustainability reports, the number has grown to thousands of companies world-wide with 95% of the global 250 companies and 53% of the S&P 500 companies currently issuing sustainability reports (EY & Boston College Center for Corporate Citizenship, 2013). Furthermore, results of a recent survey by Ernst & Young and Boston College Center for Corporate Citizenship (2013) reveal that "transparency with stakeholders" represents the most important motivation for both large and smaller companies' to report on sustainability. In fact, nearly 80% of the large and 60% of the smaller companies that report on sustainability indicated that it was an important reason for reporting (EY & Boston College for Corporate Citizenship, 2013). Furthermore, a survey by KPMG, another leading global accounting firm, discovered that 83% of the large multinational U.S.-based companies and 100% of U.K. companies that responded to their survey currently issue sustainability reports (KPMG, 2011).

Thus, investor expectations and a willingness to provide capital to companies that embrace sustainability leads to an increasing demand for formal reporting on sustainability. Clearly sustainability reporting is necessary and expected by stakeholders, such as investors. Because currently formal reporting on sustainability is not generally required in the U.S. and in many other nations, the nature, extend and quality of the reporting varies considerably. This tends to make intercompany comparisons very difficult.

The Benefits and Importance of Sustainability Reporting

Companies that implement sustainability-related programs expect to derive significant benefits from their investments. For example, a survey co-sponsored by Ernst & Young and GreenBiz Group (2011), showed that of the 274 large companies that responded to their survey, 74% indicated that cutting costs and 68% indicated that shareholder expectations were among the factors determining their sustainability agenda during the next two years.

Commitment to sustainability reporting will likely depend on companies’ perception that in the long-run, reporting will lead to tangible and/or intangible benefits that exceed reporting costs. Reporting of sustainability-related activities signals responsible behavior and may enhance stakeholders’ perceptions of the company. This tends to lead to increased investor goodwill and willingness to provide capital and employee and customer loyalty. Furthermore, sustainability reporting may also affect a company’s cost of capital. A recent study (Dhaliwal et al., 2011) suggests that high cost of capital companies that voluntarily start reporting about superior social responsibility programs tend to experience a decrease in their cost of capital.

Integrated Reporting

A rising awareness of the need to preserve resources for future generations and to assess companies’ performance not only in terms of their bottom line but also their comprehensive impact on the environment and community, has led to an increased commitment to sustainability programs and a rising demand for formal reporting. However, most companies that report on their sustainability efforts currently issue stand-alone reports. This may change in the future. A trend toward combining sustainability and financial reporting is emerging; this is referred to as integrated reporting (IR).

Integrating sustainability projects within the entire organization, linking organizational strategies with sustainability projects, involving accounting professionals as well as key corporate decision makers at each stage, and reporting based on integrated information systems can lead to many advantages. IR will help investors and other external stakeholders understand the interrelationship between a company’s financial performance and its impact on the environment and people. It also will enhance internal decision makers' understanding of the various functions and processes within their organization and the comprehensive and interrelated nature and effect of each. IR also may reduce long-run reporting costs.

Thus, in the long-run, collecting and analyzing information necessary for IR may lead to increased operational effectiveness and efficiency and long-term achievement of a company's mission and goals. An excellent example of highly successful sustainability linked strategies and value creation can be seen at BASF, one of the world's largest chemical companies. The company's integrated report clearly describes and links its own sustainable actions with its products and explains how these can help customers build value in an efficient, effective and sustainable manner (BASF, annual report 2012).

Sustainability and Integrated Reporting Standards

The usefulness of sustainability reporting depends on the scope, detail, and accuracy/reliability of the information provided. To be useful to investors and other stakeholders the information provided must not only be reliable, but also comparable. Comparability requires that companies follow uniform standards or guidelines that address format, structure, scope, and specific information content to be reported. To be useful to many stakeholders and to allow for meaningful comparison, standards for reporting sustainability-related efforts are necessary.

Organizations, such the Global Reporting Initiative (GRI), provide the basis for organizations reporting their sustainability efforts. Currently, approximately 63% of the S&P companies that publish sustainability reports are utilizing the guidelines developed by the GRI (EY and Boston College for Corporate Citizenship, 2013). Most companies that utilize the GRI guidelines report under version 3.1. Three reporting levels are available (A, B, and C), with A requiring the highest level of reporting on the highest numbers of performance indicators. Most companies that file GRI reports currently utilize level "B" and few reports are audited; those that are audited may indicate a "plus" after the reporting level (e.g., "A+") (EY, 2012b).

The GRI guidelines continue to evolve; the fourth generation of the guidelines was recently completed (GRI, 2013). While the GRI guidelines currently are globally the most commonly used standards, other organizations are also working on reporting standards. In the U.S., the Sustainability Accounting Standards Board (SASB), a private sector not-for-profit entity, currently is developing industry-specific sustainability reporting guidelines that are intended to further enhance the relevance of reporting sustainability-related performance by organizations operating in 88 specific industries (SASB, n.d.).

Efforts to develop a global framework for integrated reporting are spearheaded by the Integrated Reporting Council (IIRC), which was established under the Prince of Wales' "Accounting for Sustainability Project" (Prince of Wales, 2013). Organizations, such as the American Institute of Certified Public Accountants (AICPA, 2013) are very supportive of the IIRC's efforts. On April 16, 2013, the IIRC issued its formal "Consultation Draft of the International <IR> Framework" (IIRC, 2013). Once finalized, the guidelines will support the emerging trend toward integrated reporting.

Accountants' Role and Ethical Considerations

Accounting professionals play a key role in helping organizations achieve their goals. Currently, accountants are significantly involved in areas such as managerial and cost accounting; internal and operational auditing; and external financial reporting. However, accounting professionals currently appear to be less involved with the implementation of sustainability projects. A study involving 178 corporate responsibility officers (Ballou et al., 2012) found that while accounting professionals rarely are involved in the integration of sustainability projects, their involvement was positively related to a "strategic integration" of sustainability projects. The authors assert that more involvement of accounting staff in sustainability initiatives likely would be beneficial for companies and their stakeholders (Ballou et al., 2012).

Accounting professionals, who are very knowledgeable about their company's reporting function as well as its financial and operational aspects, are able to contribute critical expertise to formal sustainability reporting. Accounting professionals must comply not only with laws and regulation, but also must behave in a manner that is consistent with a high level of integrity both in everyday life and in their professional capacity. Accounting professionals involved in the reporting process must make ethical decisions that include reporting financial information that is unbiased and faithfully represents the underlying economic events, without managing earnings even within the boundaries and requirements of Generally Accepted Accounting Principles (GAAP).

Ethical conduct represents the corner stone of the accounting profession; this is reflected in licensing and membership requirements for accountants. Most state boards of accountancy require that accounting professionals complete ethics courses or ethics exams as part of licensing and relicensing requirements and many professional accounting organizations, such as the AICPA and the IMA, require that their members complete ethics education annually and strictly comply with the organizations' professional (ethical) code of conduct.

Disclosing qualitative information and reporting on non-financial events and activities that in the long-run effect the environment, employees, and the community requires an attitude of high integrity. Thus, accounting professionals' involvement and support can be extremely important to help companies report information that is comprehensive, reliable, and unbiased.

Peter Bakker, president of the World Business Council for Sustainable Development, recently emphasized accountants' importance in terms of sustainability with his statement that "Accountants will save the world" (Bakker, 2013). He asserts that corporate reporting must provide information not only about return on financial capital, but also on social capital (Bakker, 2013). He views accountants in a lead role toward transparent reporting of a company's creation of value that includes its impact on environmental and social benefits (Bakker, 2013).

The issues that arise from the continuing sustainability and the emerging integrated reporting trends will affect companies and accounting professionals for many years. High-quality sustainability and especially integrated reporting require support of not only current but also future accounting professionals. Students majoring in accounting represent the future accounting professionals. During their careers, they likely will become involved with sustainability and integrated reporting and in turn affect its development and implementation. Their support and their commitment to reporting unbiased, comprehensive information are essential. Hence, accounting majors' perceptions regarding sustainability and integrated reporting are important.

METHODOLOGY

Research Instrument and Validity

The researcher developed a survey instrument that addressed current considerations and issues of concern to companies, their stakeholders, and standard setters with respect to sustainability and integrated reporting. The questionnaire consisted of three sections. A brief instructional/explanatory paragraph preceded each section. The terms "sustainability reporting" and "corporate social responsibility reporting" (CSR) were defined as synonyms and used interchangeably.

The first section addressed the overall benefits of voluntary sustainability/CSR reporting for companies and investors, the value of globally uniform reporting standards, and the need for mandatory reporting. For reasons of succinctness, the acronym "CSR" was utilizing in each statement. Study participants were asked to indicate their level of agreement with several statements that address the potential benefits of sustainability/CSR reporting. A 5-point Likert rating scale was used with "5" equal to strongly agree, "4" equal to agree, "3" equal to neutral, "2" equal to disagree, and "1" equal to strongly disagree.

The second section addressed the scope and level of sustainability reporting focusing on issues relating to (1) environment and safety, (2) employees and community, and (3) corporate governance, which represent areas of concern to a broad range of stakeholders and addresses issues on which many entities are currently reporting. Study participants were instructed to pretend that they were in charge of the reporting function for a well-established, moderately profitable public company that manufactures consumer products and has already implemented a series of sustainability-related programs such as recycling and investing in energy efficient equipment and renewable energy. The participants were reminded that reporting incurs costs. The study participants were asked to rate the importance of reporting on key performance indicators relating to each reporting area: (1) environment and safety, (2) employees and community, and (3) corporate governance. Each area included multiple aspects and differentiated between reporting the company's performance with respect to (a) the current reporting period and (b) changes over the prior years (i.e., trend data). The study participants were asked to rate the importance of reporting specific performance indicators using a 5-point Likert scale with "5" equal to very important, "4" equal to important, "3" equal to neutral, "2" equal to less important, and "1" equal to not at all important.

The third section addressed several aspects relating to integrated reporting with respect to the effect on the financial reporting process and its potential benefits for multiple stakeholders. Study participants were asked to indicate their level of agreement with each statement using a 5-point Likert scale, with "5" equal to strongly agree, "4" equal to agree, "3" equal to neutral, "2" equal to disagree, and "1" equal to strongly disagree. One question relating to whether companies should issue integrated reports required a "yes" or "no" response. Furthermore, an open-ended question was included that asked study participants to indicate what they perceived as "the most important benefit for companies that voluntarily issue sustainability reports." This question was placed in the third section on the reverse side of the questionnaire to encourage students to consider benefits other than those specifically referred to in the first section. The research instrument was piloted with several students to ensure the clarity of each question or statement and slightly adapted based on their feedback.

Sample Selection and Administration of Research Instrument

All accounting majors at a Western Region University must complete the Intermediate Accounting course sequence consisting of Intermediate Financial Accounting and Reporting I & II. The fundamental concepts and principles underlying financial accounting and reporting and the major financial statements and disclosures are discussed in Intermediate Financial Accounting and Reporting I. Class discussions in this course include not only financial reporting under U.S. GAAP, but also address significant differences between U.S. GAAP and International Financial Reporting Standards (IFRS). In addition, current significant reporting trends are briefly discussed during the Intermediate Accounting course sequence. Furthermore, ethical aspects of reporting are considered throughout the Intermediate Accounting course sequence with an emphasis on the importance of the highest level of ethical conduct.

During the Winter 2013 and Spring 2013 quarters, 55 students enrolled in Intermediate Accounting I and 60 students enrolled in Intermediate Accounting II completed the survey instrument. Participation in the survey was voluntary and students' responses were anonymous. The survey was administered during the last week of instruction in Intermediate I and the first week of instruction in Intermediate Accounting II. This timing helped ensure that the study participants possessed comparable levels of knowledge of financial accounting and reporting across the two courses. One-hundred fifteen students completed the survey resulting in 115 useable responses. Awareness and some knowledge of significant current and emerging reporting trends represents one of the learning objectives of both courses, thus administration of this survey, which addressed issues discussed in class, did not require IRB approval.

Prior to administering the survey, the researcher discussed current and emerging issues in financial reporting that are currently or will in the future significantly affect the accounting profession and thus accounting students' careers. Sustainability and integrated reporting represent one of the three major issues that were discussed during a class session; the other two issues were the status of the potential implementation of IFRS in the U.S. and the development of private company GAAP.

Demographics

The study participants were asked to indicate their major, academic standing, gender, and work status. Ninety-six percent of the students that completed the survey had declared accounting as their major, and 4% had declared accounting as their minor field of study. Three percent of the study participants were sophomores, 79% were juniors, 15% were seniors, and 3% were graduate students. Seventy-seven percent indicated that they currently worked and of those who worked, 38% worked in accounting-related positions. Forty-eight percent of the study participants were female and 52% were male.

Statistical Tests Utilized

Student responses to the survey were summarized and statistically evaluated using Microsoft Excel statistical tests. The researcher utilized matched sample t-tests to test hypotheses and to determine significant associations. Means and standard deviations were derived to report descriptive statistics. The results of the study were evaluated utilizing a 0.05 significance level.

HYPOTHESIS DEVELOPMENT

Financial reporting is covered in detail in the Intermediate Accounting course sequence. All accounting majors must complete a series of Intermediate Accounting courses, which in the U.S. typically focus on reporting by public corporations under U.S. GAAP. Increasingly, Intermediate Accounting courses also include some coverage of IFRS and discussions on emerging reporting trends. Most accounting majors are aware that many small and midsize companies are privately held and hence are not legally required to make their financial statements publicly available. Thus, accounting students' perceptions regarding the importance and benefits of voluntary formal sustainability reporting may differ with respect to large and small/midsize entities; specifically, students may perceive that sustainability reporting is more beneficial to large than to small and midsize companies. Thus, hypothesis H1 stated in alternative format is:

H1: Accounting majors are more likely to perceive that in the long-run voluntary sustainability reporting is beneficial to large than to small and midsize companies.

Students enrolled in Intermediate Accounting know that generally only public companies are required to issue publically available financial statements. Based on pre-survey class discussions, students are also aware that currently sustainability reporting is voluntary in the U.S. for both public and private companies. Thus, since private companies are not legally required to issue annual reports, students may be less likely to support a mandatory CSR reporting requirement for those companies. Thus, when considering the need for mandatory CSR reporting by U.S. companies, students may be more likely to perceive that sustainability reporting should be mandatory for public companies than for private companies. Thus, hypothesis H2 stated in alternative format is:

H2: Accounting majors are more likely to support mandatory sustainability reporting for public companies than for private companies.

Although U.S. GAAP currently does not require the presentation of comparative financial information, because of user expectations and SEC requirements, companies customarily present information for several comparative years. Accounting majors are aware of these facts. Hence, if accounting majors perceive that sustainability reporting of current year information is important, they may also perceive that reporting of trend-related information is important. Thus, hypothesis H3 stated in alternative format is:

H3: *Accounting majors perceive reporting of sustainability-related information for current and comparative years as equally important.*

EMPIRICAL RESULTS

This section presents the results of this study, including the results of testing Hypotheses H1, H2, and H3.

The Benefits of Sustainability Reporting

The study addresses the overall benefits of voluntary CSR/sustainability reporting for companies and investors and the need for mandatory reporting; focusing on current considerations and issues of concern to companies, their stakeholders, as well as standard setters. Support for sustainability reporting is closely linked with its perceived benefits. Thus, students were asked to rate their agreement with several statements that address the overall benefits of sustainability reporting for companies and investors. The students also were asked to indicate their level of agreement with two statements asserting that CSR reporting should be mandatory for (1) U.S. public companies and (2) U.S. private companies and to consider the benefits of globally accepted CSR reporting standards. Students' mean ratings and relate standard deviations are presented in Table 1.

Table 1
BENEFITS OF AND NEED FOR SUSTAINABILITY REPORTING

QUESTION/STATEMENT	MEAN RATINGS 5 = strongly agree	STANDARD DEVIATION
Investors benefit	4.06	0.87
Large companies benefit	4.29	0.80
Small and midsize companies benefit	3.83	0.98
Mandatory for public companies	4.12	1.03
Mandatory for private companies	3.65	1.11
Globally uniform CSR standards would enhance annual reporting	4.18	0.85

Thus, based on the results, students tended to perceive that in the long-run sustainability (CSR) reporting is beneficial for companies and for investors. Students also tended to agree that sustainability reporting should be mandatory for public companies and that globally uniform CSR reporting standards would enhance annual reporting. Some differences in students' perceptions between large and small/midsize companies and public and private companies were expected. Hypothesis H1 tests for differences in students' perceptions between large and small/midsize companies; hypothesis H2 tests for differences in students' perceptions with respect mandatory reporting requirements for public and private companies. These results are presented in the hypotheses testing section.

The Most Important Benefit of Sustainability Reporting

Students were asked to indicate what they perceived as the most important benefit of voluntary sustainability reporting by companies. Students' responses to this open-ended question were evaluated and grouped into five categories: (1) ethical and responsible behavior and enhanced awareness of commitment to environmental and social issues; (2) effect on reporting quality and comparability; (3) enhanced reputation; (4) improved internal operations, products and services; and (5) financial success, including increased investor base.

Based on these classifications, 44% of the students indicated that the most important benefit derived from voluntary sustainability reporting related to ethical and responsible behavior and awareness and commitment to the environment and wellbeing of the community/employees; 28% specifically mentioning environmental issues. Twenty-seven percent of the student perceived improved annual reporting and enhanced comparability between companies as the most important benefit of voluntary sustainability reporting. Eighteen percent of the students indicated that voluntary reporting would enhance a company's operations and products/services. Thirteen percent of the students identified financial success, profit, and increased investor base as the most important benefit and only 8% indicated that a company's enhanced reputation was the most important benefit of sustainability reporting. Since several students indicated more than one "most important" benefit, the sum of the percentages exceeds 100%. Thus, based on students' responses, it appears that accounting majors perceive ethical aspects and especially the positive effect on the environment and people as the most important benefits of sustainability reporting.

The Importance of Reporting Performance Indicators

Students were asked to rate the importance of their company reporting on key performance indicators relating to the environment and safety, employees and community, and corporate governance. (Information about the hypothetical company, which was included in the survey instrument, is provided in the methodology section). The study focused on performance indicators that are consistent with those identified by the GRI and are also commonly reported by companies. Students were asked to rate the importance of reporting information for each performance indicator in terms of (a) the current year and (b) changes over prior years (i.e., trend information). This is consistent with the GRI's guidance for using performance indicators (GRI, 2012). Statistical summary information is presented in tables 2, 3, and 4.

Environmental Performance Indictors

A company's impact on the environment and natural resources is of paramount importance to many stakeholders. Many consumers, investors, and employees expect companies to act responsibly and to preserve precious resources. In response to these expectations and for other reasons, such as a desire to act responsibly and expected cost savings, many companies have implemented extensive sustainability-related projects. This study focuses on environmental indicators relating to areas of common concern: water usage, energy efficiency, CO_2 emissions, waste management, recycling, investments in renewable energy, environmental incidents, and transportation-related incidents. Each indicator was presented twice, reflecting current year information as well as trend-related information. Statistical results relating students' perceptions of the importance of environmental performance indicators are presented in table 2. Hypothesis H3 tests for statistically significant differences in the perceptions between current year and comparative information; the results are presented in the hypotheses testing section.

Table 2
REPORTING ENVIRONMENTAL AND SAFETY PERFORMANCE INDICATORS

PERFORMANCE INDICATORS	MEAN (SD) CURRENT YEAR 5 = very important	MEAN (SD) CHANGE OVER COMPARATIVE YEARS 5 = very important
Water usage	4.19 (0.87)	4.32 (0.87)
CO_2 emissions	4.38 (0.84)	4.37 (0.94)
Energy efficiency (usage/sales revenue)	4.31 (0.72)	4.35 (0.79)
Waste management (tons generated)	4.23 (0.81)	4.17 (0.91)
Recycling (tons)	4.15 (0.83)	4.26 (0.89)
Investments in renewable energy	3.89 (0.99)	3.91 (1.05)
Environmental incidents (number)	4.07 (1.10)	4.00 (0.96)
Transportation incidents (number)	3.66 (1.04)	3.70 (1.04)

The mean ratings for the environmental and safety-related indicators were greater than "4," which is equivalent to "important," except for reporting of investments in renewable energy and transportation-related incidents. The mean ratings were highest with respect to reporting information about current year CO_2 emissions and changes in CO_2 emission compared to prior years. Thus, overall, students perceived that it is important for companies to report environmental-related performance indicators, especially with respect to CO_2 emissions, water use, energy efficiency, and recycling projects.

Paired-sample t-tests revealed statistically significant differences between students' perceptions of the importance of information relating to the company's CO_2 emissions and recycling, investments in renewable energy, transportation incidents, and environmental incidents (p-values < 0.05). No other significant differences between students' perceptions of the importance of reporting information about the company's environmental and safety performance indicators were found.

Employee and Community Performance Indicators

Most sustainability/CSR reports focus not only on the company's impact on the environment and natural resources, but also on its interactions with and effects on employees and the community in which it operates. This study focuses on employee-related performance indicators including the number of employees, employee training and development, employee turnover, coverage by health insurance and retirement plans, employee absentees, management composition, and employee injuries. Community-related performance indicators focus on donations to community projects and employee community engagement. Each indicator was presented twice, reflecting current year information as well as trend-related information. Statistical results regarding students' perceptions of the importance of employee and community related performance indicators are presented in table 3.

Table 3
REPORTING EMPLOYEE AND COMMUNITY PERFORMANCE INDICATORS

PERFORMANCE INDICATORS	MEAN (SD) CURRENT YEAR 5 = very important	MEAN (SD) CHANGE OVER COMPARATIVE YEARS 5 = very important
Number of employees	3.79 (1.05)	3.79 (1.00)
Employee training and development (hrs/employee)	3.85 (1.02)	3.81 (1.07)
Employee turn over	3.60 (1.03)	3.52 (1.00)
Percentage with health insurance	3.90 (0.95)	3.86 (0.95)
Percentage with retirement plans	3.72 (1.12)	3.68 (1.15)
Absentees per employee	3.19 (1.17)	3.22 (1.17)
Management composition – ethnicity, age, gender	3.01 (1.23)	3.12 (1.23)
Injuries (total number per 100 employees)	4.05 (0.97)	4.05 (0.98)
Donations to community projects	3.68 (0.96)	3.59 (0.99)
Donations – total service hours	3.45 (1.04)	3.43 (1.11)

Students' mean ratings regarding the importance of reporting employee-related information were highest with respect to current year employee injury rates and lowest with respect to the current year composition of management in terms of age, gender and ethnicity. Overall, students perceived reporting of employee and community related performance indicators as somewhat below important with respect to all employee and community related performance indicators except for information about employee related injuries.

Corporate Governance Performance Indicators

Corporate governance represents one of the key areas on which companies focus in their sustainability reports. Corporate governance also represents one of the major reporting categories under the current GRI guidelines (GRI, 2012), which are utilized by the majority of sustainability reporting companies. This study focuses on corporate governance related performance indicators in terms of changes to the corporate governance structure, code of ethics violations, executive compensation, stakeholder communications, and vendor audits. Each indicator was presented twice, reflecting current year information as well as trend-related information. Statistical results regarding students' perceptions of the importance of corporate governance related performance indicators are presented in table 4.

Table 4
REPORTING CORPORATE GOVERNANCE PERFORMANCE INDICATORS

PERFORMANCE INDICATORS	MEAN (SD) CURRENT YEAR 5 = very important	MEAN (SD) CHANGE OVER COMPARATIVE YEARS 5 = very important
Oversight structure	4.05 (0.94)	4.03 (1.01)
Code of ethics enforcement and violations (reported, resolved)	4.39 (0.75)	4.48 (0.71)
Executive compensation	4.04 (1.03)	4.04 (1.05)
Vendor relationships/audits	3.80 (1.02)	4.12 (0.97)
Risk management	4.47 (0.73)	--
Stakeholder communications	4.15 (0.97)	4.15 (0.94)

Students' mean ratings regarding the importance of reporting corporate governance related issues were highest with respect to trend information relating to ethics code violations and current year information relating to risk management. The lowest mean rating related to current year vendor audit information. Overall, students perceived reporting of corporate governance related performance as important. Paired sample t-tests revealed statistically significant differences between students' perceptions of the importance of reporting information relating to employee injuries and all other employee and community related indicators except for employee absences (p-values < 0.05).

Benefits of Integrated Reporting

The study addresses the expected benefits of integrated reporting for companies, investors, and accounting professionals; the effects on the value of annual reporting and inter-company comparability; and the potential effects on companies' commitment to sustainability/CSR programs. Students were also asked whether companies that currently issue reports should adopt an integrated reporting format, assuming that high-quality global reporting guidelines become available. Statistical results regarding students' perceptions of integrated reporting are presented in Table 5.

Table 5 BENEFITS OF AND NEED FOR INTEGRATED REPORTING		
QUESTION/STATEMENT	MEAN RATINGS 5 = strongly agree	STANDARD DEVIATION
Investors benefit	4.35	0.82
Large companies benefit	4.18	0.78
Small and midsize companies benefit	3.51	0.94
Accountants benefit	4.01	0.85
Enhanced annual report	4.28	0.77
Increased comparability	4.30	0.84

Analysis of the results suggests that overall, students perceived integrated reporting as beneficial to investors, large companies, and accounting professionals. The mean ratings were above 4.0 (equivalent to agree) for each statement, except for the statement relating to the benefit of integrated reporting for small and midsize companies. Paired sample t-tests show a statistically significant difference between the perceived benefit of integrated reporting with respect to large and small and midsize companies (p-value < 0.05). Students also tended to agree with statements indicating that integrated reporting would enhance annual reporting and improve comparability among companies.

The existence of a globally applicable integrated reporting framework will encourage and support the adoption of an integrated reporting format. Thus, students were asked whether companies should integrate sustainability reporting with their annual financial reporting (i.e., adopt an integrated reporting format) assuming that a high-quality globally accepted integrated reporting framework becomes available. Ninety-one percent of the students answered “yes” to this question. Thus, assuming that a high-quality framework is available, accounting majors, the future accounting professionals, are likely to strongly support the adoption of integrated reporting.

HYPOTHESES TESTING

Hypothesis H1 tests whether students perceive sustainability/CSR reporting as more beneficial to large than to small and midsize companies. Students’ mean ratings were 4.29 with respect to large companies and 3.83 with respect to small and midsize companies. Paired sample t-tests show a statistically significant difference in students’ perceptions between large and small and midsize companies and hypothesis H1 is supported by the findings (p-value is 0.0005). Thus, accounting majors participating in this study were more likely to perceive that in the long-run voluntary sustainability reporting will be beneficial for large than for small and midsize companies.

Hypothesis H2 tests whether students are more likely to support mandatory sustainability reporting for public companies than for private companies. Students’ mean ratings were 4.12 for public companies and 3.65 for private companies. Paired sample t-tests reveal a statistically significant difference in students’ perceptions between public and private companies and hypothesis H2 is supported. Specifically, students were more likely to support mandatory reporting for public than for private companies (p value is 0.00001).

Hypothesis H3 tests whether accounting majors perceive reporting of comparative year CSR information as important as reporting of current year information. Matched sample t-tests did not find a statistically significant difference between the perceived importance of reporting information for the current reporting period and for comparative years with respect to environmental-related issue except relating to water usage. Specifically, with mean ratings of 4.32 and 4.19, respectively, student's perceived that reporting of water usage trends was more important than reporting of current year water usage (p-value is 0.03). Paired sample t-tests did not reveal any statistically significant differences between the perceived importance of reporting current year and trend information relating to employee and community related performance indicators. Paired-sample t-tests showed statistically significant differences in students' perception of the importance of reporting current year and trend information with respect to risk management (p-value is 0.0003) and vendor audits (p-value is 0.0004). Thus, hypothesis H3 is only partially supported.

CONCLUSIONS

Sustainability and integrated reporting represent important global reporting trends that require the support of accounting professionals. Accounting majors, many of whom have grown up on an environment that expects and values sustainability, represent the future accounting professionals. Their support and involvement is necessary to help continue to motivate the trend toward sustainability and integrated reporting and lead to a future in which organizations routinely report their comprehensive impact not only on profit, but also on the environment and multiple stakeholders. This study investigates accounting majors' perceptions regarding sustainability and integrated reporting focusing on the perceived benefits to multiple stakeholders, the expected scope and type of issues reported, the reporting time frame, and the need for high-quality global sustainability and integrated reporting standards.

The study finds that overall accounting majors tend to support both sustainability and integrated reporting. In fact, assuming that a high-quality framework for integrated reporting is developed, the vast majority of the students participating in the study felt that companies should issue integrated, instead of stand-alone reports and that this would enhance the value and comparability of annual reporting. The students also tended to perceive that reporting of multiple performance indicators relating to environment and safety, employees and community, and corporate governance both in terms of current year and comparative year information is important. The students identified an enhanced commitment to ethical and socially responsible behavior, especially with respect to the environment, as the most important benefit of voluntary sustainability reporting by companies. Students tended to perceive that sustainability and integrated reporting were more beneficial for large than for small and midsize companies and that sustainability reporting should be mandatory especially for public companies. Insights gained from this study provide important information for decision makers and standard setters and suggest that accounting professionals' involvement in sustainability and integrated reporting may encourage ethical, reliable, and unbiased reporting of information about companies' comprehensive impact on the environment, people, as well as profit.

Limitations

The primary limitations arise from the relatively small sample size (115 participants) relating to one university. However, accounting majors who participated in this study tend to have a diverse, global background, which enhances the validity to the results. Thus, their responses reflect important insights regarding globally important reporting issues. Since the trend toward integrated reporting is continuing to emerge and the IIRC's global framework has not yet been finalized, the study should be repeated and the sample expanded to further investigate this important reporting trend and its impact on multiple stakeholders.

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PROTECTING YOUR COMPANY'S INTELLECTUAL PROPERTY ASSETS FROM CYBER-ESPIONAGE

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ABSTRACT

Today, spies might not be going after your military secrets. Instead, corporate spies might be attempting to steal your most valuable corporate secrets, often in the form of intellectual property. Even worse, corporate espionage attacks come from both domestic and foreign competitors. Corporate espionage could even be part of a foreign country's deliberate efforts to undermine the U.S. economy. Whether the espionage attack comes from a domestic or foreign source, the resulting impact can financially cripple a company. The FBI estimates the cost of corporate espionage to be $100 billion per year (Kirby, 2007).

Companies large and small utilize competitive intelligence to help shape strategic planning. But companies may cross the line, and venture beyond ethical and even legal boundaries. Sometimes well-meaning employees justify their actions as attempting to assist their employers in gaining market share and increasing corporate profits. In other cases, corporate spying might be a deliberate strategy to undermine competitors or even an entire industry. When a nation allows its companies to engage in corporate spying without punishment, it could be a menacing approach to undermine another country's economy.

This paper presents an overview of competitive intelligence, including key examples of companies and individuals engaging in corporate espionage. The authors then offer a model for companies to consider as a means to defend against corporate spying, including specific counter-measures businesses could deploy in their defense.

Keywords: competitive intelligence, corporate spying, trade secrets

INTRODUCTION

Spying could be as old as the beginning of civilization. We find among the earliest examples of corporate spying dating back to about 300 A.D.. China held a monopoly on silk production for hundreds of years until Nestorian monks smuggled silkworm eggs out of China hidden inside walking sticks (Podszywalow, 2012).

Much later, in the early 1800's, Yankee industrialist Francis Cabot Lowell travelled to Scotland under the guise of ailing health. In fact, Lowell spent months studying the cotton-weaving mills and machinery for which Britain was well-known. The British textile industry replaced hand labor with water-powered looms that performed efficiently and effectively. Even in rural areas of England, the water-powered mills created personal fortunes for the owners as the mills could now be operated with only a handful of skilled workers (Fialka, 1997).

Because this industry and the success of the water-powered mills served as the foundation for the British economy, the British government passed patent protection laws and banned the export of textile-related technology (Fialka, 1997). Factories became virtual fortresses with spikes and broken glass placed strategically along the roof in order to deter spies from breaking in to steal information. In addition, owners swore workers to secrecy so that no information regarding the technology would be leaked to potential competitors. Despite all attempts to protect the textile industry, Lowell memorized the plans for the Cartwright loom while touring factories and brought the stolen technology back to the United States (Rosner, 2001).

Lowell's trip to the United Kingdom not only helped him become even more prosperous, the technology transfer fueled the Industrial Revolution in New England and elsewhere in the United States. By 1999, American Society for Industrial Security/PricewaterhouseCoopers (cited in Fitzpatrick, DiLullo, and Burke, 2004) estimated that 70 percent of U.S. firms' market value existed in intellectual property and trade secrets.

How significant is corporate espionage? Estimates vary significantly as to how big a problem corporate espionage might be. According to the FBI, the cost of corporate espionage appears to be approximately $100 billion per year (Kirby, 2007). As far back as 1999, the Society of Competitive Intelligence Professionals membership began increasing at a rate of 25% per year (New York Times, 1999). For firms that do not have their own competitive intelligence departments, consultants abound. These two actions suggest corporate espionage to be a significant problem facing corporate America.

While competitive intelligence can typically be found an element of many corporate strategies, competitive intelligence does not imply illegal activities. Competitive intelligence can prove a valuable tool in monitoring competitor activities, boosting sales, and making better deals with customers. In fact, a PricewaterhouseCoopers survey of CEO's of fast-growth companies reported that 84% believe competitor information important to their own company's profit growth and 33% also stated that the tough economy is making that even more so (Wellner, 2003).

Often sound competitive intelligence begins with simple steps such as monitoring competitors' websites and scanning industry press releases. Rosner (2001) stated that in many instances, "librarian types" provide good competitive intelligence by searching through publications and market studies. One way that researchers gather competitor information on websites is by examining what jobs the competition seeks to fill, which suggests what technologies you are developing in your Research and Development areas. Johnson (2000) suggested that today, as much as 90-95 percent of information included in espionage reports can be found in the public domain. Could it be that when companies or governments provide too much information to the public, they could be making espionage easier for the spies?

Lavelle (2001) reported that U.S. companies on average spend about $1 million per year tracking their competitors. Unfortunately, when the economy takes a dive and corporate profits get squeezed, companies cut back on their competitive intelligence efforts. However, those companies that continue their competitive intelligence activities often employ former intelligence officers from military and government agencies. Former CIA officer Guy Dubois (cited in Rosner, 2001) stated "there are no limits to what an agent will do". Operating under those guidelines, the likelihood of crossing the line from competitive intelligence to illegal corporate spying significantly increases.

Protecting your business and the valuable intellectual property can be a daunting challenge. Companies should first understand that every business is vulnerable, and that the intellectual property of a business should be guarded like the crown jewels. In fact, as global competition increases, we could see a proportionate increase in corporate espionage activities. Lewicki (cited in Chan, 2003) believed that as competition intensifies, corporate espionage activities increase. In addition, Lewicki (cited in Chan, 2003) argued that as espionage activities increase, security measures increase, which further leads to workplace distrust.

Table 1 in the Appendix provides a short list of some of the many cases of corporate espionage and the resulting financial impact on the corporate victim. However, in addition to the financial loss, companies need to consider the loss of long-term competitiveness resulting from stolen intellectual property.

Technology

With advanced technologies, corporate intelligence could be easier than ever before, even for smaller businesses. A great deal of information can be gathered simply by scouring competitor's websites for product information, employee and customer lists, and general news releases. Hackers go beyond the boundaries of intelligence gathering by engaging in illegal activity.

Traditionally, spying technology companies marketed primarily to the military and clandestine services. Today, however, corporate competitive intelligence departments could be the best customers of the companies that market spying technology (New York Times, 2006). At the American Society for Industrial Security (ASIS) International Conference in San Diego, approximately 20,000 corporate security experts attended to become updated with the latest information regarding corporate security. The Freedonia Group reported that worldwide, companies spent $95 billion on security measures in the previous year (New York Times, 2006).

The same spying technology portrayed on television and in the movies can easily be purchased from a number of companies that specialize in such products. Laser microphones use a beam of light in order to pick up conversations from a distance, and microphones can be installed in smoke detectors, alarm clocks, and even a computer mouse (Clear and present danger, 2004).

One company that specializes in providing security services, the Internet Security Advisors Group, conducts espionage simulations to help find holes in company security. According to their president, Ira Winkler, "in 90 percent of physical tests, getting into company offices is so easy that it's pathetic" (How real is the risk of Corporate Espionage Today, 2009).

Competitive intelligence terminology

anti-hacking-the protection of computers through a variety of means, including firewalls, intrusion detection software packages, deception methods (Schlotter, 2003).

bluesnarfing-stealing the contents of someone else's address book using a Bluetooth cell phone (Clear and Present Danger, 2004).

clipping services-a media monitoring service, a press clipping service, or a clipping service provides clients with copies of media content, which is of specific interest to them and subject to changing demand; what they provide may include documentation, content, analysis, or editorial opinion (http://en.wikipedia.org/wiki/Media_monitoring_service).

ethernet over power (EoP)-allows an employee or other company insider, the ability to download data from the network with a device plugged into an electrical outlet without revealing their location (Security Director's Report, 2009).

garbology-the study of the material discarded by a society to learn what it reveals about social or cultural patterns or in this context, going through trash (corporate or from employee residences) for the purpose of gathering competitor information (http://dictionary.reference.com/browse/garbology?s=t).

hackers-someone who accesses a computer system by circumventing its security system (http://en.wikipedia.org/wiki/Hackers).

honeypots-(also sometimes referred to as honeynets) originally designed as training tools, honeypots are purposely less secure boxes designed to allow hackers to attack the system, thereby allowing time to detect the hacker and defend valuable data (http://www.sans.org/reading_room/whitepapers/attacking/anti-hacking-protection-computers_38)

keyloggers-computer hardware that maintains a log of computer keystrokes in order to detect unauthorized access to computer information (Security Director's Report, 2009).

media scanning-as part of a firms' global environmental analysis, media scanning can include every material published in the media such as television, newspapers and periodicals to monitor competitor activities and new product development (http://en.wikipedia.org/wiki/Global_environmental_analysis).

pretexting-contacting as competitor under some pretext, such as pretending to be a customer to obtain pricing or other competitor information, or in some cases, pretending to be an employee in an attempt to gather data, steal information, or plant listening devices. (New York Times, 2006).

risk analysis-a technique to identify and assess factors that may jeopardize the success of a project or achieving a goal. This technique also helps to define preventive measures to reduce the probability of these factors from occurring and identify countermeasures to successfully deal with these constraints when they develop to avert possible negative effects on the competitiveness of the company (http://en.wikipedia.org/wiki/Risk_analysis_(business).

social engineering-non-technical or low-technology means such as lies, impersonation, tricks, bribes, blackmail, and threats used to attack information systems (http://www.sans.org/security-resources/glossary-of-terms/).

trade secrets-"trade secrets represent a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy" (Section 1 of the Uniform Trade Secrets Act of 1985, cited in Fitzpatrick, et al, 2004).

TRIPS agreement-developed during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) talks, Trade-Related Aspects of Intellectual Property Rights (TRIPS). The agreement established minimum standards in defining intellectual property rights, including patents, trademarks, industrial designs and trade secrets. The TRIPS Agreement was reached in 1996 and amended in 2005 (Correa, 2007).

ENEMIES, DOMESTIC AND FOREIGN

By 2001, the American Management Association reported 46 percent of organizations monitored employee email, 36 percent monitored employee computer files and 33 percent utilized video surveillance to monitor employees (Fitzpatrick, DiLullo, and Burke, 2004). Protecting company information and intellectual property should first begin with securing the company facility and perimeter. Controlled parking, internal and external access control, and properly-trained manned security should be the first line of defense. In addition, alarms and closed circuit television, and mandatory visitor escort can be good preventive measures (Wellner, 2003).

Employees

Employees, knowingly or unknowingly, can be a major contributor to competitive intelligence losses (Wellner, 2003). According to the FBI, disgruntled employees and former employees commit the most thefts (Lazzara, 2001). Fitzpatrick, DiLullo, and Burke (2004) also cite employees as a company's weakest link in the effort to secure trade secrets.

Outsiders, sometimes pose as a salesperson, security or insurance investigator, customer, or potential employee in order to gather competitor information. In one case, one Milliken employee posed as a business student gathering research for a paper and another employee pretended to be a Swiss banker looking for a potential investment opportunity (Eisenberg et al, 1999).

In some cases, employees can be deceived into actually assisting a competitor (Chabrow, 2008). Employees may not be aware of what company information could be considered sensitive nor methods to prevent accidental disclosure. For example, Wellner (2003) points to an example of a small Delaware company that fell victim to a competitor as a result of discarded correspondence By the company owner's estimate, a simple document shredder could have saved tens of thousands of dollars and a three-year legal battle.

Security experts find five reasons that an employee might be motivated to hand over company secrets to a competitor or foreign nation. The MICES principle (Fitzpatrick and Burke, 2001; Barron, 1985), refers to the money, ideology, compromise, ego, or sexual entrapment as the means whereby corporate spies use employees or former employees to assist them in stealing corporate secrets.

Money often motivates employees to betray their employer and many times an individual will be motivated by greed. In cases such as these, competitors seek out a disenchanted employee looking for a way to get back at his or her employer. Others can be motivated by ideology. These employees will betray their country and/or employer, usually out of loyalty to another country or philosophy. In some cases, employees can be trapped into a compromising situation. Corporate spies will coerce employees into stealing trade secrets by threatening to disclose personally or professionally damaging information (Javers, 2007).

In other cases, spies will appeal to an employees' ego. The spies convince the employee that their employer undervalues his or her abilities, but that the competitor recognizes his or her talent and offers a high-paid international consultancy. Finally, some employees get caught through sexual entrapment. The spies then use blackmail or extortion, often supported by photographs, videotapes or other evidence in order to motivate employees to disclose trade secrets.

Human Resource departments will often be the first place competitors seek out corporate information. Information gatherers posing as job applicants will ask numerous questions about new products or locations. OmniSonics Medical Technologies of Massachusetts, (Wellner, 2003) reported job applicants seeking detailed company information as becoming more common (p. 40). Human Resource Managers should therefore become more vigilant in screening job applicants, checking references, and verifying contact information. As a precaution, software firm MindBridge, (cited in Wellner, 2003) does not send access passwords to persons who use free email accounts, such as Yahoo and Hotmail.

Management should make an effort to inform employees of what constitutes confidential information as you cannot assume every employee will know what information could be considered confidential without being told. Specifically inform all employees what can and cannot be discussed in public. Sometimes competitors will contact front-line employees such as a receptionist, posing as a reporter or investor in an attempt to solicit company information. In other instances, a casual conversation at trade shows with representatives from rival companies could result in sensitive information being leaked (Lavelle, 2001).

Just as passwords serve as a way to keep nonemployees from accessing your computer server, separate passwords can also be established to restrict employee access to areas that contain confidential information. Password protected areas can also allow approved customers and suppliers access to areas that you would not want available to hackers or competitors.

Employees should take extra caution when traveling. Laptops and smart phones loaded with company information left unattended in places such as hotel rooms could be stolen for the information. Even cell phone conversations in public places, such as airports might be overheard by competitors.

Another source of information leak can be prevented by not allowing employees to use personal electronics (computers, cell phones, etc.) for company work and vice-versa. Restricting company work to company equipment allows for greater ease should you need to seize or confiscate electronic devices you think might be used for disseminating confidential information to competitors (Wellner, 2003).

Finally, exit interviews serve as a reminder to employees leaving the company to keep company information confidential. In addition, employees leaving the company should sign non-compete/nondisclosure agreements (if applicable) during the exit interview.

Foreign Nations and Competitors

In 2008, the Australian Security Intelligence Organization issued a warning stating that businesses with highly sensitive defense capabilities and government information will increasingly become targets of foreign-government spying (How Real is the risk of Corporate Espionage Today, 2009). Businesses that typically outsource data processing to firms in India could also be prone to attack through apparent widespread electronic eavesdropping and industrial espionage (How Real is the risk of Corporate Espionage Today, 2009).

India appears to have a booming industry in corporate spying (New York Times, 2012). According to the Associated Chambers of Commerce and Industry of India (Assocham), more than 35 percent of companies in India use corporate espionage to spy on their competitors as well as monitor employee social media websites (New York Times, 2012). Gottipati (2012) reports that companies in India will also use headhunters to interview people from certain companies as a ruse in order to get them to reveal business strategies of their current employers.

But India should not be considered the only foreign nation engaged in corporate spying. According to Tarm (2011), U.S. counterintelligence experts believe China to be the country most actively engaged in espionage in the United States. Increasingly, more and more cases of corporate espionage involve China. Riley, Vance, and Schneeweiss, (2012) cite a report by 14 U.S. Intelligence Agencies that charges Chinese spy agencies of engaging in a major campaign of industrial espionage.

Kirby (2007) also reported that a former Chinese diplomat, Chen Yonglin, claimed China had a network of 1,000 informants and the director of the Canadian Security Intelligence Service warned that half of all foreign spies in Canada are from China. General Keith Alexander, Director of the National Security Agency refers to corporate espionage by China as “the greatest transfer of wealth in history” (Riley, M., Vance, A., and Schneeweiss, Z., 2012).

In 2007, *The Air Force Magazine* (cited in Richardson and Luchsinger, 2007), reported the top five countries accounted for 57% of all technology-related espionage. The same report identified China, India, Pakistan, Iran, Japan, France, and Israel as the countries responsible for most technology-related espionage. In addition, the report raised the concern that such technology theft could erode current U.S. military advantage in high-tech weaponry.

Despite technology’s use as a weapon to attack a company in an attempt to secure confidential information, technology can also serve as a defense to attacks by competitors and foreign governments. In 1989, the SANS Institute formed to become a leading cooperative research and educational organization, bringing together more than 165,000 security professionals around the globe for the purpose of sharing information and seeking solutions to security challenges (www.sans.org). Considered to be the largest and most trusted information security training provider in the world, the SANS Institute offers training programs, security certification, and a research library containing information on information security (www.sans.org). SANS assists in not only providing training for computer security professionals, but also helps in developing and disseminating best practices across the industry.

LEGISLATION

Intellectual property generally consists of patents, copyrights, industrial design rights, trademarks and trade secrets (http://en.wikipedia.org/wiki/Intellectual_property). However, some jurisdictions define trade secrets somewhat differently. Today, in order to achieve international agreement in defining intellectual property, the World Trade Organization (WTO), through the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, all members of the

WTO must adhere to the rules and definitions established regarding intellectual property (Correa, 2007).

For the United States, the first attempt in protecting intellectual property rights at the federal level began with the Interstate Transportation of Stolen property Act (ITSA) of 1934. The ITSA sought to address trade secret theft through interstate or foreign commercial activities. Ruhl (1999) points to one of the weaknesses of the legislation in defining intangible property in such a manner that in effect, renders the legislation ineffective in many trade secret cases. However, this legislation served as an important first step in protecting the intellectual property held by U.S. companies.

The ITSA was later followed by the Uniform Trade Secrets Act (UTSA) of 1979 and amended in 1985, which attempts to unify the various state laws designed to protect trade secrets. In addition, the law transfers trade secret protection to statutory law from common law and in addition, addresses other trade secret issues not necessarily covered by state statute (Horovitz, 2009). Since adoption of the UTSA by forty-five states, the UTSA could be considered the primary basis for trade secret protection in the country today.

Despite these two major pieces of legislation, corporate spying continued to be a problem for U.S. firms. Corporate executives called for new laws that might better address the problem. Congress held two major hearings where the Director of the Federal Bureau of Investigation, Louis Freeh, testified regarding the need for additional legal protection for U.S. companies (Mason, Mossinghoff, and Oblon, 1999). Director Freeh's testimony supported the call for new federal legislation by industry leaders working on behalf of Silicon Valley companies and the aerospace industry.

The hearings concluded that existing legislation, principally the Interstate Transportation of Stolen Property Act and the Mail Fraud and Fraud by Wire statutes did not adequately address economic espionage issues. As a result, Congress enacted the Economic Espionage Act (EEA) in order to address the lack of uniformity among state laws and the need to augment existing patent and copyright laws.

In 1996, President Bill Clinton signed the Economic Espionage Act (EEA). This legislation seems to be directed more toward foreign agents and foreign governments. The EEA defines economic espionage and trade secret theft as criminal activities and provides prison sentences of up to ten years and fines for up to $5 million (Horovitz, 2009). The EEA goes beyond patent and copyright protection to include trade secrets.

The EEA goes farther than the UTSA, first, by permitting federal authorities the use of wiretaps as a means to explore possible violations under the terms of the act. The EEA also restricts what information or knowledge a person can and cannot disclose, even through lawful means, such as previous employment. An interesting provision of the law keeps trade secrets confidential by the court, which seems to contradict other aspects of our legal system whereby the defendants maintain the right to be aware of all evidence being used against them, and the right to challenge that evidence in an open courtroom. Perhaps most importantly, the EEA criminalizes trade secret theft committed by foreign entities as well as domestic companies or individuals (Ruhl, 1999).

Mason, Mossinghoff, and Oblon (1999) acknowledged that in addition to the EEA, other federal statutes address trade secret issues. For example, they refer to 18 USC 1905 which prohibits officers and employees of the U.S. government, as well as companies that do business with the federal government, from disclosing any unauthorized information. Mason, Mossinghoff, and Oblon (1999) further point to the sections of the EEA where a purpose of the Act is to prevent trade secret theft by a foreign government.

Trade Secrets Defined

Koen and Mitchell (2005) offer the following definition of trade secrets “Trade secrets may take the form of customer lists, business and marketing plans, pricing and financial data, research and development, production methods, product formulas, and generally anything that makes an individual company unique, and that would have value to a competitor.” Typically, a trade secret could be a formula, pattern, technique, or process that provides a business with a competitive advantage. In addition, the trade secret could not be considered known by current or potential competitors, and the company takes reasonable precautions to keep the trade secret a secret.

Unlike patents and copyrights, trade secrets do not involve application to the government and therefore, the plaintiff needs to be able to demonstrate that the trade secret in question meets the required definition. One case involved the New York Jets and New England Patriots football teams during the 2007 season. During the season-opening game, league security officials caught the Patriots videotaping the Jets’ play signals. While stealing team signals does not violate NFL rules, “videotaping of any type, including but not limited to taping of an opponent’s offensive or defensive signals, is prohibited on the sidelines, in the coaches’ booth, in the locker room, or at any other locations accessible to club staff members during the game” (Horovitz, 2009).

Corporate spying also raises new questions regarding Directors’ and Officers’ corporate liability. Lenckus (2006) points to the case of Hewlett-Packard Company in California, where the state Attorney General filed charges against executives for allegedly illegally collecting phone records of company board members and reporters. Hewlett-Packard Company used vendors to obtain the telephone records through pretexting, whereby the telephone companies were deceived into believing that they released those personal records to the customers. For Hewlett-Packard Company, the issue also included the question as to whether company liability would be covered by their corporate liability insurance.

Prevention

Prior to hiring new employees, employers should thoroughly screen applicants to include background investigations of prior behaviors, criminal background checks to uncover potential vulnerability to compromise and sexual entrapment, and credit checks as employees with poor credit may be especially vulnerable to corporate spies.

Background checks of personal behavior should look for any instances of inappropriate personal conduct, alcohol abuse, or illicit drug use. Chemically-impaired individuals have been observed to divulge proprietary information/trade secrets through both accidental and boastful (i.e.: ego enhancing) disclosures (Barron, 1985; Pittori, 1998, cited in Fitzpatrick). Although unpopular since the beginning of the recent recession, credit investigations can uncover excessive debt. The investigators should also look for persons living beyond their means. Financial problems can also be a result of children's tuition, family health care costs, lifestyle, gambling or other addictions.

While many consider polygraph testing controversial and legislation in 1988 limited its use, companies can use other forms of integrity testing. Questions of reliability, criterion-related validity, construct validity, the possibility of answering second-guessing questions in order to provide misleading test results, and the potential adverse impact of integrity tests need to be thoroughly addressed (Sackett, Burris, and Callahan, 1989). Nevertheless, at least in the United States, paper and pencil integrity tests seem to be replacing polygraph tests. According to Shaffer and Schmidt (2008) by 1990, an estimated 6,000 organizations administered more than 5 million integrity tests per year. Few states place limitations on integrity testing, despite some questions with regard to use of results.

During Employment

Companies should also continue to employ intellectual property protection efforts after employment. Many preventive measures exist, including simple steps such as requiring secure passwords. In the cases of Lucent Technologies, IDEXX, and Dennison the naiveté of employees was used to secure passwords and other sensitive information (Fitzpatrick, W., DiLullo, S., & Burke, D. (2004). Companies can also use a variety of social engineering methods, such as keystroke logging software/hardware to monitor employee computer activity.

Cameras with taping capability provide a measure of safety and security for both the company and the employee. Those employees considering theft of company information might be less likely to do, when under camera surveillance. In addition, security personnel should be well-trained in how to prevent and detect corporate theft.

Companies can also use deception/planting fake products or information. According to Kirby (2007), some believe that Steve Jobs at Apple Computer used false information of a fake product in order to flush out a mole operating within Apple. Eisenberg et al. (1999) cited what could perhaps the most creative (but illegal) defense could be the "dirty tricks" campaign Waste Management developed against California agricultural firm Cadiz, when Cadiz opposed Waste Management's efforts to build a garbage dump near its property.

As employees and others might sort through trash for information, shredding confidential information should be a high priority. Likewise, a simple stamp that says "Confidential" used on documents containing sensitive information could help employees better handle corporate documents.

Once management develops a company-wide atmosphere designed to protect company secrets, the next step should be to conduct a risk analysis assessment to determine where and how the company might be vulnerable to corporate espionage. Management should consider hiring a professional security consultant who understands the nature of your business and the industry environment in which your company operates.

CONCLUSION

Competitive intelligence can be considered essential to success in business and should shape strategic direction. However, as important as technology and sophisticated methods might be, sometimes the best information can be found hiding in plain sight. An example of this can be found in the 1970's when Xerox faced fierce market challenge from IBM, but instead, lost significant market share to Canon (Finder, 2006). Similarly, Kodak's' photography paradigm centered on using silver nitrate, which kept Kodak from adopting digital photography until long after Fuji and Sony (Finder, 2006).

As can be seen from the model in Figure 1, there happens to be many more methods of preventing loss due to corporate espionage than espionage detection, or remedies. Although many companies view preventive measures as costs, preventive measures should actually be viewed as investments in protecting intellectual property that could be valued in the billions of dollars.

Of course, although methods exist to detect corporate espionage and in addition, suggest some remedies for those businesses that fall victim to corporate espionage, the best course of action would be to develop sound preventive measures that would preclude competitors from stealing trade secrets and other confidential information.

Companies must bear the responsibility for training and communicating to employees the importance of corporate security. According to Grosso (2000), "If an employee has access to anything an employer deems confidential, then the employee is obligated to maintain the secrecy of that information, no matter how mundane or nonscientific the information may be."

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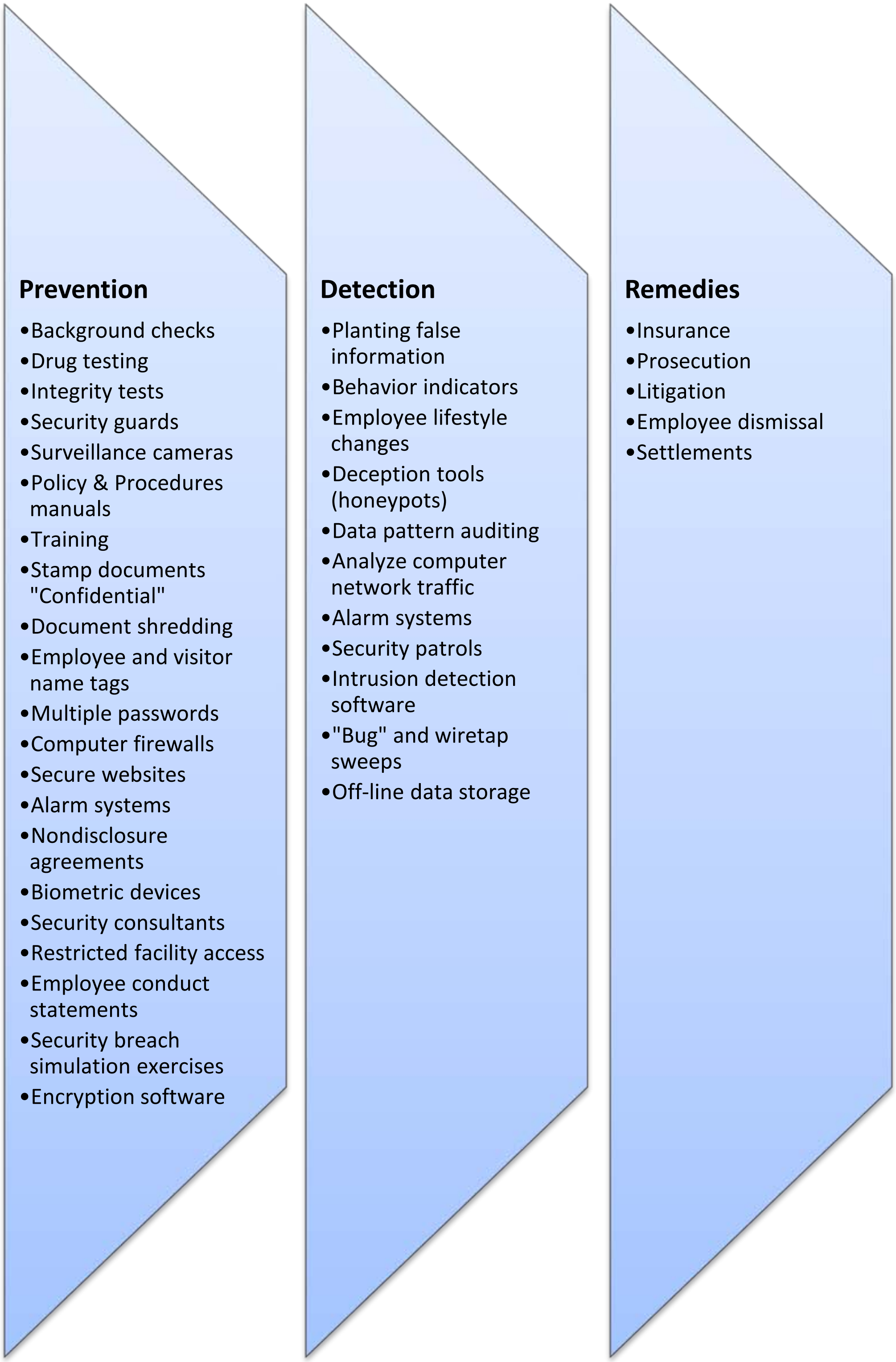
APPENDIX

Table 1: Examples of Corporate Spying

Target	Year	Area of Attack	Estimated Cost
Motorola	2011	Technology	n.a.
General Motors	2005	Hybrid technology	n.a.
DuPont	2004	Proprietary information	$400 million
Air Canada	2004	Flight data	$200 million
General Motors	1993	Trade secrets	n.a.
Deloitte & Touche	1997	Software theft	$4-6 million
Ford Motor Company	2009	Design specs	n.a.
Pittsburgh Plate Glass	1997	Secret formula	n.a.
Gillette	1998	Product designs	n.a.
U.S. high-technology	1985-1989	Technology transfer	$105 billion

Figure 1: **<u>A Three-Stage Model for Prevention and Detection of Corporate Espionage</u>**



AN INQUIRY INTO CONTEXTUAL VARIABLES THAT IMPACT CORPORATE COMPLIANCE WITH ENVIRONMENTAL SELF-AUDIT REPORTS: A REPLICATION AND EXTENSION

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ABSTRACT

This research evaluates the impact of three factors related to the persuasiveness of environmental remediation memos, replicating prior research on the variables of profitability and uncertainty and adding a previously untested variable, fines plus jail terms. It hypothesizes that meeting profitability goals, the relative certainty of the costs of solving the environmental violation, and increasing length of fines and jail terms for managers if the violation is discovered by government regulators would each add to the persuasiveness of an environmental memo, while lack of meeting profitability goals, significant uncertainty about the costs of solving the environmental violation, and lower fines and shorter jail terms would reduce an environmental remediation proposal's persuasiveness.

Statistical analysis confirmed the hypotheses about profitability and solvability. Results from the impact of size of fine and length of jail terms were not statistically significant for either the solvable or insolvable memos.

INTRODUCTION

Frater & Lee (2008) argue for the importance of producing research relevant to the environmental law and policy. A case in point is the controversy over the use of the voluntary self-analysis environmental audit privilege. As a way of increasing compliance behavior through pro-active internal self-analysis, the EPA has promoted programs of voluntary environmental audits designed and conducted by companies' internal resources. Given that regulatory officials are not as likely to be as aware of environmental issues as a company's environmental assessment managers, voluntary compliance is theorized to lead to more timely and accurate identification and remediation of environmental concerns (Bartley, 2003; Davis et al., 2008; Reid and Toffel, 2009). While environmental audits are not required of companies subject to federal environmental laws, for both business and public relations reasons, many companies have adopted self-regulatory structures as part of a commitment to environmentally sound business practices (Short & Toeffel, 2008).

Scholars have both praised voluntary self-examination as a way of demonstrating how they can make environmental responsibility part of a company's institutionalized cultural norms (Dobbin and Sutton, 1998) and also criticized self-audits as vehicles for circumventing the intent of environmental regulations (Edelman, Fuller, and Mara-Drita, 2001; Cox, 2004). Neither account reveals much about the circumstances under which we might expect to see one or the other, critical to identifying the situational variables that would help predict the conditions under which a company is most likely to address or ignore compliance violations (Short and Toeffel, 2008). Such analysis is important, for as Gray and Scholz (1993) have argued, “as studies have made us more aware of problems of imperfect regulations and everyday enforcement activities by agencies operating within the legal, budgetary, and organizational constraints of public agencies, the effectiveness of enforcement in achieving desirable goals has become much more open to question” (pp. 177-78).

The research reported here focuses on internal, situational variables that may affect a company’s compliance. A replication and extension of a previous study done by Clark et al. (2002) , this test adds the variable of jail terms, given assertions by legal scholars that only jail terms, not fines alone, would be sufficient incentive to promote compliance. The earlier study tested the variables of solvability, profitability and size of fine: each variable proved to be related to level of environmental compliance.

Given the well-established bias of editors against replications (Hunter, 2001; Tsang & Kwan, 1999), this paper first justifies the value of replication and then shows its importance as part of what Tsang and Kwan (1999) identify a multi-modal approach to research progress. It then reviews relevant research on the importance of jail terms as motivators of compliance and of additional research on environmental compliance and prospect theory since the earlier study. The updated literature review shows a continuous and contemporary interest in this topic.

Subsequently, prior to describing the rationale for each variable studied, the research methodology and the results, this paper describes the EPA’s Audit Policy and its rationale, highlights the dilemmas managers face when writing and reading environmental audit reports, analyzes the divide over how to best encourage managers to correct environmental deficiencies, and reviews relevant recent literature that provides the foundation for the variables tested in this study. Finally, it reports the results of three studies, discusses their implications for managerial practice, and suggests directions for future research.

IMPORTANCE OF REPLICATION

Hunter (2001) stresses the importance of replicating past studies to confirm or disconfirm their results. He cites the error of editors in favoring single studies addressing new topics over replications of previous research, which they may view as lacking creativity. He asserts good theory requires facts that are best established through replication of studies. Similarly, Tsang and Kwan point out “The lack of replication leads to a fragmented and dispersed literature with no sense of continuity. It is unclear whether the findings of these studies are reflections of real structures and mechanisms or, in the words of Popper, mere isolated coincidences” (p. 772).

They conclude: “A confirmatory replication obtained under suitable conditions should provide a theory with a quantum leap in credibility. The first replication of an empirical study on which a theory is used seems to play a far more important role than what is usually recognized” (p 769). They propose the value of a multifocal approach, which “by means of repeating past studies systematically, researchers can compare and contrast empirical evidence in general from several focal areas. This may lead to further refinements of the theory concerned and help to identify the boundary" (p. 775).

EPA'S AUDIT POLICY

This section reviews EPA policy and it rationale. "Incentives for Self-Policing: Discovery, Correction and Prevention of Violations," the EPA's Audit Policy, encourages companies to establish and maintain "systematic, objective, and periodic" procedures for policing themselves (Federal Register, 1995). The EPA's stated goal is to gain universal compliance rendering as unnecessary formal EPA investigation and enforcement actions (US EPA, 2000). It promotes compliance by reducing or waiving certain penalties for environmental violations when they are voluntarily reported to the government by regulated entities and solutions enacted. Audit reports are designed to verify "compliance with environmental laws, evaluating the effectiveness of existing control procedures, and assessing risks in the workplace" (Gish, 1995, p. 4).

Rationale For and Risks of Conducting Environmental Audits

The benefits of such environmental audits include more accurate budgeting and business plans, uncovering cost savings opportunities, and insulation against civil and criminal prosecution (Mazza, 1996). On the other hand, from the auditor and managerial decision maker's perspective, environmental remediation involves substantial risk. To succeed, the auditor must make a compelling case that persuades top management to approve the recommended actions (O'Reilly, 1994). When audit solutions to environmental issues are made, they compete with other proposals for limited funds. If approved, time, money, and people must be changed from existing corporate priorities to address the environmental issues raised in the report. Thus, in these situations managers must consider the cost, time, complexity, and effectiveness of diagnosing and fixing environmental problems. Managers also deal with the uncertainty of whether, or when, a failure to address an environmental violation might come to a regulator's attention, especially in light of Johnston's (1995) assessment that environmental violations are difficult for regulators to discover.

Importantly, once audit conclusions are revealed, they can "set off a chain of reporting violations, business interruptions, costly remediation efforts, negative publicity, and litigation both with regulatory agencies and private citizens . . . [serving as] deadly ammunition for plaintiffs seeking to impose liability for a company's environmental transgressions" (Crawley, 1993, pp. 229-230). Plaintiffs can include various criminal investigators from various levels of government; citizen suit plaintiffs, such as environmental groups and zoning hearing challengers; and toxic tort plaintiffs claiming injury to land or health (Vanhala, 2012).

Compounding the manager's challenge is the difficulty of interpreting the meaning of environmental regulations. Mazza (1996) cites evidence that even environmental lawyers have difficulty understanding that state and federal legislation, so uncertainty is a normal context in which environmental assessments are written. As Assy (2011) points out, "a text may be clear but so general or so incomprehensive as to make its application to concrete cases open to dispute and argument. A person may comprehend what is written, but not be able to find in the text the answer to his concern because of vagueness, open texture, and borderline factors" (p. 393).

Mazza (1996) concludes, "Corporate officers and owners are faced with the question of whether it is more dangerous to know or not to know about areas of noncompliance, given that it is clearly impossible for a company to be in continual and total compliance with the myriad of environmental laws and regulations in effect " (p. 83). On related note, Dorothy Winsor (1990) has argued that corporate writers do not own their texts because the organization's culture shapes the choices the writer can make. That is, their reports' contents are mediated by the reactions writers believe readers will have both to their reports and to themselves as employees. When writing about sensitive issues, writers may need to be especially careful, considering the reactions of both intended readers within their organizations and of external readers who may attempt to use the information in documents to prosecute the business or even the employee who wrote them. This is especially true of the reports written by environmental auditors concerning the degree to which their companies are complying with government-mandated standards (Clark, 1998).

Mazza (1996) argues that

> *The statutory creation of the proposed qualified privilege does not encourage the frank and candid reporting of audit findings. When an auditor is reporting such findings, he or she does not know whether the company will come into compliance, much less whether such compliance will be deemed by a magistrate to be prompt and reasonable. Furthermore, he or she does not know whether, several years down the line, a prosecutor will be able to convince a magistrate that there is a compelling need for the information or that the report is being used for fraudulent purposes.*

If an auditor nevertheless uses honest, candid language, he or she essentially forces the company to promptly come into compliance and prevents the fraudulent use of the report. This type of auditor will not be very popular with companies who wish to have more control over the timing of compliance measures and the use of their completed reports. Instead, companies will likely instruct auditors to relate findings of problematic areas orally or forget they ever found such areas. Since the employer may retaliate if an auditor's reports lead to increased liability, an auditing employee will be just as inhibited from making a candid record of problematic findings as he or she was before the privilege (124).

Gish (1995) observes that the fear of discovery may lead the auditor to steer clear of problem areas, deliver watered-down warnings and implementation suggestions. Mazza (1996) adds that the employees of the audited company may also withhold negative information. "A good portion of many environmental audits consists of a series of interviews with line employees, who give the auditors essential information about what is and is not working. The fear of discovery may lead the interviewees to withhold information when they believe it may harm their employer in a future lawsuit. Employees recognize that harm to the employer may lead to the loss of a job, whether it be through firing or the shutdown of the business" (110).

Even when an auditor reports negative information, Gish (1995) argues that companies may take several steps to limit publication of and access to the findings of environmental auditors, each of which contribute to concealing evidence of noncompliance. "An organization can take several steps to reduce the risk of materials generated by an audit being used against it. First the organization can structure the audit so that a minimum number of employees participate. Second the organization can limit employee access to the materials generated from the audit, especially the conclusions. Third, the organization can routinely and systematically destroy any audit-related materials" (p. 5). Mazza (1996) adds that the company might also ensure materials are protected by attorney-client privacy privileges. Hunt and Wilkins (1992) assert that this defense is probably only available to large companies whose lawyers can supervise the auditing process, creating a privacy privilege, a benefit likely to be prohibitively expensive for small and medium-sized companies).

As a result of the complex dilemmas faced by environmental auditors and others involved in the audit process, legal experts and management scholars have been engaged in a significant debate on the incentives and disincentives needed to encourage companies to comply with environmental standards. While the number of companies agreeing to self-regulate their environmental compliance has grown (Lenox and Nash, 2003) significant debate exists as to whether voluntary compliance has worked as intended by the EPA.

Importantly, more research is needed to determine the factors that encourage and discourage compliance. As Schneiberg and Bartley (2008) indicate, "new regulatory forms have produced far more empirical research on their rise and character than on their translation into practice" (p. 50) with little systematic analysis of how these regulations shape organizational behavior.

One significant contribution to fill this need is the research Short and Toeffel (2010) conducted on the impact of legal environment on compliance. They investigated how the enforcement activities of regulators construct the legal environment in ways that may be more or less conducive to self-regulation. They conclude that more research is needed to understand the complex environment in which these decisions are made.

Looking at this issue from a complementary angle, this paper reports the results of experimental research to determine some of the situational factors that influence the persuasiveness of environmental remediation proposals, as they compete for limited resources with proposals being advanced from other departments.

To explore these issues, this research, conducted as three simultaneously administered experiments, hypothesizes that increasing length of fines and jail terms for managers, meeting profitability goals, and the relative certainty of the costs of solvability of addressing the environmental violation would all add to the persuasiveness of an environmental memo, while lower fines and shorter jail terms, lack of meeting profitability goals, and significant uncertainty about the costs of solving the environmental violation would reduce an environmental remediation proposal's persuasiveness.

LITERATURE REVIEW AND RESEARCH OBJECTIVES

Fines and Jail Terms

The use of jail terms and fines to punish environmental violations has generated significant debate. Prior research indicated a positive relationship between increasing fines and compliance (Clark, et al., 2002). The research reported here adds the variable of jail terms to fines to determine if such criminal sanctions would improve compliance. Given that many legal scholars believe fines are not deterrent enough and only the promise of jail terms for those who knew of the violations and permitted them to continue would deter them from ignoring, delaying or diluting remediation recommendations. For example, Rahn (2007) and O'Hear (2004) are among those who argue that only very harsh criminal sanctions, such as the promise of jail terms, will encourage compliance. Rahn maintains that fines in and of themselves will not deter violations and that criminal consequences are necessary. "Some corporations view any environmental law violation as 'a mere economic risk.' Even large fines are considered just the 'cost of doing business.' Corporate officers allow criminal acts because they are detached and separated from those whom their acts harm. However, the threat of incarceration may increase the chance that a corporation and its officers will view environmental law violations as more than a mere economic risk" (pp. 219-220).

Criminal enforcement is preferable to fines in her view as it focuses on removing the incentive of economic benefit and replacing it with the even more highly feared alternative of a criminal conviction, and in some cases, as prison sentences for corporate officers. Mazza (1996) argues criminal sanctions are seen as appropriate by many prosecutors and juries who see environmental violations as particularly egregious. "Individuals who commit environmental crimes - particularly those involving hazardous waste - commonly demonstrate a complete disrespect for the law and disregard for the safety of others, and are motivated by a desire to enjoy the substantial profits that can be derived from such illegal activities" (p. 84).

Guthrie (2012) maintains that such legal analysis of the deterrent value of significant fines and jail terms largely depends on the rational choice-based analyses of law and legal behavior--that company management makes decisions systematically and predictably, perceiving gains and losses in the same way. On the other hand, he points out that some legal scholars have begun to question the wisdom of relying on rational choice theory because there is "so much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of this theory" (p. 6). An alternative, prospect theory, "is an empirical theory that describes how people actually make decisions. Like rational choice theory, prospect theory assumes that people *try* to maximize outcomes; unlike rational choice theory, prospect theory demonstrates that people often fail to do so in real life situations. Prospect theory predicts people will be risk averse in gain situations and risk taking in loss situations. This contrasts with rational choice theory, which assumes either risk neutrality or risk aversion in the face of both gains and losses "(pp. 6-7).

Profitability

Pressures to make a profit can lead to ethically challenged reactions in deciding whether or not to address environmental violations. If a company is unprofitable, its management may not want to immediately remedy an environmental problem that would exacerbate its losses, and perhaps lead to layoffs, reduced budgets, frozen salaries, or a plant closing versus using that money to invest in programs that might help return the company to profitability and prevent the immediate negative consequences of continuing losses (Karlin, 1994). On the other hand, if it is profitable, prospect theory would predict that company management would be risk averse and decide to use some of the profits to address environmental issues, even if it decides that discovery is unlikely.

Certainty vs. Uncertainty

By investigating potential environmental violations, a compliance auditor risks finding problems not easily amenable to clear, cost-effective solutions (Hogan & Bromberg, 1990). A key decision-making factor is uncertainty. Some audit requests, such as those for detection, may suggest moving resources, time, money and expertise from profit making investments into remediation projects that may require planning and implementing complex systems that require significant initial and ongoing investments, and which may lead to consequences that negatively affect the business' viability. That is, in terms of prospect theory, management might not authorize remediation investments to avoid potential losses and alternatively invest in efforts that will more positively impact the bottom line. In short, even a company with a commitment to high ethics may compromise them if its survival is at stake or if a plant might be shut down and jobs lost.

Objectives of the Study

The team conducted three related studies concurrently to study these three variables. This replication meets criteria Hunter (2001) identifies: it measures the independent variable and dependent variables in the same way using the same documents and same procedure, and draws upon a similar population of subjects, part time MBA students. The objective is to keep the contingent conditions as similar as possible to those of the previous study. As Hunter (2001) points out when findings are replication successfully, both the internal validity of the initial study and the validity and reliability of the measurement tools are supported.

It examines environmental remediation funding priority as it relates to two different kinds of memos: 1) "solvable," which identifies an environmental violation and indicates it can be solved, and 2) "insolvable," which indicates significant uncertainty about the exact dimensions of addressing the environmental violations and questions the ability of the company to pay for complete environmental remediation. For both kinds of memos, one of three levels of fines and jail terms is stipulated if regulators were to discover the violation. In each, environmental remediation funding priority is examined as a function of whether or not the company is meeting its profitability goals.

The following hypotheses test the objectives of this study. H1 and H2 address the first group, the solvable memo. H3 and H4 address the second group, the insolvable memos. H5 compares data from experiment 1 with experiment 2.

Solvable: Profitability & increasing fines and jail terms

H1: Funding priority for solvable environmental compliance memos will be higher if readers are informed the organization is meeting its profitability goals than if they are informed it is not meeting its profitability goals.

H2: Funding priority for solvable environmental compliance memos will increase as the levels of fines and jail terms increases.

Insolvable: Profitability & increasing jail terms

H3: Funding priority for insolvable environmental compliance memos will be higher if readers are informed the organization is meeting its profitability goals than if they are informed it is not meeting its profitability goals.

H4: Funding priority for insolvable environmental compliance memos will increase as the levels of fines and jail terms increases.

Solvable vs. insolvable

H5: Insolvable environmental compliance memos will be given lower priority for funding than solvable environmental compliance memos.

EXPERIMENTAL DESIGN

Identical memos from the initial experiment with only the addition of jail terms to the fines changes. 1200 questionnaires were distributed, 200 per section. Instructors were asked to return unneeded questionnaires, and 352 unused questionnaires were returned. Of the 848 questionnaires distributed, the 672 deemed complete and legible were returned for a response rate of 79%.

Group One – The Solvable Memos

Respondents in this group were asked to read one of two similarly worded scenarios, one indicating the company was meeting its profitability goals and one that it was not. To examine the influence of level of fine on the ranking of environmental remediation requests for funding, the solvable environmental remediation memos were divided into three sub-groups, each containing a different level of fine: $50K and 3 months in jail, $1.5M and 1 year in jail and $16.2M and 3 years in jail.

Group Two--The Insolvable Memos

To examine the hypothesis that insolvable environmental compliance memos will be given higher priority of funding if readers believe the organization is meeting its profitability goals than if they believe it is not meeting its profitability goals, respondents in this group, as were those in Group One, were asked to read one of two similarly worded scenarios, one indicating that the company was meeting its profitability goals and one that it was not. They then read four memos, including the three experimental memos, and the "insolvable" environmental remediation memo. This insolvable (high uncertainty) memo requests funds to approve a plan to detect whether the problem is solvable within the company’s fiscal constraints with a suggestion that the investigation might discover issues which could be extremely costly to remediate and could lead to the closing of the plant.

To examine the influence of level of fine on the ranking of environmental remediation requests for funding, the unsolvable environmental remediation memos were divided into three sub-groups, each, as with the solvable memos, containing a different level of fine: $50K and 3 months in jail, $1.5M and 1 year in jail and $16.2M and 3 years in jail. They do not specifically estimate the potential costs of meeting the mandated environmental standard. The test documents are same as in the original study with only the addition of jail terms added to the text to the environmental remediation memos.

STATISTICAL ANALYSIS

For hypotheses 1, 3, and 5 The Mann-Whitney U statistic, appropriate for non-parametric two-group comparisons of ordinal data, and Spearman rank-order coefficient, a non-parametric test for ordinal data, which measures the correlation between two rank ordered lists, were used in statistical analysis of the data. For hypotheses 2 & 4, Kruskal-Wallis statistic was used, appropriate for non-parametric three-group comparisons of ordinal data.

Results

The following hypotheses were supported: In both solvable and unsolvable situations, environmental remediation is more strongly supported if subjects read the company is meeting its profitability targets than if they believed it was not.

Environmental remediation efforts are more strongly supported if subjects read the problem is well defined and solvable than if they believed it was ill defined and not clearly solvable with existing company resources. These results are consistent with earlier research into this topic (See Clark, et al., 2002).

On the other hand, statistical analysis of increasing the levels of fines and jail terms did not predict greater compliance, inconsistent with past research that indicated increasing fines alone leads to improved compliance.

The results are discussed as they relate to the two groups: insolvable and solvable.

Group One—The Solvable Memos

The first hypothesis, that solvable environmental remediation compliance memos will be given higher priority for funding if readers believe the organization is meeting its profitability goals than if they believe it is not meeting its profitability goals, was supported with an observed Z value of -2.45 and a $p < .0075$ (one-tailed test). 77% of respondents placed environmental remediation as their first priority when the company was described as meeting its profitability goals versus 64% when it was described as not meeting it profitability goals.

Table 1 provides the raw scores and percentages for the 338 solvable compliance memos, categorized by perceived profitability and priority for environmental remediation.

Table 1 Solvable: Profitable vs. Unprofitable							
			Perfume				
			1.00	2.00	3.00	4.00	Total
HYP1	Solvable Criminal Sanctions that are Profitable	Count	124	20	7	10	161
		% Within HYP1	77.0%	12.4%	4.3%	6.2%	100.0%
	Solvable Criminal Sanctions that are not Profitable	Count	113	41	9	14	177
		% Within HYP1	63.8%	23.2%	5.1%	7.9%	100.0%
Total		Count	237	61	16	24	338
		% Within HYP1	70.1%	18.0%	4.7%	7.1%	100.0%

On the other hand, increasing the levels of fine and jail terms did not produce a statistically significant result, with a Chi Square of 2.049. Data are directionally consistent with the hypothesis: with high sanctions, 76% of respondents chose remediation versus less than 70% for both the low and medium criminal sanctions. Table 2 provides the raw scores and percentages for these memos.

Table 2 Solvable with Increasing Penalties							
			Perfume				
			1.00	2.00	3.00	4.00	Total
HYP2	Low Criminal Sanctions	Count	127	30	11	14	182
		% Within HYP2	69.6%	16.3%	6.2%	7.8%	100.0%
	Medium Criminal Sanctions	Count	61	19	2	6	88
		% Within HYP2	68.3%	22.8%	2.4%	6.5%	100.0%
	High Criminal Sanctions	Count	52	11	3	3	69
		% Within HYP2	76.0%	16.7%	4.3%	4.3%	100.0%
Total		Count	239	60	16	23	338
		% Within HYP2	70.6%	18.1%	4.7%	6.1%	100.0%

Group Two—The Insolvable Memos

The first hypothesis, that insolvable environmental compliance memos will be given higher priority for funding if readers believe the organization is meeting profitability goals than if they believe it is not meeting its profitability goals, was supported. With the number one being highest priority and the number four being lowest priority, the meeting-profit-goals group had a lower mean ranking, indicating a higher priority than the not-meeting-profit-goals group. These findings were statistically significant, with an observed Z value of -1.95 and a $p < .025$ (one-tailed test).

Table 3 provides the raw scores and percentages for 334 insolvable compliance memos categorized by profitability and priority for environmental remediation funding. With the insolvable memo, 59% of respondents chose environmental remediation as their first priority when the company was described as meeting its profitability goals versus 47% when it was described as not meeting its profitability goals.

Table 3
Unsolvable Profitable vs. Unprofitable

			Perfume				
			1.00	2.00	3.00	4.00	Total
HYP6	Unsolvable Criminal Sanctions that are Profitable	Count	106	30	13	32	181
		% Within HYP3	59.6%	16.6%	7.2%	17.7%	100.0%
	Unsolvable Criminal Sanctions that are not Profitable	Count	72	31	18	32	153
		% Within HYP3	47.1%	20.3%	11.8%	20.9%	100.0%
Total		Count	178	61	31	64	334
		% Within HYP3	53.3%	18.3%	9.3%	19.2%	100.0%

On the other hand, increasing the levels of fine and jail terms did not produce a statistically significant result, with a Chi Square of 2.086. These results are directionally inconsistent with the hypothesis: with high sanctions, 49% of respondents chose remediation versus less than 53% and 57% for the low and medium criminal sanctions, respectively. In addition, respondents reading the highest sanctions memo were most likely to select the riskiest option, ranking remediation as their fourth choice, with 24% versus 17% and 16% of the low and medium criminal sanctions respondents respectively. Table 2 provides the raw scores and percentages for these memos.

Table 4
Unsolvable Increasing Penalties

			Perfume				
			1.00	2.00	3.00	4.00	Total
HYP3	Unsolvable Low Criminal Sanctions	Count	59	20	12	19	110
		% Within HYP4	53.6%	18.2%	10.9%	17.3%	100.0%
	Unsolvable Medium Criminal Sanctions	Count	63	20	9	18	110
		% Within HYP4	57.3%	18.2%	8.2%	16.4%	100.0%
	Unsolvable High Criminal Sanctions	Count	56	21	10	27	114
		% Within HYP4	49.1%	18.4%	8.8%	23.7%	100.0%
Total		Count	178	61	31	64	334
		% Within HYP4	53.3%	18.3%	9.3%	19.2%	100.0%

Group Three: Insolvable vs. Solvable Memos

While this study focuses on two distinct groups, solvable and insolvable, the third hypothesis provides a way of comparing them. The hypothesis that insolvable environmental compliance memos will be given lower priority for funding than solvable environmental compliance memos was confirmed: This outcome was statistically significant with a Z value of –5.172 and a $p < .0001$ (one-tailed test). 70% chose environmental remediation as top priority in the solvable scenarios versus 53% in the insolvable scenario, consistent with the results of prior research.

Table 5 provides the raw scores and percentages for the 334 insolvable compliance memos and the 338 solvable compliance memos, categorized by priority for environmental remediation funding.

Table 5
Solvable vs. Unsolvable

			Perfume				
			1.00	2.00	3.00	4.00	Total
HYP8	Solvable	Count	237	61	16	24	338
		% Within HYP5	70.1%	18.0%	4.7%	7.1%	100.0%
	Not Solvable	Count	178	61	31	64	334
		% Within HYP5	53.3%	18.3%	9.3%	19.2%	100.0%
Total		Count	415	122	47	88	672
		% Within HYP5	61.8%	18.2%	7.0%	13.1%	100.0%

DISCUSSION

These results validate two of the findings of the study that was replicated, that profitability and solvability are variables that influence reactions to environmental audit reports. The results of adding jail terms to fines was inconsistent with rational decision theory and with previous results that increasing fines increased compliance. In fact, the data support the premise of prospect theory, that if environmental remediation expenditures results in not meeting the profitability targets to which managers had previously committed, these recommendations might be diluted, delayed or ignored. This is especially true if the auditor requests resources for detection with the threat of a potential plant closing as in the scenario used in the test. In loss situations, managers may see themselves facing a lose-lose, not meeting profit targets and potentially losing jobs and income as well, where ignoring the remediation might lead to meeting profit targets and retaining their own jobs and those of fellow employees. In short, managers may being willing to run the risk of a large loss in the future, including the potential for being jailed, to prevent any losses in the present, being less deterred by threat of future punishment than rational theory, the equal weighing of all consequences, would predict. These results provide insight into the conditions under which voluntary oversight might lead to concealing rather than addressing environmental compliance issues and also highlight the limitations of self-audit privilege as a vehicle for assuring environmental compliance, undermining the EPA goal of eliminating the need for federal oversight.

And they are consistent with Laughunn et al.'s (1980) findings that if managers perceive they are above a performance target they will practice risk averse strategies and will pursue risk taking strategies if they perceive performance as being below a targeted level. This research further revealed that the observed pattern of risk preference for below target returns was not significantly altered by other variables, including the diversity of the backgrounds of the different business managers, by the context of the decision-making progress, or by the size of the losses involved.

That is, real world issues make preparing environmental assessment reports a morally daunting task, as the writers work both to interpret complex and changing regulatory rules, and to consider reader reactions and the situational variables that are at play. They face the uncertainty of whether the employees interviewed during the audit gave honest and accurate answers to compliance questions. They are also likely to consider the personal consequences if a violation that is not reported is uncovered by an external party and at the same time consider the personal impact a negative report may have on the writer's standing in the organization, and its effects on valued colleagues and on the communities in which they live.

This may help explain results that undermine a key premise of the case for jail terms for executives concealing environmental violations: that the larger the penalties the greater the likely compliance. The data of these studies indicated no significant difference in compliance among the three levels of fine and jail terms. In one case, readers made the most risky decisions in the scenario where a recommendation in the unsolvable category was presented in a context of unprofitability, suggesting that exceptionally harsh criminal penalties in loss situations may actually motivate rather than deter unethical behavior.

IMPLICATIONS

Experts have recommended some steps to encourage honest reporting, including establishing uniform national standards with clear specific guidelines that accurately set criteria for compliance and non-compliance as a significant impediment to a more workable environmental audit policy is the current lack of standards or a professional code for environmental auditors. Mazza (1996) concludes: "Without uniform standards, the value of environmental audits can never be quantified, because audits can contain information of widely varying quality. This lack of standards makes the creation of any privilege for environmental audit reports extremely problematic" (pp. 129-130). O'Hear (2004) confirms this analysis arguing that the vagueness of what constitutes an environmental audit report could lead to litigation and, as a consequence, delays in remediation.

These findings suggest that writing complete, candid, and accurate environmental compliance reports may not be a clear-cut matter of an auditor or audit team acting ethically or unethically. Situational variables may have a strong impact of whether an environmental violation is reported, how it is reported, how it is received, and how and when its recommendations are acted upon.

These results indicate that compliance is best assured when companies have staff well versed in environmental law, are profitable, and are presented with clear solutions where the amount of time and money to be invested are known. On the other hand, compliance might be delayed or a violation not reported if the compliance team and top management see that implementing the report's recommendations for remediation might negatively affect their business, community, interpersonal, and personal interests.

They also suggest, that given the EPA's limited resources, it might focus its discovery efforts on companies most likely to commit compliance violations: those not meeting profit targets and those where there are rumors of a plant shutdown or significant layoffs and cutbacks. The EPA might particularly look at small and medium-sized companies in these circumstances as they are less likely to have the expertise to understand environmental compliance regulations or the legal implications of a violation, less likely to have access to specialized legal counsel, and typically face a disproportionately larger expense in complying with regulations than larger companies (Dean & Brown, 1995).

FUTURE RESEARCH

Future research might better identify contexts and issues that will help us understand environmental assessment reporting as a system with complex interdependencies. In particular, listening to the voices of those most directly involved in environmental decision making may help us to further understand the motivators for corporate environmental compliance and non-compliance. This might include taking surveys of and interviews with environmental auditors, lawyers, and regulators among others, as well as doing field research by visiting companies at which the auditors work and observing them in their work environments.

It would also be of value to more deeply investigate the impact of different variables. These studies specified a plant shutdown in the insolvable condition. We might see if identification of other types of economic harm, such as loss of some jobs, reductions in pay, medical benefits or retirement funds, or the loss of community tax revenues and leadership might yield different results. Future studies might also include content to assess the likelihood of discovery to determine if that variable might impact decision-making, as well as the impact of even larger fines and jail terms.

This research supports prospect theory as it applies to management reactions to environmental compliance audit reports—that managers are likely to be risk-averse in favorable situations, where the company can have clear idea of costs of recommended remediation and can remain profitable in doing so and more likely to be risk-taking and avoid remediation in situations where the costs are not clearly known and the potential consequences severe, thus yielding insight into the conditions under which environmental violations are most likely to be ignored or remediation actions diluted or delayed.

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NEW CONCERNS IN ELECTRONIC EMPLOYEE MONITORING: HAVE YOU CHECKED YOUR POLICIES LATELY?

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ABSTRACT

Employee monitoring is a significant component of employers' efforts to maintain employee productivity and, to a great extent, the means by which to avoid legal liabilities and business injuries which stem from employee misconduct. From sexual harassment to commercial disparagement, employers must guard against employee injury to third parties, inside or outside of the workplace. Moreover, disgruntled employees can expose valuable business trade secrets or engage in corporate espionage or sabotage.

Developing technologies allow for extensive monitoring with video, phones, internet, social media and other devices with which employee behaviors can be tracked. If an employer goes too far, or not far enough, to identify and prevent employee misconduct, the legal consequences that could befall the employer are costly to both revenue and reputation. This balancing act, and the dilemma it creates, demonstrates the need for businesses to develop effective electronic monitoring policies. However, policies, once developed, need to be periodically reviewed to ensure compliance with evolving legal changes. For example, recent legal decisions from the National Labor Relations Board and emerging trends in state legislation regarding employee monitoring necessitate review of employee monitoring policies.

INTRODUCTION

Employers have long had compelling reasons to monitor employees. For example, management at Los Angeles California City Hall discovered that employees were streaming the 2012 Summer Olympics over the corporate network while at work. Management's response: "Stop watching the Olympics at work!" (Winton, 2012). Events like the Olympics or the annual March Madness basketball tournament impact corporate networks during very specific times, but imagine an employer monitoring its network and discovering that *every day* employees are watching over 50,000 YouTube videos, streaming over 4,000 hours of music over the internet, or streaming movies from Netflix. This discovery, in fact, prompted Proctor & Gamble to shut down access to movies from Netflix and music from Pandora for its 129,000 employees (Schwartz, 2012).

Ensuring employee productivity is a major consideration to support the monitoring processes. But employers have also long been aware of the risk of legal liability or loss to which their organizations may be exposed as a result of inappropriate employee activities online (Papa & Bass, 2004). Lawsuits based on online harassment are typically cited as a concern that justifies employee monitoring, but these are by no means the only legal claims that can arise from employee activity online. In recent years, employee activity on social media outlets, along with employer responses to such activity, have increasingly exposed organizations to liability for unlawful discrimination (*Gaskell v. University of Kentucky*, 2010), violation of labor laws (*Hispanics United of Buffalo, Inc.*, 2012), and even violation of securities laws (Bondi & Lofchie, 2011). In addition to legal liability for employee misconduct, employers are concerned about threats to their organization's intellectual property as vital data and information are increasingly stored in digital format that is easy for employees to access and distribute outside of the organization's protocols (Willey, Ford, White & Clapper, 2011). To support and justify employee monitoring, employers have adopted policies that attempt to define the limits of permissible employee online activity and identify forms of impermissible online activity that might expose the organization to legal liability or loss. As with all best business practices, it is not enough to simply develop an employee monitoring policy. Successful organizations regularly review and update their policies and review the enforcement of those policies to ensure that they are addressing current concerns in a way that complies with state and federal laws (Rozwell, 2012).

The monitoring of employees' emails, internet usage, telephone communications and social media gives rise to confusing legal responses. While some law supports the necessity of monitoring, other law exists to limit the electronic monitoring of employees to protect employee privacy, leaving employers between a rock and hard place. On top of these concerns, recent rulings by the National Labor Relations Board confound the problem for organizations by strictly interpreting monitoring policies that could impact employees' rights under the National Labor Relations Act. Additionally, numerous states have either enacted or are considering legislation that would limit the use of social media as a monitoring tool. It's time to take out those monitoring policies, dust them off, and be sure the organization's policies comply with law.

AN HISTORICAL LOOK AT ELECTRONIC MONITORING AND A LOOK AT RECENT TRENDS

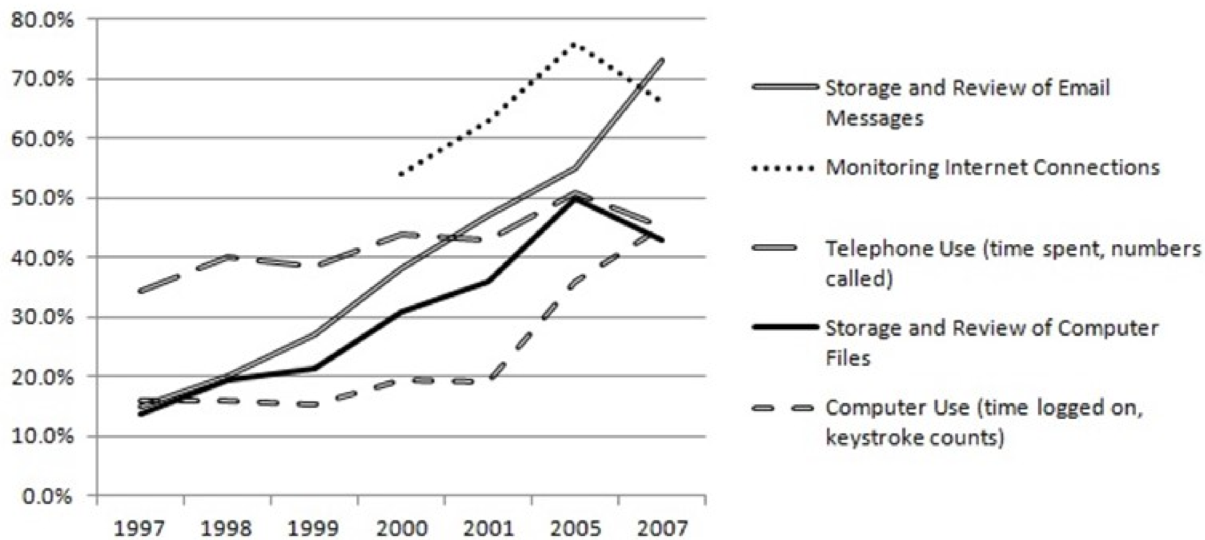
Business organizations are able to use hardware and software to electronically monitor a wide variety of employee behaviors both in and out of the workplace. Attendance and facility use can be monitored using video surveillance and through employee badges where entry and time spent in various access areas is logged. In addition, new applications for physical access cards provide authentication and access to digital systems which may ultimately lead to the convergence of Information Technology (IT) security and physical security (Walls, 2012a). Not only can employee access cards provide a digital record of their physical whereabouts, but also global positioning system (GPS) chips and radio frequency identification (RFID) chips have been used to monitor the location of assets, such as laptops, phones, and vehicles, used by employees (Ciocchetti, 2011). Beyond monitoring the physical location of assets or employees, organizations also monitor employee productivity (Mujtaba, 2003) including the use of communication equipment and computer equipment that their employees use daily: activity on the desktop personal computers, keystroke logs, email communications, text-messages; use of social network sites, use of the internet and search engines; and telephone use, including voicemail monitoring (Ciocchetti, 2011).

A Decade of Electronic Monitoring: 1997 – 2007

Monitoring techniques differ in both their usage in the workplace and in their usage over time. Surveys of member and client companies of the American Management Association (AMA) specifically examined workplace monitoring over the ten-year period from 1997 to 2007, though not all technologies were measured for all years (AMA, 2000; AMA, 2001; AMA, 2008; Anonymous, 2005). For example, monitoring using technologies such as social network sites and blogs were not measured prior to 2007. The surveys revealed that, for the period from 1997-2005, some monitoring techniques, such as the recording and review of telephone conversations or voicemail messages and the review and video recording of employees to assess job performance were used by less than 21% of the businesses surveyed (AMA, 2000; AMA, 2001; Anonymous, 2005). Video recordings of employee job performance grew at the very low rate of .2% per year (AMA, 2000; AMA, 2005). Although voicemail storage and review grew at a fairly high rate of nearly 14% per year during the period, its use is not widespread, at l5% of the surveyed companies (AMA, 2005).

Other employee monitoring techniques showed more widespread usage with several of those monitoring techniques showing higher rates of growth over time (see Figure 1).

Figure 1: Monitoring methods and usage percentages over time



For example, from 1997-2007, monitoring email messages grew at the highest annual rate (17% per year) while storing and reviewing computer files and computer use show very high growth rates of 12% and 11% per year respectively. Telephone use monitoring was fairly sizeable at 45% while monitoring internet connections was quite common at 66%. Both of those techniques showed low growth rates of 3% per year with telephone use being measured for the ten-year period from 1997-2007, and monitoring internet connections as measured for the eight-year period from 2000-2007 (AMA, 2000; AMA, 2001; AMA, 2008; Anonymous, 2005). Monitoring employees on social networking sites and on the blogosphere were first measured in

2007 and show rates of usage of 10% and 12% respectively (AMA 2008). New technologies and applications will continue to affect electronic monitoring.

Recent Trends in Electronic Monitoring

A recent trend is the use of social media by employees or potential employees. Gartner Inc., an IT research firm, conducted a survey that showed widespread adoption of social networking sites across a variety of U.S. industries including the media industry (77%), education and telecom industries (58%), and the retail industry (52%) among others (Rozwell, 2012). Organizations monitor social media use of both employees and potential employees (Willey, White, Domagalski, & Ford, 2012). Surveys of employers over the last seven years show that in 2013, 39% of employers screened potential employees using social network sites (Grasz, 2013) up from 12% (Grasz, 2006), which represents a growth rate of 225%. Information on social network sites can both help a potential employee get hired as well as hinder a potential employee from getting hired. Current employees are also monitored as to their social media use, and Gartner recommends that organizations develop social media policies, rules and training for organization employees who might be forbidden from, encouraged to use or even asked to use and track social media sites as part of their job assignments (Mann, 2012). The social network sites that organizations are monitoring fall into four major categories: public sites such as Facebook, Twitter and LinkedIn; public sites that are not based on advertising, like MyCube; semiprivate social network sites like Yammer; and private social networks such as Mumsnet (Casper, 2011). Software such as SocialLogix is able to detect multiple social media sites employees use and uncover their user profiles. While it is not uncommon to monitor social media for employee postings, particularly in the major sites such as Facebook and LinkedIn and Twitter, recent technology capabilities make it possible to monitor other social networks even if the employee posts in multiple languages. To prevent posts that are inappropriate, organizations must first monitor and intercept them using a variety of tools including network infrastructure tools, services that integrate with social media platforms and social media management software (Walls, 2012b).

A REVIEW OF THE LEGAL PRESSURES SUPPORTING EMPLOYEE MONITORING

To a significant and increasing extent, organizations monitor employee activity to reduce potential exposure to legal liability to third parties and also to minimize the risk of harm resulting from employee misconduct. Not only must an organization take reasonable measures to protect third parties from the wrongful conduct of employees, it must also take measures to protect itself from employee acts that might undermine the organization’s business interests. Although these concerns over employee misconduct are not new, technological developments have provided employees with increased opportunities to divert themselves from their work obligations and engage in conduct that can be detrimental to the organization. Technology has also provided expanded tools with which organizations may monitor employee activity. The legal system, however, generally lags behind the needs of the workplace in terms of determining rights and responsibilities in the face of new technology. Courts often attempt to graft new applications of technology onto traditional legal doctrine and precedents whenever sufficient parallels exist (Ciocchetti, 2011). Occasionally, however, courts must fashion new remedies to address new harms, or await legislative action, and the results are seldom uniform.

The availability of expanded technological tools raises multiple issues, such as concerns over employee privacy, discussed below, on the one hand and the reasonableness of monitoring efforts on the other hand. If reasonable means of monitoring employee activity are available, employers may be found negligent if they fail to use those means. (Papa & Bass, 2004) Similarly, where an organization does not take advantage of available technology to protect its business interests, it may be left with no remedy in the face of employee (or ex-employee) theft of intellectual property or other harmful acts directed at the business (Willey, Ford, White & Clapper, 2011).

Injury to Third Parties

U.S. law often places liability on employers when employee conduct results in injury to third parties, either to those outside the organization or to other employees within the organization. Because employees are hired to act on the behalf of their employer and advance the employer's interest, they are considered agents of the employer. Under agency principles, the organization, as the principal, has the right to control the agent-employee (Restatement Agency, § 1.01). This agency relationship therefore exposes the organization to vicarious liability, under the theory of *respondeat superior*, for the wrongful acts of its employees committed in the scope of employment (Restatement Agency, § 2.04). Where the wrongful acts of an employee are outside the scope of employment, the organization may still be liable for harm to a third party under tort theory if the employee is on the premises of the employer or using the property of the employer or if the employer knew or had reason to know of the employee's propensity to engage in wrongful acts (Restatement Torts, § 317).

Under the theory of *respondeat superior*, employees are generally considered to be acting within the scope of employment if they engage in work assigned by the employer or are subject to the employer's control (Restatement Agency, §7.07). Under *respondeat superior*, employees are engaged in activities they were hired to do to advance the organization's interest, but perform those activities in a manner that inflicts harm on a third party (Papa & Bass, 2004).

If the employee's conduct is not directed by the employer and is not intended to benefit the organization, then the employee is acting outside of the scope of employment (Restatement Agency, § 7.07). This exposes an organization to liability for employee misconduct under the tort theory of negligent retention. Organizations have a duty to prevent intentional harm or an unreasonable risk of bodily harm to third parties resulting from an employee's misconduct, either on the employer's premises or while using the equipment, tools, or other resources of the employer (Restatement Torts, § 317). A negligent retention theory is also available under agency law. Negligent retention under agency theory holds the employer responsible for the employee's conduct that causes harm to a third party if the employer is negligent "in selecting, training, retaining, supervising, or otherwise controlling the agent" (Restatement Agency, § 7.05). Unlike *respondeat superior*, it is not necessary for the employee to be acting in the scope of employment for liability to arise. Thus, in a situation where an employee uses workplace email to threaten or harass another, the injured third party may not be able to pursue the employer under a *respondeat superior* theory but might be able to assert a claim against the employer under a negligent retention theory. To avoid liability under a negligent retention theory, organizations often seek to prevent employee misconduct by monitoring their activities (Papa & Bass, 2004).

The use of workplace email systems for harassment is a phenomenon with which many organizations and courts are familiar. E-harassment often involves using email to send inappropriate messages to fellow employees or other third parties, distribute pornographic or obscene material, or otherwise humiliate or intimidate others. Failure to prevent such abusive e-mail practices has led to employer liability, which in turn has given employers a strong incentive to monitor employees' use of the company email (Papa & Bass, 2004).

Organizations may also incur liability when employee misconduct results in economic harm to third parties under a common law tort known as commercial disparagement (sometimes also referred to as trade libel or injurious falsehood). When a party makes a false statement that is harmful to the economic interests of another, that party may be liable for the economic harm if (1) he intended for the falsehood to cause harm or recognized or should have recognized the potential of the falsehood to cause harm, and (2) he knew that the statement was false or acted "in reckless disregard of its truth or falsity" (Restatement Torts, § 623A).

In addition to the common law tort claim for commercial disparagement, an injured party may also assert a claim for violation of the federal Lanham Act. Section 1125(a) of the Lanham Act creates civil liability for the use of a "false or misleading description of fact, or false or misleading representation of fact," including commercial advertising that "misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities" (Lanham Act, §1125(a)). Under this theory of liability, an employer may be liable for the actions of employees who carelessly or deliberately misrepresent either the employer's products or services or a competitor's products or services.

In a case involving common law and Lanham Act claims, a human resources software provider found itself fending off a lawsuit when an anonymous individual sent a forty-three page PowerPoint presentation denigrating a competitor's products and services to current and prospective customers of that competitor. The question before the court was whether a preliminary injunction should be issued forbidding the continued use of the presentation. In granting the plaintiff's request for a preliminary injunction, a federal District Court in California found that the competitor was likely to succeed on the merits of its multiple claims. Although the defendant acknowledged that the presentation originated internally, it denied authorizing its widespread anonymous release. Nevertheless, the defendant was exposed to liability for this act under a variety of legal theories, including trade libel and violation of the Lanham Act (*SuccessFactors, Inc. v. Softscape, Inc.*, 2008). Once the court entered an injunction, the defendant organization would face contempt sanctions if an employee disregarded the terms of the injunction.

Business Injury from Employee Misconduct

Employers must also be on guard for employee misconduct that could result in injury to the organization. Most organizations are well aware of the business risks presented by employees who do not have the employer's interests at heart. By virtue of their access to critical business information and resources, employees have the potential to wreak havoc by misappropriating such information or resources, by publicizing confidential information, or by leaving the employment relationship and taking with them valuable information and resources. Whether such employees are motivated by greed, spite, loyalty to another, or some other impetus, the damage done to an employer's business interests can be devastating.

Intellectual property may be one of the most valuable assets in the portfolio of an organization. Federal copyright and patent laws protect the two forms of intellectual property with which most businesspeople are familiar, and provide remedies where the rights of a copyright or patent holder are infringed (Ford, White, & Willey, 2010). However, copyrights and patents are by no means the exclusive forms of intellectual property or confidential information that need protecting. Trade secrets consist of information, in a wide variety of forms, that carries economic value as a result of not being generally known and which an organization seeks to protect from becoming known (Uniform Trade Secrets Act, §1(4)). Technology has played and will continue to play a role in the development and protection of trade secrets, but it also presents a threat to those secrets. Trade secret information is increasingly stored in digital form, which allows it to be easily accessed and shared. This becomes a disadvantage when the trade secret is accessed and then shared with someone outside of the organization. The portability of electronic devices and the popularity of cloud computing make it easy for an employee to copy trade secret information and forward or store it in locations beyond the organization's control. Even well-meaning employees may inadvertently leave trade secret information unguarded on a laptop, smartphone, or other mobile device that may be accessed by third parties. Disgruntled employees can have an even more destructive impact by copying or forwarding trade secret information to competitors or future employers before leaving their current employment. To combat the potential impact of employees' disclosure of trade secrets, monitoring the access to, use of, modifications or other manipulations of trade secret information is but one of many protective measures that employers take (Willey, et al., 2011).

Civil remedies for violations of the Uniform Trade Secrets Act, which has been adopted in all but a few states, include injunctions against actual or threatened misappropriation, monetary damages reflecting the plaintiff's actual loss or the defendant's unjust enrichment, and in cases where the misappropriation of a trade secret is willful and malicious, the plaintiff may recover double the amount of calculated damages (Uniform Trade Secrets Act §§ 2-3). However, to prevail on a civil misappropriation of trade secrets claim, the organization must establish that it took reasonable measures to protect the secrecy of the proprietary information that was taken. Courts often balance the economic value of the trade secret against the costs of protecting that secret to determine if the steps taken were reasonable. Use of automated monitoring programs to log employee access to proprietary information may be viewed as a cost effective protective measure (Willey, et al., 2011).

The criminal side of corporate espionage is best reflected in two federal laws that seek to protect trade secrets by criminalizing their theft. When proprietary business information falls into the hands of foreign interests, national security may be implicated. Accordingly, Congress has addressed both domestic and foreign corporate espionage in a pair of laws that seek to protect trade secrets. In what is frequently referred to as the Economic Espionage Act, federal law forbids the misappropriation of trade secrets through any number of means, high-tech or low-tech, if those trade secrets could benefit a foreign entity (Economic Espionage Act § 1831). The Economic Espionage Act also contains a provision that addresses theft of trade secrets without regard to whether there is a foreign entity involved (Economic Espionage Act § 1832). These provisions impose criminal sanctions on anyone who violate their terms, including business entities. The Federal Bureau of Investigation (FBI) specifically recommends that businesses protect themselves from the theft of trade secrets by "monitor[ing] computer networks for suspicious activities." (FBI, para. 3, n.d.).

In addition to trade secrets, organizations routinely compile and store other types of confidential information, such as personnel records, financial data, litigation materials, and other sensitive data. A patchwork of federal and state laws imposes a duty on businesses in a wide variety of industries to maintain confidentiality of certain data, and imposes sanctions on businesses who fail to prevent improper disclosures. Anyone who has sought medical care in the U.S. in recent months has probably received a Health Insurance Portability and Accountability Act ("HIPAA") statement addressing the confidentiality of patient information (42 U.S.C. §1320d-6, (2012)). Educational institutions that receive federal funds must guard the educational records of students under the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g (2012)). Attorneys are obligated to maintain the confidentiality of their client's information (Model Rules 1.6). Under the Graham-Leach-Bliley Act, financial institutions must protect the personal information of customers (15 U.S.C. §§ 6801-6803 (2012)). These are but a few examples of privacy laws to which organizations are subject. Given the widespread importance of confidentiality across numerous fields, employers must implement measures to prevent employees from disclosing sensitive information (Matwyshyn, 2005).

LEGAL RESTRICTIONS ON ELECTRONIC EMPLOYEE MONITORING

In spite of the clear need for employee monitoring to prevent harm to third parties or to the organization itself, monitoring policies and practices have faced numerous legal challenges from employees and government agencies responsible for regulating the workplace. These challenges often are based on common law privacy rights, federal privacy laws, labor relations statutes, and state laws limiting employer access to employees' personal online accounts.

Privacy Rights of Employees

While employers face a wide range of legal liability for not monitoring employees, some scholars argue that "…the American legal system has failed to: (1) keep up with today's powerful monitoring technology and (2) provide the necessary privacy protection for employees" (Ciocchetti, 2011, p. 289). Attempts to address this failure and to protect both employer and employee rights have been inconsistent. To the extent that employee privacy concerns are implicated in an organization's monitoring policy, the outcome often hinges on whether an employee has a reasonable expectation of privacy as to the activity being monitored. This inquiry, in turn, requires a distinction between a public employee and a private employee.

Private employees will find little in the United States Constitution to define or protect workplace privacy. While the United States Constitution does not specifically address a right of privacy, the courts have determined that public employees do have some protection from unreasonable searches and seizures from governmental employers (*City of Ontario v. Quon*, 2010). The Fourth Amendment puts some limits on monitoring government workers but only when the employee has a reasonable expectation of privacy. However, the Fourth Amendment protections do not translate to the private sector (Levinson, 2012). Even when a reasonable expectation of privacy exists for a public employee, the employer's actions will be deemed lawful if the reasons for the monitoring are deemed legitimate (*City of Ontario v. Quon*, 2010).

State law addresses privacy disputes with a variety of privacy principles that are generally referred to as "invasion of privacy" torts. All privacy torts require the party claiming injury to have a reasonable expectation of privacy violated by the conduct of another. The standard is not subjective; the expectation of privacy must be one that is considered by society to be reasonable (*Katz v. United States*, 1967). While several torts can be categorized under the umbrella of "invasion of privacy," two widely recognized privacy torts are intrusion upon seclusion and publicity of private facts. Both of these torts require the plaintiff to establish that the privacy violation be extreme and unreasonable. Intrusion upon seclusion occurs when a person ". . . intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns … if the intrusion would be highly offensive to a reasonable person" (Restatement Torts § 652B). The tort of publicity of private facts involves ". . . giving publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public" (Restatement Torts § 652E). The expectation of privacy, however, is greatly reduced in employment settings. This is particularly true where employers provide resources such as computers, email, phones, or internet access to facilitate employee productivity and where employers have notified employees that activity on company-provided resources will be monitored. Questions of unreasonableness, private affairs or offensiveness are resolved by courts on a case-by-case basis, but the workplace is not often viewed by courts as an area where a reasonable expectation of privacy is likely to exist.

Electronic Communications Privacy Act of 1986

The federal Electronic Communications Privacy Act of 1986 (ECPA) consists of two titles on which lawsuits regarding employee monitoring have been based, the Wiretap Act and the Stored Communications Act (SCA) (Electronic Communications Privacy Act). Since privacy is the intent of the law, certain applications of the ECPA support privacy in the workplace, especially for personal email accounts and social media postings. The problem is that the law is complex and courts have different views on how the law should be interpreted. The ECPA provides a civil remedy to the individual against a person or entity who intentionally intercepts an electronic communication or who obtains unauthorized access to stored electronic communications. While the statute appears to be on point when discussing workplace privacy, the interpretation of the law and its exceptions are unsettled as applied to electronic monitoring in the workplace.

The Wiretap Act prohibits interception, use and disclosure of contents of electronic communications and an interception is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device" while the communication is in transit (Electronic Communications Privacy Act, § 2510 (4)). The "interception in transit" requirement is often discussed in monitoring cases (*Global Policy Partners v. Yessin*, 2010).

The second title of the ECPA, the Stored Communications Act defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication" (Electronic Communications Privacy Act, § 2510(17)). Overall, court opinions generally hold that when employer's access and monitor stored emails on work computers, employees have no reasonable expectation of privacy even when using an employer's computer for personal reasons. Use of workplace computers "…carries with it social norms that effectively diminish the employee's reasonable expectation of privacy with regard to his use of his employer's computers" (*Sporer v. UAL Corp*., 2009 WL 2761329 at *5).

ECPA is not applicable to systems for electronic communications that are "configured so that such electronic communication is readily accessible to the general public" (Electronic Communications Privacy Act, § 2511(2)(g)(i)). Therefore, organizations are free to monitor and intercept communications employees make when those communications are available to the public, regardless of whether the communication is work related or not (Abril, 2012**).** Some courts have interpreted "readily accessible to the general public" as a broad exception that provides no protection for employee privacy. Therefore, organizations that provide electronic communications service or Internet access to employees for work-related purposes may access all communications (Abril, 2012).

Consent, authorization and the ordinary course of business are exceptions under the ECPA that are often raised by employers in ECPA litigation. In the employment area, consent is the exception to the Wiretap Act that most limits employees' rights regarding organizational monitoring and interception of electronic communications. Courts do look at the facts of a case to determine whether the employees knew they were being monitored and whether they voluntarily consented to the monitoring (Levinson, 2011). In making these determinations, courts often refer to organizational policies. Consent cases most often involve telephone rather than email interception but the analogy is similar. Employees can authorize employers to access stored emails under the SCA through workplace policies but that authorization generally does not extend to personal and password protected email accounts stored on outside servers (*Pure Boot Camp v. Warrior Fitness Boot Camp*, 2008). Employer monitoring of employee electronic communications under the Wiretap Act is permitted when such monitoring is carried out in the ordinary course of business, another exception to the ECPA. Ordinary course of business consists of "a routine activity of the business in furtherance of a legitimate business interest" (*Arias v. Mutual Central Alarm Services, Inc.,* 1998, p. 416).

Employers routinely request job candidates' usernames and passwords to access social networking sites when considering candidates for employment (Willey, et al., 2012), but employer monitoring of social networking sites sometimes continues even after the initial hire. Accessing and monitoring social networking sites without employee authorization raises legal concerns under the ECPA. What steps the account user takes to maintain privacy on a social networking site and what posted content is meant to be private and what is meant to be public are considerations when courts review alleged ECPA violations. Use of social networking sites as the means to communicate among employees regarding work-related matters also muddies the distinction between personal content and work-related content. In most states, with proper authorization, the employer can access and monitor social networking sites, but the question of how authorization was obtained has been raised in the courts. Moreover, the public debate over the use of social media monitoring in the workplace has resulted in legislative prohibitions to its use in some states and in similar pending legislation in many other states (Employer Access, 2013).

The National Labor Relations Act (NLRA)

Further complicating the balancing act between protecting an organization's interest in monitoring employee electronic activities and protecting employees' rights in the workplace is the National Labor Relations Act of 1935 (NLRA). Generally thought of as the law that protects employees' rights to organize, the NLRA includes provisions that apply to unionized and non-unionized employees. Importantly, the NLRA protects the right of employees to engage in concerted and collective activity in an effort to improve the terms and conditions of their employment. Employees have the right to discuss terms and conditions of employment with other co-workers and third parties and to take action to improve working conditions either individually or with other co-workers without retaliation by employers (National Labor Relations Act § 7). Employee conversations and expressions involving working conditions, wages, job performance issues, and problems with supervisors, for example, are protected. Such conversations are deemed lawful concerted activities.

The National Labor Relations Board (NLRB) is the administrative agency responsible for implementing and enforcing the NLRA. The NLRB has dispute resolution as well as regulatory functions (National Labor Relations Act § 3). In recent decisions, the NLRB has made it clear that while employers may monitor employees' electronic expressions, adverse action against employees for protected concerted activities or policies infringing on or chilling employees' ability to exercise their rights are unlawful. (OM 2011). Determinations as to whether employee posts are protected by the NLRA are made by the NLRB based on whether there was concerted activity, meaning that the employee actions are taken with or on the authority of co-workers and not solely on the employee's own behalf (*Meyers Industries* 1984).

At the outset of this discussion, it should be noted that the validity of some of the NLRB decisions mentioned below is in question as a result of legal challenges to several of President Obama's appointments of NLRB members. The President is entitled to make recess appointments of federal officers when the Senate is in recess, and the current challenges revolve around whether the Senate was actually in recess or was technically in session when President Obama made the appointments. The United States Supreme Court heard oral arguments on the question of these appointments in January 2014, and a decision has not yet been announced. A determination by the high court that the appointments were invalid could, in turn, invalidate NLRB decisions made when there were not enough legally appointed members to constitute a quorum (*NLRB v. Noel Canning*, 2013). Beyond this immediate question, NLRB policies and practices may also be subject to court challenges. With these limitations in mind, a review of the NLRB's current philosophy regarding social media and employee monitoring is instructive to employers who are developing or reviewing their social media policies.

In recent decisions, the NLRB found several employee-Facebook postings to be concerted activity and, therefore, protected under the NLRA. In one case an employee posted comments that her non-profit employer did not help clients sufficiently and that a co-workers' job performance was lacking. Those postings were made in anticipation of a meeting with a supervisor and the employee solicited responses from her co-workers regarding her complaints thus her postings were protected (*Hispanics United of Buffalo, Inc.*, 2012). Another case of social media postings falling within the protection of concerted activity involved comments and photographs derogatory of an employer event and the impact the disappointing event would have on sales and commissions. The Facebook postings were made after employees discussed their concerns among themselves and with a sales manager (*Karl Knauz BMW, Knauz Auto Group*, 2012). In addition, Facebook discussions between employees and a former employer expressing upset and concern over the employer's failure to withhold sufficient state taxes and its inability to complete paperwork properly was also protected when one employee stated that the issue was to be discussed with management at a staff meeting (OM 2011).

However, not all employee conversations or expressions meet the concerted activity standard. Statements that are defamatory and maliciously false, disrupt business operations, or undermine supervisory authority may not be protected although that determination is dependent on the place where the discussion took place, its subject matter, the contents of an employee's outburst and whether the expression was provoked by an unfair labor practice (*Atlantic Steel* 1979). In a case involving a reporter who "tweeted" offensive comments that the employer found to be unprofessional and inappropriate, the discipline imposed was lawful since the "tweets" did not involve conversations with other employees and did not relate to the terms and conditions of his employment. Moreover, disparaging comments made by an employee about her employers posted on the "wall" of her senator's Facebook page were not protected. The employee did not discuss the issues with co-workers at any time before or after the posts were made, nor did she raise any of the issues to management (OM 2011).

Employers who have drafted well-intentioned electronic communication policies have found themselves attempting to persuade the NLRB, often unsuccessfully, that their policies do not discourage protected concerted activity. To offer guidance in this often challenging area of law, the General Counsel office of the NLRB issued an Operations Management Memo on May 30, 2012. This OM Memo reviewed several social media policies that were found to have provisions that could be interpreted as unlawfully restricting protected collective activity. The OM Memo concluded with an acceptable social media policy that General Counsel found to be lawful (OM 2012).

The policies found to be flawed by General Counsel typically included language that was considered overbroad in that it could be interpreted as discouraging protected concerted activity. One employer's social media policy instructed employees "[not to] release confidential guest, team member, or company information" (OM 2012, p. 4). Although this language may seem like a reasonable attempt to protect proprietary employer information as well as the confidentiality of the organization's guests and workers, General Counsel determined that it could be interpreted as forbidding employees from discussing the terms and conditions of their employment, rendering the policy provision unlawful.

A second policy advised employees that anything employment-related that they post must be "completely accurate and not misleading" (OM 2012, p. 6). While this provision may be an attempt by the employer to avoid charges of commercial disparagement or defamation, General Counsel objected to this language because it could be interpreted to forbid discussions of the terms and conditions of employment or criticism of the employer's policies and practices. This same policy also instructed employees to make certain that they did not post non-public information on a public site. This provision, while a seemingly reasonable attempt to address the employer's confidentiality obligations as well as protect its proprietary information, suffered a fatal flaw in that it specifically included information about employees' terms and conditions of employment in the definition of "non-public information." Yet another flaw in this same policy involved a prohibition on the use of the employer's logo in employee postings, which General Counsel determined could unlawfully prohibit employees from posting photographs of workers engaged in protected concerted activities, such as picketing with signs containing an image of the company's logo. General Counsel did, however, find prohibitions on the posting of safety performance of its products and attorney-client privileged material to be lawful, since these did not mention employees or any potential concerted activity (OM 2012).

This same employer was also apparently concerned about the potential for workplace harassment or discrimination claims, as it included a provision in its social media policy instructing employees to avoid posting material that is "offensive, demeaning, abusive, or inappropriate" (OM 2012, p. 8). Employees were also cautioned against "friending" co-workers on outside social media sites if communication with those co-workers would be inappropriate in the workplace. The policy concluded with a "savings clause" asserting that the policy would "be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)" (OM 2012, p. 8). General Counsel determined that the prohibition against "offensive, demeaning, abusive, or inappropriate" comments was overbroad in that it could be interpreted to include criticisms or complaints about the terms and conditions of employment. The failure of the employer to identify which communications with co-workers would be inappropriate rendered the "friending" caution ambiguous and thus an unlawful discouragement of communication among co-workers. A provision directing employees to "report any unusual or inappropriate internal social media activity was found unlawful in that it would likely discourage employees from engaging in protected concerted activity. The employer's "savings clause" was insufficient to overcome the ambiguities and overbreadth of the objectionable policy provisions (OM 2012).

Confidentiality concerns over "personal information" that were reflected in another employer's social media policy were also found to be overbroad by General Counsel because "personal information" could be interpreted to include the employees' "terms and conditions" of employment. A provision prohibiting employees from commenting on legal matters or disputes was also found unlawful. Unlike a more narrow provision that forbids disclosure only of attorney-client privileged information, a prohibition against commenting on legal matters or disputes could be interpreted as forbidding the protected discussion of employee concerns. The employer advised employees to adopt a professional and courteous tone in their online postings, but General Counsel found this provision to be unlawful because it might discourage discussion of controversial subjects, such as protected concerted activity (OM 2012). A provision encouraging employees to address workplace concerns directly with co-workers and supervisors, rather than airing them on social media, was also found to be unlawful, as it might discourage employees from initiating or taking part in protected concerted activity. As with the previous employer's policy, a savings clause was determined to be insufficient to cure the flaws identified by General Counsel (OM 2012).

The fourth policy reviewed by General Counsel contained an overbroad prohibition on the posting of non-public information, which could be interpreted to include information on the terms and conditions of employment. A prohibition on the posting of confidential or proprietary information was ruled to be overbroad for the same reason, as was a prohibition on postings that might harm the image or reputation of the employer. However, the employer's prohibition on the posting of "harassment, bullying, discrimination, or retaliation" was deemed lawful, as it could not reasonably be interpreted as including protected concerted activity. A provision allowing internal concerted activity and discussions about the terms and conditions of employment while forbidding the same activity and discussions on a public forum was deemed unlawful and could not be salvaged by a savings clause (OM 2012).

The fifth policy contained a requirement that employees report unsolicited or inappropriate postings to a designated company official. This was deemed unlawful because employees could interpret this provision as requiring them to report concerted action, thus chilling such protected action. General Counsel also invalidated a provision forbidding postings that disparage or defame the employer, as this could discourage criticisms of the employer's policies or practices. A provision forbidding certain postings on company time were found unlawful because the NLRA grants workers the right to engage in concerted activity on the employer's premises during non-work times such as breaks (OM 2012).

In the sixth policy reviewed by General Counsel, restrictions on employee contact with the media and with government agencies absent prior approval by or notice to the employer were found to be unlawful limitations on concerted activity, which includes the right to communicate with third parties concerning the terms and conditions of employment (OM 2012).

The OM Memo concluded with a seventh policy that had been revised from an earlier version and which apparently cured flaws identified in the earlier version. It should be noted that the policy found to be acceptable in its entirety, attached below as Appendix A, addresses social media only and not other forms of electronic activity, and that it also references documents and policies that are not included in the OM Memo. Nevertheless, it provides useful guidance for organizations seeking to draft and implement a policy that does not inadvertently chill protected employee activity. General Counsel noted with approval that the seventh policy included examples of activity that was clearly not protected, thus clarifying and removing any potential ambiguities. The policy carefully identifies and narrowly defines prohibited communications to include only those that may properly be forbidden, such as disclosure of trade secrets or communications that would constitute unlawful harassment or create a hostile work environment. The approved policy thus strikes an appropriate balance between serving the employer's interest in avoiding inappropriate employee online communications and also protecting the rights of employees to freely discuss the terms and conditions of their employment. (OM 2012; App. A).

State Restrictions on Use of Social Media to Monitor

The increasing popularity of social media in both personal and business applications has naturally led some employers to seek access to their employees' social media accounts, whether private or workplace-related. It has become common for an employer to ask applicants for access information, such as usernames and passwords, to social media accounts. Once the applicant is employed is it also common for an employer to continue monitoring her or his social media accounts. This clearly places applicants and employees in an uncomfortable dilemma: either grant access to what one intended and wished to keep restricted to a narrow audience or refuse access, which would likely be viewed negatively by an employer or potential employer. In response to the privacy concerns of prospective and current employees, a number of states have either passed or are considering legislation forbidding employers from even inquiring as to whether these individuals have social media accounts as well as from requesting access to those accounts (Employee Access, 2013). In many of the states with current or pending legislation limiting employer access to employees' social media accounts, there are exceptions that allow access when necessary to investigate allegations of work-related misconduct or the disclosure of proprietary information. Some states may also allow employers to monitor employee activity that takes place using employer-provided resources, such as the employer's email system or internet server (See, e.g., Cal. Lab.Code §980).

REVISITING MONITORING POLICIES

Clearly, the legal impacts associated with the failure to monitor are considerable and compel an organization to monitor employees to mitigate the reputational and financial consequences of potential unlawful and wrongful conduct. On the other hand, the operation of an organization is dependent on its employees and their perception of trust regarding the organization for which they work. A mix of federal and state laws and court decisions, recent NLRB decisions, and state legislative actions regarding social media and monitoring mandate that the organization's existing monitoring policies be reviewed and revisited.

A logical starting point would be to review the organization's existing policies to see whether or to what extent they address concerns about an employee's electronic activities. Where employee monitoring policies already exist, they may be updated or modified to reflect current conditions or workplace needs. It may be helpful to include specific examples of what type of employee activities are permitted and what type of employee activities are forbidden. Critical concerns such as the importance of protecting proprietary or other confidential information should be identified and explained to employees. Ideally, a policy should provide employees with the contact information of a person or persons within the organization who can answer questions or address concerns that an employee might have concerning the policy (Mann, 2011). Employees should be made aware of the monitoring policy prior to its implementation, and should be periodically reminded of the policy. While in most cases notice of monitoring activities by an organization are not required by law unless applicable state law exists, consent of the employee to the monitoring provides the broadest protection for the organization. Implied consent such as computer screen warnings also provide consent when the employee uses the device after the warning banner is viewed (*United States v. Greiner*, 2007). Organizations may be successful in defending against invasion of privacy lawsuits when the monitoring policy includes a form for the employee to sign acknowledging her or his awareness of the policy and/or consenting to its provisions. Clear notice of monitoring activities and consent by the employee reduces the employee's expectation of privacy, the basis of privacy violation claims.

Notifying employees of the employer's monitoring policies also serves an additional purpose. Should a legal dispute arise regarding wrongful employee conduct and injury to others, a monitoring policy will allow the organization to document attempts to restrict unlawful employee conduct, potentially limiting a business's liability exposure. (Ciocchetti, 2011). Given this benefit, it might be tempting to establish a complete ban on use of electronic devices for non-work-related activities. However, such a policy may not pass legal muster due the problematic nature of enforcing such a strict policy. The lack of enforcement might prove to hinder the organization's efforts to protect third parties from employee misconduct and also to protect the business's own interests. A lack of enforcement might also send an unintended message to employees that the organization does not seriously enforce the policy and lacks commitment to the policy (*Stengart v. Loving Care Agency*, 2009). Consistent enforcement of a monitoring policy is needed to convince employees, and courts, of the seriousness of policy violations (Huth, 2013).

The objective of any policy is to allow the employee to conform her or his behavior to that established within the policy. To that end, clear enforcement policies, indicating the justifications necessitating monitoring, will help avoid the uncertainty and concern employees experience in the monitored workplace environment and allow employees to align behaviors with policy (Huth, 2013). Emphasizing the importance of monitoring for the organization and the reasons supporting monitoring provide a foundation on which employees can base their workplace conduct (Henle, Kohut & Booth, 2009).

Once developed or revised, any monitoring policy should be carefully reviewed, prior to its implementation, by an attorney knowledgeable of both the federal laws and the law of the states in which the business operates. An organization operating in more than one state may be subjected to a variety of state laws concerning employee monitoring that can result in different outcomes from one state to the next, so attention to variations in state laws is crucial. Importantly, employee monitoring policies, like all employment policies, should be reviewed on a regular basis to determine their effectiveness and continued legality in the ever-changing landscape of employment law.

CONCLUSION

Employers face a wide array of legal consequences for failing to reasonably track employee behavior and conduct that result in injuries to others. The competitive marketplace also makes an employer wary of employees who may injure the business by exposing trade secrets or revealing business processes to the competition. Technology has greatly expanded the means by which employers can protect themselves and others but that technology comes at a price. Overzealous monitoring of employees can result in claims of invasion of privacy or other legal violations and more recently claims of violations of the NLRA or newly created state statutes. The line between legal and illegal employee monitoring can be a fine one and it serves to place employers in a difficult and potentially costly position. In light of new legal developments, revisiting existing monitoring policies can serve to reduce potential violations of employees' rights while maintaining the level of monitoring necessary to achieve organizational goals.

APPENDIX A: SAMPLE SOCIAL MEDIA POLICY APPROVED BY THE NLRB

The following example of a Social Media Policy was reprinted in its entirety (OM 2012, pp. 22-24).

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.
This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).
Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

Maintain the confidentiality of [Employer} trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.

Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.

Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts
Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information
If you have questions or need further guidance, please contact your HR representative.

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DECEPTIVE POLITICAL ADVERTISING: SOME NEW DIMENSIONS

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ABSTRACT

In 2010 the Supreme Court (Citizens United v. FEC) overruled, on First Amendment grounds, the electioneering spending limits of political campaigns. This has led to a heightened concern about the role of money in politics. It is proposed that more than the amount of money spent in political campaigns it is how it spent that is a bigger cause for concern. Research indicates that some of the political ads are misleading and yet effective in influencing public opinion. The increasing use of deceptive political advertising has ethical and public policy implications. Some of these ads focus on a single event from the past, and research indicates that human decision-making can be significantly influenced by a single instance from an individual's past experience or memory. This paper provides the theoretical background and presents a model of how single exemplars might influence decision-making and how their effect may be offset by appropriate action. Possible solutions to mitigate the negative effects of deceptive political advertising are discussed in the context of the model.

[KEYWORDS: Deception, deceptive advertising, political advertising, single instances]

INTRODUCTION

The long-term success of democracy is predicated upon citizens making informed and reasonably rational decisions about the choices that they have. Yet, the growing role and influence of political advertising in elections has resulted in the ability of interested parties to manipulate individual opinions in overt and covert ways. That issue got exacerbated by the Supreme Court ruling in 2010, commonly referred to as Citizens United that paved the way for unlimited inflow of money to political campaigns and "SuperPACS" (Adweek 2012; Nichols and McChesney 2012). It may be too early to evaluate the full impact of the court verdict but already vast sums of money have been flowing to political action committees (e.g., *http://www.opensecrets.org/pacs/index.php*). (Note: There are now many tools readily available to track money flows including *www.followthemoney.org* and *www.maplight.org*.) It has been estimated that in the 2010 mid-term election campaign "More than 90 percent of voters …encountered information they deemed misleading or false. More than half of voters – regardless of political affiliation – say this occurred frequently. Moreover, a majority of voters say the level of misleading information was higher than usual." (Clemmitt 2011, p. 148) Many other questions have been raised as well, regarding how the system may be broken (Sides et al, 2014) This raises questions about the ethics of some of these campaigns, as well as having long term implications for society. It is proposed here that *a better understanding of the underlying psychological processes involved may enhance our ability to address related issues*. There are numerous areas of concern in this arena, and this paper examines one that may be particularly susceptible to abuse. Specifically, this paper explores the theoretical background relating to the possible impact of single instances on voter decision-making. Especially when a single instance (or attribute of a candidate) is used to create a potentially false impression regarding the candidate. Since it is harder to put in perspective recent events, examples are used mostly from earlier years. Examples of single instances tainting the image of candidates in the past were the Willie Horton ad used in the 1988 presidential election against Michael Dukakis, and the ads featuring Monica Lewinsky and the finger wagging President Clinton during the 1998 elections (Mayer 2012). The ads by the Swift Boat Veterans for Truth in the 2004 presidential election against John Kerry (Knight 2008). The attempts to portray George W. Bush as a "draft dodger" were similarly used to provide instances of how each of the candidates was weak on defense issues. (Esquire 2004)

The First Amendment considerations indicate that the Federal Trade Commission will not be mandating corrective advertising for deceptive political ads anytime soon, despite concerns (Federal Trade Commission 2008). Therefore, we must find other means to minimize this degradation of democracy while preserving free speech. Why and how are political advertisements able to use deception to manipulate public opinion? If we had a better understanding of the process, we might be able to create mechanisms that limit this travesty of the democratic process. The review of research from various areas presented here should enhance our understanding of advertising in general and deceptive political advertising in particular. A model of the process is presented, along with possible remedies for alleviating the effects of deceptive political advertising. Hopefully, this will lead to appropriate action by governmental and private agencies, leading to better consumer (citizen/voter) protection.

BACKGROUND

Ordinarily, consumers base their decisions on general principles and rules that they have abstracted from experience. For example, many people have a rule of thumb: always vote for the same political party irrespective of the individual candidate. Yet, evidence from several disciplines indicates that people may sometimes rely on the similarity of the present situation to a single past experience (or memory) in arriving at some analogical judgment or decision. Thus, in the wake of Black Monday (October 19, 1987) on Wall Street, many experts were looking at the parallels to, and lessons from, The Great Stock Market Crash of 1929. They were later proven to be wrong. There were too many structural dissimilarities that should have been evident to an objective processor of information (e.g., the Federal Reserve did not exist in 1929.) In 1987 the Fed acted aggressively in expanding the money supply, and there was no major slow down of the U.S. economy in the months and years that followed. A decade later, the declines in the stock market (July-October 1998) were substantial but spread over a longer period of time and did not evoke either the 1929 or 1987 crashes, but the 1970s! That analogy was also wrong and the stock market soon began its upward march unlike the doldrums of the 1970s. More recently, the post-2007 economic malaise has been compared to the 1930s Depression and an attempt made to draw conclusions based on that similarity. (Temin 2010) *(Note: Single instances here can mean a lone instance or a few similar instances from the past.)*

The inclination to analogize is inherent to human nature. People tend to build analogies by trying to match incoming information with information already in their long-term memory. This fact has been used extensively by educators researching how children learn (e.g., Nation and Hulme, 1998). The use of analogies to make causal judgments in decision-making has also been studied in other fields, and may have implications for advertisers. Historians have been interested in the role of analogical reasoning as a central mechanism by which decision-makers make sense of novel situations (Houghton, 1996). Similar instances are found in the arena of political decision-making. Researchers have concluded that President Woodrow Wilson acted unduly cautiously in disputes with the British at the beginning of World War I. This was because he saw a parallel from the war of 1812 when Madison — *the only other Princeton graduate to have become President* — was running the country (May, 1973).

The likelihood of conflict with Britain was a result of President Wilson's perception regarding the *similarity between the situation facing him* and the one faced by President Madison, and this influenced his decision making process. And that similarity was based on an irrelevant fact of which college he had attended. Excellent analyses of historical records which point out how politicians have explicitly relied on single historical events (rather than generalizations) in choosing specific courses of action have been presented by May (1973) and Jervis (1976). Houghton (1996) presents a detailed discussion regarding similar usage of analogical reasoning in the Carter White House during the 1980 Iranian hostage crisis.

The impact of prior knowledge on decision-making has been discussed from many perspectives (e.g., Hastie and Dawes 2010; Kahneman 2011; Nisbett and Ross 1980; Smith 1998; Tversky and Kahneman 1973; Abelson (1976) was one of the first persons to propose that people might base their decisions on the similarity between their present situation and a single prior event. Others who have also found support for the single-instance phenomenon include Gilovich (1981), Kolodner (1997), Lewicki (1985), Read (1983, 1987) and Spellman and Holyoak (1992).

THE ROLE OF SINGLE EXEMPLARS

Explorations into factors that affect the use of single instances in analogical reasoning and decision-making have been limited. Most of the time, when the cause-effect relationship becomes complex, or when the relationship is unknown, and cannot be inferred easily, there is a human tendency to make analogical predictions based on the overall similarity of the new instance to a similar instance experienced in the past or available in memory. In one of the early studies, Read (1983) had his subjects read descriptions of a foreign culture, in which some members performed a rule-governed behavior. The subjects were then asked to predict the behavior of other members of the culture. One of the members was similar to an individual who performed the behavior, but the rule predicted that this new member would not perform the behavior. The study revealed that subjects relied on the similarity between this member and the previously encountered individual in making these predictions. Furthermore, it was found that people were increasingly likely to use a single similar exemplar as the rule-governing behavior became more complex. Additionally, subjects had a high degree of *confidence* in their judgement. Reliance on highly similar exemplars as a basis for decision making was found in two other areas: rating of college football players in terms of their potential for professional teams, and in the course of action preferred in an international political crisis (Gilovich 1981).

Analogies have two parts: a target and a base (Genter 1983). The target of the analogy is the person or situation *for which* the prediction is to be made, while the base is the person or situation *from* which the generalization is made. Some have suggested that people may be more likely to make analogical predictions (based on base exemplars) when the base and the target share features or attributes that can be causally related to the behavior or outcome of the base exemplar. (Holyoak, 1984; Winston, 1980) Subsequent research has shown that this matching of the base and the target on a relevant variable is not necessary for the use of analogy: Subjects tend to use the degree of similarity between base and target, in the absence of a causally relevant variable (Read, 1987). Thus when a Tylenol commercial on television invokes 'the time I was in the hospital having my first baby' it is attempting to get some of the consumers to develop a connection between two substantially different situations requiring painkillers by dwelling on a single instance from the past.

A literature search found only one study in the domain of marketing and communication that examined the single exemplar effect on decision-making. Misra (1990) used scenarios from international marketing in which a manager was attempting to choose between two countries for a new joint venture. The first country was slightly more attractive than the other in terms of objective data: market size and taxation. The two scenarios were different only in terms of subjective data — half the subjects were told that the CEO of the potential partner was similar to the CEO of a previously successful joint venture in a third country - *in terms of taste in music and wine*. The other half was not given the information about the CEO of the company in the other country, but only the objective data. It was found that subjects relied more on the qualitative single exemplar (the CEO) than on the objective evidence in terms of evaluating the attractiveness of the potential joint ventures. Since international marketers entering new markets face multi-variable complex situations, the reliance on single instances was to be expected.

THEORETICAL BACKGROUND

The existence of the single exemplar effect is well documented, but the underlying theoretical basis is less well defined. It is somewhat similar to research examining base rates versus concrete instances (Kahneman 2011; Nisbett and Ross 1980). It has been found that people often overlook decision rules (or base rates) and instead rely on concrete information (or single exemplar). Another parallel is that when persons do not perceive (or learn) the causal rule (or causal relevance of the base rates) they are more likely to rely on the single similar instance (or concrete instance). The single exemplars also form the basis for analogies. Thus most people tend to believe homicides are more common than suicides in the United States while the opposite is true. This happens because information about homicides is more readily available in memory because of exposure to the news or personal sources.

Vivid information also appears to have a greater impact on human decision-making. It has been argued that in influencing people's judgments, inferences, and behaviors, vividly presented information are weighted more heavily than are pallid and abstract propositions of substantially greater probative and evidential value. (Kahneman 2011; Nisbett and Ross 1980) Thus when the effect of drugs on the brain is presented as being akin to frying of an egg, the effect is expected to be greater than when similar information is presented in a less vivid manner.

Nisbett and Ross (1980) described vivid Information as that which is likely to attract and hold our attention and to excite the imagination to the extent that it is (a) emotionally interesting, (b) concrete and imagery provoking, and (c) proximate in a sensory, temporal, or spatial way. Using a resource matching perspective, Keller and Block (1997) found, among other things, a positive linear relationship between vividness of information and degree of persuasion. There has been a substantial amount of research in examining other influences on supposedly rational consumer decision making (e.g., Hastie and Dawes 2010; Kahneman 2011).

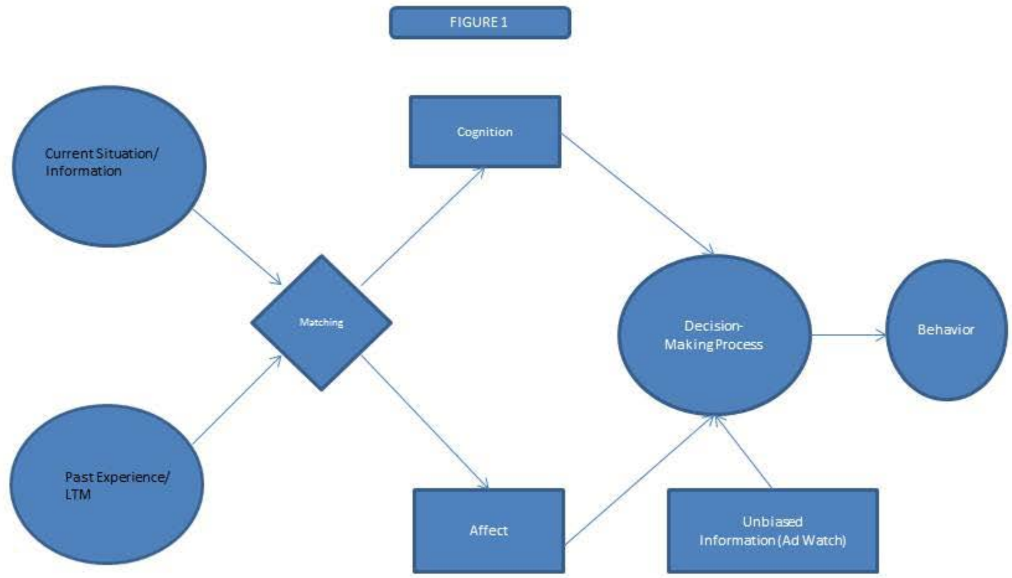
An individual's memory of single exemplars is likely to be based on personal experience (e.g., viewing an ad or watching events on television), and it is likely to be more vivid, as well as more memorable, than objective statistical information. Thus advertising using exemplars could be more persuasive. Tapping long-term memory is also believed to lead to greater communications effectiveness (McInnis and Jaworski, 1989). Further, since the single instance exemplar is anchored in the person's experience base, and generated by the individual's own mental processes, it is likely to be more *personally relevant* to the individual. Or, the presentation in the ad can be such as to make it relevant to the individual. Research has shown that strong relevance is a desirable aspect of persuasive communications (McInnis and Jaworski, 1989).

One major difference between the base-rate literature and the single exemplar literature is that the base rate research emphasizes the importance of the matching between the concrete instance *and a schema* (or existing knowledge structure) for the concrete information to be influential. In the case of single exemplar, the matching of the exemplar with a specific (past) situation or event is emphasized (Read, 1983). This has greater significance for advertising, where it is easier to operationalize exemplars from the past than to enhance vividness.

THE INFLUENCE OF SINGLE EXEMPLARS: A MODEL

It is proposed that when individuals are faced with new situations, or new information through advertising, they tend to search their long-term memory (LTM) for a match with information from the past. This degree of matching between the exemplar and the current situation has an influence on the decision-making process (see Figure 1). Advertisers attempting to influence consumers could tap single exemplars, which may be more readily available in long-term memory. This influence may work either through the cognitive or affective path.

Advertisers may also be able to present historical information to create that exemplar even if it did not exist in the LTM. For example, in 1988, very few people had even heard of Willie Horton, an African-American man was serving time in jail for a murder. He was subsequently convicted of raping a Caucasian woman while out on a furlough. He claimed he was framed on the rape charge (Elliott 1993; Mayer 2012). It was possible to present Horton – through clever television advertising - as exemplifying the liberal policies of the presidential candidate Michael Dukakis. Dukakis had been Governor of Massachusetts at the time the events occurred. (The fact that Willie was released under a Federal parole program and Dukakis had nothing to do with it, though he did support it, was ignored.) Thus at the cognitive level, many people who believe that capital punishment deters crime had their beliefs 'confirmed.' (The commercial also mentioned that Dukakis opposed capital punishment.) At the affective level, the ad 'confirmed' the fears of many Americans that African-American males are a dangerous lot. This may be based on one (or a few) instances from the individual's personal experience from the past or even news reports on television or in newspapers. This made the ad effective in its goal.



IMPLICATIONS FOR POLITICAL ADVERTISING

There is a need for a lot more research into the various aspects of political advertising. (Henneberg and O'Shaughnessy 2007; Kaid 2012) We do know that political advertising can have favorable or unfavorable impact on the perception of candidates as we saw in the 2004 and 2008 presidential election (Kaid, Fernandes, and Painter 2011; Winneg, Kenski, and Jamieson 2005). During the 2008 presidential election as many as 56% of all voters said that they encountered misleading ads "frequently". (Clemmitt 2011; also see Wiggin 2011) In modern times, deception in political advertising has been growing. This needs a greater effort at protecting the public. Ad watches are a collaborative effort between the media and academics, that attempt to analyze and discuss political advertising and could play an important role in reducing the effects of deception (see Bennett 1997) Yet, there is concern that even the ad watches have systematic biases. (Frantzich 2002). Critics continue to bemoan the very limited coverage that network television provides for the party conventions (Copps 2004). On the other hand, advertising continues to have an increasing role. It is not clear whether it was a decline in media coverage that led to more advertising or the other way around. In any case the role and significance of the advertising in providing information to voters increased dramatically. And with it, the opportunity for deception.

Probably the most famous example of using a single instance in political advertising was the Willie Horton ad in the 1988 presidential election, discussed earlier. Political pundits believe that Dukakis would have lost the election anyway, but that ad increased George Bush's margin of victory. To many voters the ad presented an example of the kind of things that may happen nationally if Dukakis won the election and implemented his liberal policies. Thus, that single instance was used to represent the policies of the candidate. Since that landmark ad, researching the opponent's past for a negative instance has become a multi-million dollar business (Impoco, 1996). More recently, in the 2012 election, presidential candidate Mitt Romney has similarly been labeled as "The Guy Who Fires You" based on his tenure with Bain Capital (McGillis 2012) while

Barack Obama is seen by many as a foreigner and ineligible to be the President of the United States (Silverblatt 2010).

We know that when information is transferred from long-term memory to working memory, the resulting high elaboration results in more effective communication (McInnis and Price, 1987). As discussed earlier, the higher personal relevance of the recalled information is also likely to render the communication more effective. Thus voters who were concerned about the rising crime rate were more likely to be influenced by the Horton ad.

Political campaign strategists have increasingly become fonder of negative advertising; even though research indicates that voters dislike negative ads and consider them unethical and deceptive (see Pinkleton 1997 for a discussion as also Hartman 2000). Negative ads also run the risk of a backlash against the sponsor. Even though such ads have lower credibility, research indicates that negative comparative advertising can lower the evaluations of the targeted opponent without lowering the sponsor's evaluation (Pinkleton 1997; Hartman 2000). Negative ads can target the opponent's broken promises, specific votes in the legislature, misstatements, missing crucial votes, and the like. If a candidate can figure even a single instance from the opponent's record, in an area that is of concern to voters — e.g., crime or education — they could target that and be sure that voters will remember that much better than more generic advertising. On the positive side, a candidate can also play up a favorable single instance from their own record. Ostensibly, voters will tend to focus more on that single instance than the total record.

The field of political advertising is being researched increasingly (e.g., Kaid 2012; Henneberg and O'Shaughnessy 2007). There has been a growing movement aiming at greater accountability from politicians (Mundy 1998). The formation of Ad Watches where analysts from the media and academics analyze political advertising before each election might help improve the quality in the future (Bennett, 1997; Pfau and Louden, 1994). The growth of the Internet has been helpful, and some websites have done a good job of tracking deceptive political advertising, with Politifact assigning grades like "Pants on Fire" to misleading ads (http://www.politifact.com/). But it is not clear what percentage of the voting public takes advantage of these sites. Despite their declining importance in society, television and the traditional media continue to play a significant role as sources of political information. In any case, this important area needs more research to help us have a better understanding of how politicians may be manipulating voters. This may have implications for public policy in the future.

THE MODEL REVISITED

As discussed earlier, the proposed model hypothesizes that single exemplars may be a potent tool in influencing consumer decision-making. Further, the model proposes that this influence may come through the cognitive or affective path, or both. Further, it is proposed that deception of the public through deceptive advertising using single exemplars may be offset by external intervention in the form concerted effort including Ad Watches and other similar efforts, which can provide unbiased analysis to voters. *Collaboration between academics and the media, trying to analyze political advertising in a more objective fashion, would help mitigate the deceptive influence of the advertising*. In addition, an attempt should be made at election time to alert the public that single exemplars might weigh unduly heavily in their judgement, and that they should make a *conscious effort* to take into account all the facts.

Evidence from marketing research supports this notion. During experimental manipulations, subjects are frequently misled as part of a treatment condition. Conventional debriefing is supposed to take care of that deception. In at least one study, it was found that conventional debriefing was not adequate in erasing the lingering effects of the deception. Yet, when subject were *explicitly told* that many people may experience a 'carry-over effect' of the deception despite debriefing, there was a significantly lower rate of the carry-over of the deceptive information (Misra, 1992). Thus, it is likely that when citizens are explicitly informed about the potential lingering effects of the deception they are less likely to be deceived.

CONCLUSIONS AND FUTURE RESEARCH

Deception in political advertising has become rampant, at least in the United States, potentially undermining the democratic process. Public policy concerns require that we have a better understanding of the psychological underpinnings of the different means by which voters can be deceived. There is a body of research that spans diverse disciplines from psychology to history and indicates that exemplars based on single instances can have a significant impact on consumer decision-making. Advertising that taps into long-term memory for such instances may be particularly effective. This conceptual paper reviews the relevant literature and attempts to build upon past work. It also discusses possible mis-applications in political advertising. Academics as well as the media have to be more watchful than they have been in the past. Better pre-election analysis and discussion by academics and media professionals may help alleviate the problem of politicians subverting democratic processes via deceptive advertising. This should be accompanied by a discussion of the possibility of a 'carry-over' effect even after people have been informed at a cognitive level. Hopefully, this will help preserve the integrity of the democratic process by reducing the extent of deception. Considerably more research is directed towards preventing consumers being misled about consumer products (e.g., Harris and Graff 2012; Twomey, Knight, and McNeill 2011) and not enough to voters being misled. There have been calls for creating a higher level of advertising literacy to counter the potential deceptions, but not so much in the area of politics. (Rozendaal, Lapierre, vanReijmersdal, and Buijzen 2011)

Future research should attempt to empirically test the model. This validation may also include the testing of the affective and cognitive paths and whether one or the other is more potent. It is hoped that researchers will continue to explore the various ways in which deceptive political advertising can be counteracted. In the case of deceptive commercial claims at least the Federal Trade Commission provides some protection to consumers. Given the special protection that political speech enjoys, society has to develop alternate means of oversight and protection from deception, especially now that the floodgates of PAC money have been opened.

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THE NCAA DEATH PENALTY: A REVIEW OF LEGAL AND BUSINESS IMPLICATIONS

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ABSTRACT

In the wake of the recent sanctions levied against The Pennsylvania State University (Penn State) by the National Collegiate Athletic Association (NCAA), the NCAA's "Death Penalty" is again on the minds of all who follow intercollegiate athletics. In this paper, the authors explore the potential issues that may affect a school that has had a sport prohibited from some or all outside competition. The authors have reviewed available conference affiliation agreements; conference media rights agreements; team competition contracts; employment agreements; and other agreements as relevant. Additionally, the authors have experience working with many of the agreements and relationships listed. The purpose of this paper is to broadly examine the legal issues and practical business ramifications that would ensue should the NCAA mandate that a major sport program cease operation for a period of time.

INTRODUCTION

The NCAA is an organization comprised of 1,281 institutions in the United States and Canada that voluntarily subscribe to membership principles for their intercollegiate athletic program Division I football is divided into the Football Bowl Subdivision (FBS) and Football Championship Subdivision (FCS). It consists of major collegiate athletic powers and is the highest level of intercollegiate athletics sanctioned by the NCAA in the United States. Division I schools usually possess larger budgets, more elaborate facilities, and more athletic scholarships than Divisions II and III.

As a regulatory environment, the NCAA is unique in that membership is voluntary. There are, however, two compelling reasons for institutions to participate in a self-induced regulatory environment. The first reason is money. In the NCAA's 2008-09 distribution plan, approximately $20,667,000 was allocated for the enhancement of academic support programs for student-athletes at Division I institutions. This means that each Division I institution received a payment of $62, 438. Further, the basketball fund provides money that is distributed to Division I conferences based on their performance in the Division I Men's Basketball Championship over a six-year rolling period. For example, for the 2008 - 2009 distribution, the rolling period would be 2003 – 2008. The total distribution for 2008 – 09 was $154.7 million (Rosner & Shropshire, 2011).

The second reason for institutions to participate in the NCAA is competition. While NCAA member institutions are permitted to compete against non-member institutions, conference competition consumes most of an institution's schedule. This typically leaves few openings for competitors outside the conference. Therefore, establishing a schedule of competition with reasonable travel expectations, would become nearly impossible. In addition, these spots on the schedule are often occupied by larger institutions who often pay the smaller institution to play at the larger institution. Further, if an institution is not a member of the NCAA, it may not participate in NCAA sponsored championships. This will often make recruitment of student-athletes more difficult.

HISTORY AND EVOLUTION OF THE NCAA AS A REGULATORY AGENCY

Regarding regulation, "between 1840 and 1910, there was a movement from loose student control of athletics to faculty oversight, from faculty oversight to the creation of conferences, and ultimately, to the development of a national entity for governance purposes" (Rosner & Shropshire, 2011, p. 480). These changes stemmed from the high number of deaths in injuries in the sport of football.

In 1905, there were 18 deaths and nearly 150 major injuries in intercollegiate football. The issue scored national attention when President Theodore Roosevelt called a conference of the major football programs at the White House. However, deaths and injuries in the sport persisted (Rosner & Shropshire, 2011). The Chancellor of New York University, Henry M. MacCracken, invited presidents of other schools to discuss the reform or abolition of football. Thirteen presidents met and declared their intent to reform the game of football. When the same group met three weeks later, 62 colleges and universities were represented. This group formed the Intercollegiate Athletic Association of the United States (IAAUS). In 1912, the group took the name National Collegiate Athletic Association (NCAA) (Masteralexis et al, 1998).

In 1929, The Carnegie Foundation visited 112 colleges and universities and found many academic abuses, recruiting abuses, payments to student-athletes, and commercialization of athletics. The Carnegie reports established that responsibility for college athletics lies with the president and faculty of the institution. Therefore, "the NCAA was pressured to change from an organization responsible for developing playing rules used in competitions to an organization that would oversee academic standards for student-athletes, monitor recruiting activities of coaches and administrators, and establish principles governing amateurism, thus alleviating the paying of student-athletes by alumni and booster groups" (Masteralexis et al, 1998, p. 169).

ENFORCEMENT OF NCAA SANCTIONS

While NCAA staff members investigate possible rule violations by member institutions and restoring eligibility to student-athletes who may have been involved in possible rules violations, it is important to note that the decision to enforce sanctions rests with the Committee on Infractions, a committee of peers from member institutions. This Committee determines responsibility and imposes penalties (Masteralexis et al, 1998).

In most cases, institutions will conduct their own internal investigations rather than wait for the NCAA staff to inquire. This proactive approach is becoming more common. "In 1996, the NCAA estimated that of 1,200 cases involving secondary or minor violations, 90% were self-reported by the institution. Schools also initiate 30-40% of the 15-20 cases that arise each year involving major violations" (Masteralexis, et al, 1998, p. 175).

"A proactive approach is encouraged by the NCAA through endorsement of institutional control, a concept that the college or university is responsible for conduct within its athletic department. Through this principle, the institution's administrators must oversee and monitor the activities of the athletic department, making sure that the NCAA and conference rules are being followed" (Masteralexis, et al, 1998, p. 175).

The NCAA's "Death Penalty", also known as "repeat-violator legislation" is applicable to an institution if, following the announcement of a major case, a second major violation occurs within five years of the starting date of the penalty assessed in the first case. Penalties for repeat violators of legislation, subject to exemptions authorized by the committee, may include the prohibition of some or all outside competition in the sport involved in the latest major violation for one or two sport seasons and the prohibition of all coaching staff members in that sport from involvement (directly or indirectly) in any coaching activities at the institution during that period.

In its history, the NCAA has issued the Death Penalty to five institutions. The first institution to receive the NCAA's Death Penalty was the University of Kentucky, where three members of the men's basketball team were arrested in a point-shaving scandal during the university's 1948-49 national championship season. In this case, the entire athletic program was barred from competition for the 1952-53 season, not just the offending men's basketball team (Johnson, 2011).

The second institution to receive the Death Penalty from the NCAA was the University of Southwestern Louisiana (currently known as The University of Louisiana at Lafayette), whose men's basketball team was not allowed to complete for the 1973-74 and 1974-75 seasons because of repeated recruiting violations. Fourteen years later, the NCAA levied the Death Penalty for the third time. In 1987, Southern Methodist University's football program was forced to cancel its season in what is the most widely-known instance of the Death Penalty. This case will be discussed in more detail on the following pages (Johnson, 2011).

The Morehouse College men's soccer team, a member of the NCAA's Division II, was issued the longest suspension of any program. It became the fourth program to receive the NCAA's Death Penalty. Because the program allowed two professional soccer players to play for two seasons without adherence to admissions or eligibility requirements, the NCAA added two years to the institution's self-imposed disbanding of the program. The total probationary period lasted for five years (Johnson, 2011).

Finally, the fifth and most recent recipient of the Death Penalty was the men's tennis program at MacMurray College. In this case, student-athletes were illegally paid. As a result, the team was banned from competition for the 2005-06 and 2006-07 seasons. Additionally, the head coach was fired and was required to seek approval from the NCAA's Committee on Infractions before he could be hired at an NCAA member institution (Johnson, 2011).

THE DEMISE OF SMU

In 1984 Southern Methodist University ("SMU") was finding great success on the football field. In fact, the period between 1980 and 1984 saw SMU post a record of 45-5-1 and won three Southwest Conference titles. All was not well in Dallas, though. After an investigation into, among other things, the payment of players, the NCAA banned scholarships for the 1985 season and allowed fifteen (15) scholarships for the 1986 season. In addition, SMU was not permitted to compete in bowl games or appear on live television for both 1985 and 1986 seasons. Finally, SMU was placed on NCAA probation.

While 1984 and 1985 were not good years for the SMU football program, 1986 would be disastrous. First, the NCAA passed the "repeat offender bylaws" which stated that if a school had been found guilty of two major violations within five years, it could be barred from competing in the sport involved in the second violation for up to two years. Second, ABC affiliate, WFAA-TV, received a tip, which piqued the interest of the NCAA, that SMU had continued to pay student-athletes after the 1984-1985 NCAA action. (Taafe, 1987)

Over the next several months, an NCAA investigation revealed that, in 1985 and 1986, 13 players had received payments from a slush fund provided by a booster. Further, this slush fund operated with the knowledge and approval of the athletic department (Sullivan, 1987). The NCAA Infractions Committee voted to cancel SMU's entire 1987 football season and all but four of SMU's scheduled home games in 1988 (Asher, 1987). Additionally, SMU lost scholarships; its NCAA probation was extended as was its ban from bowl games and live television; it was asked to ensure that "problem" boosters were banned; the number of permissible coaches was reduced; and recruiting was limited (NCAA, 1987).

Some might argue that the SMU football program has never fully recovered from the "Death Penalty. After all, they did not play in a bowl game until the 2009 Hawaii Bowl (ESPN, 2009). Some argue that SMU merely deemphasized the football program (Wetzel, 2012). While they have had some success in Conference USA and have accepted an invitation to the American Athletic Conference, they have yet to achieve the level of success that they saw in the early 1980s (Flynn, 2011).

LEGAL IMPLICATIONS RELATED TO AN INSTITUTION'S WEB OF CONTRACTUAL AGREEMENTS

A web of contractual agreements allows the business of intercollegiate athletics to function and thrive. One or more contractual agreements govern the relationship between an institution and its conference; between an institution's conference and the third party hoping to commercialize the media rights owned by the institution, conference, or both; between an institution and a non-conference opponent; and between an institution and its coaching staff. In addition, contractual agreements govern much of the game "experience," such as what the players on the field wear and what fans who attend competitions eat, drink, and wear. If the death penalty were levied against an institution, many, if not all, of these contractual relationships would be affected.

INSTITUTION'S CONTRACTUAL RELATIONSHIP WITH ITS CONFERENCE

Institutional intercollegiate departments of athletics (Athletic Departments) primarily interact with one another through conference alignment. To formalize the relationship and provide an element of stability, each member institution agrees to conference by-Laws and/or other agreements binding the institution and the conference. These agreement(s) typically mandate the institution's participation in conference activities, such as competition between conference institutions; participation in joint marketing campaigns; and assignment of all or a portion of its media rights to the conference.

In the event of receipt of the NCAA's Death Penalty sanction, the sanctioned institution could potentially be in breach of its contractual relationship with its conference, resulting in a host of negative outcomes, including sanctions against specific athletic teams; the entire Athletic Department, and/or sanctions against specific Athletic Department staff; the expulsion of the institution and/or program from the conference; and/or actual money damages in the form of forfeited conference earnings. Further, many conferences require that a member institution participate in all conference sponsored athletic programs. If one athletic program is not permitted to compete in the conference, the institution could be forced to look for another conference home for the remaining programs.

Compliance issues will lead to considerations on the part of both the institution and the conference. An institution will want to know how a conference plans to handle a program suspension; it will want to protect its programs that were not subject to the Death Penalty and ensure that they have a home in the event a program is suspended. Further, it will want to know what, if any, assistance the conference will provide until the Death Penalty sanction expires. The conference will want to include or impose rules that give it as much membership flexibility as possible and provide as much oversight of Athletic Departments as possible.

CONFERENCE TELEVISION AND/OR MEDIA RIGHTS AGREEMENT

Lucrative media rights deals between conferences and television networks have become common in this multiple platform, multiple channel, multiple outlet media environment. The power that television has on recruiting, marketing and brand awareness is undisputed. The value of a media agreement is tied directly to conference membership and quality of competition as advertisers flock to broadcasts that include marquee programs which, in turn, increase the value of the conference game package. It benefits a conference to have multiple quality programs among its membership when negotiating media rights contracts. Conversely, it behooves a media rights company, such as a television network, to seek relationships with conferences that have the greatest number of marquee programs. Again, marquee programs bring public attention to the conference, which, in turn, attracts media rights organizations.

When a program loses the ability to compete in a conference, the competition level of the conference is weakened, which decreases the value of the rights agreed upon by the parties. Since the sanctioned program is no longer part of the package, at least for the short term, the media rights organization will not be able to transmit that program's games. The media rights organization could argue that the conference is in breach of the media rights agreement as the program(s) that were part of the bargained for exchange is no longer available. The loss of a marquee program may provide compelling evidence that, if the agreement was for the conference to provide certain institutional programs and those programs are no longer available, the conference has breached the agreement. If the conference is found to be in breach of its contractual obligation the agreement could be terminated (at worst) or it could be forced to re-negotiate the entire agreement or portions thereof.

In the wake of the threats reportedly made by the NCAA against Penn State (Van Natta, 2012), media rights organizations, when negotiating a media rights contract, may want to request that the conference confirm that its membership will be available for the length of the agreement, or that the conference maintains a certain number of marquee programs acceptable to the media rights organization. In addition, language may be developed outlining what options/responsibilities the parties have if conference membership changes due to NCAA related sanctions and what replacement institutions may be acceptable to the media rights organization.

SCHEDULING AGREEMENTS

Conference Opponent. As a member of a conference, an institution is required to compete in a set number of contests per season against conference rivals. A Death Penalty sanction would prevent the required competition between conference rivals, resulting in each conference rival having an opening on its schedule. Openings cause problems across a variety of venues. For instance, an opening could impact post-season eligibility. With regard to a marquee program traveling to the home location of an in-conference rival, the sanction could create economic issues associated with the loss of a home contest for the in-conference rival (Kercheval, 2012). For example, tickets will not be sold, hotel rooms will not be filled, restaurants will not be filled, and novelties will not sold.

A conference may want to adopt rules that take a Death Penalty sanction into consideration. For instance, a conference could create a mechanism which would allow for an intra-conference replacement to fill the schedule gap created by the exit of the sanctioned program. A conference could also craft a penalty structure to further sanction an institution that is not permitted to compete and/or benefit the institution that is harmed by the opening on its schedule.

Non-Conference Opponents. In addition to intra-conference competition, institutions regularly compete with institutions from other conferences. These games are typically established by way of an agreement specifying rights and responsibilities of each institution as well as what happens when an institution breaches the agreement. In many agreements damages from a breach are governed by the agreement's liquidated damages clause. The term liquidated damages is applicable when the parties agree in advance as to the amount or limit of damages for breach (U.C.C. §2-718 2007). In the event that a program receives a Death Penalty sanction from the NCAA, a typical liquidated damages clause would cap the amount of damages that the breaching school may have to pay to the non-breaching school. This amount may or may not fully compensate the non-breaching party, as it now has to find another opponent on short notice (Kercheval, 2012). Additionally, depending on when and where the game was to be played, serious economic damages could occur. For instance, if the sanctioned program was scheduled to travel to the home location of the non-conference opponent, all the economic benefits of a home game, especially one against a marquee program, would be lost. Finally, if the sanctioned program is not replaced with an opponent of the same or similar caliber, the post season or season ending rankings of the non-conference opponent could be jeopardized, which could result in additional money damages for the non-breaching party.

Oft sanctioned programs, such as the University of Miami, could be in for a change in how they relate to and contract with their non-conference opponents. After any finding of a major rules violation, an institution could experience difficulty establishing and/or maintaining a full competition schedule as they may be viewed as scheduling "liabilities." After all, one more major violation could result in the Death Penalty for an institutional program. In order to compete against this perception, an institution may simply not receive an opportunity to compete against more prestigious "clean" programs or may otherwise be subject to new or different contract terms meant to protect the interest of the "clean" institution. It may become a necessity for "clean" institutions that are contracting with institutions that have problematic histories to insert pro-active language beyond the standard liquidated damages clause, in competition contracts to cover the possibility that the problematic program may not be permitted to field a team. For example, a problematic program may be required to assist the non-breaching school in finding a new opponent or the game contract could include the problematic program's conference as a signatory – with the hope that the conference would assist the non-breaching school with the opening in its schedule. Non-conference scheduling can become very difficult for an institution that has been issued the NCAA's Death Penalty and a program that has recently received a finding of a major rules violation.

EMPLOYMENT ISSUES

Head Coach. In the event that the NCAA sanctions an athletic program with the Death Penalty there are very few scenarios that do not include the program's head coach as a key and responsible party with respect to the violation(s). As such, the contracts of all head coaches at NCAA institutions must include language mandating that the head coach is responsible for adherence to all NCAA rules and regulations. In the event that the program is sanctioned by the NCAA and the head coach is named as a responsible party, the head coach maybe terminated for cause by the institution per his/her employment contract. The institution must then determine when to terminate the coach. If the institution were willing to pay the remainder of the head coach's contract, termination without cause would be a more expedient solution. Alternatively, if the institution wishes to terminate with cause, it would be well served to wait until it receives an official finding from the NCAA's investigation. Either way, an institution will need to carefully evaluate the situation as well as its own rules and regulations regarding the termination of employees. Termination(s) prior to the receipt of official findings made by the NCAA should be implemented with extreme caution.

Assistant Coach(es). Many assistant coaches do not have the same type of compliance language in their employment agreement as do an institution's head coach; however, all are held to the same standard with regard to NCAA compliance. An example of such wording is:

> *Your performance and compensation in this position are subject to review annually. It is understood that any procedural, substantive, or willful violation of NCAA rules and regulations may result in summary dismissal as "Position Title" at "Name of University".*

With such language in his/her employment contract, it is likely that an assistant coach will be dealt with harshly by his/her employing institution. Again, it would be imperative that decision makers review applicable employment rules relevant to the situation, as well as the assistant coach's contract.

An assistant coach who was not involved in the bad acts which resulted in the sanction of the program is in a difficult position. Regardless of what happens with their future employment, their careers may be tainted for an unknown period of time by the program's violations or the perception of the violations. While it is common for assistant coaches to voluntarily find other jobs after the head coach has been terminated, the institution should consider various employment law related theories before the institution makes any negative employment decisions related to the assistant coach or coaches. For example, assistant coach contracts may include liquidated damages language that the institution would be responsible for. Additionally, if the assistant coach was a "whistleblower" for the violation(s), depending on the specific state law, it may be difficult for the employing institution to terminate them. Simply terminating an "innocent" assistant coach will not always be possible.

Support Staff. With any program, especially football, there are support personnel that do not have the word "coach" in their title, but who are necessary for the program to function. Secretaries, strength and conditioning staff, managers, trainers, tutors, and student employees are examples. If a program is suspended, each employee could be reviewed to ensure their necessity in a post-program short-term future. Some employees may simply be reassigned. For example, strength and conditioning coaches tend to be assigned to more than one sport. For those who are reassigned or who are targeted for termination, the Athletic Department will need to review contracts, applicable university policy, and state law with regard to employment to determine the rights of the Athletic Department and the rights of the employee.

OTHER FISCAL CONSIDERATIONS AND ISSUES

When a school is termed a "repeat offender" and a specific program (or entire Athletic Department) is banned from competition, a number of financial realities will be brought to the immediate attention of the institution's fiscal administrators. Donor contributions to the Athletic Department could flat-line or decrease (Associated Press, 1987). Ticket sales for the sanctioned program, as well as expected concession income, will, understandably, be nonexistent. Additionally, ancillary ticket sales for other athletic programs could be negatively impacted. By way of example, many universities pair an early season basketball game with a late season football game to drive attendance to the basketball game or vice-versa. If one program is not permitted to compete, ticket sales to the companion program could be impacted negatively. Advertising revenue from TV, radio, and internet could decrease as the number of competitions decreases. Finally, if the sanctioned program is the university's primary apparel/paraphernalia seller, the disappearance of that program could negatively impact sales of licensed apparel.

Further, although the banned program cannot compete, the University will continue to incur expenses related to that program. The University would need to maintain its facilities. If the University leases the facility, the lease terms may require the University to continue to pay facility rent. Depending on the contractual arrangements with concession contractors and/or vendors, the University may be required to make a minimum payment and/or buyout any lost revenue. Also, the University will have to figure out how to pay any support staff that remains associated with the banned sport, particularly if the university is a public institution. Finally, the University could choose to contract with a marketing and/or media firm to attempt to manage the media "fallout".

POLICY IMPLICATIONS AND SUGGESTIONS

While athletic departments now have extensive policy manuals, such manuals did not exist when the SMU case occurred. This is at least part of the reason "compliance" statements exist in job descriptions. It may have impacted the way coaches' contracts are written altogether. The SMU case certainly sent a wakeup call throughout the NCAA membership. It was not the only school where student-athletes got paid or were given extravagant benefits (e.g. University of Kentucky's basketball program, University of Miami's football program, University of Georgia football program).

Institutions may have or consider internal policies that prevent the negotiation and/or entrance into non-conference game contracts with institutions that have a major infraction on their records or who have a history of major infractions. Further, institutions may increase liquidated damages demands found in most, if not all, game contracts.

It is absolutely critical that policies governing the behavior of coaching staff, and thus directly tying them to NCAA rules and regulations, be communicated and enforced. Institutions are held liable when coaches break the rules. As a result, many institutions implement policies and/or employment agreements that give the institution the maximum flexibility when/if it needs to reassign or separate employees from employment.

Finally, conferences may implement policies allowing the conference more access to the personnel processes and files of its member institutions in an attempt to ensure that every conference member is running a "clean" operation.

While many believe the NCAA will never issue the Death Penalty to another football program, it certainly came very close with the sanctions issued to Penn State. All it may take is one major violation by a repeat offender to bring the Death Penalty to the forefront of potential sanctions. If this happens, university administrators should be fully aware of the far-reaching fiscal, legal, and business implications that will result.

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USING LIDM TO EXAMINE THE POTENTIAL EFFECTS OF THE AFFORDABLE HEALTH CARE CASE FOR SMALL BUSINESSES AND ENTREPRENEURS

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ABSTRACT

This paper examines some economic and legal consequences of a key recent USSC case affecting small business and entrepreneurs, the Patient Protection and Affordable Care Act decision, which will affect legal insight decision making [LIDM] of SME's and entrepreneurs for the next decade. The case is analyzed using the LIDM process and potential issues for individual entrepreneurs and small businesses are raised. The paper concludes with a comparative options model and lessons to encourage a long term strategic approach to complement the USSC decision; these lessons are applicable to managers, board members, and those who profess to teach the next generation of business leaders and employees.

INTRODUCTION AND LITERATURE REVIEW

Economic and legal consequences of USSC decisions are important, interesting and yet are sometimes marginalized in the pedagogy of business education; this is particularly true within the wide-ranging field of topics in legal environment or business law (Miller & Crain, 2011)**,** (Bardwell, A Model Pedagogy for Small Business Consultants and Educators Using Legal Insight Decison Making, 2012), (Steslow & Gardner, 2011).

Highly charged and exciting legal cases are the caviar of every business law professor, but alas, cases involving taxation, the commerce clause and insurance are neither typically captivating nor compelling. However, in 2012, the USSC heard the complex, fascinating and significant Patient Protection and Affordable Care Act [PPACA] case which received tremendous media coverage and thus generated excitement and high emotions in the general public. This law was challenged by numerous states and the NFIB; appeals tested Obama administration policy and congressional design of an unprecedented national health insurance program. One can see the full opinion of this very significant case at the official Supreme Court website (National Federation of Independent Business v. Sebelius, 2012) at www.supremecourt.gov. The case is discussed in detail later in this article.

Many diverse interest groups have opined on the need for and consequences of a national health care policy; there are various points of view both economic and humanistic from well-educated physicians, (Cardo, et al., 2010), economists, lawyers, scholars whose historical perspective cannot be ignored, (Terris, 1999) and budding scholars who describe the value of social media in transmitting information, views and analysis (Osborn, 2010). Each provides compelling reasons why we must treat this issue as a predominant challenge to small business, particularly in our current era of economic recession.

How should we have anticipated the significance of this case and of the legislation? We would have predicted it easily under the LIDM model. It promises to become a classic problem- a new triumvirate in the certainty of death, taxes and health care insurance.

ANALYSIS OF THE CASE USING THE LIDM PROCESS

A brief review of the Legal Insight Decision Making procedure is provided in Figure 1; this captures the eight steps in applying the LIDM process (Bardwell, 2010) (Bardwell, A Model Pedagogy for Small Business Consultants and Educators Using Legal Insight Decison Making, 2012). Annotations relevant to the PPACA case are inserted in italics.

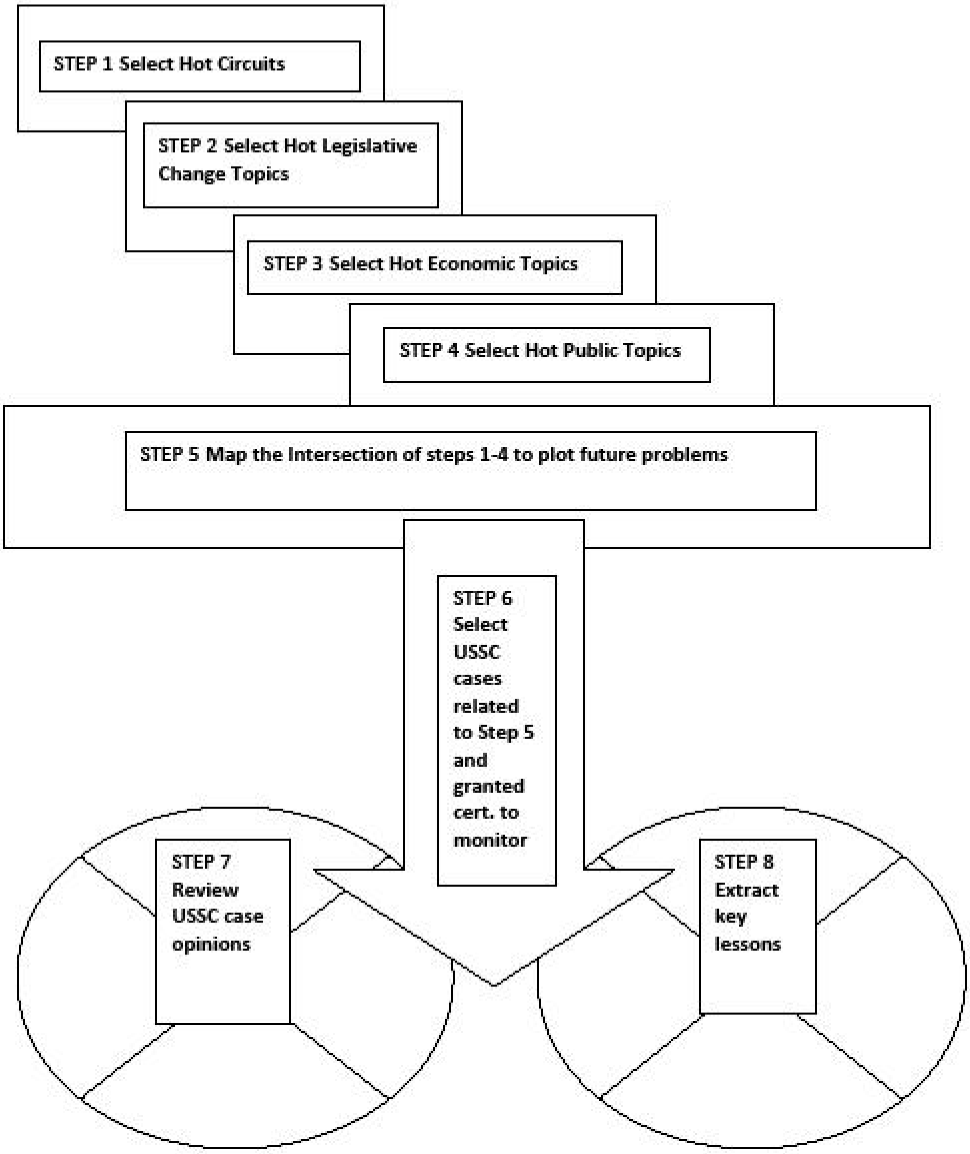

FIGURE 1- LIDM PROCESS

Step 1: Select Hot Circuits
Identify recalcitrant Circuits and include the circuit in which your business interests reside. *When a case reached the USSC, every business, wherever located and in every state will be affected. The PPACA case affects small business, individuals and all businesses which may decide to offer health insurance plans as part of the employee compensation package.*

Step 2: Select Hot Legislative Change Topics
Identify legislative changes and add two years to permit the appeals process to mature. *As noted, the PPACA was passed in 2010, and took exactly two years for the legal challenge to reach the USSC in 2012. This legislative innovation was the product of decades of rancorous and partisan political activity; but this voluminous piece of legislation was passed by both houses and signed by President Obama as a very hot legislative topic.*

Step 3: Select Hot Economic Topics
a. Identify topics covered in multiple issues in the WSJ, NYT, LAT, WP related to industry performance and add 6 months to one year for trickledown effect upon small business/entrepreneurs. *The economic features of the PPACA were featured in all the major media outlets and became the subject of powerful lobbyist efforts, both pro and con. The economic data utilized by lobbyists was not possible to verify, but nonetheless was emotionally compelling. Thus, this hot economic topic, in which health care costs for the government in Medicare and Medicaid were projected via estimations that were difficult to replicate or verify is a perfect example of why selecting Hot Economic Topics should be used in LIDM and long term strategy by SMEs.*
b. Identify topics funded by SBA over past 2 years. *The SBA funds research that is deemed relevant to small business and typically promotes administrative policies. Over the past two years, the SBA has funded multiple studies demonstrating that small business shoulders a greater financial burden complying with governmental regulations than is deemed appropriate. As a result of these studies published on the SBA website, one can see that the PPACA specifically targets small business for favorable tax treatment ranging from a 35% tax break in the first year to a 50% tax break in 2014 if the small business offers health plan insurance to its employees.*

Step 4: Select Hot Public Topics
Identify abusive ethical or professional breach behaviors covered in popular media and determine if federal regulations govern such behaviors and add 6 months to 1 year for resultant civil or criminal prosecutions. *Again, the PPACA certainly addresses this pertinent observation; abusive, unethical behavior was tracked, investigated and prosecuted in multiple jurisdictions over the past year. This abusive, unethical behavior took the form of rampant Medicare fraud; Medicare fraud includes financial fraud, patient over-billing, falsification of procedures, medical malpractice, and unfortunately, even patient death. This type of abusive ethical and professional breach of duty also constitutes federal crime; the data on increased prosecutions of these federal crimes shows that Medicare fraud was and is a hot ethical topic.*

Step 5: Map the Intersection of steps 1-4 to plot future problems. *Every alert business mind could have predicted the intersection of the forgoing Steps 1-4 would have lead to the issues of the PPACA; these issues will be problematic for most SMEs since the regulatory impact upon small business is typically more onerous and will require a relatively higher percentage of resources to be allocated for compliance, [in spite of the incentive tax benefits] than pre-PPACA. Legislative changes are more burdensome on SMES than upon large businesses.*

Step 6: Select USSC cases related to Step 5 and granted cert. to monitor. *This step was obvious and simple; over 26 states took legal action either challenging or attempting to interpret aspects of the PPACA. We know that USSC cases in which there is discord among the USCA [Unites States Courts of Appeal] are red flags to the savvy business strategist. In the case of the PPACA, some states questioned whether it was constitutional for the federal government to require states to provide certain types of health insurance, whether the individual mandate was legal and if so, under what theory, and whether Congress could claim the regulation was authorized under the Commerce Clause. Of course, we know that the case which reached the USSC* (National Federation of Independent Business v. Sebelius, 2012) *was on cert. from the Eleventh Circuit. When the USCA for the Eleventh Circuit heard the case, it decided that the individual mandate was unconstitutional, but that the provision of the law requiring an individual mandate was severable from the rest of the Act. The effect of the Eleventh Circuit decision was to strike down the individual mandate, but affirm the rest of the PPACA. The Eleventh Circuit decision was appealed to the USSC and the USSC granted cert.*

Step 7: Review USSC case opinions
a. Overt issues which will surface again: split decisions and dissents. *Where money, taxes and financial burdens are concerned, laws enacted may later be retracted! The PPACA is currently the law of the land; it has been deemed constitutional by a split court. Since this is a split decision, we know there is a probability the issue will surface again in the political arena, the public arena, and that the economic consequences of the Act may later be determined to be unacceptable.*
b. Unambiguous decisions –per curium or unanimous. *This decision is neither per curiam nor unanimous. Some found the decision ambiguous on first blush, but the Roberts portion of the decision is clear and unambiguous. Congress has the authority to tax, whether it call it a tax does not determine whether it IS a tax!*
c. Track remands. *This decision had no remand. It specifically addresses two issues only: the individual mandate, and the Medicaid expansion, which gives federal funds to the States on the condition that the state offers health care to all citizens whose income is low or below a particular level.*

Step 8: Extract key lessons from Step 7 and apply to business/educational/entrepreneurial interests. *The KEY lessons from this USSC case that apply to small business, entrepreneurs, and educators are significant and essential. These lessons, discussed in detail in the rest of this article include tax planning, financial accounting, fiscal creativity and sharing for business; commerce clause, tax powers and constitutional business lessons for educators!*

We can observe that the LIDM process perfectly predicts the PPACA significance to business interests and correctly predicts which cases are likely to bring headaches to small business interests, managers and decision makers. Some hot topics will not disappear, but remain as significant and influential from inception to conclusion. The PPACA fits the bill and requires additional examination from helpful resources and critical thinkers.

UNDERSTANDING THE NUANCES OF THE SUPREME COURT DECISION

Chief Justice Roberts delivered the opinion of a divided [5-4] Court in his deliberate and logical manner. He set up and then destroyed arguments for and against the power of Congress to require every individual to purchase health care insurance; this is commonly referred to as the “individual mandate” aspect of the act. The other issue decided involved the States’ participation in Medicaid. Since 1965, the Medicaid law has offered federal funding to States to assist the blind, the elderly, and the disabled, as well as pregnant women, children, and needy families, to get medical care. These two questions, the individual mandate and the requirement that States must participate in the PPACA expansion of states’ coverage to continue to qualify for Medicaid funding were the key questions.

Robert’s exploration and dismissal of various legal arguments challenging the constitutionality of the act confused some pundits who failed to understand how to read a decision thoroughly before concluding what the result shall be. Not only did the Roberts’ opinion set up each plausible objection, including the Anti-Injunction Act, the Commerce Clause, the Necessary and Proper clause, and the Taxing power clause, but it thoroughly explained each rationale as it applied to the Affordable Health Care act and it’s individual mandate component.

For the majority opinion, Roberts examined each argument pro and con concerning the individual mandate. First, he determined that a rose by any other name is still a rose... sometimes. The fact that Congress claimed the failure to purchase Health care insurance would subject folks to a “penalty” [but NOT a TAX] was not dispositive of whether this so-called penalty was in fact a “tax”.

First, Robert’s sought to sweep away all arguments that the USSC could not hear the case, since to hear a “tax” appeal a priori would be a violation of the Anti- Injunction Act. The Anti-Injunction Act forbids challenges to tax laws BEFORE there has been an actual tax imposed and paid. In one of the most Robertsian aspects of the decision, Roberts reasoned that for purposes of the Anti-Injunction Act, Congresses’ label and intent that individuals would be subject to a “penalty” NOT a “tax” was sufficient to avoid application of the Anti-Injunction Act. That is, Robert’s said he was satisfied that Congress did not intend the penalty to operate as a “tax” and trigger the Anti-Injunction Act device...that device requires that if a tax, the tax must first be imposed, paid and then a suit for a refund would be the only proper method of challenging the law.

The Commerce Clause and the Necessary and Proper Clause are exquisite features of our Constitution which authorize and also restrict Congressional authority to regulate the states and individuals. Roberts examined arguments that the Commerce Clause, which authorizes Congress to regulate interstate commerce, nonetheless was not the source of authority for the federal government to require national health insurance. Since we know that federal authority to regulate must be grounded in an enumerated power under the Constitution, and that the federal government does NOT have what are commonly referred to as “police powers” like the states, Roberts reminds us that the power of Congress to Tax and Spend is a plausible source of federal constitutional authority for the specific individual mandate portion of the PPACA. It is indeed a tax. Thus Roberts eventually concluded that the individual mandate may be upheld as Constitutional since it is within Congress’s power under the Taxing Clause.

As for the expansion question, Roberts said that Congress cannot penalize States that choose not to participate in the new expansion program by taking away their existing Medicaid funding.

In sum, the Supreme Court majority decision affirmed in part and reversed in part the Eleventh Circuit decision. It reversed the Eleventh Circuit decision that the individual mandate was unconstitutional. It held that States cannot be compelled to expand their Medicaid coverage, and it affirmed the Eleventh Circuit decision that the rest of the PPACA is constitutional.

MICRO LEGAL AND REGULATORY ISSUES FOR SMES PRESENTED BY THE PPACA

What actions are employers required to take to comply with this law? Must employers offer health care insurance to their employees? What factors determine whether a business should offer health insurance to its employees? How should decisions be made? Should a decision be based solely on economic impact or bottom line? What are the consequences of failing to offer a health insurance option? How will the law be enforced? Will small businesses, NPOs and entrepreneurs face a different set of questions and decisions than large corporations?

Some scholars offer guidance based upon statistical studies of entrepreneurship (Shaver, Davis, Kindy, & Blair, 2012); use of national studies from Shaver's work on Panel Studies on Entrepreneurial Dynamics is particularly effective if studying nascent entrepreneurs. Achieving a relevant perspective is essential, whether studying start-ups, nascent entrepreneurs, or differences between male and female entrepreneurs (Malewicki & Leitch, 2012), (Bird & Brush, 2002), (DeMartino & Barbato, 2003), (Gupta, Turban, Wasti, & Sidkar, 2009) (Sorenson, Folker, & Brigham, 2008).

The influence of gender on performance (Gibson, 2012), the effect of gender on strategic decision-making (Sonfield, Lussier, & McKinney, 2001) and the influence of external scoring mechanisms to effect ranking or rating of small businesses is yet another aspect to consider (Akhavein, Frame, & White, 2005). In the particular case of small business borrowing based upon credit ratings, and the effect of credit scoring on small businesses' ability to borrow, there are significant doubts that lenders are likely to alter practices toward a more favorable outcome for SMEs (Frame, Padhi, & Woosley, The effect of credit scoring on small business lending in low- and moderate-income areas, 2004), (Frame, Srinivasan, & Woosley, 2001) since the rate of failure and default for small business loans has increased, not decreased since the implementation of SME credit scoring.

Finally, there is a necessary evil task to accomplish to truly analyze this important topic with a generously combined and enriched history from both business and humanity; we believe that excluding a perspective because it is outside the "silo"ed discipline, is a poor approach to problem solving, and many others agree (Friedman & Gostin, 2012). As noted by Friedman and Gostin in their 2012 article from Harvard's Health and Human Rights journal:

> *"We believe the right to the highest attainable standard of physical and mental health can be a force to enable even the world's poorest people to benefit from the immense health improvements that we know to be possible—interventions that are proven and affordable. Increasingly, civil society and communities, courts and constitutional assemblies, are turning to the right to health as tool for developing a more just society. The six new national constitutions adopted in 2010 all codified the right to health. Court decisions based on the right to health are burgeoning."*

Since the United States Congress passed the PPACA in light of these global influences, and thus the examination of the law and its impact on individuals and businesses could not be more appropriate or timely in a global context, we can inquire, "what will be the effect" of this new law in the workplace and to the large numbers of SMEs in the USA?

According to Ambassador Miriam Sapiro,

> "*Since taking office, the Administration has secured 18 tax cuts for small business. ... President Obama announced additional initiatives to reduce paperwork and streamline processes to help more small businesses access the credit they need to invest, hire, and grow. The President's National Export Initiative (NEI) also puts a special emphasis on finding new ways to enhance SME participation in trade, including by making government programs and resources more accessible through one-stop online platforms such as Export.Gov.* (Sapiro, 2012)

We know that in the United States, small businesses account for nearly 98 percent of all U.S. exporters. The value of exports by U.S. small businesses in 2010 was over $380 billion, an increase of more than 24 percent from 2009, and an estimated 34 percent of the total value of known U.S. goods and services exports (Sapiro, 2012). However, the number of employees of the small firms that engage in export may be <u>beneath</u> the "threshold" for "small" under the PPACA (US Department of Health & Human Services, 2012) definitions!

Over the years, many scholars have remarked on the variety of definitions of "small" business, as well as remarking on the reasons for failure of many small businesses (Nadim & Lussier, 2012). Since the SBA is primarily concerned with the success of Small Business, and the PPACA specifically addresses incentives [and "penalties"] for compliance with the PPACA, should we ask how does the SBA calculate number of employees?

In determining the number of employees, SBA counts all individuals employed on a full-time, part- time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. However, the SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees (or independent contractors) of a concern. Volunteers (i.e., individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees (13 CFR Ch. I (1–1–07 Edition), 2007).

According to the O'Neill Institute for National and Global Health Law (Georgetown University Law Center), World Health Organization and Lawyers Collective, Global Health and Human Rights Database the IRS should be the federal agency to enforce the PPACA. (http://www.ghhrdb.org). In fact, the IRS is decidedly THE agency to track, monitor and enforce several provisions of the PPACA. This should come as no surprise to those who agree with experts in health policy that the IRS is the federal agency most likely to be in universal contact with the citizen, be it corporate or individual (Goldberg & Camic, 2009). As noted by top tax policy proponents:

> *"From an administrative standpoint, the IRS is the one institution that deals regularly with virtually all citizens. It also functions in many ways as the largest financial institution in the world, collecting funds and information from, and disbursing funds to, all of those with a stake in health care policy—individuals and families, employers and workers, the self-employed, purchasing cooperatives and health insurance providers. Within this framework, implementation of health policy reform would likely include leveraging the existing infrastructure provided by the IRS"* (Goldberg & Camic, 2009).

IMPLICATIONS AND RECOMMENDATIONS

There is confusion in aligning the disparate definitions of small business; the SBA and the IRS are two of the most confusing of the pertinent federal agencies providing such definitions. For example, if you have fewer than 25 employees and provide health insurance, you may qualify for a tax credit of up to 35% (up to 25% for non-profits) to offset the cost of your insurance. This credit will increase in 2014 to 50% (35% for non-profits). This is an incentive to offer insurance to employees and may have the effect of making the cost of providing insurance lower. (US Department of Health & Human Services, 2012).

But, back to our original series of questions...Must a small business provide health insurance to its employees? We can answer that question by stating the facts: large companies will be assessed penalties for failure to provide health insurance. Individuals will also be assessed penalties for failure to have health insurance. In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (e.g., prescription drugs and hospitalization).

Thus we can see that the overall approach to expanding access to coverage is to require U.S. citizens and legal residents to have health insurance. One important semantic issue is to remember that health coverage is NOT the equivalent of health care.

The legislation mandates the creation of a state-based American Health Benefit Exchange system as well as separate employer requirements. The PPACA requires qualified health plans participating in the Exchange to meet marketing requirements, have adequate provider networks, contract with essential community providers, and have a contract with navigators to conduct outreach and enrollment assistance. They must also be accredited with respect to performance on quality measures, use a uniform enrollment form, and a standard format to present plan information. The legislation also requires qualified health plans to report information on claims payment policies, enrollment, disenrollment, number of claims denied, cost sharing requirements, out-of-network policies, and enrollee rights in plain language.

In spite of the fact that the legislation specifically says individuals can purchase coverage, and there will be premium and cost-sharing credits available to individuals/families with income between 133-400% of the federal poverty level (which for a family of four is about $22,050)- if that individual claims the credit, his/her employer may be audited to inquire whether or not the employer offered an employer plan to the employee. This makes for yet another hidden cost in the legislation, and sets up another risk factor for the small business. The risk is real; an audit by the IRS to compare employer and employee insurance credits to prevent double-dipping can be yet another hidden cost and possible liability, to even a well-intentioned small business.

Employers are required to offer coverage to their employees to provide a free voucher with incomes less than 400% of the FPL. The act also requires employers to pay penalties for employees who receive tax credits for health insurance through the state-based employer requirements, with exceptions for small employers (but remember, small is less than 50 employees) as well as imposing new regulations on health plans in the Exchange, and in the individual and small group markets. Once again, the definition of "small" will rear its ugly head! Under the terms of the law, a "large" employer is an enterprise with <u>50</u> or more employees (US Department of Health & Human Services, 2012). This number flies in the face of typical definitions of "small" business.

The important specific code section pertaining to consequences IF an employer does NOT offer health coverage is actually part of the Internal Revenue Code Sec. 4980H called, "Shared Responsibility for Employers Regarding Health Coverage".

In that section, it states:

> *''(1) If any applicable large employer fails to offer to its fulltime employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer sponsored plan (as defined in section 5000A(f)(2)) for any month, and*
> *''(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month."* (US Department of Health & Human Services, 2012)

The exact language of the law defining who will be determined to be a "Large" employer is essential knowledge. The law states: ''(2) Applicable Large Employer.—(A) In General.—The term 'applicable large employer' means, with respect to a calendar year, an employer who employed **<u>an average of at least 50 full-time employees</u>** (emphasis added) on business days during the preceding calendar year." (US Department of Health & Human Services, 2012).

Incidentally, the PPACA creates four tiers of benefit plans, and a catastrophe plan offered via the state based health benefit exchange program. The Bronze plan represents minimum creditable coverage and provides the essential health benefits. It covers 60% of the benefit costs of the plan with an out-of-pocket limit equal to the Health Savings Account (HSA) current law limit. The Silver plan provides the essential health benefits and covers 70% of the benefit costs of the plan with the HSA out-of-pocket limits. The Gold plan provides essential health benefits and it covers 80% of the benefit costs of the plan with HSA out-of-pocket limits. The Platinum plan provides the essential health benefits and it covers 90% of the benefit costs of the plan with the HSA out-of-pocket limits and the Catastrophe plan is available to those up to the age of 30 or those who are exempt from the mandate to purchase coverage. It provides catastrophe coverage <u>only</u>; the coverage level is set at the HSA current law levels, but prevention benefits and coverage for three primary care visits would be exempt from the deductable. The plan is only available in the individual market.

The law also requires a tremendously complex cooperative megalith, optimistically called health insurance exchanges. The formal titles for these exchanges are "State-based American Health Benefit Exchanges and Small Business Health Options Program (SHOP) Exchanges". This new level of bureaucratic administration will be overseen by a governmental agency or non-profit organization.

These exchanges are designed to permit individuals and small businesses with up to 100 employees to purchase qualified coverage. The PPACA will permit states to allow businesses with more than 100 employees to purchase coverage in the SHOP Exchange beginning in 2017. The public option plan requires the Office of Personnel Management to contract with insurers to offer at least two multi-state plans in each Exchange. At least one plan must be offered by a non-profit entity and least one plan must not provide coverage for abortions beyond those permitted by federal law. Each multi-state plan must be licensed in each state and must meet the qualifications of a qualified health plan. The determination that an NPO can act as administrator of the exchange is yet another complexity inherent in the act.

The basic healthcare plan permits states the option to create a plan for uninsured individuals with incomes between 133-200% of the federal poverty level who would otherwise be eligible to receive premium subsidies in the Exchange. It is important to note that the federal poverty level is not a permanent fixed dollar value, but is adjusted using an econometric income averaging based on a national, not state scale. States opting to provide this coverage will contract with one or more standard plans to provide at least the essential (basic) health benefits and must ensure that eligible individuals do not pay more in premiums than they would have paid in the Exchange and that cost-sharing requirements do not exceed those of the platinum plan for enrollees with income less than 150% FPL or the gold plan for all other enrollees.

Finally, the small business compliance expenses will be as severe, perhaps more so, than large business compliance. This is because it is unlikely that the small business will be able to afford a dedicated position to set up, monitor and execute the compliance requirements. More likely, it will fall to a designated key person to take on additional responsibilities for PPACA compliance.

It is recommended, that educators, researchers, and those involved in small business consulting raise awareness of the legal liabilities under the PPACA. Secondly, it is recommended that a coordinated approach, involving accountant, human resources and key managers take into account the definitions of large and small employers by the terms of the PPACA and the IRS. The bottom line is but one factor in decision making; other factors, as we have seen, should influence small businesses to act in a thoughtful, strategic and responsible manner when assessing exactly how knowledge of the nuances of the PPACA can improve the firms legal insight decision making.

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LIGHT IN THE DARKNESS: UNDERSTANDING THE FUTURE DIRECTIONS OF ORGANIZATIONAL CORRUPTION

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ABSTRACT

The purpose of this study is to present directions for future research through a review of the existing literature on organizational corruption from the United States.[1] To this end, the discussion in this paper is developed in accordance with the research question, "What are the underlying views of research on organizational corruption?" This theoretical study on organizational corruption focuses on reviewing existing research in Japan and the United States. The review of existing research consequently reveals three points: (1) The existing research was developed by applying a master narrative of research on organizational corruption; (2) no empirical research have been conducted in the existing literature, and theoretical research predominates; and (3) the existing research has overlooked political processes that are affected by stakeholders involved in organizational corruption. Conducting theoretical research into these three points allows for a critical examination of research on organizational corruption theory and creates the opportunity to consider new practical measures against organizational corruption.

Keywords: Bad Apples, Bad Barrels, Organizational Corruption

INTRODUCTION

With the arrival of the 2000s, research on organizational corruption started to attract attention in the United States. In particular, serious cases such as the failure of WorldCom, concealment of income by Enron, and fraudulent accounting by Arthur Andersen, in 2001, as well as the failure of Lehman Brothers in 2008, invited considerable attention in the United States. The Academy of Management has been promoting academic conferences given the social influence of organizational corruption, and held a special symposium in 2002 and a special topic forum in 2008.

As mentioned below, the existing research on organizational corruption can be divided into research specifying the factors that contribute to organizational corruption and research on controlling organizational corruption. The former focuses on the behaviors of individuals and groups as well as on organizational cultures and norms to specify contributing factors, whereas the latter addresses how to prevent organizational corruption, with a focus on constructing models to control it.

This study reviews the existing research on organizational corruption and presents directions for future research in Japan. It examines existing research on organizational corruption to determine which discussions are necessary in Japan by reviewing research on organizational corruption from the United States.

CURRENT STATUS OF RESEARCH ON ORGANIZATIONAL CORRUPTION

Analytical views of research on organizational corruption

This section first explains the analytical views of existing research on organizational corruption in the context that research on organizational corruption has addressed this subject multilaterally.[2] In the explanation, analytical views are presented with reference to Ashforth, Gioia, Robinson, and Trevino (2008) and Fukuhara and Chae (2012). To date, research on organizational corruption has focused mainly on five analytical views (Ashforth et al., 2008: Fukuhara and Chae, 2012): the (1) micro, (2) macro, (3) wide, (4) long, and (5) deep views.

First, let us examine the micro view. The micro view identifies the behaviors of individuals and organizations as factors that contribute to organizational corruption, and it has become a focus of research with the help of such concepts as antisocial, deviant, and counterproductive behaviors (Robinson and Greenberg, 1998). As a result, the micro view explores how organizational cultures and norms cause organizational corruption (e.g., Anand, Ashforth, and Joshi, 2005; Beenen and Pinto, 2008; Bell, 2009; Lange, 2008; Pinto, Leana, and Pil, 2003). For example, the literal translation of "bad apples," which Ashforth et al. (2008) used as the subtitle in the text on the micro approach, is "rotten apples." This reasoning comes from an English proverb stating that "bad apples spoil the barrel," meaning that corrupt behavior exhibited by individuals (bad apples) inside an organization corrupts (spoils) the entire organization (the barrel) and that the corruption (spoiling) of an entire organization (the barrel) occurs in an organization in which individuals or groups exhibit corrupt behavior.

Next, the macro view is discussed. Unlike the micro view, which analyzes the occurrence of organizational corruption on the individual and collective levels, the macro view analyzes how formal and informal systems cause organizational corruption in an entire organization and industry, and deals with organizational corruption as an ethical issue. As in the case of the micro view, the literal translation of what Ashforth et al. (2008) called "bad barrels" is "rotten barrels." That is, the term, "rotten barrels" means that individuals who internalize the culture and rules of an organization will engage in organizational corruption when the entire organization is corrupt.

The wide view analyzes organizational corruption as a system. Analyzing organizational corruption as a system refers to the concept that the demand side, which offers benefits, and the supply side, which receives benefits, cause corruption when they form a joint system.

The long view analyzes how organizational corruption has been regulated historically. It analyzes organizational corruption and regulations by examining what regulations have been used to control organizational corruption in the past and whether they have occasionally generated harmful consequences. It is generally accepted that organizational corruption should be controlled by regulations. However, some research indicates that imposing regulations is detrimental because when this is done, employees are subject to excessive pressure from outside the organization, which impairs their motivation and autonomy (Fukuhara and Chae, 2012).

The deep view conducts theoretical research into organizational corruption, such as comparative examinations of research on organizational corruption and the integration of analytical views. Various disciplines, such as economics, sociology, psychology, social psychology, and criminology, are used as analytical tools in research on organizational corruption. This causes discussions to be unfocused because researchers from diverse disciplines are conducting this research. At the same time, as shown in this paper, it is necessary to identify methodological problems in existing research. It is the objective of the deep view to examine these problems critically.

The next section analyzes existing research with the help of these five views. First, existing research is classified into research that specifies contributing factors and research focusing on controlling these factors. In the former type of research, the micro, macro, and wide views are reviewed. Because these three views examine organizational corruption exhibited by individuals, groups, and systems, the author decided to use these three views as research subjects to identify contributing factors. In the latter type of research, the long view and control perspective are reviewed because both are applicable to this research: the long view discusses regulations for organizational corruption and the control perspective focuses on measures to deter organizational corruption. The author decided to analyze these two views in research on deterrence. The deep view is not discussed in this paper, but it is an important perspective that should be examined in future research on organizational corruption.

Research to specify contributing factors

Here, research aimed at specifying contributing factors is reviewed. As mentioned above, the micro, macro, and wide views are discussed. The author examines the discussions in the existing research by considering these three views.

Research on the micro view

First, the micro view is examined. In the micro view, individual and collective behaviors are specified as factors that contribute to organizational corruption. For example, Pinto et al. (2003) analyzed the micro view by using the concept of organizations of corrupt individuals (OCI), which views an organization as a group of individuals who engage in corruption. According to Pinto et al. (2003), the OCI concept attributes the occurrence of organizational corruption to individuals and uses an organization comprised of these individuals as the focus of analysis. At the same time, OCI is observable at the behavioral level of individuals and groups that are affected by factors that influence organizational characteristics such as organizational climates, cultures, and codes of conduct. Research on OCI involves behavioral-level research on individuals and groups, but Pinto et al. (2003) repeatedly mentioned that this research takes a different view from research on organizational climate and organizational culture, pointing out the following characteristics of research on OCI.

The first characteristic is that OCI assumes the presence of unethical behavior, while research into organizational climate and culture do not necessarily deal with unethical phenomena. Not all types of research on the climates and cultures of organizations necessarily target malicious climates and cultures. However, OCI focuses on behavior as a research target after determining whether the behavior in question is ethical or unethical in relation to the ethical criteria inherent in the organization. It thereby attributes organizational corruption to unethical behavior and develops a discussion on said behavior. The second characteristic of this type of research is that, unlike research on organizational climate and culture, OCI focuses mainly on the benefits that individuals receive, as epitomized by the question “How do individuals receive benefits from corruption?” This approach is based on the assumption that “individuals and groups receive benefits from organizational corruption,” which consequently makes the behavior of individuals and groups a research target. The third characteristic is that OCI focuses persistently on the micro behavior of individuals and groups while targeting not only organizational climate and culture but also formal and informal systems. Research on organizational climate and culture covers a broad scope that includes organizational norms, rules, and procedures, as well as the “formal and informal systems” mentioned by Pinto et al. (2003). In contrast, OCI specifies the factors that contribute to organizational corruption by focusing persistently on micro behavior. As previously mentioned, OCI emphasizes behavior at the individual or collective levels and takes note of how this behavior causes organizational corruption.

Beenen and Pinto (2008) applied OCI in an actual analysis when they interviewed Sherron Watkins, the whistle-blower in the Enron case. They used OCI to analyze the interview’s content and understand how the individuals who caused the Enron case received benefits. Their interview started with the aim of determining whether individual or organizational benefits are more important with respect to the question “Why does organizational corruption occur?” The statements of Sherron Watkins attributed the occurrence of organizational corruption, above all, to the behavior of individuals.

The first factor she mentioned is extreme pressure. She said that Enron felt itself to be under extreme pressure from Wall Street to achieve its organizational objectives, and that this pressure affected the behavior of individuals and caused organizational corruption. The extreme pressure pushed employees to take any and all measures to achieve the organizational objectives, and individuals were consequently forced to take inappropriate measures. The second factor is the pursuit of private interests that individuals attempt to obtain without being detected by the various systems installed within an organization. For example, accounting reports were disguised and falsified in the Enron case, and these actions regarded as personal malicious behavior. Insiders within the actual systems were exposed for disguising and falsifying information and taking advantage of opportunities to act, leading to the commission of crimes by individuals. The third factor is the rationalization of inappropriate behavior. As stated by Beenen and Pinto (2008), it is accepted that a person who commits a crime on the street in the course of her or his daily life may be arrested by the police as a criminal. However, because crimes committed by white-collar employees are hard to recognize from the outside, these criminals attempt to make themselves appear innocent by justifying and rationalizing their behavior.

As for the micro view, research by Anand, Ashforth, and Joshi (2005), in addition to research on OCI by Pinto et al. (2003) and Beenen and Pinto (2008), can be introduced. Using the concept of rationalization tactics, Anand et al. (2005) analyzed how individuals justify unethical and fraudulent behavior. These rationalization tactics can be said to have something in common with the rationalization of inappropriate behavior, as analyzed by Beenen and Pinto (2008). Anand et al. (2005) mentioned that the recurrence of the rationalization tactics used by individuals and the socialization processes that develop inside organizations cause organizational corruption. That is, the behavior of individuals who intend to justify malicious behavior permeates organizations through organizational socialization, and unethical and exploitative behavior by individuals thereby results in organizational corruption in the long run.

Research on the macro view

Research on the micro view focuses on the behaviors of individuals and groups to understand why organizational corruption occurs. Here, the author analyzes the research that has been conducted from the macro view, which examines how formal and informal systems cause corruption in an entire organization or industry (Fukuhara and Chae, 2012). For example, in order to analyze the mechanism that generates organizational corruption, Majima (2007) examined four cases—(1) A critical accident at Japan Nuclear Fuel Conversion Co., Ltd. (JCO), (2) a switched patient at Yokohama City University Hospital, (3) the concealment of medical malpractice by Tokyo Women's Medical University Hospital, and (4) the concealment of a complaint by Mitsubishi Motors—and analyzed these cases by using the structuration theory approach developed by Giddens as a model of organizational culture theory. Focusing on the duality signified by the concept of structuration, structuration theory characteristically views a structure from the perspective that "a social structure is not only a structure composed of human actions but also is an 'intermediary' of these components" (Majima, 2007). By applying this structuration theory to organizational culture theory, Majima (2007) proposed the structuration theoretical organizational culture theory and analyzed cases of organizational corruption by applying this theory. Analyzing the corruption-generating mechanism from the perspective of organizational culture is an important research achievement.

Taniguchi (2012) conducted research on corporate ethics that falls under the macro view of research on organizational corruption. He said that, "research into corporate ethics examines corporate behavior from the ethical aspect and treats corporate corruption as an ethical issue" (Taniguchi 2012, p. 49), and reported the case of group food poisoning involving Snow Brand Milk Products as a macro view case of research on organizational corruption. According to Taniguchi (2012), lack of ethics can be divided into two categories: managerial and employee lack of ethics. The former can be characterized as attributing responsibility to management as the decision-making body, and analyzes the lack of ethics by management critically, while the latter is characterized as holding deteriorating morale and rule violations by employees to be responsible for unethical behavior, thereby attributing organizational corruption to a lack of ethics among employees.

Research on the wide view

In the wide view, discussions with a focus on the demand and supply of benefits are conducted. Fukuhara and Chae (2012) pointed out that industrial and social hazards to morale nurture fraud and scandal in business. They analyzed the causal relationship between a sense of ethics and morality—which mediates systems, such as company-to-company as well as company-to-society relations—and corruption. In this case, the wide view focuses on the demand side, which receives benefits from fraudulent behavior including insider deals and collusion, as well as the supply side. On the demand side is the fraudulent actor who demands bribes and other benefits in a business transaction, and on the supply side is the actor who tries to maintain the system by responding to these demands or requests. It is the philosophy of the wide view that a system causes fraud when the speculations of the two actors are aligned and demand and supply that are split within a system cause organizational corruption.

Research on controlling organizational corruption

In this paragraph, the author analyzes the discussions found in the research on controlling organizational corruption, considering the research on the factors that contribute to organizational corruption. Research on organizational control can be divided into research on the long view and research on control. As mentioned above, the former analyzes how regulations have been established over the course of the historical analysis of organizational corruption, whereas the latter analyzes how to design a system to control organizational corruption. Now, let us examine these two kinds of research.

Research on the long view

First, let us discuss the long view. As mentioned by Fukuhara and Chae (2012), the long view addresses the process through which regulations such as laws and systems to monitor corruption have been established and revised on a case-by-case basis over long historical periods. For example, in the case of organizational corruption at a TV station, it can be observed that broadcasting ethics are revised and stricter criteria are included in the procedure manual after a specific issue is covered and highlighted by the mass media.[3] This is a measure in which relevant laws and systems are reviewed by considering the occurrence of organizational corruption to be an opportunity to prevent it from reoccurring. However, as indicated by Fukuhara and Chae (2012), the strengthening of external controls as a result of a review of relevant laws and systems consequently reduces the ability of organization members to act autonomously and exercise self-control. At the same time, it may also be a problem that strengthened external control impairs the originality and ingenuity of people in the field.

Ashforth et al. (2008) classified research on the long view into one of the five approaches mentioned above, but the fact remains that, to date, no systematic research has been conducted on the long view. Therefore, instead of conducting a critical review, the author hopes for the further accumulation of this type of research.

Research on controlling organizational corruption

Next, research on controlling organizational corruption is discussed. Lange (2008) conducted studies that analyze control of organizational corruption. To begin with, in order to chart organizational corruption control systems, Lange (2008) placed two types of orientations—outcome and process—on the vertical axis. At the same time, placed two types of controls—administrative controls, imposed by predetermined procedures, and social/cultural controls, imposed by an organization's climate and culture—on the horizontal axis. As Figure 1 shows, Lange created a control circumplex consisting of eight types of controls by dividing both the vertical and horizontal axes into two. The four quadrants are (1) autonomy reduction, which controls the autonomy of members (Quadrant I); (2) consequence systems, which attribute the control of organizational corruption to remuneration and promotion (Quadrant II); (3) environmental sanctioning, which imposes sanctions from external environments including laws and regulations (Quadrant III); and (4) intrinsically oriented controls, which try to avoid corruption (Quadrant VI). These four quadrants are further divided into eight types to establish concrete measures to control organizational corruption. Each of these eight types is examined closely.

First, bureaucratic controls (Type 1) are examined. Bureaucratic controls are process-oriented and contract autonomously. This type of control refers to controlling the behavior of employees in a bureaucratic manner through such means as publishing official rules, establishing routines, and enacting policies. They encourage employees to behave autonomously and thereby increase the possibility of control.

The next type is punishment (Type 2), which is process-oriented and based on outcomes. That is, it is intended to allow the leader of an organization to become associated with employee behaviors and outcomes by giving him or her the authority to punish them. For example, if employees are involved in organizational corruption, he or she can control them by establishing punishments for their behavior.

The third is incentive alignment (Type 3), which is process-oriented and exercised by virtue of the result system. As the term "incentive alignment" indicates, it characteristically controls employee behavior by virtue of extrinsic remuneration, through, for example, pay and promotion.

Next is legal/regulatory sanctioning (Type 4), which is result-oriented and a type of administrative control. It is a form of control that specifies clear regulations and rules for the internal organs of an organization, and punishes erroneous behavior by employees.

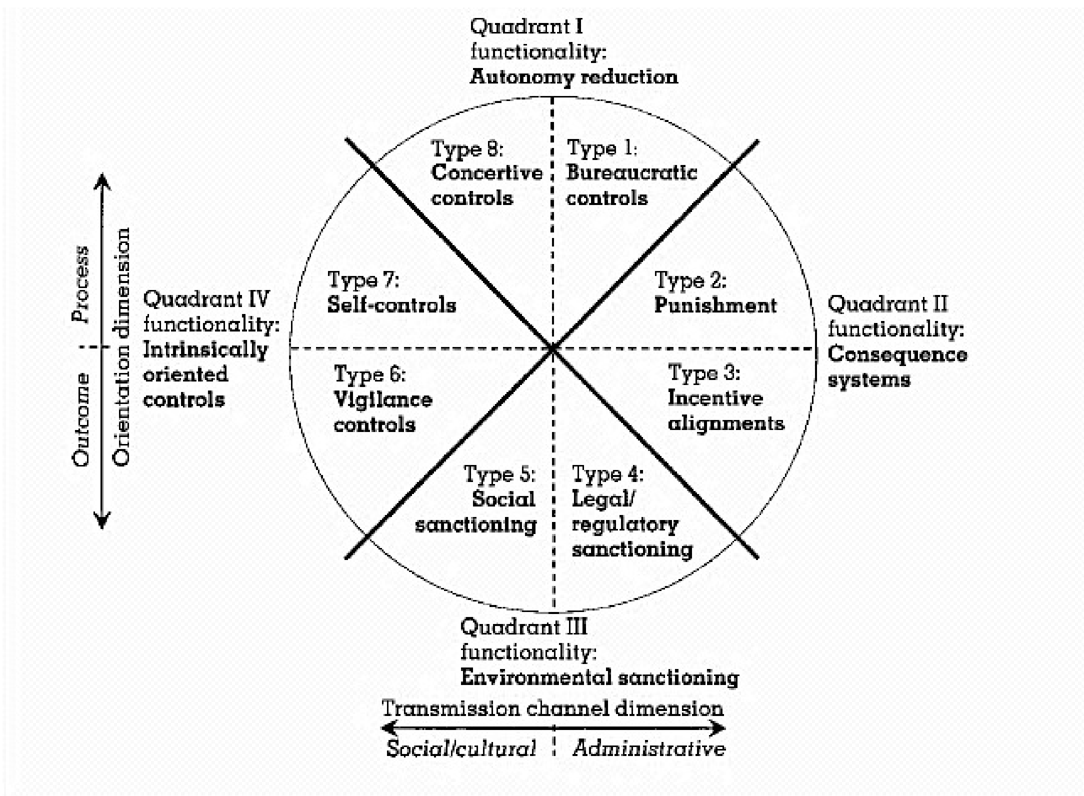
Social sanctioning is result-oriented and a type of social/cultural control (Type 5). In terms of social control, it is a method of control that uses the normative influence obtainable from the organizational culture and climate. For example, even though what employees should not do is not clearly mentioned within an organization, an employee may infer what employees should not do from daily conversations with colleagues and superiors, and these inferences will be reflected in her or his behavior.

Next are vigilance controls (Type 6). These are result-oriented and exercised by virtue of intrinsic controls. They make employees control corruptive behavior spontaneously, and focus on how the behavior of each employee is motivated intrinsically. They thereby aim to have employees control their behavior themselves.

Next are self-controls (Type 7). These are process-oriented and exercised by virtue of spontaneous control. They are exercised by each employee, in contrast to vigilance controls. That is, they are intended to allow employees to continuously control their own behaviors, thereby encouraging them to nurture an attitude of not getting involved in corruption.

The last are concertive controls (Type 8). These are process-oriented and exercised by virtue of autonomous contraction. In concertive controls, the behavior of each employee is controlled by virtue of a negotiated consensus, which consists of (1) increasing the interpretation and common awareness of important values involved in duties within the organization, (2) increasing expectations for the precise behavior of other employees based on these values, and (3) formulating behavior based on these values as a code of conduct. That is, concertive controls are ways of controlling corrupt behavior by having employees share a common awareness.

Figure 1: Organizational Corruption Control Circumplex (Lange, 2008)



FUTURE DIRECTIONS FOR RESEARCH ON ORGANIZATIONAL CORRUPTION

Departure from the master narrative

This paragraph discusses the master narrative of existing research. Sakurai (2002) defined the master narrative as “the story that has a privileged position within a certain community (p. 36).” In this case, a privileged position refers to a position in which one side tries to define the other under a power relationship, such as a “one-way privilege from those who discriminate to those who are discriminated against.” If the master narrative is analyzed in the context of research on organizational corruption, it means that organizational corruption researchers specify the factors that contribute to organizational corruption unilaterally and discuss controls with these contributing factors in mind. The master narrative that “specifies contributing factors involved in the occurrence of organizational corruption and discusses control to prevent organizational corruption from reoccurring” underlies existing research, and it is an important discussion in understanding the theoretical assumptions of existing research.

The master narrative used to specify and control contributing factors generates discussions on how to specify and control factors related to individuals, groups, and organizations, and it is easily understandable for readers. For example, knowledge of such factors as extreme pressure, pursuit of personal interests, and the rationalization of inappropriate behavior makes it possible to prevent organizational corruption from occurring by eliminating extreme pressure, forbidding the pursuit of personal interests, and prohibiting the rationalization of inappropriate behavior. At the same time, in the discussion on control, constructing a model to control organizational corruption allows for organizational corruption to be prevented by asking about the types of controls that exist and how they can be utilized as needed. The master narrative of these kinds of existing research involves “specifying contributing factors involved in the occurrence of organizational corruption and conducting a discussion on the control to prevent corruption from reoccurring.” Responsibility for the occurrence of organizational corruption is primarily attributed to the individuals and groups in question.

However, research conducted with the help of a master narrative has its limits. It has the “good and evil dualism diagram” (Yamada, 2011) in which organizational corruption researchers make the interested party assume responsibility for the individuals, groups, and organization in question, while pursing the responsibility of the interested parties thoroughly. In this regard, the interested party is asked not to cause organizational corruption by “redressing” its own behavior and norms, and the existence of responsibility depends on which behaviors and norms the interested party has internalized. However, because “organizational corruption is rampant” (Fukuhara and Chae, 2012, p. 100), in recent years, the master narrative of existing research focusing on “how to prevent organizational corruption from occurring” will become a fruitless discussion that takes place after the occurrence of organizational corruption. To avoid this situation, it is necessary for future research on organizational corruption to overcome fruitless discussions, while keeping the master narrative of existing research in mind.

Implementation of empirical research

As far as the limits of existing research are concerned, it should be noted that existing research has not gone beyond theoretical discussion and no empirical research have been conducted. As indicated by Fukuhara and Chae (2012), organizational corruption is a research field in which an empirical research cannot be conducted easily. Fukuhara and Chae (2012) discussed the following obstacle to conducting a pilot research on organizational corruption: "We asked five companies (three manufacturing companies and two service companies) in which organizational corruption had occurred in the past for interviews as a pilot research to study the causal relationship when organizational corruption occurs, ex-post remedial action, and the present approach to prevent corruption. Of the five companies, four companies turned us away at the door and one company declined at the stage of an in-house meeting. The attitudes of the five companies show how hard it is to get permission to conduct an interview" (p. 112). This indicates that serious obstacles must be overcome to locate a research target and points out that it is extremely difficult to conduct research on organizational corruption. Considering this background, locating and establishing a relationship with a target should be regarded as a high-priority issue. This makes it clear that it is urgent to establish a method of fieldwork that allows for a relationship to be established with a target company.

For future research into organizational corruption, however, it is important to clarify the research subject of an empirical research before establishing a fieldwork method. At the same time, it is necessary to select a research subject that allows discussion on what an empirical research would clarify and allow research on organizational corruption to achieve.

Focus on the political processes involved in organizational corruption

As mentioned above, existing research asks that the interested party assume responsibility for organizational corruption. However, it can be said that organizational corruption is not free from political processes that involve diverse stakeholders surrounding the interested party.

For example, let us consider at the case of unintended acceleration in Toyota vehicles that occurred in the United States from 2009 to 2010. In this case, the defect in the Toyota vehicles in question was first pointed out and the story later grew bigger. While the responsibility of Toyota, as the interested, party was discussed, various stakeholders surrounding Toyota, including lawyers, plaintiffs, the National Highway Traffic Safety Administration (NHTSA), the National Aeronautics and Space Administration (NASA), media in the United States and Japan, and United States insurance companies also became involved in this case. Because various stakeholders were involved in the case, the measures taken by Toyota but also the opinions and behaviors of the stakeholders aggravated the situation to a significant extent. Furthermore, the reports published by NHTSA and NASA, which finalized the case, declared Toyota's products to be totally defect-free and attributed the accidents mostly to driver error.[4] This is a case in which it was necessary to focus on the political processes revolving around the involved stakeholders while pursuing the responsibility of the interested parties.

The case of unintended acceleration in Toyota vehicles is only an example, and it shows that organizational corruption involves political processes that implicate not only the parties in question but also various stakeholders. It is hard to say that existing organizational corruption research has analyzed these political processes thoroughly, although it has focused on the interested parties. Therefore, future research on organizational corruption should also analyze the political processes of organizational corruption that implicate various stakeholders.

CONCLUSION

This paper discussed directions for future research by reviewing existing research on organizational corruption. Over the course of the discussion, it clarified that existing research has focused on specifying the factors that contribute to organizational corruption as well as how to control it. At the same time, it pointed out the problem with the master narrative, the necessity for empirical research, and the political processes involved in organizational corruption as issues on whixisting research has failed to focus. Above all, interest in the political process is related to the essential problem of how to analyze organizational corruption. Analyzing not only the responsibility of the interested parties but also that of the stakeholders surrounding them will allow the master narrative to be overcome.

ENDNOTES

1. It is possible to translate "organizational corruption" into "organized corruption." Bell (2009) pointed out, however, that "in research on organizational corruption, researchers have focused on symptomatic research that attributes generous bonuses, managerial salaries, sexual harassment, organizational crimes, and bullying to lack of ethics and sloppy management." As his analysis indicates, this symptomatic research covered a wider scope than the corruption research conducted in Japan. For this reason, this paper uses "organizational corruption" instead of "organized corruption" by taking the characteristics of the scope it covers into consideration.
2. It should be noted that existing research has been classified solely for the purpose of this paper. Therefore, the classification of existing research in this paper is not exhaustive. Please see Ashforth et al. (2008), Lange (2008), Fukuhara and Chae (2012), and Pinto, Leana, and Pil (2003) for exhaustive classifications.
3. This is based on a story that the author learned of during fieldwork at a TV station (Nakahara, 2013).
4. See the "NHTSA Full Report" and the "NASA Full Report" at http://www.nhtsa.gov/UA for further details on the research on unintended acceleration in Toyota vehicles.

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THE IMPACT OF CORPORATE SOCIAL RESPONSIBILITY ON DOCTORS' PRESCRIPTION INTENTION

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ABSTRACT

Recently, the relationship between corporate social responsibility (CSR) activities and corporate value has attracted significant attention. While the decision-making process by which consumers select products is associated with CSR activities, medical doctors' intention to prescribe drugs has not been examined. We therefore conducted an empirical analysis to explore the impact of the CSR activities of pharmaceutical companies on doctors' prescription decisions. Using individual data from an online survey of 300 doctors in Japan, we found that 32.3% of doctors preferred to prescribe the drug of a company that was actively engaged in CSR activities. The results of a two-tailed t-test showed that this prescription preference was significantly higher for doctors who worked at an advanced treatment hospital and frequently participated in conferences. A factor analysis of 14 CSR activities confirmed reliability and convergent and discriminant validity and identified a four-factor structure. Path analysis using structural equation modeling demonstrated that the Value delivery factor was most salient for doctors and encompassed CSR activities such as providing information on related diseases, supplying the company's own drugs to developing nations, and providing scholarships. These activities increased the reputation of the company and made its products more likely to be selected by doctors.

INTRODUCTION

The increasing importance of non-financial factors—such as environmental, social, and governance issues—to corporate value has more recently generated significant interest in the role of corporate social responsibility (CSR) activities and their effects on corporate value. For example, according to the International Integrated Reporting Committee, the contribution of non-environmental, social, and governance information to the decision-making process (inclusive of investment decisions) has been increasing since 1995. Corporate assessment rankings in Japan, such as the CSR ranking of Toyo Keizai Inc. (Shinrai sareru kaisha) and the NICES[i] company ranking developed by three Nihon Keizai Shimbun companies, demonstrate that the level of emphasis placed on CSR activities is equivalent to, or heavier than, the focus placed on financial data.

In much the same fashion, consumers are also gradually focusing more on CSR (Carrigan & Attala, 2001; Maignan, 2001), and there are occasional reports that company CSR activities are influencing the product choices of consumers. Thus far, those CSR activities that have been reported to correlate directly with consumers' purchase intentions have included the following factors: company's ethics record exceeding expectations (Creyer & Ross, 1996), CSR actions (Murray & Vogel, 1997), consumers' overall evaluation of CSR (Brown & Dacin, 1997), corporate reliability (Lafferty & Goldsmith, 1999), consumer knowledge about social responsibility issues and the social responsibility records of companies (Mohr & Webb, 2001), company CSR record when product quality is high (Sen & Bhattacharya, 2001), ethical products (Auger *et al*., 2003), environmental commitment (Mohr & Webb, 2005), positive CSR information (Alniacik *et al*., 2010), and perceived environmental performance (Grimmer & Bingham, 2013).

According to the 2013 Cone Communications Social Impact Study, in which 1,270 consumers in the United States were surveyed, nearly all U.S. consumers (93% compared to 84% in 1993) stated that they have a more positive image of a company when it supports a cause. The survey indicated that 88% of respondents said that they would purchase products from a company that provided some type of social and environmental benefit, and 54% had in fact made such purchases in the past 12 months. Further, 89% of respondents said that they would switch to brands associated with a good cause, given similar quality and price.

As this data indicates, consumers are willing to make their product selections based on whether or not a company supports a good cause. This trend is particularly pronounced for products with similar prices and quality, and annual figures show that it is a growing trend. In contrast, the impact of CSR activities on product choice by medical doctors has not yet been investigated with respect to ethical pharmaceuticals (drugs only available on prescription). The main reason for this concerns the specific characteristics of the ethical pharmaceutical industry. Their products are not selected directly by the consumer (patient) but by a third party (a doctor or physician) with specialized knowledge of the products.

Accordingly, the goal of this research is to explore the impact of the CSR activities of pharmaceutical companies on medical doctors' intention to prescribe drugs and to provide valid suggestions for the management strategies of pharmaceutical manufacturers.

LITERATURE REVIEW

Early research on factors influencing the selection of ethical pharmaceuticals by medical doctors dates back to the 1950s. Initial research focused on conditions determining the selection of new or existing drug products. Caplow and Raymond categorized a total of 377 reasons for pharmaceutical choices based on data from 182 physicians and specialists in private practices in Minnesota, United States. The study revealed that usefulness of the drug (therapeutic effect, side effect, ease of administration) was a major reason for choice (85.6%), outweighing corporate reliability (2.7%), patient preference (2.7%), and price (2.4%) in the decision-making process. In the early years of this research, the main source of information for assessing the efficacy of a pharmaceutical was marketing activities conducted by pharmaceutical companies (Caplow & Raymond, 1954). However, in line with the increasing number of difficulties associated with the long-term administration of drugs to treat chronic diseases (including pharmaceutical adoption), colleagues (Coleman, Menzel, & Katz, 1959) and medical journals (Bauer & Wortzel, 1966) gradually became more important sources of information.

The focus of later research has shifted from the choice between new and existing drugs to brand selection based on therapeutic category. More emphasis has been placed on the range of promotions offered by pharmaceutical companies as a key selection criterion. This research has generated contradictory findings. Some studies have indicated that marketing detailing is effective (Gönül, Petrova, & Srinivasan, 2001; Manchanda & Chintagunta, 2004; Manchanda, Rossi, & Chintagunta, 2004; Mizik & Jacobson, 2004; Narayanan, Manchanda, & Chintagunta, 2005; Venkataraman & Stremersch, 2007) and others deem it ineffective (Parsons & Abeele, 1981), while some researchers believe that the distribution of pharmaceutical samples is effective (Bawa & Shoemaker, 2004; Mizik & Jacobson, 2004; Joseph & Mantrala, 2009) and others do not (Boltri, Gordon & Vogel, 2002). The mainstream focus of research has therefore emphasized pharmaceutical company activities rather than the product.

Since ethical pharmaceuticals determine life or death in some cases, product selection is more complex than it is for ordinary products. The criteria by which selection is made are a topic of debate in the literature. The selection of ethical pharmaceuticals is a complex trade off—whether to prioritize the extension of life expectancy or sustain quality of life—and is based on a combination of criteria including ethical considerations and regulatory limitations. Kahn *et al.* (1997) have pointed out that, in comparison with consumer product choices, the conditions for ethical drug selection are complicated, due in part to third-party payment systems such as insurance payments for medication. Campo *et al.* (2005) have made the same point, adding that price, as well as efficacy and safety, is now considered a determining factor due to the advent of generic drugs in recent years. Monteiro, Dibb, and Almeida (2010) analyzed the reasons for selection of 14 antihypertensive drugs based on data from 283 general practitioners in the UK, with the objective of identifying selection criteria for drugs in the same therapeutic class. A factor analysis of the 21 reasons given by the respondents pinpointed five evaluative dimensions (long term efficacy, medical support, adverse side effects, and asthmatic and bronchitic suitability), and the results of a multiple regression analysis indicated that respondents only focused on the first three factors.

The research suggests that the factors doctors take into account when selecting ethical pharmaceuticals can largely be assigned to two main categories: perception of the attributes of the pharmaceutical and perception of the attributes of the pharmaceutical company. The main factors of the former are efficacy/safety, price, and endorsement by experts, while only one factor, promotional activities, has been reported for the latter. In other words, it has been suggested that the influence on doctors' drug selection stems from those activities that have an impact on the doctor. To date, there have been no reports on the impact of CSR activities that target stakeholders, (such as the general public, including patients/consumers), the local community, shareholders, employees, and business partners, on physicians' prescription intention. Research on the impact of these factors is essential.

Our goal, therefore, is to explore the impact of pharmaceutical company CSR activities on the prescription intentions of medical doctors. Specifically, we aim to clarify the following: 1) the percentage of doctors who would prescribe drugs from companies that are actively implementing CSR activities; 2) the characteristics of doctors that indicate a willingness to allow a company's CSR activities to influence their prescription intention; and 3) which CSR activities will improve a company's reputation and encourage doctors to select their products.

RESEARCH METHODS

Survey respondents

We administered an online questionnaire survey to 300 medical doctors in Japan. These participants were registered on a medical website featuring the largest sample of medical doctors available. We selected doctors working at medical institutions nationwide (advanced treatment hospitals, other hospitals, and clinics) to reflect the attributes of individuals proportionally in the Ministry of Health, Labour and Welfare's (MHLW) 2000 Survey of Doctors, Dentists, and Pharmacists. The discrepancy in composition of the sampling target based on attributes (gender and age composition) with the MHLW survey was less than 10% (for instance, the percentage of male respondents in our survey was 91.0%, whereas it is 81.1% in the MHLW survey). The medical fields sampled were of a similar composition to those of the MHLW survey and were as follows: 49.3% physicians, 7.0% surgeons, 8.0% pediatricians, 4.0% urologists, 4.0% psychiatrists, 3.3% dermatologists, 3.3% ophthalmologists, 2.7% emergency care or anesthesiologists, 2.7% obstetricians and gynecologists, and 13.3% doctors practicing in some other field of medicine. We believe that our sample was a reasonable representation of medical doctors in Japan.

Establishing variables

We established doctors' "prescription intention" with regard to products of companies that were positively engaged in CSR activities as an outcome variable, using the question "Do you want to prescribe drugs from companies that are positively engaged in CSR activities?" We also measured prescription intention with regard to products of companies that are positively engaged in CSR activities with specific prerequisite conditions as another outcome variable, using the question "Do you want to prescribe drugs of companies that are positively engaged in CSR activities when the drugs have similar effects, safety, and prices?" Responses to the questions were provided on a five-point Likert scale (5 = strongly agree, 4 = somewhat agree, 3 = neither agree nor disagree, 2 = somewhat disagree, and 1 = strongly disagree).

The two independent variables were personal characteristics of the participants and their evaluation of CSR activities. For the latter, we asked, "Do you think the CSR activities that a pharmaceutical company is engaged in help its reputation?" Participants responded to this question in relation to 14 different types of CSR activity as follows (specific examples were used to facilitate recall): provision of information on related therapeutic areas (i.e., activities to raise awareness of a particular disease among the general public/patients); supply of own pharmaceutical products to developing nations; contribution to academic fields (i.e., grant system for research); contribution to the arts and sports (i.e., sponsoring concerts); contribution to local communities (i.e., garbage collection activities in the area where the company's office exists); philanthropic work (i.e., supporting restoration for damage caused by the Great East Japan Earthquake); efforts to reduce greenhouse gas emissions (i.e., reducing CO2 emissions);

initiatives for developing a recycling-oriented society (i.e., recycling activities); measures to prevent air, water, and soil pollution and stop the emission of environmental hormones; measures to sustain plant and animal ecosystems and preserve the natural environment (i.e., forestation); disclosure of management information (i.e., uploading research and development (R&D) information to the company homepage); legal compliance (i.e., information on legal compliance for production and distribution activities in terms of safety); improvements to the workplace environment (i.e., human development); and development of an organizational structure that is conducive to sound management (i.e., no scandals). The same five-point Likert scale was used to score responses.

We surveyed the following characteristics of doctors: personal attributes (gender, age, medical qualifications, and academic degrees); factors related to the hospital (type of hospital, number of beds, number of outpatients the doctor sees per day, and extent of power for drug adoption decisions); information factors (frequency of participation in scientific meetings, frequency of participation in seminars sponsored by pharmaceutical companies, and frequency of visits by medical representatives); and emphasis on drug adoption (efficacy, safety, and price).

Data analysis procedure

Mean response scores were calculated and a factor analysis was performed using SPSS version 18 (PASW Statistics, SPSS IBM, New York, U.S.A.) to determine the dimensions of CSR activities assessed by doctors as beneficial in improving a company's reputation. We used Cronbach's alpha to determine the reliability of the factors and factor loadings for each question and confirm convergent validity and discriminant validity. We also used Pearson's correlation coefficient to test multicollinearity. During the design of the questionnaire, face validity and content validity were confirmed by several experts.

To assess differences in personal characteristics of doctors, we performed a two-tailed t-test on group means. The level of significance was set at $p < .05$. In addition, we conducted a structural equation modeling analysis using the AMOS module of SPSS to assess the impact of each professionalism dimension on the outcome variables, using path analysis to clarify the relationship between assessment of CSR activities and prescription intention.

RESULTS

Likelihood of prescription intention

The percentage of doctors who responded that they would prescribe drugs from companies that are positively engaged in CSR activities was 32.3% (M = 3.57). The figure increased to 55.3% when doctors thought that the drugs had similar efficacy, safety, and price (M = 3.77). The difference in responses between the two questions was significant ($p < .001$).

Personal characteristics of medical doctors

We carried out two-tailed t-tests to assess differences in prescription intention with regard to personal characteristics (personal attributes, factors related to the hospital, information factors, and emphasis on drug adoption). Statistically significant differences were found for factors related to the hospital (type of hospital, number of beds, number of outpatients the doctor sees per day, decision power for drug adoption), and information factors (frequency of participation in scientific meetings; Table 1). There was a tendency for prescription intention to be highly influenced by CSR activities among those doctors who worked at advanced treatment hospitals and hospitals with more than 200 beds, had power to make drug adoption decisions, saw less than 40 outpatients per day, and frequently participated in scientific conferences (four times or more per year).

Table 1
Comparison of prescription intention for drugs of companies positively engaged in CSR activities in relation to doctors' personal characteristics

Factors	Mean ± S.D.		t-value	p-value
Personal attributes				
Gender	Male (*n* = 273)	Female (*n* = 27)	-0.032	0.974
	3.77 ± 0.752	3.78 ± 0.698		
Age	<50 y.o. (*n* = 167)	≥50 y.o. (*n* = 133)	1.538	0.125
	3.83 ± 0.725	3.70 ± 0.769		
Medical qualifications	Yes (*n* = 249)	No (*n* = 51)	1.328	0.185
	3.80 ± 0.762	3.65 ± 0.658		
Academic degree	Yes (*n* = 122)	No (*n* = 178)	-0.212	0.832
	3.76 ± 0.716	3.78 ± 0.768		
Hospital-related factors				
Type of hospital	Advanced tx. Hp. (*n* = 215)	Others (*n* = 85)	3.500	0.001**
	4.01 ± 0.748	3.68 ± 0.726		
Nº. of beds	<200 beds (*n* = 153)	≥200 beds (*n* = 147)	-2.389	0.018*
	3.67 ± 0.700	3.88 ± 0.748		
Nº. of outpatients seen per day	<40/day (*n* = 189)	≥40/day (*n* = 111)	2.989	0.003**
	3.87 ± 0.711	3.60 ± 0.778		
Decision power of drug adoption	Yes (*n* = 114)	No (*n* = 186)	2.288	0.023*
	3.89 ± 0.683	3.70 ± 0.775		
Information factors				
Participation in scientific meetings (freq.)	<4/ year (*n* = 152)	≥4/ year (*n* = 148)	-2.266	0.024*
	3.68 ± 0.687	3.87 ± 0.794		
Participation in sponsored seminars (freq.)	<5/ year (*n* = 153)	≥5/ year (*n* = 147)	-0.583	0.560
	3.75 ± 0.704	3.80 ± 0.788		
Frequency of visits by MRs	<3/week (*n* = 189)	≥3/week (*n* = 111)	-0.134	0.894
	3.77 ± 0.754	3.78 ± 0.740		
Emphasis on drug adoption				
Efficacy	Yes (*n* = 250)	No (*n* = 50)	1.177	0.240
	3.80 ± 0.741	3.66 ± 0.772		
Safety	Yes (*n* = 240)	No (*n* = 60)	1.239	0.216
	3.80 ± 0.739	3.67 ± 0.774		
Price	Yes (*n* = 87)	No (*n* = 213)	0.123	0.903
	3.78 ± 0.738	3.77 ± 0.752		

The mean differences between 2 groups were tested using 2-tailed t-tests; significant *p*-values are $^{*}p < .05$, $^{**}p < .01$, $^{***}p < .001$.

CSR activities that are beneficial to the improvement of corporate reputation

We performed an exploratory factor analysis using the principal factor method with promax rotation to assess the 14 types of CSR activity. The analysis indicated that a four-factor structure was considered the best fit. The factor patterns are shown in Table 2. Before rotation, four factors accounted for 73.0% of the variance. We used Cronbach's alpha to determine the reliability of the factors. Because all of the coefficients were above .60 (Factor 1: .925, Factor 2: .849, Factor 3: .784, Factor 4: .614), the reliability of the analysis was confirmed. The model showed convergent validity because each construct's factor loadings were greater than .4. No multicollinearity was found. We named these four factors *Value delivery*, *Contribution to community*, *Environmental management*, and *Sound management*.

These factors encompass a range of activities: (1) *Value delivery* is the provision of information about related therapeutic areas, mainly to raise awareness among the general public and patients; the supply of the company's own pharmaceutical products to developing nations; and contribution to the academic field, including a grant system for research. (2) *Contribution to the community* covers philanthropic work, such as supporting restoration work in areas stricken by the Great East Japan Earthquake; contribution to local communities, including garbage collection activities; contribution to the arts and sports, including sponsoring concerts. (3) *Environmental management* comprises measures to reduce greenhouse gases; initiatives to develop a recycling-oriented society; steps to prevent air, water, and soil pollution and stop the emission of environmental hormones; and measures to sustain plant and animal ecosystems and preserve the natural environment. (4) *Sound management* consists of disclosing management information; legal compliance; improving the workplace environment; and development of an organizational structure that is conducive to good management.

We calculated the scaled score of each factor and performed an ANOVA. This showed that the *Value delivery* score was significantly ($p < .001$) higher than those of the other factors. This suggested that doctors believed that value delivery activities improved a company's reputation.

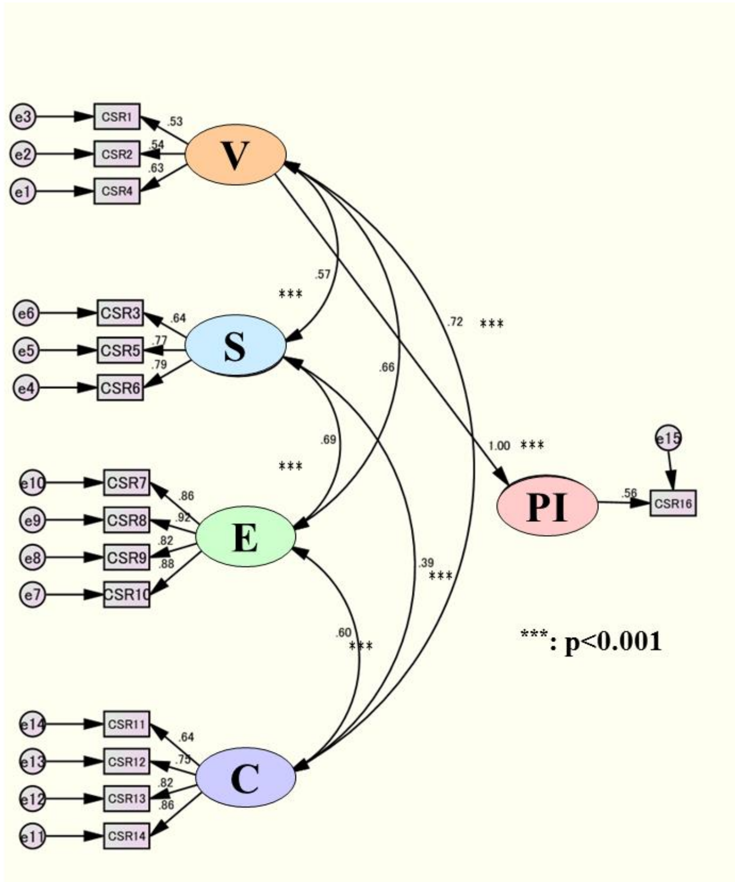
Table 2
Dimensions of CSR Activities: Result of factor analysis

	Dimensions after factor analysis				
Activities	**Environmental management**	**Sound management**	**Contribution to community**	**Value delivery**	**Cronbach's α coefficients**
Efforts to reduce greenhouse gas emission	**.926**	.046	-.025	-.091	.925
Initiatives for developing recycling-oriented society	**.884**	-.010	.015	.024	
Contribution to global warming	**.831**	-.082	.086	.032	
Emission control of environmental hormones	**.830**	.227	-.140	-.066	
Development of an organizational structure for sound management	-.064	**.858**	.061	.027	.849
Improvements to the workplace environment	.056	**.806**	.151	-.113	
Legal compliance	.111	**.734**	-.227	.096	
Disclosure of management information	-.012	**.535**	.129	.131	
Contribution to the local community	.053	.025	**.843**	-.073	.784
Contribution to the arts and sports	-.101	.056	**.748**	.002	
Philanthropic work	.370	-.035	**.433**	.089	
Provision of information on related therapeutic areas	-.114	.100	-.073	**.695**	.614
Supplying own drugs to developing nations	.310	-.162	.097	**.462**	
Contribution to academic field	.000	.258	.024	**.441**	

CSR activities that contribute to product selection

We conducted a path analysis using structural equation modeling to assess the relationship between the four factors (CSR activities) and doctors' prescription intention. Our analysis assumed that each of the four factors may affect prescription intention. After eliminating those paths with no significance, the analysis yielded a goodness-of-fit index (GFI) of .866 and an adjusted GFI (AGFI) of .809. According to Sharma *et al.* (2005), the allowable lower limit for GFI and AGFI is 0.8; therefore, we believe that our model is interpretable. The results showed that CSR activities mutually impacted each other, and that a consideration of value delivery activities significantly influenced doctors' intention to prescribe drugs from companies positively engaged in CSR activities ($p < .001$; Figure 1). In other words, there was a clear relationship between doctors' assessments of the activities that correspond to value delivery (such as research subsidies for doctors and raising awareness of disease among the general public and patients) and their prescription intention with regard to drugs supplied by companies that actively implement these activities.

Figure 1
CSR activities influencing prescription intention for drugs from companies positively engaged in CSR activities



V: Value delivery, S: Sound management, E: Environmental measures, C: Contribution to community, PI: Prescription intension

DISCUSSION

This research focused on the ethical selection of pharmaceuticals, which, unlike most other types of consumer choice, requires specialized knowledge on the part of the consumer (the physician). The aims of the study were to identify (1) the percentage of doctors that would prescribe drugs from companies that were actively implementing CSR activities, (2) the personal characteristics of doctors that indicate a willingness to allow a company's CSR activities to influence their prescription intention, and (3) the dimensions of CSR activities; namely, which

CSR activities tend to improve a company’s reputation and encourage doctors to select their products.

A simple comparison cannot be conducted for the first aim. However, in contrast with the results of a survey of general consumers (Cone Communications, 2013), the percentage of doctors who were influenced by CSR activities was low, indicating that Japanese doctors’ recognition of CSR activities (22.8%) is lower than that of general consumers (56%). It is our opinion that the understanding of the definition of CSR itself is partially responsible for this discrepancy. Meanwhile, this research on prescription intention shows higher figures than those found in our exploratory research (Shimada & Uryuhara, 2010). The reason for this is that the questions used in our previous research did not incorporate specific examples of CSR activities. The present survey ensured that questions on prescription intention with regard to CSR activities were presented after the items about the 14 different specific CSR activities, thus making CSR activities more salient to the participants.

The findings related to the second aim showed that prescription intention was not related to doctors’ personal characteristics but was related to the type of hospital participants worked at. Advanced treatment hospitals were established after revisions to the Medical Care Law in 1993 and provide state-of-the-art advanced medicine. They are required to have more than 400 beds, and more than 30% of patients who come to these hospitals are referrals. There are approximately 80 advanced treatment hospitals, which include university hospitals, the National Cancer Center Hospital, and the National Cerebral and Cardiovascular Center. Doctors who work at these hospitals have many opportunities to work with patients and patient advocacy groups and participate in symposia or lectures to raise disease awareness in the public. Consequently, these doctors generally recognize the importance of CSR (which itself includes these activities). Our survey results indicate that these doctors have a positive attitude toward pharmaceutical companies that support these activities. The number of beds and the number of outpatients examined per day also relate to prescription intention, and these are characteristics of advanced treatment hospitals.

Doctors with a high frequency of participation in academic/scientific meetings were more influenced by CSR activities. Pharmaceutical companies set up booths at scientific meetings and conferences. They not only provide information about pharmaceuticals but also offer materials for patients. This type of CSR activity is designed to target the general public and patients. We believe that doctors who frequently participate in academic/scientific meetings have a high level of exposure to this information, and hence, are more likely to select products supplied by companies implementing these activities.

However, the frequency of attendance at research meetings sponsored by companies, or the extent to which doctors met with representatives in charge of pharmaceutical information, did not influence prescription intention. This may be because the information provided at research meetings or through marketing activities focuses more on the pharmaceutical products and less on CSR activities. Exploratory research indicates that doctors would be more likely to select pharmaceuticals if information on company CSR activities was made more available by representatives (Shimada & Uryuhara, 2011).

Our findings in relation to the third aim—to explore the dimensions underlying doctors' perception of CSR activities—reflect the high importance assigned to value delivery by the participants. CSR does not refer solely to the fulfillment of social contributions as a responsible corporate citizen, but also requires that companies satisfy their economic responsibilities (secure profits), legal responsibilities (comply with laws and regulations), and ethical responsibilities to a wide range of stakeholders (Carroll, 1979). However, the most common activity that medical doctors frequently come into contact with is the provision of information about diseases to the general public and patients (value delivery). The results indicate that doctors view these activities as CSR actions implemented by pharmaceutical companies.

In general, CSR activities at B2C (business-to-consumer) companies have a tendency to be carried out actively, while those at B2B (business-to-business) companies tend to be passive (Shimada & Uryuhara, 2011). Ethical pharmaceutical manufacturers make up the only industry that possesses both elements. In fact, the Toyo Keizai CSR ranking indicates that the CSR activities of major Japanese pharmaceutical companies are not very prominent compared to their financial strength.

In ethical pharmaceutical development, the success rate for new drugs is 1/21,677. The ratio of R&D costs to sales (19.49%) stands substantially higher than the average for all industries (1.43%; Shimada & Uryuhara, 2010). Pharmaceutical companies concentrate a high percentage of resources toward the research, development, manufacturing and sales of pharmaceuticals. In many cases, their employees believe that their social responsibility is to deliver pharmaceuticals to patients, which will treat unmet medical needs. Given this background, it is clear that the focus so far has been placed on providing product (pharmaceutical) information to doctors who make the decisions on product choice. However, pharmaceutical companies should also invest resources into CSR activities that are directed toward stakeholders, such as the general public and patients. The results of our survey clearly indicate that informing doctors of these activities would improve corporate value and have a positive impact on product selection.

LIMITATIONS AND IMPLICATIONS

To our knowledge, this is the first research that assesses the impact of CSR activities implemented by pharmaceutical companies on doctors' decision-making processes for pharmaceutical selection. Research on physician prescription behavior has examined various factors, such as personal characteristics, proxy factors, and the trust between doctor and patient. All of these factors center on, or are connected to, the doctor. This research has brought to light the influence of CSR activities that target various stakeholders, including not only medical doctors but also the general public. This research therefore provides a fresh theoretical viewpoint on physicians' prescription behavior. At the very minimum, our findings should contribute to promoting research on the CSR activities of B2B companies, as pharmaceutical companies do have elements of this type of business.

Our findings may also contribute to management strategies for pharmaceutical companies, helping to build CSR strategies by clarifying activities that both improve corporate value and help medical doctors to make product choices. The results also point out the importance of emphasizing pharmaceutical-linked information about disease to doctors as a part of CSR activities. We confirmed the validity of this by showing our results to global pharmaceutical companies.

One limitation of this research is the possibility that the subjects of this research—the doctors registered on the medical information site—already have a high level of awareness of these social activities. There is little bias in terms of the gender and age distribution of our sample, but we did not fully eliminate other possible sampling biases related to this group.

To take this research forward, we plan to conduct a survey of patients who take medication in order to better understand those CSR activities that improve the credibility of pharmaceutical companies. We suggest that our findings may be of use in improving shared value for producers (pharmaceutical companies), people selecting the products (doctors), and consumers (patients).

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[i] A corporate evaluation system launched in 2010, which was jointly developed by Nihon Keizai Shimbun, Nikkei Research Inc., and Nikkei Digital Media Inc. Four major indicators are evaluated and ranked: Investor (seven indicators, including change in market capitalization and dividends), Consumer & Business Partner (five indicators, including sales and recognition), Employee (five indicators, including acquisition rate for paid vacations and retention), and Society (five indicators, including securing employees and corporate social activities). The system not only evaluates the health of earnings but also assesses a company based on a friendly work environment and a high level of social contribution. NICES is an acronym for Nikkei, Investor, Consumer & Business Partner, Employee, and Society.

OLLIE OTTER BOOSTER SEAT SAFETY PROGRAM IN TENNESSEE: IMPACT OF STATEWIDE IMPLEMENTATION

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ABSTRACT

Child safety seats reduce the risk of fatal injury by 71 percent for infants and 54 percent for toddlers in passenger cars. However, not every child was restrained in vehicles. Ollie Otter Booster Seat Safety Program initiated a campaign to advocate child safety. This study reviews results of Ollie Otter's Booster Seat Safety Program in Tennessee. Specifically, it compares the Ollie Events to Date to the Percentage of Restrained Children in Crashes. A better understanding of the effectiveness of this program will help organizers to manage activities and budgets better. This paper also includes a review of literature on the state of booster seat usage and child safety related research in the US.

INTRODUCTION

Booster seats reduce crash injury by 45 percent versus just a safety belt for 4- to 8-year – olds (Arbogast 2009). Yet only 43 percent of US children required to use booster seats (i.e. under 4 ft. 9 in or 9 yrs. old) actually use them (NHTSA 2009). Most programs formed to influence the general population to use booster seats fail to adequately motivate their intended population because they are primarily informational and rely on parents to seek out and attend events to obtain the information (Will et al 2012).

The need for an effective program prompted the development of *Ollie's Seatbelt and Booster Seat Safety Program.* This new program focused on the aspects of a good marketing ácampaign and applied those fundamentals toward influencing the next generation of children to understand and apply proper safety concepts such as wearing a booster seat until 4 ft. 9 in tall or 9 years old. *Ollie's Seatbelt and Booster Seat Safety Program* focused on targeting the kindergarten and elementary schools where they could guarantee reaching a large number of children in different communities throughout the state of Tennessee. The program also created a mascot, Ollie the Otter, which has been crucial to the brand development and longevity of the program and information presented to children. Ollie has helped to make learning about safety fun and exciting.

During the beginning of the program, in 2007, a statewide average of 88.4 percent of children in crashes were restrained, as reported by the Tennessee Department of Safety and Homeland Security. In 2011, the number of children in crashes that were restrained had risen to 91.5 percent (Tennessee 2012). As stated by the Washington State Booster Seat Coalition (2003), motor-vehicle collisions were the single largest killer of children age 4-8 years because riding unrestrained generated the greatest risk for death and injury among child passengers (Anitsal, Anitsal and Liska 2010a and 2010b). Furthermore, child safety seats reduce the risk of fatal injury by 71 percent for infants and 54 percent for toddlers in passenger cars (NHTSA 2013). In fact, before the Ollie Campaign started, "of the children ages 0-14 years who were killed in motor vehicle crashes during 2005, nearly half were unrestrained" (NHTSA 2006).

Ollie's Seatbelt and Booster Seat Safety Program was designed to target the lack of a comprehensive statewide seatbelt and booster seat education program and to help develop the next generation of drivers into making the correct choice in choosing not only to wear their own seatbelt, but also to encourage others to do the same. Furthermore, Ollie the Otter as a mascot specifically targets the actions of children and their attitude toward the use of seatbelts and booster seats paralleled with the information to correctly apply these safety habits in their everyday lives. "Ollie Otter's Child Booster Seat Safety Program teaches Tennessee school kids child booster seat laws and regulations for car booster seat requirements in nation's first statewide seatbelt and booster seat education campaign" (seatbeltvolunteer.org 2009).

The objective of this paper is to evaluate the preliminary results of *Ollie's Seatbelt and Booster Seat Safety Program* based on actual data of booster seat and seat belt usage among children involved in crash Specifically, this paper will review Tennessee Traffic Crash Data and Ollie Events to Date for the years 2007-2012 to determine a relationship and/or trends the *Ollie's Seatbelt and Booster Seat Safety Program* has had on particular variables associated with and related to seatbelt and booster seat safety.

LITERATURE REVIEW

The use of booster seats has been an important topic of discussion among scholars. In a study to determine the effectiveness of booster seats over seatbelts alone, Elliot et al (2006) noted that there is a 28 percent reduction in the risk of death for children aged two through six years ol. Furthermore, Elliot et al (2006) concluded that "efforts should continue to promote use of child restraint systems through improved laws and with education and disbursement programs" (Elliot et al 2006). The effects of the inappropriate use of booster seats are generally agreed upon by scholars and law enforcement. Thompson and Robertson found that "because of the inappropriate positioning of the seat belt, the 4- to 8- year-old child using the shoulder-lap belt only is three times more likely to sustain abdominal injuries than the child restrained in a booster seat*"(Partners for Child Passenger Safety 2004).* Thompson and Robertson (2012) also highlighted that "child restraint devices have significantly decreased child injury and death rates as the result of motor vehicle crashes. Despite these devices, motor vehicle crashes remain the leading cause of death in children 4 years of age and older" *(Committee on Injury, Violence, and Poison Prevention, American Academy of Pediatrics [AAP] 2011)* (as cited in, Thompson and Robertson 2012).

An important aspect to the use of booster seats is consistency. If a child only uses a booster seat 50 percent of the time required, they have increased their likelihood of injury or death substantially. As noted in Thompson and Robertson's research, a study of 4,243 children involved in a motor vehicle collision found that 18 percent of the children were not restrained at the time of the accident, seat belts were used by 42 percuent of 4-year olds, 72 percent of 5-year olds, and 89 percent of 6- and 7-year olds, while belt-positioning booster seats were only used by 16 percent of 4-year olds, and 4 percent of 6- and 7-year olds (Thompson and Robertson 2012).

Multiple reviews indicate potential key variables that influence the continuing use of booster seats among children. "Social norms and self-efficacy may be factors associated with lower booster seat use when carpooling" (Macy et al 2012). Macy et al also found that "living in a state without a booster seat law covering the child's age" influenced the decisions of parents to use a booster seat (Macy et al 2012). Furthermore, Thompson and Robertson (2012) discovered that a main reason for the lack of use of booster seats rested in the lack of awareness and understanding by parents of the proper use and safety issues involved with booster seats.

Bruce et al (2011) discovered that the strongest predictors of a parent's intent to use a booster seat resulted from attitudes and community norms and that a lack of these community norms and positive attitudes served as barriers to using a booster seat. He also concluded that by focusing on the benefits of preventing injury in children by using booster seats and establishing booster seats as a social norm, local officials could positively influence the effective use of booster seats for school-aged children (Bruce et al 2011). The effect of influencing the entire community on the use of booster seats was also noted by Kelli England Will et al, "Effective booster seat programs require distribution channels that are likely to reach a large majority of parents of 4-to 8- year olds in a community" (Will et al 2012). Furthermore, he went on to say, "Caregivers of booster-age children are a difficult group of caregivers to reach given low perceptions of risk, poor recognition of booster seat effectiveness, flawed understanding of crash forces, and a number of other competing factors such as child protest and legal loopholes" (Will et al 2012).

Other factors influencing the use of booster seats concern the attitudes of parents towards booster seats and the influence it has on the parents intentions to purchase and use booster seats for their children. The most influential predictor of using booster seats regularly has belonged to the attitude toward booster seats which is related to how pleasant, and easy it is to use a booster seat for both parent and the child. This predictor has a positive impact on the regular use of booster seats (Anitsal, Anitsal, and Liska 2009). This finding suggest car and booster seat designers have to come up with easier to use booster seats, especially for families with more than one child in the age group. Anitsal, Anitsal, and Liska noted that the key variable in forming a positive relationship toward the use of booster seats was the attitude of subjects towards children while driving (Anitsal, Anitsal, and Liska 2010a). Frequently, parents allowed whining children to get out of their booster seats. Booster seats were not considered "cool" around elementary school children before the start of the Ollie Otter Program. This information has proved useful in developing a statewide program to increase the use of booster seats.

On October 1, 2007, *Ollie's Seatbelt and Booster Seat Safety Program* was initiated in Tennessee (Anitsal, Anitsal, and Liska 2009). Since the initiation of *Ollie's Seatbelt and Booster Seat Safety Program*, over 2,140 Ollie events have taken place in each of the 95 counties in Tennessee. *Ollie's Seatbelt and Booster Seat Safety Program* was designed to fill the gap existent in current safety programs and in turn create a new community norm to which parents and children will continue to imitate. In reviewing the mascot of *Ollie's Seatbelt and Booster Seat Safety Program*, it was concluded that using a spokes-character increased the effect and impact of the message given to children at the Ollie events. "Letters and drawings to Ollie weeks after the school visit indicate a longer retention of Ollie's identity and message in the visual and verbal memory of K-4 children" (Brown et al 2010).

A study of parental perspectives on booster seats indicated that Mothers and Fathers both have an important impact on children using booster seats but that the children's cooperation is key to the consistent use of booster seats. *Ollie's Seatbelt and Booster Seat Safety Program* has been crucial to enhancing the cooperation of children and their attitudes towards using booster seats (Anitsal et al 2012). Furthermore, a study of the attitudes of Hispanic versus Caucasian parents towards booster seats indicated that Hispanic parents tended to be stricter in enforcing their children to use a booster seat, especially once educated to the benefits and laws of using booster seats. The study also found that Caucasian parents, especially younger ones, tended to be more lenient in enforcing their children to use booster seats. They believed that short drives did not require booster seats and preferred to allow their children the freedom to move around to avoid conflict and whining while driving (Anitsal, Anitsal, and Liska 2012).

In a response to the Ollie program, a K-4 student said, "My mom she forgot my babysitter's daughter's booster seat and I said mom where is her booster seat and she said she does not need one and I said at school they said if you are not 4'9 you ride in a booster seat" (Anitsal, Anitsal, and Liska 2010b). *Ollie's Seatbelt and Booster Seat Safety Program* is designed specifically for these types of potential life changing moments; to alter the decision of a child or parent to use proper restraining devices each and every time they drive. *Ollie's Seatbelt and Booster Seat Safety Program* has a website that is used to highlight the program and also provide educational information. The URL is http://www.seatbeltvolunteer.org/. On seatbeltvolunteer.org, Ollie has an Inbox and Picture Gallery which consists of letters and pictures that students drew for Ollie when he visited their schools. Sending Ollie mail has become an easy and effective way for teachers to reinforce the message Ollie has brought to the community while allowing development of core student competencies such as writing, drawing, and communicating. Over 120 teachers sent Ollie mail during the first year of the program (Anitsal, Anitsal, and Liska 2009).

Through *Ollie's Seatbelt and Booster Seat Safety Program,* Tennessee has begun to develop Ollie the Otter into a community norm, each and every year, thousands of children in each county throughout the state are introduced and reintroduced to the important safety issues and laws regarding seatbelts and booster seats. The effects, as portrayed in the responses to the Ollie program, have shown that Ollie the Otter is having a real impact on the decisions and lives of children across Tennessee.

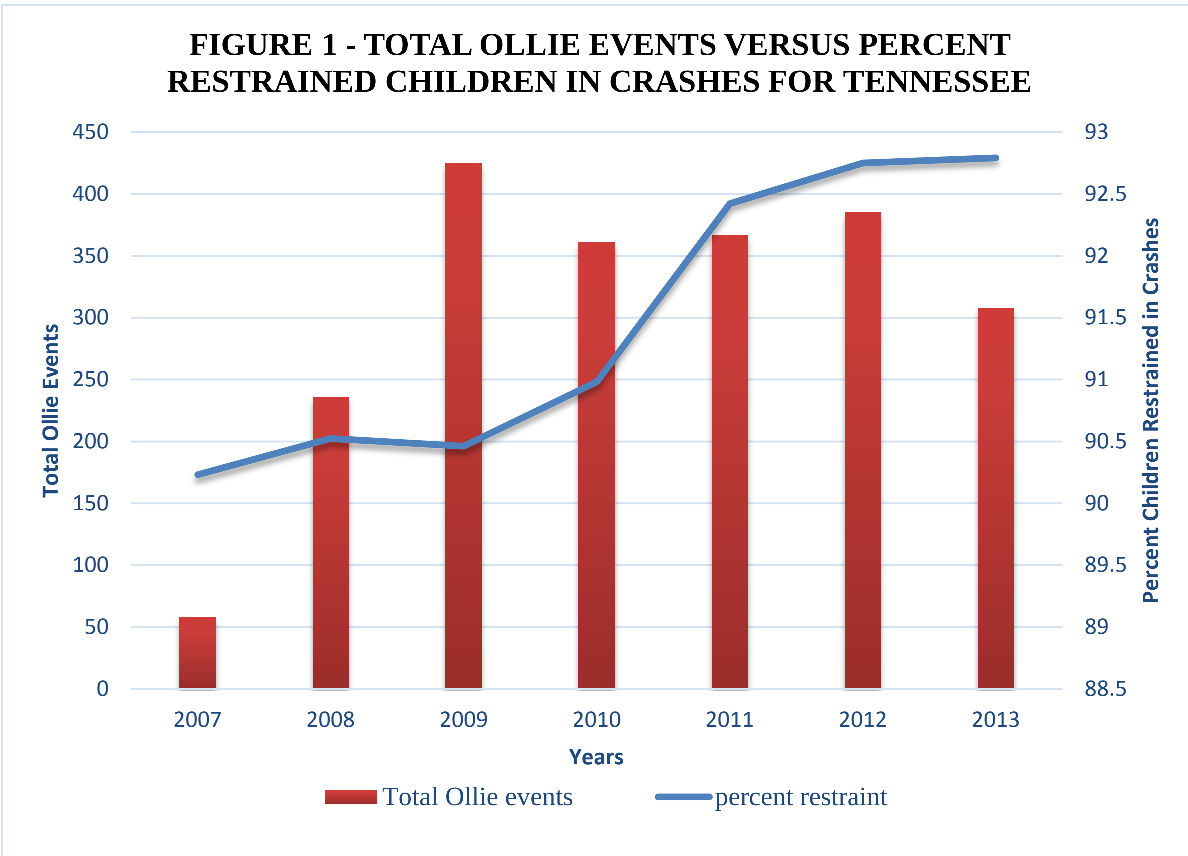
METHODOLOGY

Data for this research was collected from the Tennessee Department of Safety and Homeland Security Research, Planning and Development Division. Using two separate reports 2007-2011 and 2008-2013, data highlighting alcohol crashes, alcohol fatalities, children restrained/unrestrained, crashes, crashes involving a child, drivers 15-24 in crashes, drivers 65 and over in crashes, fatalities, injury's, total licensed drivers as well as 15-24 and over 65, motorcycle crashes/licenses, restrained occupants of crashes, and speeding crashes were obtained for each of the 95 counties in Tennessee. The number of Ollie Events per county from 2007-2013 were obtained from the Business Media Center (BMC) at Tennessee Tech University. The BMC provides cost-effective, in-depth knowledge of current marketing techniques and state-of-the-art technology to businesses, organizations, universities, governmental agencies, and other corporations and industry affiliates. The BMC also operates day to day activities of Ollie Otter program, and manages and maintains the website and communication with teachers and schools about Ollie events.

Using SPSS, the variables listed above were used to run correlations. These correlations were run for both the state of Tennessee as a whole and for each of the 95 individual counties. Once the correlations were determined, graphs were used to further analyze the relationship between Ollie Events to Date and the correlated variables with a Pearson Correlation of 0.05 or below.

RESULTS AND DISCUSSION

Data is first analyzed on total Tennessee 'Percentage of Children in Crashes' and 'Ollie Events to Date'. Figure 1 summarize available data on both variables for Tennessee over seven-year period.



This data suggests a lagging relationship between Ollie events and children restrained in crashes. For example, a drop in number of events in the last couple of years after 2009 may show its impact on the flat profile of percent children restrained in crashes from 2011 to 2013. However, more data points are needed for a thorough time series analysis.

The correlations of the primary variable, 'Total Ollie Events', and the secondary variables, such as percent restraint used, crashes, were examined next. Even though correlations for total Tennessee on Ollie events versus percentage of children restrained in crashes over the seven-year period was not significant, the picture changes for per county correlations. Data showed that there were more Ollie events in some counties compared to others. The events occurred completely based on voluntary activity leader's initiative. Naturally, counties with higher percentage of children at K12 age group had more Ollie events. So, per population based comparisons were expected to reveal meaningful findings. In fact, there was a statistically significant correlation between 'Total Ollie Events per County' and 'Percentage of Children Restrained in Crashes' for the entire state of Tennessee. Table 1 shows this relationship.

TABLE 1 - CORRELATIONS FOR TENNESSEE COUNTIES			
		Total Ollie Events per county Between 2007-2013	Total restraint used in crashes From 2007 to 2013
Total Ollie Events per county Between 2007-2013	Pearson Correlation	1	.623**
	Sig. (2-tailed)		.000
	N	95	95
Total restraint used in crashes From 2007 to 2013	Pearson Correlation	.623**	1
	Sig. (2-tailed)	.000	
	N	95	95
**. Correlation is significant at the 0.01 level (2-tailed).			

The results also point toward the importance of the effect of Ollie Event saturation levels within each county. Data indicated that not all counties have similar concentration of events. Ollie reached more students more frequently in some counties, and less frequently in others. The greater the percentage of Ollie Events by Population, the more impact the Ollie Events have on the percentage of Restrained children by population for that county. As the penetration of events increases for a county, the impact of it will become more apparent. The significant positive correlations also indicate that the Ollie Otter campaign has been successful in the state of Tennessee to increase the percentage of children properly restrained in vehicles. As the number of Ollie Events increases, the percentage of saved lives will also increase. In overall Tennessee basis, the number of events per population was not enough to trigger significant increases in children restraint percentages yet. Apparently, the Ollie Otter events have not reached to saturation yet.

LIMITATIONS AND FUTURE RESEARCH AVENUES

There were many limitations of this research, therefore it should be considered as preliminary results. First of all, state based time series data is very limited to be able to do a better analysis of the impact of Ollie Events. Specific information about the number of children reached per county would also increase our ability to estimate the percentage of population reached. If Ollie is only reaching 1-2 percent of each county's children then the sample size could possibly be too small; or the Ollie events are too small to make a significant impact on every community.

More data is necessary to be able to do time series analysis on how long the number of Ollie Events it will take to influence the crash data, if at all, and for how long it would carry over. Furthermore, there is no way to measure the difference between children restrained in crashes and children restrained overall per county. Also, the crashes were recorded based on where they happened. Data did not include demographic details of the drivers such as in which county that driver lives, what his/her level of education, income, number of vehicles owned or number of children in households. Finally, even though some information was available about drivers of 15-24 and over 65, speeding crashes, motorcycle crashes, etc., more data points were needed to do a meaningful analysis on these potentially influential variables.

CONCLUSION

Ollie's Seatbelt and Booster Seat Safety Program has had an important impact on the communities in Tennessee. The results indicated that Ollie the Otter has been successful in increasing the percentage of children restrained in crashes, which was instrumental in preventing major injuries and even saving lives. Ollie the Otter's appeal and success in Tennessee has motivated many other states such as Mississippi, Florida, Alaska, and Arizona to begin a path towards creating an effective nationwide program. In order to fully see the success of *Ollie's Seatbelt and Booster Seat Safety Program*, we should ensure that its activities increase in number, frequency, and reach. This study revealed that even though there were more than 2,000 events throughout Tennessee until 2013, Ollie still has a long way to go to reach the majority of Tennessee population. Community leaders should continue to encourage volunteer activities and provide funding for such a behavior changing campaign for long term success in Tennessee or any new state that embarked on this program.

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SORRELL V. IMS HEALTH, INC., SUPREME COURT RULING ON PHARMACEUTICAL DATA MINING FUELS CONTINUING DEBATE

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ABSTRACT

In June 2011 the United States Supreme Court decided the case of Sorrell v. IMS Health, Inc. That case addressed the constitutionality of Vermont's Prescription Confidentiality Law, a statute that restricted the sale, disclosure and use of pharmacy records that reveal the prescribing practices of individual doctors. Data miners and pharmaceutical manufacturers challenged the statute as a violation of their First Amendment rights. The Supreme Court agreed. The direct result is a victory for business enterprises that wish to buy and sell information generated by business transactions and use it to facilitate further transactions. Perhaps more importantly, this decision may contribute to an erosion of the distinction between commercial speech and other forms of speech that receive greater protection. If it does result in greater protection of the flow of commercial speech then it will also increase the difficulty of protecting an individual's privacy. This paper begins by defining data mining and discussing its use, particularly in the pharmaceutical industry. The principles developed by previous Supreme Court rulings on commercial speech are then identified. The Supreme Court's ruling in Sorrell is examined, and, finally, subsequent cases in which that ruling has been cited are examined in an attempt to determine Sorrell's role in the evolution of commercial speech jurisprudence.

INTRODUCTION

A recent United States Supreme Court ruling protecting the use of data mined information as a guide in developing promotional strategies in the pharmaceutical industry positively impacts all business organizations using similar data collection and analysis. The purpose of this paper is to examine the use of data mining in the pharmaceutical industry, review its criticism, describe the Supreme Court decision, and assess the impact of the Court's holding.

In Sorrell v. IMS Health, Inc. (2011) a data mining health information company won its constitutional challenge of a Vermont statute that restricted the sale and use of data mined information. The Supreme Court held that such information was protected by the First Amendment and invalidated the statute as an infringement of free speech. There are those who see this outcome as an erosion of the privacy interests that might be advanced by keeping that information confidential (Huhn 2011), but the ruling is a victory for any business wishing to gain access to information that will facilitate their commercial transactions (Denniston 2011). Some legal commentators opine that *Sorrell* represents a new era of protection for commercial speech (Outterson 2011). Although there are differing views of that proposition, there is no doubt that the ruling positively impacts any business that uses information about consumer buying behavior to guide its marketing and sales strategies.

RELEVANT MARKETING LITERATURE

Data mining involves utilizing electronic methods for distilling meaningful information, trends and predictions from large volumes of data collected for some other purpose. The concept has been defined as "the process of secondary analysis of large databases aimed at finding unsuspected relationships that are of interest or value to the database owners" (Klosgen and Zytkow 2002, p. 637). From a marketing perspective, the patterns discovered in the data have value because they can impact the bottom line of a business (Peacock 1998). The end result is new insights and knowledge discovery (Fiske 2002). Businesses either generate their own information from data mining or purchase the gleaned information in order to improve marketing planning and decision making.

As described by Rafalski (2002), the process of data mining begins with "trend analysis and the search for patterns in the underlying data. Once a pattern of interest is identified, statistical analysis is applied to determine whether the pattern is significant. If it is found to be of significance, root cause analysis is applied to determine the cause of the trend" (p. 609). Tools utilized include query tools, descriptive statistics, visualization tools, regression-type models, association rules, decision trees, case-based reasoning, neural networks and genetic algorithms (Peacock 1998).

Data Mining in the Pharmaceutical Industry

This paper focuses on data mining doctors' prescription data which is purchased from participating pharmacies by health information companies such as IMS Health, SDI Health (formerly known as Verispan), and Source Healthcare Analytics (*Information Management* 2011). The channel of distribution in the pharmaceutical industry is unique in that the intended user of a product cannot access it without a physician, a middleman whose involvement is mandated by law. The original data is generated when a prescription is filled by a patient; the name, dose, and quantity of the drug is collected along with the date of the prescription and the physician's name. The patient's name is not retrieved. The data miner, however, assigns a specific number to the patient for tracking future prescriptions to permit analysis of the patient's prescription history (Orentlicher 2010). In 2007 IMS was reported to have obtained records on over two thirds of prescriptions filled in community pharmacies (Fugh-Berman 2007). Some pharmacies, e.g., WalMart, do not sell their prescription records (Pharmaceutical Sales Jobs 2012).

Data mining companies bundle the pharmacy data with data from other sources, primarily the American Medical Association's Physician Masterfile, a database that includes all (over 600,000) U.S. physicians (Stone 2011). Major data mining techniques utilized in the pharma sector include clustering (e.g., grouping drugs most likely/unlikely to be used), association (e.g., tracking physicians adopting drugs with customer's prescription), and classification and prediction (e.g., predicting the likelihood of success in a drug adoption process) (Ranjan 2009). Data miners' development of integrated proprietary databases has led to a wealth of information that pharmaceutical marketers are eager to access, specifically, profiles of doctors including name, specialty, practice site, and tracking information on prescribing habits for their own and competing drugs (Rafalski 2002). Drug companies observe trends and develop segmentation and marketing strategies based on the information (Fugh-Berman and Ahari 2007). The information is also used to evaluate the impact of sales representatives, samples, and any other marketing efforts on physicians. Some industry salespeople are compensated based on sales data drawn from the data miners' reports (Pharmaceutical Sales Jobs 2012).

Tracking helps a company label and group doctors as heavier or lighter prescribers of their drugs and determine the potential for a representative to effect a change in the doctor's prescribing habits (Hogg 2005). The designations determine how often the representative should call on a doctor as well as the focus of the visit. Tracking is also used by some companies (e.g., Eli Lilly) to categorize doctors by personality type and attitude toward detailers in order to tailor messages to their particular type (Rhee 2009). In addition, Ranjan (2009) indicates that data mined information is utilized in pharmaceutical marketing to help identify the most profitable product(s) and determine the allocation of marketing funds. Without data mining, pharmaceutical marketers' understanding of the target market would be diminished, and the ability to tailor messages for individual physicians would be compromised (Hogg 2005).

Marketers are not the only beneficiaries of data mining. The information produced by data mining is disseminated to insurers, pharmacy benefits managers, academic researchers, health policy officials, law enforcement agents and even the general public. Ultimately, patients benefit from this process. When the FDA approved a new drug to treat a debilitating form of epilepsy in children, the pharmaceutical company that produced the drug was able to use prescriber identifying information to locate the 1,300 health care providers, from a universe of 10,000 to 12, 000, most likely to treat that form of epilepsy. That would not have been possible if statutes like the one in Vermont had been in effect in other states (Brief of Respondents IMS Health Inc. et al., 2011).

Pharmaceutical Sales Representatives and Detailing

The face-to-face visit with the doctor by a sales representative promoting prescription pharmaceuticals and therapeutic devices is known as "detailing." Armed with the knowledge of what, how and when the physician prescribes a drug, the representative can attempt to enhance the effectiveness of each visit by selecting the most appropriate and persuasive information to share. "Traditionally, detailing involved a personable, well-dressed professional visiting a physician's office sharing news, clinical results and product samples with a physician. The meetings involved a good amount of banter and were part of a cordial relationship" (Young 2011). As experts on their drugs, the representatives must possess knowledge of and confidently answer questions about everything from insurance coverage to "the mechanisms of disease, routes of drug metabolism and excretion, side effects, indications and contraindications" (Rhee 2009). Detailing has evolved into a more sophisticated and personalized interaction in which compelling messages are tailored for specific physicians based on the information gained from data mining prescription records.

Doctors benefit from the information shared by detailers. Many physicians like the visits from detailers and enjoy lunch for the office compliments of the pharmaceutical company (*Informationweek* 2011). The system provides a two-way channel of communication, and recent medical findings can be learned through a quick visit with the detailer. In addition, physicians have a resource for understanding drug interactions, side effects, and insight into difficult cases. For example, using data mined information allows the drug company and the detailer to pinpoint physicians whose patients might benefit most from a new drug for a rare disease. "Without the data, you might visit 1,000 physicians to identify the 10 whose patients might most benefit," Mr. Frankel [Vice President for External Affairs at IMS Health] said. "With the data, you would go to the 10" (Singer 2011, p. 3). Today's physician likely looks to detailers to impart new knowledge that can improve patient care more than the opportunity to get a free lunch. Catering, however, continues as an incentive for the doctor's attention in spite of ethical concerns.

Resistance to Detailers and Data Mined Information

Pharmaceutical companies are supportive of health information companies that data mine physicians' prescription records and defend their right to collect data and analyze it for marketing purposes. However, resistance to sales representatives' detailing and their utilization of data mined information has grown over the years for several reasons. According to Young (2011), the first wave of resistance by doctors began in the late eighties and nineties. Some doctors believed that patient care and the doctor's integrity were compromised by accepting the detailer's complementary items such as pens, pads, lunches, and more. Questions arose regarding detailers with their gifts creating the perceived need for reciprocity by doctors. Reports of abuse of the system (e.g., filling the physician's car with gas while sharing drug information) were circulated, but most doctors continued to see the detailers. One review of nine years of literature on the interaction between the pharmaceutical industry and physicians concluded that "there is a degree of influence . . . on providers' prescribing habits," and that influence has sometimes been labeled as unethical (Rhee 2009).

Young (2011) sums up the second issue of resistance as being an economic one – doctors simply have more demands on their time as a result of managed care companies' demands. Increased doctor workloads and pressure to complete clinical tasks have resulted. In addition, insurers have become more restrictive by checking doctors' billings more closely and setting firm reimbursement rates. In some cases, the insurer has become, in a sense, the doctor's employer. As doctors' workloads increased, detailers were granted less face time due to time shortages. Sales representatives were invited to leave samples with a doctor's staff, but real time with the doctor dwindled significantly. In a study conducted by Ipsos Vantis, they found that when a doctor does see a rep, it is for less time with over half the discussions lasting four minutes or less (Young 2011).

In spite of efforts to self-regulate the marketing behavior of pharmaceutical companies by the AMA and PhRMA, the number of doctors who dislike the use of their prescribing history for one reason or another has grown over the years. Many physicians bemoan the fact that prescription data is protected for patients but not for physicians (Stone 2011). Some feel as though they are being spied upon by members of the pharmaceutical industry (IMS Health Corp. 2007). Criticisms include negative impacts on public health (detailers encourage the prescription of new drugs that might be riskier to patients, with perhaps no increase in efficacy, than already established treatments), skyrocketing drug costs due, in part, to marketing expenses (marketing efforts cost money and increase the usage of expensive brand-name medicines), and privacy issues (prescriber data is often sold without the consent or knowledge of a physician and patients' privacy may be inadequately protected, especially in small communities with small numbers of physicians or patients with specific diagnoses) (The Prescription Project 2008).

Critics of detailing also point out that marketing expenditures on prescription drugs are significant and drive up the cost of health care. Reporting methods for marketing expenditures vary widely, leaving questions about the true amount spent on an annual basis. One international market research firm reported $33.5 billion in promotion spending in 2004 while IMS Health reported $27.7 billion for the same year; in addition to these conflicting reports for 2004, *Science Daily* determined that the true marketing expenditures for that year may have been as high as $57.5 billion (York University 2008). Marketing efforts directed at physicians appear to have declined over the past five years due to drug maker consolidation and the need to cut costs (O'Reilly 2012). For example, $29 billion was spent in 2005 (figure includes detailing, advertisements in medical journals, direct-to-consumer advertising and drug samples), with $7.2 billion spent on physicians (Donohue, Cevasco and Rosenthal 2007). Four years later, pharmaceutical companies reported spending approximately $6.3 billion on detailers' visits to doctors in 2009, a decline of nearly a billion dollars (Singer 2011). At its peak, 105,000 detailers were employed in 2007, but by 2012 that number had decreased to approximately 72,000 sales representatives (Rockoff 2012). Expenditures on samples left with doctors have also been reduced by 25 percent since 2007 (O'Reilly 2012).

LEGISLATURES REACT

The criticisms and the dissatisfaction of medical providers no doubt fueled the state legislative initiatives. Vermont, New Hampshire and Maine were among the first states to enact statutes restricting the sale and use of data mined information. The statute challenged in *Sorrell* was passed by the Vermont legislature in 2007. It had three components, two of which applied to pharmacies, health insurers and similar entities. The first component prohibited those entities from selling prescriber identifying information. The second component prohibited the same entities from allowing the information to be used for marketing. The third component applied to pharmaceutical manufacturers and pharmaceutical marketers and prohibited them from using prescriber identifying information for marketing. All three components allowed for an exception when the prescriber's consent had been obtained. The statute also included a definition of "marketing," as well as several exceptions to the prohibitions. It was supported by numerous legislative findings, including that the use of prescriber identifying information increases the effect of detailing programs, and that detailing increases the cost of health care and health insurance and fosters disruptive marketing visits that are tantamount to harassment (Sorrell 2011). Over 20 other states were considering similar statutes at the time that *Sorrell* was decided (Brief for the States of Illinois, Alabama et al. 2011).

Commercial Speech and the U.S. Supreme Court

When a statute is challenged as unconstitutional, there are two fundamental questions to be addressed. The first question is whether the statute was passed pursuant to a constitutional authority. If so, then the second question is whether that statute violates some specific check on that authority. When the statute is passed by a state, as it was in *Sorrell*, the constitutional authority is the police power, which is acknowledged in the Tenth Amendment. This is the power of the state to regulate for the health, safety, welfare and morals of its citizens. The Vermont statute was not challenged as exceeding the police power of the state. Instead, the issue was whether the statute violated a specific check on that authority, the First Amendment protection of speech, as incorporated to the states by the Fourteenth Amendment.

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech…" (U.S. Const. Amend. I). This is one of the most familiar of all the constitutional protections available to the American people (Burke and Ford, 2011). There are two forms of speech that are protected by the First Amendment. The first is often referred to as "public discourse." It is protected in order to ensure that a democratic state remains responsive to the views of its citizens. This type of communication is a form of participation in the process of democratic self-governance. Another form of speech that is protected by the U.S. Constitution is that which conveys information necessary for public decision making. The speech is valuable because it disseminates information, rather than because it is a form of participation in democracy. Commercial speech falls within this second form of speech (Post 2000).

It has not always been clear that commercial speech is protected by the First Amendment. Valentine v. Chrestensen (1943) is one early case that was widely interpreted as establishing that commercial speech was not protected (Burke and Ford, 2011). *Valentine* was initiated by the owner of a former US. Navy submarine. He wished to distribute handbills on the streets of New York City advertising the boat and soliciting visitors for a stated admission fee. There was, however, a New York City ordinance prohibiting the distribution of commercial and business advertising matter. The ordinance did allow the distribution of material devoted to information or a public protest. The submarine owner revised his handbill so that it was double faced. One side advertised his vessel and the other side protested an action of the City Dock Department. He was restrained by the police. He brought an action claiming that the ordinance violated his freedom of speech, but he did not prevail. The U.S. Supreme Court explained that "the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares" (Valentine 1943, p. 54). Then the Court added the statement that was cited until 1976 as authority for the proposition that commercial speech does not enjoy constitutional protection: "We are equally clear that the Constitution imposes no such restraint on the government as respects purely commercial advertising" (Valentine 1943, p. 54).

It was not until 1976 that the question of whether commercial speech is protected by the Constitution was "squarely" before the U.S. Supreme Court. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976) the Court again considered the relationship between commercial speech and information. It held that commercial speech is protected by the First Amendment.

Like *Sorrell*, *Virginia Board of Pharmacy* revolved around the sale of prescription drugs. A Virginia statute declared that pharmacists were guilty of unprofessional conduct if they published, advertised or promoted any price for any drugs dispensed only by prescription. The statute was challenged as a violation of the rights of a prescription drug consumer. The Supreme Court held that the advertisement of prescription drug prices was protected by the First Amendment even though it was commercial speech. In so holding, the Court emphasized the interests of both the particular consumer and society in general in the free flow of commercial information. It found that the free flow of commercial information is indispensable to the free enterprise economy, because it promotes intelligent and well-informed decision making about the allocation of resources. Chief Justice Rehnquist dissented, stating that the result reached by the Court extended First Amendment protection "to purely commercial endeavors which its most vigorous champions on the Court had thought to be beyond its pale" (Va. Bd. of Pharmacy 1976, p.781).

Four years after *Virginia Board of Pharmacy* the U.S. Supreme Court again addressed commercial speech issues in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (1980). In that case the Court clearly stated, "The Constitution, therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression" (Central Hudson 1980, p 563). The Court then laid down a four-part analysis for examining whether regulations meet that lesser degree of protection. First, the expression must be one that is protected by the First Amendment. That means that it must concern lawful activity and not be misleading. Next, the asserted governmental interests must be found to be substantial. Then, the court must determine whether the regulation directly advances the governmental interest asserted, and finally, the regulation must not be more extensive than is necessary to serve that interest (Central Hudson 1980).

One of the early cases in which the Court utilized the four-part analysis was Bolger v. Youngs Drug Products Corporation (1983). That case is relevant not only as an example of the *Central Hudson* test application, but also because in it the Supreme Court explained the distinction between speech that is "fully protected" and commercial speech. At issue in that case was the constitutionality of a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. Youngs Drug Products Corporation was engaged in the manufacture, sale and distribution of contraceptives and had undertaken a campaign of unsolicited mass mailing about its products to members of the public. When the Postal Service notified the company that their mailings were in violation of the federal statute, Youngs brought an action to have the statute declared invalid.

Noting that the degree of protection afforded by the First Amendment was dependent upon whether the speech was commercial or noncommercial, the Supreme Court first determined the proper classification of the speech disseminated by Youngs. The Court began by identifying the core notion of commercial speech – speech which does no more than propose a commercial transaction. Then, it addressed three characteristics of the speech. First, the pamphlets were advertisements. Second, there was a reference to a specific product. And third, there was an economic motivation for distributing the pamphlets. Finding that none of these alone would be sufficient to cause the pamphlets to be classified as commercial speech, the Court stated that the combination of all of the characteristics did support that conclusion. This was true even though the pamphlets also discussed important public issues, such as venereal disease and family planning.

Having concluded that the speech involved in the case was commercial, the Court then engaged in an application of the four-part analysis adopted in *Central Hudson* for assessing the validity of restriction on commercial speech. The Court found that the proposed commercial speech was protected by the First Amendment. Next, it concluded that one of the government's interests, aiding parents' efforts to discuss birth control with their children, was substantial. The Court then found, however, that the statute did not withstand scrutiny as a means of effectuating that interest. The statute was declared unconstitutional as applied to Youngs' mailings.

The *Central Hudson* four-part analysis has been used consistently by the Supreme Court in commercial speech cases. This test was applied to state restrictions on in-person solicitation by CPAs (Edenfield v. Fane 1993), a federal statute that prohibited the disclosure of alcohol content information in advertising or labeling (Rubin v. Coors Brewing Co. 1995), and a state statutory prohibition of advertisements that disclosed the retail prices of alcoholic beverages (44 Liquormart, Inc. v. Rhode Island 1996). It is sometimes referred to as the intermediate scrutiny test.

The intermediate scrutiny test developed in *Central Hudson* stands in contrast to two other standards of review. The lowest level of scrutiny is the rational basis test. The highest level is the strict scrutiny test. When the rational basis is used, the regulation being challenged is presumed to be valid. In order to convince a court to invalidate such a regulation, "a challenger must prove either that the government has no legitimate reason for the regulation or that the regulatory means selected are not rationally connected to some hypothetical governmental interest" (Massey 2012, p. 846-847). Strict scrutiny applies, for example, when the government attempts to regulate political speech. Under this test the government is required to prove that the restriction of speech furthers a compelling interest and is narrowly tailored to achieve that interest (Citizens United 2010).

SORRELL V. IMS HEALTH, INC.

Sorrell v. IMS Health, Inc. (2011) was initiated by data miners and an association of pharmaceutical manufacturers that produce brand name drugs. Their challenge was rejected by the United States District Court for the District of Vermont. The district court's decision was reversed by the U.S. Court of Appeals for the Second Circuit, which held that the statute violated the First Amendment by burdening the speech of pharmaceutical marketers and data miners. Noting that the decision of the Second Circuit was in conflict with decisions on similar cases from the First Circuit, the U.S. Supreme Court granted certiorari. The U.S. Supreme Court issued its opinion on June 23, 2011. It upheld the Second Circuit's conclusion by a vote of 6 to 3. Justice Kennedy wrote the majority opinion. Justice Breyer wrote the dissent, joined by Justices Ginsburg and Kagan (Sorrell 2011).

The majority began its opinion with an issue of interpretation of the statute. Throughout the litigation, Vermont had argued that the first component of the statute prohibited the sale or transfer of prescriber identifying information only for marketing. However, it changed its position at oral arguments in the Supreme Court by arguing that entities were prohibited from selling the information for any purpose. The Court noted that a change in position is particularly troubling in a First Amendment case but also observed that even with that interpretation the act could not be upheld, so it would assume that the State's interpretation was correct.

After disposing of this preliminary question, the Court moved to the more important question of what level of judicial scrutiny must be applied to restrictions like those created by the Vermont statute. IMS Health argued that the speech restrained by the statute was entitled to full constitutional protection (Brief of Respondents IMS Health Inc. et al. 2011). If the Supreme Court had agreed with IMS Health, then the Vermont statute would have to have passed the strict scrutiny test. While IMS urged the Court to apply strict scrutiny to the Vermont statute, it also argued that the statute must be declared unconstitutional even if the intermediate scrutiny standard was applied (Brief of Respondents IMS Health Inc. et al 2011). Vermont argued that it was not proper for the statute to be evaluated as a restriction of speech at all. It argued that the statute regulated "conduct, not speech" (Sorrell 2011, p. 2666). If the Court had agreed, it would have applied the rational basis test, the lowest level of scrutiny.

It was this issue of the applicable level of scrutiny that had seemingly convinced the Court to hear *Sorrell*. The issue had been examined on three occasions, by two different courts of appeal. The first of those decisions was IMS Health Inc. v. Ayotte (2008). That case addressed the constitutionality of a New Hampshire statute that prohibited certain transfers of physicians' prescribing histories for use in detailing. The U.S. Court of Appeals for the First Circuit found that the statute regulated conduct, not speech. Thus, it was subject to the lowest level of scrutiny, the rational basis test. The court went on to explain that, had the statute been treated as a restriction of protected speech, it would have been subject to the intermediate scrutiny test delineated by *Central Hudson*, and it would have survived that level of scrutiny. The second decision was also in the First Circuit, and the result was the same. This second case, IMS Health Inc. v. Mills (2010), examined a Maine statute that prohibited the use, sale, transfer or exchange for value, for marketing purposes, of prescription drug information that identifies a prescriber who filed for confidentiality protection. Consistent with its holding in *Ayotte*, the court again held that the statute regulated conduct, not speech, and that even if it did regulate speech, it was commercial speech, and the statute would have survived the intermediate scrutiny dictated by *Central Hudson*.

In contrast, both the trial court and the court of appeals that heard *Sorrell* had determined that the Vermont regulation was a restriction of speech, not merely conduct (IMS 2010). This was a victory for the data mining plaintiffs, because it meant that the statute would have to survive a level of scrutiny higher than the rational basis test. The plaintiffs, however, were unable to convince the lower courts that the highest standard of review, strict scrutiny, applied. They urged the court to apply strict scrutiny by arguing that the speech restricted was noncommercial speech. The Second Circuit cited *Bolger* in its discussion of whether the data miners' speech was commercial or noncommercial. The court fell short of holding that the speech restricted by the Vermont statute was noncommercial speech and thus protected by the strict scrutiny test. It found, instead, that it was not necessary to reach that decision because the statute could not survive even the *Central Hudson* intermediate scrutiny test.

On this important issue, the decision of the U.S. Supreme Court was not as clear as the decisions of the lower courts. The Court in *Sorrell* does not clearly distinguish between the three levels of scrutiny. Justice Kennedy, in his majority opinion, spoke of a "heightened judicial scrutiny." The Court failed to clarify, however, whether that was simply higher that the rational basis test applicable to economic regulation, or alternatively, whether it had collapsed the intermediate *Central Hudson* test heretofore reserved for commercial speech with the strict scrutiny test previously reserved for speech that does more than propose a commercial transaction. The Court did not state that it was applying a stricter form of judicial scrutiny than had previously been applied to commercial speech. It did explain, however, that the outcome of this case would not change if a form of judicial scrutiny that is stricter than the commercial speech standard had been applied. Instead of fashioning a new test, or extending full protection to commercial speech, the Court applied the *Central Hudson* test.

The Court's application of that test led to a conclusion that the statute was unconstitutional. That test required an identification of the interests that were purportedly advanced by the statute. The State offered two general justifications for the statute. The first general justification included three interests relating to the health care providers, medical privacy, avoidance of harassment, and integrity of the doctor-patient relationship. The second general justification was related to policy objectives of improving public health and reducing healthcare costs.

The Court examined each of the interests offered by the state and found deficiencies with each. The medical privacy interest, according to the Court, was not advanced by this statute because it did not keep the information confidential; it only kept it from being sold and used for marketing purposes. Here the Court offered some guidance in how a statute might be drafted so that it would advance such an interest. "For instance, the State might have advanced its asserted privacy interest by allowing the information's sale or disclosure in only a few narrow and well justified circumstances. (citation omitted) A statute of that type would present quite a different case than the one presented here" (Sorrell 2011, p. 2668). Likewise, the Court was not convinced by the State's interest in protecting doctors from harassing sale practices. Its response was, "Many are those who must endure speech they do not like, but that is a necessary cost of freedom" (Sorrell 2011, p 2669). Last in this general justification was the argument that detailers' use of the information undermines the doctor-patient relationship by allowing detailers to influence treatment decisions. The Court noted that if treatment decisions are affected, it must be because doctors find the use of the information persuasive, hardly a reason to quiet it.

The second justification for the statute related to policy issues. Recognizing that interests in promoting health and lowering costs are proper, the Court still found that the statute did not advance those interests. The State had contended that detailing would promote the use of brand name drugs that are more expensive and less safe than generics. The Court characterized this as a concern that expression will be too persuasive, so it needs to be quieted. While there may be different views about the prescription of brand name drugs, the resolution of the debate will result from speech, not from an inhibition of it.

Those hoping for an expansion of free speech rights for business enterprises would certainly advocate that the mention of only two options, one the heightened scrutiny and the other applicable to economic activity, supports the conclusion that the distinction between the intermediate and strict scrutiny tests has disappeared. They will find support for their position that a new standard was applied in this case in Justice Breyer's dissenting opinion. Breyer's dissent was critical of the majority for transferring power from legislatures to judges. He lamented the return to a "bygone era when judges scrutinized legislation for its interference with economic liberty," (Sorrell 2011, p. 2679) and rejected the application of a heightened scrutiny because it would change the balance between the legislative and judicial branches of government in a way that would weaken the legislature's authority.

THE IMPLICATIONS OF SORRELL

Sorrell v. IMS Health, Inc. is viewed by many commentators as a significant development in First Amendment jurisprudence. It has been portrayed as a case that expands corporate rights by protecting commercial speakers rather than commercial speech (Piety 2012). In this sense, it is similar to its better known predecessor, *Citizen's United v. FEC* (2010). Both cases offer businesses greater protection from government regulation. It has been argued, for example, that *Sorrell* casts some doubt on the constitutionality of rules passed by the Federal Drug Administration that prohibit promotion of drug and medical devices for uses that have not been approved by the FDA (Tyler 2012). Also, it may increase the level of scrutiny applied to restrictions on speech imposed by federal securities laws (Samp 2011). This interpretation of *Sorrell* is troubling to privacy advocates, because it means that regulations that are enacted to protect individuals from the disclosure of personal information are also held to a higher standard and are thus more likely to be held invalid (Bhagwat 2012). Others are more cautious and interpret the ambiguity in the majority opinion to mean that a majority of the Court is not ready to expand the constitutional protection afforded to speech by business interests, when that speech is not related to the political process (Samp 2011).

Sorrell's Progeny

The lack of agreement on the meaning of *Sorrell* is not limited to commentators and academicians. Judges in the lower courts are now facing litigants who are citing *Sorrell* as authority for two propositions. The first is that the scope of protected speech has been expanded. The second is that the highest standard of review must now be used for evaluating regulations of that speech. Not all courts have accepted these arguments, but the latter has found some support.

Among the courts which have rejected the argument that *Sorrell* has significantly changed the scope of protected speech is the U.S. District Court for the Middle District of Pennsylvania. In Telesweeps of Butler Valley, Inc. v. Kelly (2012) a corporation challenged a state law that prohibited the use of electronic video monitors for simulated gambling. The corporation argued that the law violated its free speech rights by preventing it from expressing or communicating by way of electronic video device to inform a patron that he had won a prize. Previous court decisions had held that such laws did not implicate First Amendment protections. Telesweeps argued that *Sorrell*, which was decided more recently than the other cases, dictated a different result. The court rejected that interpretation of *Sorrell*. It held that the law in question regulated gambling as conduct, and not speech.

The decision in *Telesweeps* is consistent with the ultimate outcome of a North Carolina case involving Hest Technologies. In that case the Court of Appeals of North Carolina cited *Sorrell* in support of its holding that a statute banning the "dissemination of sweepstakes results through entertaining displays … directly regulates protected speech under the First Amendment" (Hest Technologies S.E.2d 2012, p. 13). The North Carolina Supreme Court reversed. It found that the statute in question regulated conduct and even questioned whether *Sorrell* had "definitively determine[d] that the prescriber-identifiable prescription data … was actually protected speech" (Hest Technologies N.C. 2012, p.8).

Sorrell has also been used as authority by litigants who argue that any restriction of commercial speech, or any speech by a commercial entity, should be subject to strict scrutiny. AT&T Mobility used *Sorrell* in its defense of a lawsuit brought by General Charles E. "Chuck" Yeager (Yeager 2011). At issue was the nature of a press release that used Yeager's name without his permission. AT&T asked the district court to dismiss the lawsuit. In December of 2009, the court refused, based partially on the conclusion that the press release was commercial speech, as defined by the U.S. Supreme Court in the Bolger v. Youngs Drug Products Corporation (1983). In August of 2011, AT&T requested that this decision be reconsidered in light of, among other things, the Supreme Court's holding in *Sorrell.* It argued that *Sorrell* extended full protection to corporate speech even it if furthered a commercial enterprise. If the court had agreed, then its characterization of the speech as commercial in nature, and thus deserving of lesser protection, was in error. The *Yeager* court declined, however, finding that "the Supreme Court in no way modified the *Bolger* test" (Yeager 2011, p. 5).

This argument was also advanced in Demarest v. City of Leavenworth (2012). In that case, the plaintiff challenged the constitutionality of a city sign code that required a particular type of design, lettering style and color. The plaintiff urged the court to evaluate this code under the strict scrutiny standard. The court explained that doing so would place a higher burden on the government, requiring it to provide a compelling, not just a substantial, interest and to show that the regulation was "precisely drawn" (Demarest 2012, p.1194). Use of this higher standard, the court explained, would have been a drastic alteration, and "an elemental change to the long standing and well established constitutional framework" (Demarest 2012, p.1195). The court refused to hold the government to this high standard. Describing *Sorrell* as "significant," (Demarest 2012, p. 1194) the court nonetheless did not view it as having changed the standard of review applicable to restrictions on commercial speech.

Demarest is a decision of the United States District Court for the Eastern District of Washington. The reasoning of the *Demarest* court was echoed in at least four other cases, Hart v. Electronic Arts, Inc. (2011), Fleminger v. U.S. Dept. of Health and Human Services (2012), King v. General Information Services, Inc. (2012), and McCullen v. Coakley (2013).

A different view is expressed in the decision of the Southern District of Florida in Wollschlaeger v. Farmer (2012). The Florida court invoked *Sorrell* as an example of a case that applied strict scrutiny to a content based restriction of commercial speech. This case involved the constitutionality of the Firearm Owners' Privacy Act, a law that restricted health care practitioners from asking patients about their ownership of firearms, recording any information about patient's ownership of firearms, harassing patients about firearm ownership and discriminating on the basis of firearm ownership. Physicians challenged that law on the basis of the First Amendment and were awarded a preliminary injunction. In the second phase of the litigation both the physicians and representatives of the State moved for summary judgment. The judge described the first phase of the litigation by stating that "[f]ollowing the principles laid out in Sorrell, I applied strict scrutiny to analyze" the Act (Wollschlaeger 2012, p. 1262). In *Sorrell* the Court had noted that the regulation could not be sustained because of a concern for physicians who may have felt coerced or harassed by marketers. In *Wollschlaeger,* it was the patients who felt harassed by their physicians. Citing *Sorrell*, that court held, among other things, that a "concern for some patients who may be offended or uncomfortable by questions regarding firearm ownership is insufficient to justify this law." (Wollschlaeger 2012, p. 1264) The court held that the challenged provisions did not pass constitutional muster.

Mahoning Education Assoc. of Developmental Disabilities v. State Employment Relations Board (2012) also relied on *Sorrell* to apply strict scrutiny to a statute that required public employees to give 10 days' notice of their intent to picket the public employer. The Court of Appeals of Ohio found that the statute did not meet that standard.

The argument that *Sorrell* requires that strict scrutiny be applied to a regulation of what all parties agreed was "only commercial speech" was also advanced in Educational Media Company at Virginia Tech, Inc. v. Insley (2013). At issue was a ban on the advertising of alcoholic beverages in college student publications. The ban was challenged by the student newspapers at Virginia Tech and the University of Virginia. The district court ruled in favor of the state. On appeal, the newspapers argued that because the ban was content and speaker based the ban had to be evaluated under strict scrutiny, even though the speech was commercial in nature. The 4th Circuit did not reject that argument, but did hold that it was not necessary to determine whether strict scrutiny was applicable as the ban did not meet even the intermediate level of scrutiny.

Another line of cases falls somewhere between *Wollschlaeger* and *Demarest*. One of these is a decision of the U.S. District Court in Arizona. In Friendly House v. Whiting (2012), Arizona's Support Our Law Enforcement and Safe Neighborhoods Act was challenged as a violation of the First Amendment. The statute prohibited speech by day laborers and those who wished to hire them. The plaintiffs asked for a preliminary injunction and the district court ruled in their favor.

In order to issue the preliminary injunction, the judge in *Friendly House* had to determine that the plaintiffs were likely to succeed on the merits of their argument that the Arizona statute violated the First Amendment. The plaintiffs first argued that the speech by day laborers was not commercial speech because it included political and economic messages. This argument was advanced because the plaintiffs wanted the court to apply a higher standard of review to the statute than the *Central Hudson* test. The court was unconvinced by this argument and found that it was "obliged to apply the commercial speech test as established by the Supreme Court." (Friendly House 2012, p. 1056-1057) It did find, however, that the commercial speech test had been refined by *Sorrell*. Specifically, this court interpreted *Sorrell* as modifying the fourth part of the *Central Hudson* test. In *Central Hudson* the Court stated that a regulation must be no more extensive than is necessary to serve a substantial government interest. The court in *Friendly House* found it important that the *Sorrell* Court described the last part of the test to require that a regulation of speech be "drawn to achieve a substantial governmental interest." (Friendly House 2012, p. 1058)

By changing this language, *Sorrell* "tightened the test for content-based bans on commercial speech." (Friendly House 2012, p. 1060) The court concluded that the Arizona statute was not drawn to achieve the stated goal of promoting traffic safety, so it did not pass the test. The U.S. Court of Appeals for the 9th Circuit affirmed, but did not go so far as to sanction the District Court's use of *Sorrell* to modify the commercial speech test. Instead, it found that the restriction did not satisfy the test as announced by *Central Hudson*, and so deferred discussion of *Sorrell* for a more appropriate case. (Valle Del Sol, Inc. 2013)

Similarly to the District Court in *Friendly House*, U. S. v. Caronia (2012) and 1-800-411-Pain Referral Service, LLC v. Otto (2014), interpret *Sorrell* as modifying the test for regulations of commercial speech. *Caronia* and *411-Pain* describe *Sorrell* as requiring a new two part test. In *Caronia*, a pharmaceutical sales representative was convicted of conspiracy to introduce a misbranded drug into interstate commerce. He had promoted Xyrem for a purpose not approved by the FDA. His conviction was vacated because the U.S. Court of Appeals for the Second Circuit found that he had been convicted for his speech, in violation of the First Amendment. The court's decision was based on its interpretation of *Sorrell* as dictating that the court first determine whether the regulations were content- and speaker-based, and second, if so, apply heightened scrutiny. But the Second Circuit acknowledged that *Sorrell* did not identify "the level of heightened scrutiny to be applied, that is strict, intermediate, or some other form of heightened scrutiny." (Caronia 2012, p. 164) The court concluded that the provisions of the Federal Drug and Cosmetic Act on which Caronia's conviction was based were content- and speaker-based. Like the Court in *Sorrell*, however, the Second Circuit found it unnecessary to pinpoint the applicable level of scrutiny because it concluded that the provisions failed even if the intermediate scrutiny test defined by *Central Hudson* was applied. A similar result was produced by the same process in *411-Pain*, a case challenging the constitutionality of a Minnesota law that limited advertising by medical and legal referral companies.

The results of *Caronia* and *411-Pain* are not different as a result of *Sorrell*, but the process by which the courts reached those results is. Because of their interpretation of *Sorrell*, both courts added a layer of analysis that had not previously been implemented. Although each ultimately applied the preexisting four part *Central Hudson* test to determine the constitutionality of a restriction of speech, they also each recognized that there may yet be a case in which a restriction passes muster under that test, but is then stricken when the heightened scrutiny is applied. They do not refute the existence of that standard; they only determine that it has not been necessary yet to use it. Thus it is far from clear how that scrutiny is to be applied (Samp 2011).

Beyond Commercial Speech

The issue of which level of scrutiny applies to regulations of speech is not limited to cases like *Sorrell*, in which the regulation in question restricts the flow of commercial speech. *Sorrell* is closely related to the much more widely known Citizens United v. Federal Election Commission (2010). There, the U.S. Supreme Court struck down a provision of federal law that made it a felony for a corporation to expressly advocate the election or defeat of candidates, or to broadcast electioneering communications within a prescribed time period before an election. Also authored by Justice Kennedy, the majority opinion in *Citizens United* expressly stated that the "First

Amendment protects the speech and speaker, and the ideas that flow from each" (Citizens United 2010, p. 899). The fact that the speech was to be advanced by a corporation was irrelevant (Bhagwat and Struhar 2013). As a result, it is now clear that there is not a two-tiered system for the protection of political speech, one for individuals and another for corporations. There is only one. Strict scrutiny, the highest level, applies to any restriction of political speech without regard for the nature of the speaker.

A debate over the applicable level of scrutiny is also being held in the compelled speech arena. This includes cases like R.J. Reynolds Tobacco Company v. Food and Drug Administration (2012), in which a business was compelled to include warnings and graphic images on its packaging. The trial court noted that the "parties continue to disagree fundamentally on the applicable level of scrutiny" (R.J. Reynolds Tobacco Company 2012, p. 271). It held that the regulations were subject to strict scrutiny, and that they did not meet that standard. The U.S. Court of Appeals for the D.C. Circuit disagreed and applied the intermediate test instead. It did find, however, that even under this lower standard, the FDA rules in question did not pass constitutional muster. In dissent, one judge opined that neither the trial court nor the majority of the court of appeals was correct and that the FDA rule should be evaluated by reference to a standard akin to a rational basis review. That case is expected to progress to the Supreme Court (Carvajal 2012).

Another compelled speech that is likely to progress to higher levels of the legal system is Stuart v. Loomis (2014). This case examines the constitutionality of North Carolina's Woman's Right to Know Act. Health care providers who treated patients seeking abortions challenged the constitutionality of the speech and display provision of the Act. That provision required the provider to perform ultrasounds and describe the images to patients in advance of the abortion. The providers contended that strict scrutiny applied. The defendants maintained that the speech was commercial in nature that intermediate scrutiny was, therefore, the correct standard. The district court cited *Sorrell* in support of its conclusion that heightened scrutiny applied. It held that the provisions did violate the First Amendment.

A similar debate occurred in Minority Television Project, Inc. v. Federal Communications Commission (2012). That case involved the law of broadcast regulation and challenged the continued validity of a ruling issued by the Supreme Court in 1978. Similarly to *Citizens United*, the distinction in this venue was made on the nature of the speaker. In FCC v. Pacifica Foundation (1978), the Court held that speech restrictions on broadcasters are subject to a less demanding form of judicial scrutiny than restrictions on other media. Instead of strict scrutiny, these regulations have been evaluated by use of the same intermediate scrutiny test that was questioned in *Sorrell*. The television station operator who challenged the FCC regulations in *Minority Television Project, Inc*. argued that the time had come to extend full protection to the speech of broadcast media. The U.S. Court of Appeals for the Ninth Circuit declined. Noting that a case was pending in the U.S. Supreme Court in which the *Pacifica* rule might indeed be changed, the Ninth Circuit compared itself to the golfer who "must play the ball as it lies" in that it must "apply the law of broadcast regulation as it stands today" (Minority Television Project, Inc. 2012, p. 876).

The case referenced in *Minority Television Project, Inc*. is Federal Communications Commission v. Fox Television Stations, Inc. (2012). It involved the constitutionality of the FCC's indecency regime. The broadcasters challenged the indecency standards on both Due Process and

First Amendment grounds. More specifically, they argued that broadcasters should "enjoy the same First Amendment protection enjoyed by every other medium of communication" (Brief of Respondents Fox Television Stations, Inc. et al 2012, p. 17). The U.S. Supreme Court ruled that the standards violated Due Process and declined to reach the First Amendment argument. The Court did not reaffirm the *Pacifica* rule; it only found it unnecessary to reconsider the rule at that time. It will no doubt be given an opportunity to do so at some point in the future.

These cases illustrate the role of *Sorrell* as but one of several cases in which the two-tiered scheme of constitutional protection of speech is being challenged. While the *Sorrell* Court did not take full advantage of an opportunity to collapse those two tiers into one, it has been described as having "blurred the distinction between strict and intermediate scrutiny: a blurring that suggests a willingness (at least among the six Justices in the majority) to reconsider the treatment of commercial speech as a category of lower value, less protected speech" (Bhagwat 2012, p. 858). Another commentator, noting the relationship to *Citizens United*, views the opinion as one which "strongly suggested that corporate commercial speech might be deserving of the same protection as corporate political speech" (Khan and Holloway 2012, p. 439).

Sorrell **and Privacy**

Although the words "right to privacy" appear nowhere in the U.S. Constitution that right has been recognized by the U.S. Supreme Court, and is now considered to be fundamental (Barkacs 2008). In its attempts to convince the Supreme Court that its statute was constitutional, Vermont argued that the statute protected medical privacy. When the Court invalidated the law, privacy advocates were concerned that the outcome would jeopardize others laws that limit the dissemination of private information (Bhagwat 2012). "[S]ome consumer advocates say the real issue in the case is the confidentiality of information that people submit in government-regulated transactions that they would not otherwise make public" (Singer 2011, p 3). One organization labeled *Sorrell* number nine on its list of "Worst Decisions of the Corporate Court Term because it grants corporations a First Amendment right to use private medical information" (Alliance for Justice 2011).

There is certainly some reason for concern. *Sorrell* establishes that information about one party gathered by another in the course of a business or professional relationship is speech and thus protected by the Constitution. The unique nature of the transactions involved in *Sorrell*, however, distinguish it from other situations and give merit to the argument that the holding in *Sorrell* is too narrow to be used as authority for striking down other laws that limit the flow of private information.

Consumers engage in many activities every day that reveal valuable information to marketers. Clicking on "Likes" in Facebook is one example. Researchers have been able to use data mining techniques to identify political affiliation, race and sexual orientation from a person's "Likes." Those details can then be used to enhance online advertising (Hotz 2013). As a result of *Sorrell*, this data mined information is now understood to be a form of constitutionally protected speech. If a state, or the federal government, passed a statute prohibiting the sale of that information in order to protect the consumers' privacy, would that statute withstand a constitutional challenge? Most likely it would not but not because of any rule established by

Sorrell. The greater obstacle in challenging that statute would be establishing that a privacy interest existed. The Facebook information is being shared by the consumer voluntarily and in a forum that is widely understood to be readily accessible. This is very different from the transaction in *Sorrell*.

There are many other scenarios in which individuals reveal valuable marketing information in forums that are not as widely accessible as Facebook. These include financial transactions, retail purchases, and television viewing habits. The privacy interest of the individual is more evident in these scenarios. And, as in the Facebook example, *Sorrell* can be interpreted to mean that the data about a person's financial and retail transactions, and television viewing habits, as well as the information gleamed from sifting through that data, is speech that is protected by the Constitution (Bhagwat 2012). That itself is a significant development. It means that any attempt to regulate the flow of that information must meet constitutional standards.

It does not necessarily follow that any statute attempting to restrict the sale and use of that information would be deemed unconstitutional. There is a key difference between the individual's privacy interest in this information and the privacy interest that was asserted in *Sorrell*. That is the position of the person who holds that interest. In *Sorrell*, it was not the patient's privacy that advanced, it was the doctor's. The pharmaceutical manufacturers were not looking directly at any individual patient's consumption of prescription drugs. They were looking at the prescribing habits of the doctor. The doctors in *Sorrell* are not similarly situated to the account holder, or the retail purchaser, or the television viewer. They are more closely analogous to the potential business clients whose privacy was of concern in Edenfield v. Fane (1993). When Florida adopted a rule prohibiting in-person solicitation by CPAs, and argued that the privacy of the potential clients was one of the interests supported by the rule, the U.S. Supreme Court noted that if the potential client was not receptive to this solicitation, "they need only terminate the call. Invasion of privacy is not a significant concern" (Edenfield 1993, p. 1803). Likewise, the doctor who feels that detailers are invading their privacy need only give the appropriate instructions to the office managers and receptionists who buffer them from intrusion (Sorrell 2011, p. 2670).

If the data mined information in *Sorrell* had revealed information about patients, and Vermont had argued that its statute was necessary in order to protect those patients' privacy, and the Court had held that such an interest was insufficient to support the statute, then there would be cause for alarm. That is not what happened in *Sorrell*. The data miners and detailers did not intrude upon a consumer's privacy interest. Vermont did not assert the patient's privacy as an interest that needed to be advanced by the statute, and the Court did not state that a consumer's interest in the privacy of their health related information was insufficient to support a statute restricting the flow of that information.

CONCLUSION

The degree of protection that the legal system affords to speech that does no more than propose or facilitate a commercial transaction has far reaching implications for all businesses. Speech is protected because it is information. The success of business entities in general, and marketing entities in particular, depends upon the flow of information. Marketing professionals must be able to gather information that they can use to create value for the customer;

they must also be able to convey information to the customer, whether it be a channel member or end user of the product. This process is obstructed when legislative bodies enact regulations because they disagree with the message being conveyed. If the judiciary applies a low standard of review when those regulations are challenged, then businesses will find it more difficult to accomplish their objectives. If, however, the judiciary applies the highest standard of review to those regulations the resulting flow of information will be beneficial to all parties. *Sorrell* has contributed to the development of the arguments in favor of extending the highest standard of review to commercial speech, and speech by commercial entities, but the debate over that issue is far from settled.

In addition to contributing to the debate over the applicable standard of review, *Sorrell* has contributed to the evolving definition of speech. Pharmaceutical drug manufacturers are communicating their information in the marketplace using both a push and pull promotional strategy in the channel of distribution. Direct-to-consumer advertising is being seen more and more today and represents a pull strategy. That type of speech is clearly protected as a result of the Supreme Court's decision in Virginia Board of Pharmacy (1976). The reaction of the pharmaceutical drug manufacturers to the Vermont legislation confirms that the more traditional promotional strategy of personal selling and sales promotion to push the products to physicians, who act as middlemen and whose involvement is legally mandated, is still considered a crucial component of their strategy. As a result of the Supreme Court's holding in *Sorrell*, each step in this process is now considered a form of speech and, as such, is protected by the First Amendment.

Because of the Supreme Court's holding, manufacturers and marketing research firms can continue to combine data gathered from wholesalers, retailers, and other business entities and then data mine it to spot trends, segment markets, and develop promotional campaigns. But even with a victory in *Sorrell*, marketing practitioners should be discriminating in their use of this information. Many marketers will voluntarily comply with AMA guidelines and PhRMA codes, and individually prohibit practices such as confronting physicians with their prescribing history. But, some detailers and companies may still employ that practice and others that gave rise to the state legislative efforts. The Court's opinion does leave room for other states to enact similar laws (Hirsch et al 2011).

In a *Wall Street Journal* article, Rockoff (2011) shares accounts of pharmaceutical marketers shifting their focus in sales representatives' visits. Some are moving detailers away from aggressively pushing products to acting more as a resource for the doctors in an effort to increase their satisfaction with the sales call. For example, Eli Lilly now trains its detailers to use a soft sell approach focused on what the doctor wants to talk about rather than an agenda fixated on touting a drug's benefits. Lilly conducted its training at Disney's business training institute in Florida where sessions were devoted to customer service (including watching how Animal Kingdom employees greeted families and answered questions) rather than product education. Changes in economic and regulatory conditions have prompted pharmaceutical companies to alter their commercial model, and Lilly's sales, as well as doctor's satisfaction ratings, are rising. In addition, GlaxoSmithKline PLC has stopped evaluating detailers based on the number of prescriptions written and use physicians' ratings of the salespeople instead. Both of these examples suggest that pharmaceutical marketers are getting the message and adapting to avoid further legislative efforts to regulate the use of data mined information.

Had the Court's finding not been in favor of the data miners and pharmaceutical companies, the price of information previously provided to researchers and the government at little or no cost may have skyrocketed (Information Management 2011). Data miners in the healthcare industry profit from the sale of the information to pharmaceutical companies; without that major source of revenue, they would have either been out of business or forced to charge higher fees to other users of the information.

The outcome in *Sorrell* promotes both economic growth and personal liberties. It advances the policy of facilitating a commercial discourse that will foster innovation and development. It also prevents the government from censoring a message (Massey 2012, p. 854). From a legal standpoint, the significance of *Sorrell* is subject to interpretation and, for now, speculation. From a marketing standpoint, it reinforces the importance of the business entity as a source of information that all parties can use to make better decisions.

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