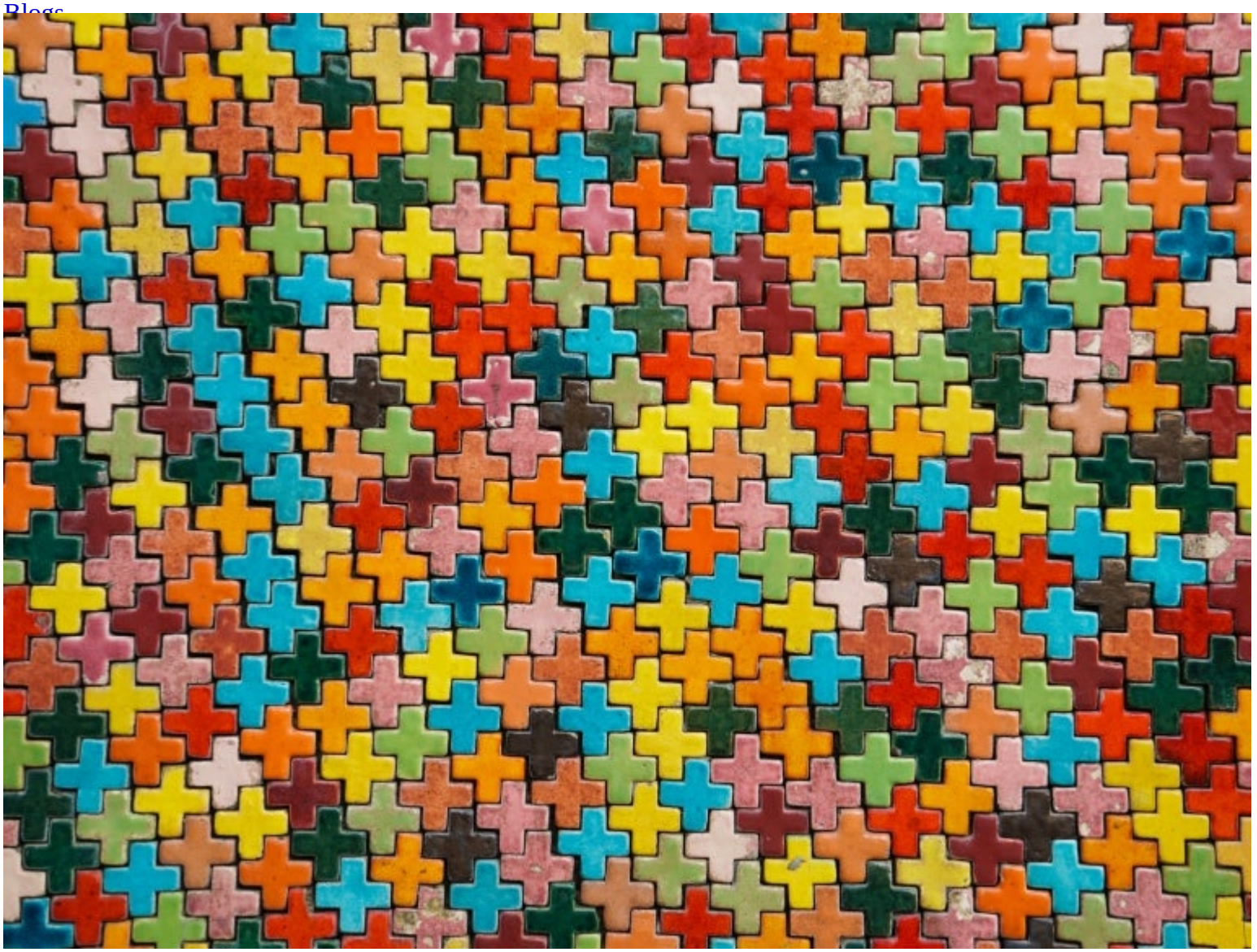

Recently, I was talking to Ben Dale about what constituted best practices as it pertained to a particularly tricky topic in the securities laws. It led me to pause and think, "What are best practices anyway?"

It's a fair question—and from what I can tell from my 30+ years of experience, it is one with no single answer. The question you should hear in response is: "From whose perspective?" Let me explain.

There are quite a few companies who purposely avoid being on the cutting edge. They don't want to be a corporate governance leader. They don't want to have the "best in class" disclosure. They're perfectly comfortable being in the middle of the pack. For them, their "best practices" is not being a leader, but also not being a laggard.

Of course, for those that do want to lead, they look at what everyone else is doing and try to innovate to accomplish a given task more effectively. That might be a cost-cutting undertaking. But more often than not, being a leader means having to spend more. Leaders tend to be the companies with more resources, though not always.

There are some situations where stakeholders on all sides of an issue get together and craft a set of "best practice" guidelines. For example, such collective thinking for virtual annual meetings resulted in this **set of guidelines** a few years back.

To me, that type of effort is more in the realm of creating "common practices" rather than "best." The goal of that effort is to get practitioners on board with a particular way of doing things rather than pushing the envelope. It's a smart thing to do as there is safety in numbers. If everyone is doing it, it's hard to convince a court or regulator that they aren't compliant.

But this is not an ironclad guarantee that one can't get in trouble. See the options backdating scandal from two decades back. One of my favorite moments from working at the SEC was when several dozen of the finest Wall Street lawyers in the asset-backed securities industry came in for a meeting to argue that what they all had been espousing was acceptable because everyone was doing it, even though it crossed the line from what the SEC's rule said. That was not a winning argument that day.

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