CHAPTER 1

An Overview of Corporate Criminal Liability: the Principles and Process Governing Its Imposition

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§ 1.01 Introduction

Since the early 1900s, corporations increasingly have been held criminally accountable for their misdeeds.[1] This trend has evolved to a point to which corporations now stand in essentially the same position as any other citizen. If the corporation—acting in the only way it can, through its employees or agents—commits any applicable specific or general intent crime, it can be held criminally accountable. Individual corporate employees can also be held personally accountable for their actions or their failure to act in either their direct or supervisory roles.

Some contemporary legal scholars have argued that corporate criminal liability serves no clear purpose. In response to this criticism, the following rationale has been offered for its continued validity:

> "Absent the possibility of criminal liability, corporations would escape moral condemnation for wrongdoing, and the retributive

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[1] See, e.g., New York Central & Hudson Railroad Co. v. United States, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909) (imputing guilty intent of corporation's employees to corporation).

> import of criminal liability to the community would be lost. For under a civil liability regime for the corporation *qua* corporation, there would be no moral condemnation equivalent to a criminal conviction: if found civilly liable, a corporation might be deemed negligent, or perhaps reckless, but no statement, in the form of a conviction, would attest to the proper valuation of the persons or goods at issue. In the end, the financial liability imposed would come to be viewed, by both the corporation and the community, merely as a cost of doing business."[2]

This chapter discusses the legal principles governing the imposition of criminal liability on corporations, their officers and directors, and their employees. The chapter then provides a brief overview of the process by which criminal liability is imposed.

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[2] Friedman, "In Defense of Corporate Criminal Liability," 23 Harv. J. L. & Pub. Pol'y 833, 857-858 (2000).

§ 1.02 Basic Principles of Corporate Criminal Liability

[1]—Historical Development of Corporate Criminal Prosecutions

Under historical common law principles of criminal accountability, a party was found guilty only if it had committed some prohibited act (or failed to act as required) while possessing a specified state of mind. In other words, a party could not be held criminally accountable for acts or thoughts alone.[1] Thus, the early English cases held that a corporation could not be guilty of a crime because it could neither form the requisite criminal intent nor be imprisoned.[2]

However, this concept began to change in the mid-1800s with the development of the doctrines of vicarious liability and strict liability. The doctrine of vicarious liability, which is rooted in principal-agency concepts of common law, allows the imputation of an employee's acts and intent to the corporation for purposes of tort liability. In imposing vicarious liability, courts acknowledged that corporations can act only through their agents and thus there is nothing inequitable about imposing corporate liability for an individual's tortious acts which may be performed on behalf of the corporation. The doctrine of strict liability, which evolved as an attempt to address a number of the social ills inherent to modern industrialized society, allows the imposition of liability without fault in certain circumstances. Strict liability statutes developed for two primary reasons: (1) to help prosecutors deal with situations in which the fault element was extraordinarily difficult to prove; and (2) to eradicate conduct viewed as so harmful that the risk of convicting the innocent-minded was justified.[3] These strict liability crimes generally reflected overriding public welfare and safety concerns. Examples are pure food laws, traffic laws, and some occupational safety laws.[4]

With the evolution of vicarious liability and strict liability doctrines, courts began to impose criminal liability on corporations. Given the increasingly significant role that corporations began to play in our daily lives during the late nineteenth and early twentieth centuries, this shift in the law seemed inevitable. Courts gradually found that corporations could be held accountable for specific intent crimes as well as strict liability crimes.[5] As the affairs of modern

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[1] See, LaFave and Scott, *Criminal Law*, 193-195 (2d ed. 1986).

[2] Henn, *Law of Corporations,* § 184, at 354-357 (2d ed. 1970).

[3] LaFave and Scott, *Criminal Law*, 242-243 (2d ed. 1986).

[4] *Id*. See Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55, 84-88 (1933).

[5] *Id*. See generally: Comment, "Criminal Liability for Corporations that Kill," 64 Tul. L. Rev. 919 (1990); Brickey, "Corporate Criminal Liability: A Primer for

corporations have become increasingly complex, the spectrum of problems that may result in criminal prosecution has grown. The areas of taxation, securities issuance and financing, antitrust, purchasing and sales, environmental safety, worker safety, campaign contributions, and international transactions each possess issues that may create potential criminal exposure for a corporation as well as for those who run it.

The most significant development in the imposition of criminal liability on corporations in the latter part of the twentieth century was the federal government's enactment of sentencing guidelines for corporations and other business organizations.[6] These guidelines, which took effect on November 1, 1991 with much fanfare and after much debate, have raised the collective consciousness of the business community significantly. Corporate managers and directors are now undeniably on notice that corporations and other business entities can and will be prosecuted increasingly.

The guidelines' stated purpose is: (1) to provide uniformity in sentencing business entities; (2) to deter business entities from committing similar crimes; and (3) to encourage the reporting of offenses and the creation of compliance programs to prevent and detect offenses.[7] By enacting these corporate sentencing guidelines, which differ from the guidelines used in sentencing individuals, Congress acknowledged implicitly that the prosecution of corporations and other business organizations is now very much part of the fabric of our society.

[2]—The General Rule for Imposing Corporate Criminal Liability

In general, a corporation can be held criminally liable for any criminal act carried out by one of its agents if that act occurs within the scope of the agent's employment for the benefit of the corporation.[8]

Corporate Counsel," 40 Bus. Lawyer 129, 131 (1984); Note, "Developments in the Law—Corporate Crime: Regulating Corporation Behavior Through Criminal Sanctions," 92 Harv. L. Rev. 1229 (1979); Yarosky, "Criminal Liability of Corporations," 10 McGill L. J. 142 (1964); Comment, "Increasing Community Control Over Corporate Crime—a Problem in the Law of Sanctions," 71 Yale L. J. 280 (1961); Mueller, "Mens Rea and the Corporation—A Study of the Model Penal Code Provision on Corporate Criminal Liability," 19 U. Pitt. L. Rev. 21 (1957); Edgerton, "Corporate Criminal Responsibility," 36 Yale L. J. 827 (1927).

[6] U.S.S.G. § 8 (Nov. 1991), 56 Fed. Reg. 22762 (1991).

[7] *Id.*

[8] *Supreme Court:* United States v. Wise, 370 U.S. 405, 82 S.Ct.1354, 8 L.Ed.2d 590 (1962); New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481, 493, 29 S.Ct. 304, 53 L.Ed. 613 (1909).

First Circuit: United States v. Potter, 463 F.3d 9 (1st Cir. 2006); United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982).

Executives are often surprised to learn that the acts of the lowest level employees, acting contrary to expressed directions, may create criminal liability for the corporation.[9] Liability may be imposed on a corporation even if the individual employees involved in the criminal conduct are not indicted.[10] In fact, only two requirements must be met to impute criminal liability of an agent to the corporation. First, the conduct must occur *within the scope of the agent's employment*. Second, the conduct must in some way be undertaken *for the benefit of the corporation*. This rather stern rule reflects the basic notion that a corporation can

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Second Circuit: United States v. Koppers Co., Inc., 652 F.2d 290, 298 (2d Cir.), *cert. denied* 454 U.S. 1083 (1981); Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp.2d 275, 296 (S.D.N.Y. 1998).

Third Circuit: Mininshon v. United States, 101 F.2d 477 (3d Cir. 1939).

Seventh Circuit: United States v. Empire Packing Co., 174 F.2d 16 (7th Cir. 1949).

Ninth Circuit: United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom.* Western International Hotels Co. v. United States, 409 U.S. 1125 (1973).

See generally, 1 Brickey, *Corporate Criminal Liability*, Ch. 3 (2d ed. 1991).

[9] See cases holding that low-level employees may bind a corporation for purposes of imposing criminal liability, e.g.:

Supreme Court: United States v. Illinois Central Railroad, 303 U.S. 239, 58 S.Ct. 533, 82 L.Ed. 773 (1938) (manual laborers; employee whose duty was unloading cattle for carrier).

First Circuit: St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955) (rating clerk).

Second Circuit: United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir.), *cert. denied* 328 U.S. 869 (1946) (salesman).

Fourth Circuit: United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814 (D. Md. 1957) (truck drivers).

Fifth Circuit: Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963) (truck driver).

Seventh Circuit: Zito v. United States, 64 F.2d 772, 775 (7th Cir. 1933) (sales agent).

Eighth Circuit: Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958) (terminal log clerk).

Ninth Circuit: Dollar S.S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939) (manual laborers; crew member emptying garbage); United States v. Wilson, 59 F.2d 97 (W.D. Wash. 1932) (sales manager).

Tenth Circuit: United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295 (10th Cir. 1972) (truck driver); Texas-Oklahoma Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1970) (truck drivers).

See also, United States v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975) (pipe-laying crew consisting of supervisor, foreman, and back hoe operator).

But see, State of Ohio v. Black on Black Crime, Inc., 136 Ohio App.3d 436, 736 N.E.2d 962, 968 (2000) (business entity is guilty of criminal act only if it was approved, recommended or implemented by high managerial personnel who make basic corporate policies).

[10] State of Ohio v. Black on Black Crime, Inc., 136 Ohio App.3d 436, 736 N.E.2d 962, 968 (2000).

act only through the individuals it employs and like all "persons," will be bound by its acts.[11]

[a]—Scope of Authority

The "scope of authority" requirement means that the agent was exercising the duties and authority conferred upon him by his job. It does not mean that the corporation must actually have authorized the agent to commit illegal acts. Indeed, often the agent's acts will have been *ultra vires* and contrary to express authority. Rather, "within the agent's scope of authority" means that the agent must have committed the acts in the course of his ordinary duties. For example, a salesman agreeing with competing salesmen to fix prices, a purchasing agent demanding some form of gratuity from a vendor, or a truck driver dumping a load of waste at an unauthorized site probably will be deemed to be acting within the scope of their authority. The focus is on the function delegated to the employee or agent and whether the conduct falls within that general function.[12] So long as the employee's acts were consistent with his general job function, a corporation may be held liable for those acts, even if they were contrary to express corporate policy.[13]

[b]—Benefit of the Corporation

The "for the benefit of the corporation" requirement means that the agent's acts were intended to benefit the corporation in some way.[14]

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[11] *Id*. See also:

Supreme Court: United States v. Illinois Central Railroad Co., 303 U.S. 239, 244, 58 S.Ct. 533, 82 L.Ed.2d 773 (1938).

First Circuit: United States v. Potter, 463 F.3d 9 (1st Cir. 2006); United States v. Cincotta, 689 F.2d, 238, 241-242 (1st Cir. 1982).

Second Circuit: United States v. DeMauro, 581 F.2d 50, 54 n.3 (2d Cir. 1978).

Ninth Circuit: C.I.T. Corp. v. United States, 150 F.2d 85, 89 (9th Cir. 1945).

[12] See, Brickey, "Corporate Criminal Liability: A Primer for Corporate Counsel," 40 Bus. Lawyer 129, 131 (1984). See also, C.I.T. Corp. v. United States, 150 F.2d 85, 89 (9th Cir. 1945).

[13] See e.g.: United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom*. Western International Hotels Co. v. United States, 409 U.S. 1125 (1973).

[14] See generally:

Supreme Court: New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481, 493, 29 S.Ct. 304, 53 L.Ed. 613 (1909).

First Circuit: United States v. Cincotta, 689 F.2d, 238, 241-242 (1st Cir. 1982).

Second Circuit: United States v. Georgopoulos, 149 F.3d 169, 171 (2d Cir. 1998), *cert. denied* 525 U.S. 1139 (1999); United States v. Jacques Dessange, Inc., 103 F. Supp.2d 701, 706 (S.D.N.Y. 2000), *aff'd* 4 Fed. Appx. 59 (2d Cir. 2001).

Third Circuit: United States v. American Standard Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970).

The benefit to the corporation need not have been the sole reason for the agent's acts nor must the corporation have received some actual benefit.[15] The corporate agent committing the act almost always will receive some direct or indirect personal benefit. For example, increased sales entitling him to a commission or better performance ratings entitling him to a bonus or raise. However, corporate liability cannot be avoided merely because the primary motivation may have been the personal benefit to the agent. So long as the motive includes a direct or ancillary benefit to the corporation—either realized or unrealized—the corporation will be accountable for the agent's acts.[16]

A 1985 Fourth Circuit case illustrates this point.[17] The head of a corporation's compliance office, which was responsible for ensuring compliance with Food and Drug Administration regulations, instructed his employees to falsify and fabricate records to conceal various regulatory deficiencies. The corporation was later indicted and convicted

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Fifth Circuit: United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963); Standard Oil Co. of Texas v. United States, 307 F.2d 120, 128 (5th Cir. 1962).

Sixth Circuit: Trollinger v. Tyson Foods, Inc., 2007 WL 1091217 (E.D. Tenn. April 10, 2007); United States v. Carter, 311 F.2d 934, 941-942 (6th Cir.), *cert. denied* 373 U.S. 915 (1963).

Seventh Circuit: United States v. One Parcel of Land, 965 F.2d 311, 316 (7th Cir. 1992); United States v. One 1997 E35 Ford Van, 50 F. Supp.2d 789, 796 (N.D. Ill. 1999).

Eighth Circuit: Egan v. United States, 137 F.2d 369, 380 (8th Cir.), *cert. denied* 320 U.S. 788 (1943).

Ninth Circuit: Magnolia Motor & Logging Co. v. United States, 264 F.2d 950 (9th Cir.), *cert. denied* 361 U.S. 815 (1959); United States v. Banco Internacional/Bital, 110 F. Supp.2d 1272 (C.D. Cal. 2000).

Tenth Circuit: United States v. Harry L. Young and Songs, Inc., 464 F.2d 1295 (10th Cir. 1972).

District of Columbia Circuit: United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998), *aff'd on other grounds* 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999).

See also, 1 Brickey, *Corporate Criminal Liability*, § 4.02 (2d ed. 1991).

[15] *Fourth Circuit:* Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir.), *cert. denied* 326 U.S. 734 (1945).

Sixth Circuit: United States v. NHML, Inc., 225 F.3d 660 (6th Cir. 2000); United States v. Rhoad, 36 F. Supp.2d 792, 792 (S.D. Ohio 1998).

Ninth Circuit: United States v. Beusch, 596 F.2d 871, 877-878 (9th Cir. 1979).

Eleventh Circuit: United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984), *cert. denied* 469 U.S. 1217 (1985).

[16] See, e.g., United States v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1998), *aff'd on other grounds* 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999) (finding corporate liability even though the employee's scheme "came at some cost to [the corporation]" because it "also promised some benefit"). See also: 1 Brickey, *Corporate Criminal Liability*, § 4.02 (2d ed. 1991); Burgess and Stein, "Carrots, Sticks and Criminal Penalties," Arizona Attorney, p. 32 (Feb. 2001).

[17] United States v. Automated Medical Laboratories, 770 F.2d 399 (4th Cir. 1985).

for regulatory violations. On appeal, the corporation argued that the head of the compliance office instigated the unlawful practices to benefit himself, not the corporation, citing the manager's ambitious nature and desire to ascend the corporate ladder. The court rejected this argument, noting that the manager "was clearly acting in part to benefit [the corporation] since his advancement within the corporation depended on [the corporation's] well-being and its lack of difficulties with the FDA."[18]

Given the broad inclusiveness of the "for the benefit of the corporation" requirement, it may be properly read as a limitation on corporate liability only when the corporate agent is unfaithful to the corporation in acting to advance the interests of a party other than the corporation.[18.1] A Fifth Circuit case is instructive.[19] Two corporations, Standard Oil of Texas and Pasotek, were charged with violating a law regulating the transportation and production of oil. The employees of these corporations were engaged in a secret scheme with another corporation, Thompson, which involved their falsification of certain records of their employers in order to allow Thompson to circumvent certain limitations on its oil production and transportation activities. The Fifth Circuit held that Standard Oil of Texas and Pasotek could not be held liable for the acts of their employees which were committed with an intent to benefit only Thompson and the employees themselves, even though the employees did so while ostensibly carrying out their duties for Pasotek and Standard Oil.[20]

Professor Brickey, the author of the treatise *Corporate Criminal Liability*, has concluded that the "for the benefit of the corporation" requirement merely is an extension of established principles of agency law.[21] To the extent that a corporation hires someone who chooses to act outside the law, albeit without authorization and with personal gain as the prime motivating factor, the corporation can be held responsible so long as the employee intended her act would result in some potential benefit to the corporation. In general, when the act is not undertaken for any conceivable corporate benefit, the corporation may avoid

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18 *Id.*, 770 F.2d at 407. See also:

Fourth Circuit: United States v. Maryland Home Health Services, 95 F. Supp.2d 465, 469 (D. Md. 2000).

Sixth Circuit: United States *ex rel*. Shackleford v. American Management, Inc., 484 F. Supp.2d 669 (E.D. Mich. 2007).

18.1 See:

Fifth Circuit: United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966).

Ninth Circuit: United States v. Banco Internacional/Bital, 110 F. Supp.2d 1272 (C.D. Cal. 2000).

19 Standard Oil Co. of Texas v. United States, 307 F.2d 120 (5th Cir. 1962).

20 *Id.*, 307 F.2d at 128-129.

21 1 Brickey, *Corporate Criminal Liability* § 4.02 (2d ed. 1992).

liability. For example, the Seventh and Eleventh circuits have applied the "innocent owner" defense in similar cases involving forfeiture suits by the government against family-owned businesses. In both cases one co-owner/employee conducted drug-trafficking activities on the corporation's property without the knowledge of the other co-owners.[22] Both circuit courts reversed district court summary judgments, holding that the corporation's land could not be forfeited by the government "where a corporate employee engages in criminal activity outside the scope of his employment, with no benefit accruing to the corporation, and such activity was without the knowledge of the other shareholders."[22.1]

A more difficult case is presented where an employee conducts illegal activities within the scope of his employment for personal gain and without any apparent concern for whether the company is benefited or harmed by his acts. For example, a California district court considered a case where a bank employee who laundered money through his employer was unwittingly cooperating with undercover government agents. The government attempted to impute the individual employee's actions to the bank. The court found no evidence of the employee's intent to benefit the corporation and dismissed the government's civil penalty action against the bank on summary judgment.[22.2]

Similarly, in line with its decision in *Standard Oil*, the Fifth Circuit ruled that two defendant banks should not be liable, and subject to a government forfeiture action, for the submission of falsified FHA loan applications by a rogue employee.[22.3] The court reasoned that the employee falsified the loan applications for personal gain, and could not have been acting for the benefit of the corporation because he "must have known that the loans he approved would be defaulted, so that the banks would not make any money on interest on the loans."[22.4] Furthermore, the Fifth Circuit determined the employee's actions "endangered the bank's ability to continue to handle FHA business

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[22] See:

Seventh Circuit: United States v. One Parcel of Land, 965 F.2d 311 (7th Cir. 1992).

Eleventh Circuit: United States v. Route 2, Box 472, 136 Acres More or Less, 60 F.3d 1523 (11th Cir. 1995).

[22.1] United States v. Route 2, Box 472, 136 Acres More or Less, 60 F.3d 1523, 1523 (11th Cir. 1995). See also:

Seventh Circuit: United States v. One Parcel of Land, 965 F.2d 311, 316 (7th Cir. 1992).

Eighth Circuit: United States v. Real Property Located at 3238 Washington Ave., North Minneapolis, Minnesota, 480 F.3d 841 (8th Cir. 2007).

[22.2] United States v. Banco Internacional/Bital, 110 F. Supp.2d 1272 (C.D. Cal. 2000).

[22.3] United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966).

[22.4] *Id.*, 357 F.2d at 498.

and jeopardized the reputation of the banks and their financial integrity."[22.5]

In sum, a corporation realizing that an employee has committed a criminal act within the scope of his employment faces an uphill battle where the government elects to indict the corporation. Most courts will consider minor or ancillary benefits to the corporation to be sufficient to impute an individual's criminal intent to the entity. However, the corporation may argue that the employee's intent was to benefit himself and not his employer and emphasize the employee's personal benefit. Any direct or indirect harm the employee knew the corporation would incur as a result, either at that time or in the future, may persuade the government not to charge the entity.[22.6] One can best bolster declination of a corporation by showing that it was in fact the victim of the employee's acts, such as in an embezzlement.

[3]—Federal Prosecution of Corporations

In 1999 the Department of Justice issued a formal policy, *Federal Prosecution of Corporations*,[23] to provide guidance to federal prosecutors on what factors they should consider when deciding whether to charge a corporation. The policy parallels much of the criteria for prosecuting individuals outlined by the department in its 1980 *Principles of Federal Prosecution*.[24] Under the corporate prosecutions policy, prosecutors should use sound exercise of prosecutorial judgment weighing all of the relevant factors including: (1) sufficiency of evidence, (2) likelihood of success at trial, (3) the probable deterrent, (4) rehabilitative and other consequences of conviction, and (5) the adequacy of non-criminal approaches.

Due to the nature of the corporate entity, some additional factors are present. Thus, in 2003, the principles embodied in the Department of Justice's 1999 policy were supplemented in the "Thompson Memorandum," named after then Deputy Attorney General Larry Thompson. The Thompson Memorandum in turn was partially superseded in 2006 by a memorandum from then Deputy Attorney General Paul J. McNulty, and by a 2008 policy issued by then Deputy Attorney General Mark Filip.[25] These documents (discussed further in Chapter 16),

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[22.5] *Id*.

[22.6] See Tigar, "It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law," 17 Am. J. Crim. L. 211, 227-229 (1989-1990).

[23] See Appendix K *infra*.

[24] See Appendix F *infra*.

[25] See Appendices H and L *infra*.

collectively explain that prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

(1) The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

(2) The pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management;

(3) The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;

(4) The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

(5) The existence and adequacy of the corporation's compliance program;

(6) The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

(7) Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable;

(8) the adequacy of prosecution of individuals responsible for the corporation's misconduct; and

(9) The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.

The policy includes commentary on each of these nine factors which defense counsel may be able to use or may need to rebut.

As noted above, in 2008 the Department of Justice once again issued new guidance revising its corporate charging principles for federal prosecutors. Though it exhibits significant overlap with both the 1999 policy and the Thompson and McNulty Memoranda, the 2008 guidelines made several changes. Perhaps the most significant change concerns the effect on prosecutors' charging decisions of a company's waiver (or refusal to waive) the attorney-client privilege and work product protection.

The Thompson Memorandum had explicitly allowed prosecutors to consider a company's decision whether to waive the privilege in making charging decisions. The Memorandum also empowered prosecutors to consider a company's willingness to advance attorneys fees and provide counsel to its employees as a factor weighing in favor of indicting the company.[26] These provisions generated a great deal of criticism both from business interests and civil liberties groups. In a much discussed 2006 decision, discussed in further detail in Chapter 16, the Southern District of New York held that the Government had violated the Fifth and Sixth Amendment rights of several defendants by causing their company "to depart from its prior practice of paying the legal expenses of [company] personnel in all cases in which they were sued in consequence of their activities on behalf of the firm."[27] Attempting to address the Thompson Memorandum's perceived shortcomings, the McNulty Memorandum clarified that "[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation" and that "[p]rosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations."[28] This memorandum also set forth a number of procedural steps prosecutors were required to take prior to requesting a company's waiver of the privilege.[29]

The 2008 guidance went a step further by making clear that cooperation credit *should not* depend on the waiver of attorney-client privilege, but only on the extent to which the corporation discloses relevant facts to authorities.[30] The new guidance also provides that, in deciding whether to assign corporation credit, prosecutors may not consider whether a corporation has punished or retained culpable employees, or whether a corporation has advanced attorney's fees to employees.[31]

As with *The Principles of Federal Prosecution* of 1980, the foregoing factors are intended to provide guidance rather than to mandate a particular result. These factors are meant to be illustrative of those

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[26] See generally, United States v. Stein, 435 F. Supp.2d 330, 338 (S.D.N.Y. 2006), *aff'd* 541 F.3d 130 (2d Cir. 2008).

[27] *Id.*, 435 F. Supp. 2d at 394.

[28] See Appendix H *infra*.

[29] *Id.*

[30] See Appendix L *infra*.

[31] *Id.*

that should be considered and do not constitute a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. Furthermore, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others.

The Department of Justice policy also provides that in negotiating plea agreements with corporations, federal prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the policy states that prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

(Text continued on page 1-13)

§ 1.03 Imputing the Acts of Agents to the Corporation

The modern day corporation usually has many agents carrying out a wide array of duties. The improper acts of any of these agents can conceivably cause a corporation to be held criminally accountable. Thus, precisely whose conduct may be imputed to a corporation is really a function of the limits of the law of agency.[1] However, in general, the types of agents whose conduct might create liability for the corporation may be categorized as follows: individuals directly associated with the corporation, i.e., directors, officers, employees; subsidiaries; and independent contractors.

[1]—Directors, Managers and Employees as Agents of the Corporation

Courts have held that the conduct of all individuals associated directly with a corporation can be attributable for purposes of assessing criminal liability against the corporation. Because officers and directors sit atop the corporate hierarchical pyramid, it is easy to understand how their acts can be imputed to the corporation. In essence, these people are the corporation's alter ego. More than any other agents, they embody the corporation. Accordingly, courts have found that a wide array of acts of directors and officers have been sufficient to hold the corporation liable. For example, courts have imputed corporate liability when a president instructed various employees to collect kickbacks from prospective purchasers;[2] when an officer made unlawful payments to union officials;[3] when officers falsified invoices submitted to various governmental bodies in connection with federal construction projects;[4] when officers of a nonprofit corporation used funds to buy automobiles for their personal use and pay personal bills and expenses;[5] and when a bank's chairman, president and vice-president acquiesced

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[1] See, e.g.:

Second Circuit: In re Parmalat Securities Litigation, 375 F. Supp.2d 278 (S.D.N.Y. 2005); Suez Equity Investors, L.P. v. Toronto Dominion Banks, 250 F.3d 87 (2d Cir. 2001).

Sixth Circuit: Sipes v. Kinetra, L.L.C., 137 F. Supp.2d 901 (E.D. Mich. 2001).

[2] United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.), *cert. denied* 337 U.S. 959 (1949), *abrogated on other grounds* United States v. Raether, 82 F.3d 192 (9th Cir. 1996).

[3] United States v. Carter, 311 F.2d 934, 942 (6th Cir.), *cert. denied* 373 U.S. 915 (1963).

[4] United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983).

[5] State of Ohio v. Black on Black Crime, Inc., 136 Ohio App.3d 436, 736 N.E.2d 962 (2000).

to a plan to defraud the United States through the filing of false Currency Transaction Reports.[6]

The acts of non-executive middle managers and supervisors also can be used to hold the corporation criminally liable. Although the Model Penal Code would limit the liability of the corporation to acts performed, authorized, or recklessly tolerated by the Board of Directors or a high managerial agent acting on behalf of the corporation,[7] this view has been soundly rejected by the courts. Based on the previously discussed fundamental principals of accountability, courts have refused to recognize any limitation of liability based on job title or description. The focus, again, is on the agent's authority. Thus, courts have found a variety of acts done by supervisors and middle managers sufficient to hold a corporation criminally liable. For example, courts have imputed corporate liability when a branch manager of a motion picture company willfully and contumaciously violated an antitrust consent decree;[8] when a mid-level manager coordinated bid rigging and customer allocation practices between two companies in violation of the Sherman Act;[9] when a sporting goods store manager knowingly made false entries on firearm sales forms, despite the specific instructions from the corporation's president not to make such false entries;[10] and when managers responsible for a corporation's compliance with Food and Drug Administration regulations instructed other employees to falsify and fabricate records to conceal violations.[11]

It logically follows that the acts of even the lowest level employees of a corporation may also be imputed to the corporation, provided they occur within the scope of the employee's authority. Therefore, courts have imputed corporate liability when clerical employees of a

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[6] United States v. LBS Bank-New York, Inc., 757 F. Supp. 496 (E.D. Pa. 1990).

[7] Model Penal Code § 2.07 (1) (Proposed Official Draft 1962). See Mueller, "*Mens Rea* and the Corporation, A Study of the Model Penal Code Position on Corporate Criminal Liability," 19 U. Pitt. L. Rev. 21 (1957).

[8] United States v. Twentieth Century-Fox Film Corp., 700 F. Supp. 1246 (S.D.N.Y. 1988), *aff'd in part, vacated in part on other grounds* 882 F.2d 656 (2d Cir. 1989), *cert. denied* 493 U.S. 1021 (1990).

[9] United States v. Koppers Co., Inc., 652 F.2d 290 (2d Cir.), *cert. denied* 454 U.S. 1083 (1981) (expressly declining the invitation to limit the imputation of criminal liability to "high managerial agents"); Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp.2d 275, 296 (S.D.N.Y. 1998).

[10] United States v. Gibson Products Co., Inc., 426 F. Supp. 768 (S.D. Tex. 1976).

[11] United States v. Dizelos, 217 F.3d 841 (4th Cir. 2000), *cert. denied* 532 U.S. 976 (2001); see also: United States v. Automated Medical Laboratories, Inc., 770 F.2d 399 (4th Cir. 1985); United States v. Southern Maryland Home Health Services, 95 F. Supp.2d 465, 469 (D. Md. 2000).

retail eyewear chain conspired to falsify Medicare claims;[12] when a hotel chain's local purchasing agent participated in a boycott violative of the Sherman Act, even though such actions were contrary to general corporate policy and express instructions to the employee;[13] when a salesman for a car dealership obtained automobile loans for customers by misrepresenting financial information submitted to a bank;[14] and when bid rigging activities in state road paving contracts were perpetrated by two lower level employees without the knowledge of any corporate officers, and despite a longstanding corporate policy against such activities.[15]

[2]—Subsidiaries as Agents of the Corporation

The general rules governing corporate liability also may apply when the agent is a division or subsidiary of the corporation.[16] This holds true even though a corporation may have acquired the subsidiary after the illegal conduct had begun.[17] Once the parent acquires the subsidiary, it has an obligation to supervise its conduct and assure that it complies with all applicable law. Accordingly, criminal liability of the subsidiary can be imputed to the parent from the time of the acquisition forward. This is particularly relevant in light of the frenzy toward corporate mergers and acquisitions.

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[12] See, e.g.:

Sixth Circuit: United States v. NHML, Inc., 2000 WL 125868 (6th Cir. Jan. 28, 2000).

Eleventh Circuit: United States v. Gold, 743 F.2d 800 (11th Cir. 1984), *cert. denied* 469 U.S. 1217 (1985).

[13] United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom.* Western International Hotels Co. v. United States, 409 U.S. 1125 (1973).

[14] Commonwealth v. Duddie Ford, Inc., 28 Mass. App. 426, 551 N.E.2d 1211 (1990), *aff'd in part, rev'd in part* 409 Mass. 387, 566 N.E.2d 1119 (1991).

[15] United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983), *cert. denied* 464 U.S. 956 (1983) (rejecting the argument that the prosecution needs to prove "that the corporation, presumably as represented by its upper level officers and managers, had an intent separate from that of its lower level employees to violate the antitrust laws"). But see, R.E. Davis Chemical Corp. v. Nalco Chemical Co., 757 F. Supp. 1499 (N.D. Ill. 1990) (vicarious liability may be imposed upon a corporate defendant under 18 U.S.C. § 1962(a) [RICO] only if the corporation, through its upper level employees or officers, knew of and acquiesced in the racketeering conduct of its lower level employees). See also: Touhy v. Northern Trust Bank, 1999 WL 342700 (W.D. Ill. May 14, 1999); American Auto Accessories v. Fishman, 991 F. Supp. 982, 993 (N.D. Ill. 1998), *aff'd* 175 F.3d 534 (7th Cir. 1999).

[16] *Third Circuit:* United States v. Johns-Manvill Corp., 231 F. Supp. 690 (E.D. Pa. 1963).

Tenth Circuit: United States v. Wilshire Oil Co., 427 F.2d 969 (10th Cir.), *cert. denied* 400 U.S. 829 (1970).

[17] See, e.g., United States v. Wilshire Oil, 427 F.2d 969 (10th Cir.), *cert. denied* 400 U.S. 829 (1970).

Courts have also found a parent liable for crimes of a subsidiary based on what is sometimes called the "mere instrumentality" theory.[18] Under this theory, "a parent corporation may be held liable for its subsidiary's conduct when the parent uses a separate forum to defeat public convenience, justify a wrong, commit fraud, or defend crime."[19] Courts adopting this approach look to whether the subsidiary is a "mere instrumentality" of the parent which does not truly merit separate treatment given the intertwined nature of their operations.[20] There is nothing truly revolutionary in this concept. Some might see it merely as an extension of the general doctrine allowing for "piercing of the corporate veil." Nonetheless, some courts have recognized it as a separate basis for the imposition of liability on a parent based on the conduct of a subsidiary.

In other cases in which the corporate form is given greater respect, courts have looked to whether the parent played some type of active role in the affairs of the subsidiary which gave rise to the criminal charges. This seems to be a question of degree. For example, in upholding the imposition of liability on a parent, one court focused on the fact that a parent's representatives reviewed and approved safety practices and regularly inspected plant premises.[21] In contrast, another court refused to find a parent liable based on its mere receipt of reports concerning the subsidiary's safety practices.[22]

[3]—Independent Contractors as Agents of the Corporation

Courts have held that agency relationships as distinct as that of principal and independent contractor can still be sufficient to impute criminal liability from the agent to the corporation. For example, in one case, a corporation was held liable when its independent contractor violated the Food, Drug and Cosmetic Act by failing to properly place finished goods in appropriately labeled containers.[23] The court held

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[18] *Eighth Circuit:* National Dairy Products Corp. v. United States, 350 F.2d 321, 325 (8th Cir. 1965).

State Courts:

Alaska: Jackson v. General Electric Co., 514 P.2d 1170, 1173 (Alaska 1973).

[19] Volkswagen Werk, A. G. v. Klippan, 611 P.2d 498, 505 (Alaska 1977). See also: Casciola v. F.S. Air Service Inc., 120 P.3d 1059 (Alaska 2005); Nerox Power Systems, Inc. v. M-B Contracting Co., 54 P.3d 791 (Alaska 2002); Parker v. Department of Revenue, Child Support Enforcement Division *ex rel*. R.A.W., 960 P.2d 586, 587 (Alaska 1998).

[20] *Id*.

[21] Johnson v. Abbe Engineering, 749 F.2d 1131 (5th Cir. 1984); see also, Merrill *ex rel*. Estates of Merrill v. Arch Coal, Inc. 118 Fed. Appx. 37 (6th Cir. 2004).

[22] Pomales v. Becton Dickinson & Co., S.A., 839 F.2d 1 (1st Cir. 1988).

[23] United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1947), *cert. denied* 332 U.S. 851 (1948).

the principal corporation criminally liable for this mislabeling because it delegated its authority to the contractor to perform that task and received the benefit of the contractor's acts. Accordingly, a corporation will be held accountable for acts committed by an independent contractor within the scope of authority provided to the contractor to accomplish the ends of the principal corporation.

[4]—Successor Corporate Criminal Liability

Although prosecutions are infrequent, a successor corporation may be held liable for the criminal acts of its predecessor corporation. Corporate clients considering mergers, acquisitions or asset purchases should be informed of the risks of successor criminal liability and instructed on how to minimize them.[24] The foundation for successor corporate criminal liability was laid by the Supreme Court in the 1959 case of *Melrose Distillers, Inc. v. United States*.[25] In *Melrose Distillers*, two corporations were indicted for price-fixing violations. After the indictment, the corporations dissolved themselves and merged into their parent corporation. The corporations then sought dismissal of the charges, arguing that because the corporations no longer existed they could not be prosecuted. The Supreme Court held that despite their dissolution, the corporations' lives continued under state law for purposes of prosecution.[26] Although *Melrose* was specific to post-indictment dissolutions, some courts have extended the holding to predecessor corporations dissolved or merged before charges have been filed against them,[27] and to successor corporations that were not parents of the corporations they acquired.

In *United States v. Polizzi*,[28] the Ninth Circuit addressed the issue of whether a corporation could be prosecuted for violations of federal law committed by a predecessor corporation. The governing New York statute provided that after a merger or consolidation, "[t]he surviving or consolidated corporation shall assume and be liable for all of the liabilities, obligations and penalties of each of the constituent corporations."[29] Although the statute did not specifically address criminal

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[24] For a discussion of minimizing the risks associated with corporate successor criminal liability, see Villa, "Overseeing Corporate Criminal Investigation and Litigation Analysis," 2 *Corporate Counsel Guidelines*, 5.36 (2005 ed.).

[25] Melrose Distillers, Inc. v. United States, 359 U.S. 271, 79 S.Ct. 763, 3 L.Ed.2d 800 (1959).

[26] *Id.*, 359 U.S. at 272.

[27] See: United States v. Mobile Materials, Inc., 776 F.2d 1476 (10th Cir. 1985); United States v. Arcos Corp., 234 F. Supp. 355 (N.D. Ohio 1964).

[28] United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974).

[29] N.Y. Bus. Corp. Law § 906(b)(3) (McKinney 1963, Consol. Laws, c.4).

liability, the Ninth Circuit held that it could be inferred from the legislature's use of the words "liability," "obligation" and "penalty," thereby permitting "the maintenance of a prosecution against the surviving corporation for crimes allegedly committed by a constituent organization."[30]

Similarly, the Fifth Circuit in *United States v. Alamo Bank of Texas* upheld the conviction of a successor bank for criminal acts committed by its predecessor.[31] The *Alamo* defendant was a state bank that recently merged with CNB, a national bank. Several years before the merger, CNB violated federal law by failing to report certain transactions. The district court convicted the state bank even though the violations were based on CNB pre-merger activities. On appeal, the state bank argued that it could not be criminally liable for acts committed by CNB when it was a separate entity. The Fifth Circuit disagreed and upheld the successor corporation's conviction. In evaluating the issue, the Fifth Circuit determined that the federal bank merger statute controlled.[32] Under this statute, when a national bank merges or consolidates with a state bank, "the resulting State bank shall be considered the same business and corporate entity as the national banking association. . . ."[33] The Fifth Circuit held that "CNB continues to exist, albeit now as part of [the state bank]." Thus the state bank "is CNB, and it is CNB now named Alamo which is responsible for CNB's actions and liabilities, including criminal responsibility."[34]

Corporations considering any type of restructuring should take successor criminal liability into account and conduct due diligence to determine if the company to be acquired or merged with has any past or potential criminal liability. Voluntary disclosure to regulators or to the DOJ and remedial measures may stave off criminal charges. In addition, in-house and outside counsel working with a corporate client must review both federal and state law to determine the extent of successor liability as it may differ from jurisdiction to jurisdiction and industry to industry.

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[30] *Polizzi*, 500 F.2d at 908.

[31] United States v. Alamo Bank of Texas, 880 F.2d 828 (5th Cir. 1989).

[32] The district court convicted the defendants based on a Texas statute which states "the resulting bank shall be deemed a continuation in entity and identity of each of the banks involved in the merger; shall be subject to all the liabilities, obligations, duties and relations of each merging bank. . . ." *Id.* at 829. See also, Tex. Rev. Civ. Stat. Ann. Art. 342-308.

[33] 12 U.S.C. § 214(b).

[34] *Alamo*, 880 F.2d at 830.

§ 1.04 Imputing Liability Through the Acts of the Organization as a Whole Rather than Through the Acts of a Particular Agent

Often when a crime occurs, it is difficult, if not impossible, to prove that any single agent of a corporation acted with the intent to commit the offense or even had knowledge of all the operative facts constituting the offense. Under the previously discussed principles of corporate criminal liability, it would seem that a corporation could not be held criminally accountable in such circumstances. However, courts have used the judicially created "collective knowledge doctrine" to impute a "knowing state of mind" and impose liability in such instances. Under this doctrine, it is possible to hold a corporation accountable for crimes requiring a given mental state even if no single agent is responsible and could be prosecuted individually.[1] A corporation's general knowledge will be imputed based on distinct specific facts, none themselves sufficient to constitute general knowledge, known by individual employees. Just as the acts of a corporation's various agents are considered to be those of a single actor, the cumulative knowledge of several agents may be imputed to the corporation, even if no single corporate agent knows all the facts.[2]

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[1] See, e.g.:

First Circuit: United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir. 1987).

Fourth Circuit: United States v. T.I.M.E.—D.C., Inc., 381 F. Supp. 730, 740-741 (W.D. Va. 1974).

Sixth Circuit: Peoples State Bank v. American Casualty Co. of Reading, Pennsylvania, 818 F. Supp. 1073 (E.D. Mich. 1993).

Eighth Circuit: United States v. Sawyer Transportation, Inc., 337 F. Supp. 29 (D. Minn. 1971), *aff'd* 463 F.2d 175 (8th Cir. 1972).

State Courts:

Georgia: Gem City Motors, Inc. v. Minton, 109 Ga. App. 842, 137 S.E.2d 522 (1964); see also, Graphic Arts Mutual Insurance Co. v. Pritchett, 220 Ga. App. 430, 469 S.E.2d 199 (1995).

Hawaii: Daiichi Hawaii Real Estate Corp. v. Lichter, 103 Hawai'i 325, 82 P.3d 411 (Haw. 2003).

Michigan: Upjohn Co. v. New Hampshire Insurance Co., 438 Mich. 197, 476 N.W.2d 392 (1991); Groidon Sel-Way, Inc. v. Spence Brothers, 177 Mich. App. 116, 440 N.W.2d 907, 909 (1989); People v. American Medical Centers of Michigan, Ltd., 118 Mich. App. 135, 324 N.W.2d 782 (1982), *cert. denied sub nom.* Fuentes v. Michigan, 464 U.S. 1009 (1983).

See 1 Brickey, *Corporate Criminal Liability*, § 4.05 (2d ed. 1992).

[2] *Second Circuit:* First Equity Corp. v. Standard & Poor's Corp., 690 F. Supp. 256, 260 (S.D.N.Y. 1988), *aff'd* 869 F.2d 175 (2d Cir. 1989).

Fifth Circuit: Gutter v. E.I. dupont de Nemours, 124 F. Supp.2d 1291, 1309 (S.D. Fla. 2000).

United States v. Bank of New England is the leading case applying the collective knowledge doctrine.[3] The case involved a prosecution for violations of the Currency and Foreign Transactions Reporting Act,[4] which requires banks to file Currency Transaction Reports (CTRs) within fifteen days of customer currency transactions exceeding $10,000. The bank was charged with violating the Act by failing toreport thirty-one separate transactions in which a single customer withdrew more than $10,000 in cash. The customer made these withdrawals by presenting multiple counter checks, each in an amount less than $10,000 but together totaling over $10,000, to tellers on thirty-one occasions.

As part of its defense, the bank argued that to prove that it acted willfully, with knowledge, the government was required to show that the employees responsible for filing the CTRs had actual knowledge of the transactions and failed to report them. The bank argued that willful failure to file could not be shown if all the government could prove was that the bank maintained a poor communications network that prevented the consolidation of information held by its various employees. In other words, it contended that the negligent failure to compile all relevant information with a single source with responsibility for reporting could be a defense to that source's failure to report.

The district court rejected the bank's arguments concerning knowledge and instructed the jury, "You have to look at the Bank as an institution. As such, its knowledge is the sum of the knowledge of all its employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment."[5] The First Circuit affirmed this instruction, acknowledging the realities of modern corporate organizational structure. It reasoned, "corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation."[6] The court commented

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[3] United States v. Bank of New England, 821 F.2d 844 (1st Cir.), *cert. denied* 484 U.S. 943 (1987). See also:

Second Circuit: In re Worldcom, Inc. Securities Litigation, 352 F. Supp.2d 472, 497 (2d Cir. 2005).

Eighth Circuit: Riss & Co. v. United States, 262 F.2d 245, 250 (8th Cir. 1958).

Ninth Circuit: Kern Oil and Refining Co. v. Tenneco Oil Co., 792 F.2d 1380, 1396-1387 (9th Cir. 1986), *cert. denied* 480 U.S. 906 (1987).

[4] 31 U.S.C. §§ 5311-5322.

[5] United States v. Bank of New England, N. 2 *supra*, 821 F.2d at 855.

[6] *Id.*, 821 F.2d at 856.

that in light of the complexities of the operations of modern corporations, a collective knowledge instruction like that given by the district court is "not only proper but necessary."[7]

In considering the collective knowledge doctrine, it is important to keep in mind that it applies to a corporation's knowledge and not necessarily its specific intent. Courts have held that specific intent (for example, an intent to defraud or an intent to join a conspiracy) cannot be aggregated from multiple individuals to prove a corporation's intent.[8] Thus, the government must still prove that at least one agent of the corporation had the requisite specific intent when the corporation is charged with a specific intent crime.

With the development of the collective knowledge doctrine, the law has begun to view the corporation as an entity, responsible for acts made possible only through unrelated "sub-acts" of its employees, rather than as a principal whose culpability is assessed under agency concepts. At least one commentator has noted that in some instances the entire concept of corporate criminal responsibility—including the issue of specific intent—might be better assessed from the perspective of the organization as a whole rather than through the acts of any single agent.[9] For example, in prosecutions for crimes such as deaths arising out of industrial accidents, improper product design, or improper operation of facilities open to the public, it may be better to

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[7] *Id*. See also:

First Circuit: United States v. Osorio, 929 F.2d 753 (1st Cir. 1991).

Eleventh Circuit: United States v. Cable News Network, 865 F. Supp. 1549 (S.D. Fla. 1994).

[8] *First Circuit:* United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1992).

Second Circuit: First Equity Corp. of Florida v. Standard & Poor's Corp., 690 F. Supp. 256, 259-260 (S.D.N.Y. 1988), *aff'd* 869 F.2d 175 (2d Cir. 1989).

Third Circuit: In re Tyson Foods, Inc. Securities Litigation, 2004 WL 1396269 (D. Del. June 17, 2004); United States v. LBS Bank-New York, Inc., 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990).

Fifth Circuit: Southland Securities Corp. v. Inspire Insurance Solutions, 365 F.3d 353 (5th Cir. 2004); Louisiana Power & Light v. United Gas Pipe Line, 642 F. Supp. 781, 803 (E.D. La. 1986).

Ninth Circuit: United States v. Fiorillo, 186 F.3d 1136 (9th Cir. 1999); United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998).

Eleventh Circuit: Gutter v. E.I. Dupont de Nemours, 124 F. Supp.2d 1291, 1311 (S.D. Fla. 2000) (knowledge necessary to form fraudulent intent must be possessed by at least one agent and cannot be imputed to corporation based on disconnected facts known by different agents).

District of Columbia Circuit: United States v. Phillip Morris U.S.A., Inc., 449 F. Supp.2d 1 (D.D.C. 2006).

[9] See First, *General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers, White Collar Crime* Ch. 5 (1989).

focus on the corporation as an organization rather than as an entity acting through individuals. Under this view, the decision about whether to impose criminal liability will be based on what the organization has done to give rise to the improper behavior rather than on the improper behavior itself. The factors most likely to be considered will be: (1) whether the organization positioned an employee in a place of responsibility which allowed the improper acts to occur; and (2) whether the organization maintained standard operating procedures which allowed the improper acts to occur.[10] The argument is that such an organizational approach to liability will encourage corporations to do all they can to prevent fatal injuries. Although the theory seems better suited to the imposition of civil rather than criminal liability under traditional concepts of accountability, it is consistent with the trend toward viewing the corporation as an *entity*.

The collective knowledge and organizational theories for imposing liability are evolving and may likely create new situations for criminal prosecutions of corporations in the future.

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[10] *Id*. See also, Lipman, "The Responsible Corporate Officer Doctrine and Environmental Criminal Enforcement," in National Institute on White Collar Crime, Section of Criminal Justice, American Bar Ass'n, 187 (March 5-6, 1992).

§ 1.05 Liability of the Corporation for Employees Acting Contrary to Express Corporate Policy

One of the ways a corporation may discourage unlawful conduct by employees and mitigate its potential sentence if convicted, is to establish and enforce a compliance program which may include strict directives prohibiting certain conduct. The existence of such a program might also be used by a defense lawyer in an effort to dissuade a prosecutor from exercising the discretion to indict a corporation in a particular case. However, as a rule, the existence of a corporate compliance program and specific directives to employees will not, as a matter of law, preclude a corporation from being held criminally liable for the acts of an employee taken in direct contravention to the company's compliance program and directives.[1] Although this may seem "unfair," public policy considerations do support the rule.

The general rationale advanced for imposing liability, notwithstanding a corporation's precautionary measures and instructions to employees, is that criminal laws prohibit and forbid certain acts. In general, those acts pose a serious threat to the public well being. If the fact that a corporation took due care to attempt to prevent the crime could be an absolute defense, the criminal law in question would be changed from one of prohibition to merely one requiring due care. This would leave the public without the degree of protection intended by the drafters of the law. Moreover, for the corporation to be held liable, the agent must still be found to have acted within the authority and for the benefit of the corporation. Thus, it seems less "unfair" to penalize the corporation that stood to benefit and chose to employ the agent.

United States v. Hilton Hotels Corp.,[2] a leading case on this issue, is illustrative. The case involved the indictment of a corporation based upon a purchasing agent's threat that a supplier would lose the hotel's business unless it paid a trade association assessment. The corporation had twice instructed the employee not to grant preferential treatment

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[1] *First Circuit:* United States v. Potter, 463 F.2d 9 (1st Cir. 2006).

Second Circuit: United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989), *cert. denied* 493 U.S. 1021 (1990).

Third Circuit: United States v. Universal Rehabilitation Services, Inc., 1996 WL 297575 (E.D. Pa. May 31, 1996).

Fourth Circuit: United States v. Basic Construction Co., 711 F.2d 570 (4th Cir.), *cert. denied* 464 U.S. 956 (1983).

Fifth Circuit: United States v. Gibson Products Co., Inc., 426 F. Supp. 768 (S.D. Tex. 1976).

Ninth Circuit: United States v. Beusch, 596 F.2d 871 (9th Cir. 1979).

[2] United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); Federal Trade Commission v. Garvey, No. 2001 U.S. Dist. LEXIS 25060 (C.D. Cal. Nov. 7, 2001).

to suppliers who had paid the assessment and the employee admitted that he knowingly violated those instructions based on personal animosity toward the supplier. The Ninth Circuit, in affirming the corporation's conviction, reasoned that in light of the importance of the Sherman Act to business regulation, the imposition of criminal liability on the corporation was not unfair and was consistent with traditional principles of liability.[3] The court noted that notwithstanding the instructions issued to the employee, the corporation chose to continue to employ him, had not created a mechanism to enforce those instructions, and stood to benefit from his conduct. It found that the employee's authority within the company placed him in a position to involve the corporation in this activity and therefore it seemed logical that the corporation that placed him in this position could be held accountable for his acts.[4]

Although the overwhelming weight of federal authority follows this holding, there is some limited authority which indicates that in some circumstances the existence of explicit directives which the agent violated might be a defense. In one case a corporation was indicted as being in violation of wartime regulations when it replaced a furnace that could have been repaired.[5] The sale occurred based on dishonest representations by the salesman concerning the irreparability of the homeowner's furnace. The court considered the substantial evidence, however, of a strict compliance policy involving periodic issuance of bulletins and discussions with salesmen who were warned to stay strictly within the bounds of the regulations and if they failed to do so they would be summarily fired. The court noted the "emphatic admonition of the corporation to its agents" and held that it would not impose liability "on the facts of [that] case."[6] While this case is a

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[3] FTC v. Hilton Hotels, 467 F.2d at 1005-1006. See also, United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989).

[4] *Id.* See Note, "Corporate Criminal Liability for Acts in Violation of Company Policy," 50 Geo. L.J. 547 (1962). See also:

Second Circuit: United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660-661 (2d Cir. 1989); United States v. Vulpis, 807 F. Supp. 284 (S.D.N.Y. 1991), *aff'd sub nom.* United States v. Paccione, 964 F.2d 1269 (2d Cir. 1992).

Fifth Circuit: United States v. Cadillac Overall Supply Co., 568 F.2d 1078 (5th Cir.), *cert. denied* 437 U.S. 903 (1978); United States v. Thompson-Powell Drilling Co., 196 F. Supp. 571, 574 (N.D. Tex. 1961), *rev'd by* Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962).

Sixth Circuit: Continental Baking Co. v. United States, 281 F.2d 137, 151 (6th Cir. 1960).

[5] Holland Furnace Co. v. United States, 158 F.2d 2 (6th Cir. 1946).

[6] *Id.*, 158 F.2d at 8.

beacon of hope, it is not to be relied upon as a guaranteed passage to a safe harbor. Corporate compliance programs and company directives are more important in preventing corporate liability and in persuading a prosecutor not to indict than they are in defending against charges once they are brought.

§ 1.06 Personal Criminal Liability of the Corporation's Agents: Officers and Directors, Managers, and Subordinate Employees

Individuals who are agents of a corporation may be held personally liable for crimes committed in the course of their corporate duties. Individual liability generally arises in one of three ways: (1) the agent participates directly in the commission of a crime; (2) the agent aids or abets the commission of the crime; or (3) the agent fails to prevent the crime by not properly controlling or supervising subordinates.[1] The question of an individual agent's liability is clearly distinct from the question of the corporation's liability. In fact, courts have upheld verdicts in which a corporation has been convicted but its employees have been acquitted, even though the acts of the employees formed the basis of the charge against the corporation.[2]

[1]—Direct Participation in the Crime

A fundamental tenet of the United States' criminal justice system is that an individual must answer for his own wrongdoing. He cannot be allowed to hide behind the corporate shield or contend that the corporation alone should accept responsibility because in performing some criminal act he was just doing his job.[3] Incorporation subjects the corporate enterprise to the laws of the state but does not relieve the individuals participating in the corporation from liability under the same laws. For courts to hold otherwise would allow individuals to relieve themselves of criminal liability merely by incorporating. The corporation may become the instrumentality of the wrongful acts of the individuals associated with it and thus also may be accountable. However, for purposes of determining individual accountability, each

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[1] Knepper and Bailey, *Liability of Corporate Officers and Directors*, pp. 232-234 (4th ed. 1988).

[2] See, e.g.:

Second Circuit: United States v. American Stevedores, Inc., 310 F.2d 47 (2d Cir. 1962), *cert. denied* 371 U.S. 969 (1963).

Seventh Circuit: United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied* 314 U.S. 618 (1941).

District of Columbia Circuit: American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), *aff'd* 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943).

See also, 1 Brickey, *Corporate Criminal Liability*, § 3.08 (1984).

[3] *Id.* See United States v. American Radiator & Standard Sanitation Corp., 433 F.2d 174 (3d Cir. 1970), *cert. denied* 401 U.S. 948 (1971).

is distinct. Thus, a corporation and individual officers may be prosecuted together and the guilt of each will be assessed independently.[4]

[2]—Aiding and Abetting Liability

Aiding and abetting, or accomplice, liability occurs when a party facilitates the commission of a crime by doing some affirmative act or by knowingly failing to act.[5] Federal law recognizes no distinction between those acting directly and those who merely aid and abet a crime; both are equally culpable. Instructing or authorizing another to commit a criminal act is sufficient to impose accomplice liability.[6] The touchstone is some effort, through action or inaction, at bringing about the fruition of the criminal conduct. The accomplice need not have the capacity to commit the crime himself so long as the party he has aided can be prosecuted directly for the crime.[7]

[3]—Failure to Supervise

Finally, individual corporate agents may be held liable for failing to prevent the commission of corporate crimes under what is known

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[4] See, e.g.:

Second Circuit: United States v. American Stevedores, Inc., 310 F.2d 47 (2d Cir. 1962), *cert. denied* 371 U.S. 969 (1963).

Seventh Circuit: United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied* 314 U.S. 618 (1941).

Tenth Circuit: United States v. Abbott Washroom Systems, Inc., 49 F.3d 619 (10th Cir. 1995).

District of Columbia Circuit: American Medical Ass'n v. United States, 130 F.2d 233, 252 (D.C. Cir. 1942), *aff'd* 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943).

State Courts:

Ohio: State of Ohio v. Black on Black Crime, Inc., 136 Ohio App.3d 436, 736 N.E.2d 962 (2000) (three principals of nonprofit corporation were convicted of grand theft when city of Cleveland mistakenly wired overpayment to corporation's bank account and principals withdrew money to use for personal purposes).

[5] See 18 U.S.C. § 2.

[6] Knepper and Bailey, *Liability of Corporate Officers and Directors*, 232-234 (4th ed. 1988).

[7] See 1 Brickey, *Corporate Criminal Liability*, § 5.10 (1984). See also:

Sixth Circuit: United States v. Talbott, 460 F. Supp. 253 (S.D. Ohio 1978), *aff'd* 590 F.2d 192 (6th Cir. 1978).

Seventh Circuit: United States v. Melekh, 193 F. Supp. 586 (N.D. Ill. 1961).

Eighth Circuit: United States v. J. R. Watkins Co., 127 F. Supp. 97 (D. Minn. 1954).

State Courts:

Massachusetts: Beaupre v. Cliff Smith & Associates, 50 Mass. App. 480, 494-495, 738 N.E.2d 753, 766-767 (2000) (corporate officer could be found liable for aiding and abetting corporation in both his separate acts of sexual harassment, which corporation is deemed vicariously to have authorized him to do, and in causing corporation to sanction demotion and constructive discharge of employee and revocation of benefits promised).

as the "responsible share" theory. Under this concept, a defendant is liable if his role within the corporation bears a "responsible relation to the situation."[8] Courts deem the imposition of liability on the individual proper to the extent he had the power to prevent, or detect and correct, violations from occurring but failed to do so.

The seminal case on this issue, *United States v. Park*,[9] was decided by the Supreme Court which held that the president of a food retailer had a duty to implement measures to ensure that violations of the federal Food, Drug and Cosmetic Act did not occur. Rodents had infested food at a warehouse run by a corporate retailer. Both the company and its president were charged with violating the act. The company pled guilty, but the president stood trial. The sole issue on which the jury was instructed was "whether [the president] held a position of authority and responsibility in the business. . . ." The Supreme Court upheld the president's conviction, noting that in light of his responsible relation to the situation, guilt was attributable "even if he did not consciously do wrong" and did not "personally participate in the situation."[10]

The "responsible share" concept of criminal liability for corporate officers and directors has been extended to a broad array of federal criminal statutes, including the Federal Hazardous Substances Act,[11] the Sherman Act,[12] the Economic Stabilization Act of 1970,[13] the

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[8] United States v. Park, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975); United States v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943).

See also:

Second Circuit: United States v. Ballistrea, 101 F.3d 827 (2d Cir. 1996).

Fifth Circuit: United States v. Luv N' Care International, Inc., 897 F. Supp. 941 (W.D. La. 1995).

Eighth Circuit: United States v. Shelton Wholesale, 1999 U.S. Dist. LEXIS 15980 (W.D. Mo. Sept. 21, 1999).

Tenth Circuit: United States v. Ellison, 112 F. Supp.2d 1234 (D. Col. 2000).

Eleventh Circuit: Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1998).

[9] United States v. Park, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975).

[10] *Id.*, 421 U.S. at 655, n.9. See also:

First Circuit: United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991); In re Grand Jury Subpoena, 220 F.R.D. 130, 155 (D. Mass. 2004).

Ninth Circuit: United States v. Fiorillo, 186 F.3d 1136 (9th Cir. 1999); United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998); Humboldt Baykeeper v. Simpson Timber Co., 2006 WL 3545014 (N.D. Cal. Dec. 8, 2006).

District of Columbia Circuit: Novicki v. Cook, 946 F.2d 938, 942 (D.C. Cir. 1991).

[11] 15 U.S.C. §§ 1261-1276.

[12] 15 U.S.C. §§ 1-7.

[13] 12 U.S.C. § 1904.

Occupational Safety and Health Act,[14] the Federal Water Pollution Act[15] and other state and federal statutes.[16]

However, courts have begun to take a closer look at the responsible corporate officer doctrine's application, particularly in the context of certain environmental statutes which require proof of knowledge or another specific mental state. For example, the First Circuit reversed the conviction of the president of a corporation who was convicted along with his company for violating the Resource Conservation and Recovery Act (RCRA).[17] The RCRA section at issue applied to any person who "*knowingly* transports or causes to be transported any hazardous waste . . . to a facility which does not have a permit."[18] The district court instructed the jury that it could convict the president if it found that he had direct responsibility for the activity alleged to be illegal and he knew or "believed that the illegal activity *of the type alleged* occurred."

The First Circuit reversed, reasoning that the district court's instruction allowed the jury to convict without finding that the individual had actual knowledge of the *specific* activity alleged to be illegal.[19] The court reasoned that when the criminal statute includes an express knowledge requirement, it is not enough to show a corporate officer had general knowledge of business activity "of the type" in question; the officer must have knowledge of the specific business activity (although perhaps not every act alleged to be wrongful) charged as illegal. The court noted, however, that the requisite state of mind could be proven through direct or circumstantial evidence.[20] In other words, the jury could consider the corporate officer's position and duties as circumstantial evidence of his knowledge but the mere fact that an individual held the position is insufficient, in itself, to establish knowledge. Thus, under the First Circuit view, the responsible share

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[14] 29 U.S.C. §§ 651-678.

[15] 33 U.S.C. §§ 1311-1319.

[16] This theory of liability is discussed along with a discussion of some of the statutes in two excellent resources, Knepper and Bailey, *Liability of Corporate Officers and Directors*, pp. 240-242 (4th ed. 1988), and Brickey, "Corporate Criminal Liability: A Primer for Corporate Counsel," 40 Bus. Law. 129, 142-143 (1984).

[17] United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991).

[18] RCRA § 3008(d)(1), 42 U.S.C. § 6928(d)(1). See *United States v. MacDonald & Watson Waste Oil Co.*, N. 17 *supra*, 933 F.2d at 50. See Facchiano Construction Co., Inc. v. United States Department of Labor, 987 F.2d 206, 214 (3d Cir. 1993). See also, state cases applying a similar analysis: People v. Matthews, 7 Cal. App.4th 1052, 9 Cal. Rptr.2d 348 (1992); People v. Martin, 211 Cal. App.3d 699, 259 Cal. Rptr. 770 (1989).

[19] United States v. MacDonald & Watson Waste Oil Co., N. 17 *supra*, 933 F.2d at 51-53.

[20] *Id*.

doctrine is limited to strict liability and public welfare statutes and not applicable to those requiring proof of a specific state of mind.[21]

Although not all courts have taken this approach to limiting the responsible corporate officer doctrine,[22] there does appear to be growing concern that the mental state element not be read out of statutes simply because prosecutions occur in the context of corporate wrongdoing.[23]

[4]—Chief Executive Officer and Chief Financial Officer Certifications of Financial Reports

The Corporate and Criminal Fraud Accountability Act of 2002 established criminal liability for the failure of the principal Chief Executive and Chief Financial Officers to properly certify annual or quarterly reports. The certification requirements currently apply to the principal executive officer and principal financial officer of over 750 of the largest companies whose securities are registered with the SEC.[24] Under the new law a signing officer must certify that:

(1) he has reviewed the report;

(2) based on the officer's knowledge, the report does not contain untrue statements of a material fact necessary in order to make the

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[21] *Id*. See also, United States v. White, 766 F. Supp. 873 (E.D. Wash. 1991) (rejecting application of responsible corporate share doctrine in RCRA prosecution).

[22] In *United States v. Johnson & Towers, Inc*., 741 F.2d 662 (3d Cir. 1984), the court took the opposite view in a prosecution brought under RCRA. The Third Circuit analyzed the purpose of RCRA, which it described as a "'cradle-to-grave' regulatory scheme for toxic materials, providing 'nationwide protection against the dangers of improper hazardous waste disposal.'" 741 F.2d at 666 (citing H. R. Rep. No. 1491, 94th Cong., 2d Sess., 11, reprinted in 1976 U.S. Code Cong. & Ad. News 6238, 6249). The court's analysis focused on the purpose of the statute rather than the specific knowledge requirement. It concluded that like the Food and Drug Act at issue in *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975) (discussed in the text accompanying Ns. 9-10 *supra*), RCRA reflected an attempt by Congress to control hazards that, "'in the circumstances of modern industrialism, are largely beyond self-protection.'" 741 F.2d at 667 (citing United States v. Dotterweich, 320 U.S. 277, 280, 64 S.Ct. 134, 88 L.Ed. 48 (1943)).

See also:

Ninth Circuit: United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998).

Tenth Circuit: United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991).

But see, United States v. Dean, 969 F.2d 187 (6th Cir. 1992), *cert. denied* 507 U.S. 1033 (1993). See also, United States v. Kelley Technology Coatings, 157 F.3d 432 (6th Cir. 1998).

[23] See, Lipman, *The Responsible Corporate Officer Doctrine and Environmental Criminal Enforcement*, National Institute on White Collar Crime, Section of Criminal Justice, American Bar Association, 187 (March 5-6, 1992).

[24] Glater, "Companies Certify Data Today; Some Seem Quite Confused" New York Times, p. C11 (Aug. 14, 2002).

statements made in the light of the circumstances under which the statements were made, not misleading; and

(3) based on the officer's knowledge, the financial statements and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for the periods presented in the reports.

The Act provides that whoever certifies any such statement knowing that the periodic report accompanying the financial statement does not comport with the statute's requirements can be fined up to $1,000,000 and imprisoned up to ten years or both. Further, the act provides that whoever willfully certifies any statement, knowing that the periodic report accompanying the statement does not comport with the statute's requirements, can be fined up to $5,000,000 and incarcerated up to 20 years, or both. It is unclear what criminal sanctions apply to executives who simply fail to file certifications.

In addition, under this statute the signing officer must certify that he: is responsible for establishing and maintaining internal controls; has designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officer by others within those entities, particularly during the period in which the periodic reports are being prepared; has evaluated the effectiveness of the issuer's internal controls as of a date within 90 days prior to the report; and has presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date.

The signing officer must further certify that he has disclosed to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)—all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize, and report financial data and has identified for the issuer's auditors any material weaknesses in internal controls; and any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls.

Finally, the signing officer must certify that he has indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of his evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

§ 1.07 The Special Problem of Criminal Liability for Injuries to Workers in the Workplace

During the 1980's a new area of concern for corporations emerged in the form of prosecutions for deaths and injuries to workers in the workplace. These prosecutions have been brought under state manslaughter or reckless endangerment statutes against both business entities and individual managers. Courts traditionally have been hesitant to impose criminal liability in this context. In fact, as recently as 1986, one law review commentator stated that "the vast majority of American jurisdictions are . . . unwilling to extend their homicide statutes into the area of work-related deaths."[1]

However, just as the general reluctance to applying criminal liability to corporations diminished over time, judicial hesitance to allowing criminal prosecutions for the death or injury of an employee in the workplace is diminishing rapidly. Courts in several states have recognized that corporations can be prosecuted for manslaughter or reckless endangerment of their employees based on unsafe conditions in the workplace.[2] The conditions giving rise to these prosecutions have included exposure to dangerous chemicals and gases, unsafe construction sites, workplace explosions, and exposure to carbon monoxide through an unsafe company vehicle.[3]

General principles of corporate criminal liability apply to these cases. However, a significant jurisdictional issue related to these prosecutions is not resolved. Defendants charged in these cases have raised the question of whether the Federal Occupational Safety and Health Act of 1970 (OSHA) preempts states from prosecuting corporations for conduct relating to occupational health and safety. Courts in Illinois, New York and Texas have held that the statute does not.

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[1] Note, "The Application of Criminal Homicide Statutes to Work-Related Deaths: *Mens Rea* and Deterrence," 1986 U. Ill. L. Rev. 969, 982 (1986).

[2] See, e.g.:

California: Granite Construction Co. v. Superior Court, 149 Cal. App.3d 465, 197 Cal. Rptr. 3, 5 (1983).

Illinois: People v. J.F. (In re J.F.), 312 Ill. App.3d 449, 727 N.E.2d 689 (2000); People v. O'Neil, 194 Ill. App.3d 79, 550 N.E.2d 1090 (1990).

New York: People v. Warner-Lambert Co., 51 N.Y.2d 295, 434 N.Y.S.2d 159, 414 N.E.2d 660, 661 (1980); People v. Reagan, 256 A.D.2d 487, 683 N.Y.S.2d 543 (N.Y. App. 1998), *aff'd* 94 N.Y.2d 804, 701 N.Y.S.2d 306, 723 N.E.2d 55 (1999); People v. Carpenter, 268 A.D.2d 798, 702 N.Y.S.2d 228 (N.Y. App. 2000), *appeal denied* 94 N.Y.2d 945, 731 N.E.2d 619, 710 N.Y.S.2d 2 (2000).

Ohio: State v. Cecos International Inc., 38 Ohio St.3d 120, 526 N.E.2d 807 (1988).

See Note, "Criminal Liability for Corporations that Kill," 64 Tulane L. Rev. 919, 930 (1990).

[3] *Id.*

The Illinois Supreme Court held[4] that OSHA did not preempt Illinois from prosecuting the defendant corporation for "knowingly and recklessly causing the injury of 42 employees by failing to provide for them necessary safety precautions in the workplace to avoid harmful exposure to 'poisonous and stupefying substances' used by the company in its manufacturing process."[5] The defendants had argued that OSHA standards defined permissible exposure limits for the substances which had caused the harm to the workers, and therefore, any attempt at state prosecution for what may have been a violation of those standards would be preempted under the Supremacy Clause to the United States Constitution.

The court rejected this argument holding that nothing in OSHA's language or legislative history indicated an intent to preclude states from prosecuting conduct which also happens to be an OSHA violation. Further, the court noted that, "state criminal law can provide a valuable and forcible supplement to ensure that workers are more adequately protected and that particularly egregious conduct receives appropriate punishment."[6]

The New York Court of Appeals expressed agreement with the Illinois Supreme Court's decision, holding that OSHA does not "preempt state criminal prosecution of employers for criminal activity in the workplace directed against employees."[7] The court noted that the state's enforcement of its criminal code in the context of workplace safety would necessarily touch upon conduct already subject to federal regulation but stated that it found nothing undesirable in that fact. It noted that OSHA encourages states to, "assume the fullest responsibility for the administration and enforcement of their occupational and safety health laws."[8] The court concluded that, "state prosecutions of cases such as this one may cause employers to pay stricter attention to the standards promulgated by OSHA. This we find to be entirely consistent with the Act's self-proclaimed purpose—insuring 'safe and healthful working conditions' for American workers."[9]

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[4] People v. Chicago Magnet Wire, 126 Ill.2d 356, 534 N.E.2d 962 (1989). See also, People v. Lewis, 295 Ill. App.3d 587, 693 N.E.2d 916, 230 Ill. Dec. 438 (1998).

[5] *Id.*, 126 Ill.2d at 359.

[6] *Id.*, 126 Ill.2d at 373.

[7] People v. Pymm, 76 N.Y.2d 511, 563 N.E.2d 1, 561 N.Y.S.2d 687, 695 (1990), *cert. denied* 498 U.S. 1085 (1991). See also:

First Circuit: Pedraza v. Shell Oil Co., 942 F.2d 48 (1st Cir. 1991), *cert. denied* 502 U.S. 1082 (1992).

Sixth Circuit: In re Welding Fume Products Liability Litigation, 364 F. Supp.2d 669 (N.D. Ohio 2005).

[8] Pymm, 561 N.Y.S.2d at 692 (citing 29 U.S.C. § 651[b][11]).

[9] *Id.*, 561 N.Y.S.2d at 693.

A Texas appellate court has held to the contrary, but its decision was reversed on further appeal.[10] The lower court held that OSHA preempted the negligent homicide prosecution of a corporation for the deaths of two employees who were killed when a trench they were working in collapsed. The court held that OSHA, "absolutely preempts all state regulation of workplace safety where such regulation would effectively establish state safety standards in areas governed by OSHA."[11] It stated that it thought a homicide prosecution for this type of conduct would be tantamount to establishing standards effecting occupational safety issues addressed by OSHA. It reasoned that if the state could do this, an employer could meet OSHA standards but still be prosecuted by the state; and this would be inconsistent with OSHA's intent to establish uniform safety standards.[12] However, on further appeal, the higher court held that state law was not preempted by OSHA.[13]

Although the trend appears to be toward state courts finding that OSHA does not preempt state prosecutions for homicide or reckless conduct in connection with death or endangerment to employees, the issue is not resolved. The federal courts have not addressed the issue fully. The final word on this rapidly evolving issue will probably be had by the Supreme Court of the United States which has addressed a closely related issue.[14]

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[10] Sabine Consolidated Inc. v. State, 756 S.W.2d 865 (Tex. App. 1988), *rev'd* 806 S.W.2d 553 (Tex. 1991), *cert. denied* 506 U.S. 934 (1992).

[11] *Id.*, 756 S.W.2d at 868.

[12] *Id.*, 756 S.W.2d at 869. See also, People v. Hegedus, 432 Mich. 596, 443 N.W.2d 127 (Mich. 1989) (OSHA did not preempt manslaughter prosecution of corporation based on death of employee from carbon monoxide poisoning while working on defective company van).

[13] Sabine Consolidated Inc. v. State, 806 S.W.2d 553 (Tex. 1991), *cert. denied* 506 U.S. 934 (1992).

[14] Gade National Solid Waste Management Ass'n v. National Solid Waste Management Ass'n, 505 U.S. 88 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992), *aff'g* National Solid Waste Management Ass'n v. Killian, 918 F.2d 671 (7th Cir. 1991). In *Gade*, the Supreme Court discussed the preemption of state workplace safety laws with respect to the licensing of certain state workers and facilities treating hazardous waste. In that context, the Court found that OSHA preempted state law. Although *Gade* does not necessarily address the issue of state homicide or reckless endangerment statutes, those arguing in favor of preemption can be expected to rely on *Gade*.

§ 1.08 The Way in Which Corporate Criminal Liability Is Imposed: An Overview of the American Criminal Justice Process

The American criminal justice process has its roots in the English common law system. However, the United States Constitution and the 200 years of case law interpreting it have provided additional safeguards to ensure due process and fairness to the subjects of criminal investigations and prosecutions. As a result, a somewhat elaborate process has evolved by which suspected criminal conduct is investigated and allegedly responsible parties are charged before the imposition of any penalty. For the most part, corporations enjoy the same protections afforded individuals under the criminal justice system.

Crimes are generally classified as either felonies or misdemeanors. Basically, felonies are crimes which are punishable by more than one year imprisonment; misdemeanors are crimes which are punishable by up to one year imprisonment.[1] Both felonies and misdemeanors usually can also be punished by a fine. The statute creating the offense or a separate statute within the general criminal code will define the offense as either a felony or misdemeanor.[2] Whether a party is convicted of a felony or a misdemeanor may have significant consequences beyond the sentence for the crime. A felony conviction can result in debarment or suspension in numerous regulated industries and professions and can restrict a party's ability to do business in other instances.

A crime may be investigated by a single federal, state or local governmental agency acting alone or several agencies acting together. Frequently, a single transaction or series of events may be the basis of a violation of both state and federal law. For example, a single corporate kickback scheme may violate a state commercial bribery law as well as the federal mail fraud statute. Accordingly, in assessing any potential criminal liability, corporate counsel must be aware of which authorities may have jurisdiction over the matter and what laws apply.

An investigator may gather information provided to him voluntarily or may use an administrative or grand jury subpoena, depending upon the nature of the investigation and the agencies involved. The subpoena can be used to compel the production of documents and tangible objects as well as witnesses to give testimony. An investigation may

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[1] LaFave and Scott, *Criminal Law 2d ed.*, 29-32 (1986).

[2] See, e.g., 18 U.S.C. § 3559. Some states also have a lesser category of offenses known as "business offenses" which are usually punishable by a nominal fine. See, e.g., 730 ILCS 5/5-1-2, which defines "business offense" as a "petty offense for which the fine is in excess of $500." "Petty offense" means one for which a fine is the only penalty. 739 ILCS 5/5-1-17.

be concluded in as short as a few weeks or it may take as long as several years before a final decision is made whether to proceed with formal charges. Often, an agency will decide to conclude an investigation without bringing charges and not tell the subject of the investigation for some time, if at all, after that decision has been made. The outside limit for the length of the investigation is the statute of limitations, that is, the period of time after the offense during which a charge may be brought. The statute of limitations is five years for most federal crimes.[3] However, it may be longer or shorter, depending on the crime.

A formal charge is instituted by way of either a grand jury indictment or the filing of an information. The Fifth Amendment to the United States Constitution guarantees that no person can be compelled to stand trial on a felony charge unless he has been indicted by a grand jury. However, a party can waive the indictment by a grand jury and agree to proceed by way of information. An information is a criminal complaint filed with the court by the prosecutor.[4] For felony charges both procedures require a preliminary finding that there is probable cause to believe that a crime has been committed. In the case of an indictment, the grand jury must first find the existence of probable cause and vote a "true bill." In the case of an information, a court must find probable cause after holding a preliminary hearing on the information.[5] White collar criminal cases almost always proceed by way of felony indictment and thus, there is no opportunity for a preliminary hearing. Misdemeanors are charged by way of informations and a misdemeanor defendant does not have a right to a preliminary hearing.

There is some authority to support the proposition that a corporation may be prosecuted for a felony by information, without any right to an indictment, because it cannot be subjected to imprisonment.[6] However, because the *crime* for which the corporation may be charged can

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[3] 18 U.S.C. § 3282.

[4] Fed. R. Civ. P. 7.

[5] For cases discussing the differences between indictment and information, see, e.g.:

Fifth Circuit: Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999), *rev'd on rehearing* 252 F.3d 749 (5th Cir. 2001); United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied* 381 U.S.935 (1965).

Eighth Circuit: Bartlett v. United States, 354 F.2d 745 (8th Cir.), *cert. denied* 384 U.S. 945 (1966).

The grand jury process is discussed in greater detail in Chapter 12 *infra*.

[6] United States v. Yellow Freight System, 637 F.2d 1248 (9th Cir.), *cert. denied* 454 U.S. 815 (1980); United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. 1980), *cert. denied* 450 U.S. 965 (1981).

be *punishable* by imprisonment, the better view is that a corporation has a right to indictment by a grand jury for felonies.[7]

The indictment or information must set forth the alleged crime and the essential facts constituting the offense. Usually these are rather barebones, setting forth only the statutory language and the most basic facts supporting the allegations. Two or more offenses may be charged in the same indictment or information if they are similar or based on the same acts or transactions which form a common scheme or plan. When more than one offense is charged in an indictment, it must be set forth in a separate count. If two or more defendants are alleged to have participated in the same act or transactions, they may be joined together in a single indictment or in the same counts within an indictment.[8]

Once the formal charges have been lodged by way of the indictment or the finding of probable cause after a preliminary hearing, the defendant must appear at an arraignment. This is simply an initial court hearing at which the charges are presented and a plea of either guilty or not guilty is entered. If a plea of not guilty is entered, a defendant has a right to a speedy trial. In federal court, this means the defendant has a right to have the trial begin no later than seventy nor earlier than thirty days from the date of the indictment or arraignment. As a practical matter, both the prosecutor and defense will want more time and certain justifications may allow the trial to be delayed. However, in even the most complex corporate criminal cases, a trial

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[7] The Fifth Amendment to the United States Constitution requires that capital crimes and infamous crimes shall originate by indictment of a grand jury. An infamous crime is one punishable by death, imprisonment in a penitentiary or hard labor. See, e.g.:

Supreme Court: United States v. Moreland, 258 U.S. 433, 42 S.Ct. 360, 66 L.Ed. 700 (1922); *Ex parte* Wilson, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89 (1884).

Ninth Circuit: United States v. Driscoll, 612 F.2d 1155 (9th Cir. 1980).

Thus, a corporation indictable for an infamous crime should be entitled to indictment by a grand jury.

[8] Fed. R. Civ. P. 8. See:

Second Circuit: United States v. McGrath, 558 F.2d 1102 (2d Cir. 1977).

Fourth Circuit: United States v. Taylor, 218 Fed. Appx. 249 (4th Cir. Feb. 16, 2007); United States v. Cole, 857 F.2d 971 (4th Cir. 1988), *cert. denied* 489 U.S. 1970 (1989).

Fifth Circuit: United States v. Davis, 752 F.2d 963 (5th Cir. 1985).

Sixth Circuit: United States v. Spikes, 158 F.3d 913 (6th Cir. 1998), *cert. denied* 525 U.S. 1086 (1999).

Seventh Circuit: United States v. Lanas, 324 F.3d 894 (7th Cir. 2003); United States v. Todosijeric, 161 F.3d 479 (7th Cir. 1998); United States v. Gomez, 860 F.2d 706 (7th Cir. 1988); United States v. Velasquez, 772 F.2d 1348 (7th Cir. 1985), *cert. denied* 475 U.S. 1021 (1986).

will usually occur within a year of the indictment. Corporate criminal cases, unlike their civil counterparts, move rapidly once formal proceedings begin. They also differ from civil cases in that the party with the burden of proof, the prosecution, must prove its case beyond a reasonable doubt by an unanimous verdict of a jury of twelve.

One crucial distinction exists between the criminal process for corporations and individuals. Unlike an individual, a corporation enjoys no Fifth Amendment privilege against self-incrimination.[9] The general rationale given for this rule is that the Fifth Amendment privilege against self-incrimination is a personal one and an individual should not be allowed to invoke it on behalf of another party. However, in fashioning this rule, the Supreme Court of the United States relied in part on the inherent distinctions between corporations and individuals. The Court reasoned that, unlike an individual, a corporation is a creature of the state and presumed to be incorporated for the public benefit. The special privileges it enjoys give the government the right to investigate whether it has exceeded its lawful authority.[10] It should be noted, however, that an individual retains his own Fifth Amendment privilege against self-incrimination notwithstanding the fact that he is affiliated with a corporation and may be the target of an investigation along with a corporation.[11]

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[9] Essgee Co. v. United States, 262 U.S. 151, 43 S.Ct. 514, 67 L.Ed. 917 (1923); Grant v. United States, 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed. 423 (1912); Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911); Hale v. Henkel, 201 U.S. 43, 66, 26 S.Ct. 370, 50 L.Ed. 252 (1906). Although this general rule was developed first with corporations, it has been applied to other business entities as well. Courts have refused to allow other business entities, such as unions, partnerships, and trusts, to assert a Fifth Amendment privilege. See, e.g.:

Supreme Court: Bellis v. United States, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974); United States v. Fleischman, 339 U.S. 349, 70 S.Ct. 739, 94 L.Ed. 906 (1950); United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944).

First Circuit: Amato v. United States, 450 F.3d 46 (1st Cir. 2006); In re Grand Jury Subpoena, 973 F.2d 45 (1st Cir. 1992).

Seventh Circuit: United States v. Kuta, 518 F.2d 947 (7th Cir.), *cert. denied* 423 U.S. 1014 (1975).

Ninth Circuit: In re Grand Jury Proceedings, 633 F.2d 754 (9th Cir. 1980).

[10] Hale v. Henkel, 201 U.S. 43, 66-76, 26 S.Ct. 370, 50 L.Ed. 252 (1906). The Court also noted that allowing an individual to assert a Fifth Amendment privilege over a corporation's records would make it virtually impossible to prosecute corporate crime. The Court reasoned that the examination of a corporation's documents produced pursuant to a grand jury subpoena is often the only way that illegal corporate conduct can be proven.

[11] See, e.g.:

Supreme Court: Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988); Curcio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957) ("A custodian, by assuming the duties of his office, undertakes the obligation

Another distinction between the rights of a corporate defendant and an individual defendant may be in the defendant's right to confront witnesses. The Sixth Amendment to the United States Constitution guarantees a defendant the right to confront accusers.[12] The Second Circuit has held that a corporation wholly owned by a single shareholder does not retain the same rights under the Confrontation Clause as an individual retains.[13] The ruling is troublesome because of the potential ramifications outside its limited factual context.

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to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.").

Second Circuit: Armstrong v. Guccione, 470 F.3d 89 (2d Cir. 2006).

Sixth Circuit: In re Grand Jury, 771 F.2d 143, 148 (6th Cir.) (*en banc*), *cert. denied* 474 U.S. 1033 (1985) (individual may not claim the privilege in response to subpoena that seeks production of corporate records that are in the individual's custody, but "it is well-settled in this circuit that if the government later attempts to implicate the custodian on the basis of the act of production, evidence of that fact is subject to a motion to suppress"); see also, United States v. Csotty, 2007 WL 627872 (E.D. Mich. Feb. 26, 2007).

But see, United States v. Scornavacco's Restaurant, Inc., 528 F.2d 19 (7th Cir. 1975) ("an individual cannot rely upon the privilege to avoid producing records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally").

[12] Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[13] United States v. King, 134 F.3d 1173 (2d Cir. 1998).

§ 1.09 Sentencing of Corporations Convicted of Crimes

A corporation obviously cannot be imprisoned, but it can be punished, often severely, for criminal violations. Although both state and federal courts have demonstrated a willingness to punish corporations for criminal violations, the nature of punishment imposed on corporations has varied even more greatly than the nature of punishment imposed on individuals. Presumably, this is due to both the difficulty in fashioning a sentence that will be truly punitive and the general disagreement over how best to shape corporate behavior through law enforcement.

The most significant recent development in the sentencing of corporations occurred with the enactment of the United States Sentencing Commission's Guidelines for the Sentencing of Organizations.[1] These guidelines apply to the sentencing of business organizations convicted of federal crimes. The federal Sentencing Guidelines were enacted in an attempt to bring uniformity to the sentencing of persons and entities convicted of federal crimes. Guidelines for the sentencing of individuals took effect on November 1, 1987. After significant debate and numerous drafts, the Organizational Guidelines took effect four years later, on November 1, 1991.

The Organizational Guidelines apply to corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and non-profit organizations. They cover most federal felonies and Class A misdemeanors including embezzlement, bribery, mail and wire fraud, labor racketeering, insider trading, money laundering, tax fraud and evasion, and antitrust violations. However, environmental, export control, and food and drug offenses are not covered by the Guidelines' due to the Commission's determination that the nature of these crimes requires a separate sentencing methodology. The Commission has made the development of guidelines for environmental offenses its next priority, and drafts of proposed environmental guidelines are under consideration.[2] Until further guidelines are developed, fines for these offenses are calculated based on the statutes creating their prohibitions.

In an Introductory Commentary, the Guidelines set forth the following general principles underlying their formulation and anticipated application:

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[1] U.S.S.G. § 8 (Nov. 1991), 56 Fed. Reg. 22762 (1991).

[2] Advisory Working Group on Environmental Sanctions to the United States Sentencing Commission, Working Draft Recommendations (March 5, 1993).

"First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."[3]

Thus, in addition to providing greater uniformity in sentencing, the Guidelines purport to reflect three main goals. First, they intend to avoid unnecessarily harsh punishment to otherwise law abiding organizations which may serve a useful purpose in society when acting lawfully. Second, they intend to exact much harsher punishment from primarily corrupt organizations. Third, they intend to reward an organization that has taken steps to ensure compliance with the law and acted to remedy wrongdoing as soon as it is uncovered.

Sentences under the Guidelines generally may have three components: (1) a fine; (2) probation; and (3) remedial action, including restitution, community service, notice to victims, or remedial orders requiring the elimination of risk of future harm or establishing trust funds sufficient to address future estimated harm. Courts are given discretion in imposing a remedial order or probation. However, the method for calculating fines is rather rigidly determined by the Guidelines.[4] If a court determines that the organization was operated primarily for a criminal purpose or primarily by criminal means, it may set a fine sufficient to divest the organization of all of its assets

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[3] U.S.S.G., Introductory Commentary.
[4] U.S.S.G. §§ 8C2.2-8C2.9.

remaining after it has satisfied legitimate claims of its creditors.[4.1] The commentary to the Guidelines suggests that examples of such organizations might be those which are actually fronts for ongoing fraud schemes, money laundering or drug running operations, and hazardous waste disposal businesses that use no lawful means of disposal.[5]

If the organization was not operated primarily for a criminal purpose or by criminal means, the court must undertake a three-step process to determine the fine. First, it sets a base fine by considering the offense severity and the amount of pecuniary gain realized by the organization or loss caused to the victim as a result of the offense. Second, it determines the organization's "culpability score" which is derived by considering a number of factors which are stated in their most basic form in the Introductory Commentary. They include:

- The size of the organization
- Management's role in the offense
- The pervasiveness of the offense throughout the organization
- Any prior criminal history of the organization
- Whether the offense occurred in violation of a court order
- Whether the organization obstructed any investigation or prosecution of the offense
- Whether the organization had a *bona fide* compliance program in place[5.1]

Third, the court selects a fine within a specified range or makes an upward or downward departure to impose the final sentence.[6]

A downward departure can be based on either specific factors not adequately taken into account by the Guidelines or, more commonly, on substantial assistance provided by the organization to authorities. These same factors are present as justifications for a downward departure in the Guidelines governing the sentencing of individuals. Experience has shown that substantial assistance to the authorities is usually the only practical means of obtaining a downward departure. This ground must be brought to the court's attention by the government and cannot be based on the organization's exposure to further criminal enforcement efforts as a result of wrongdoing committed either by the

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[4.1] U.S.S.G. § 8C1.1.

[5] U.S.S.G. at § 8C1.1, App. n.1.

[5.1] U.S.S.G. § 8C2.5.

[6] U.S.S.G., Ch. 8, pt.4, intro. comment.

organization or its employees. The assistance must relate to the investigation or prosecution of another organization or individuals not directly affiliated with the organization being sentenced. The Guidelines identify a number of specific factors which may justify upward departures including: foreseeable risk of death or bodily injury; a threat to national security; a serious threat to the environment; a threat to the integrity or continued existence of a market; and bribery of a public official. An upward departure may also be justified if the calculated fine guideline fails to adequately reflect the seriousness of the crime and the culpability of the organization.[7]

The court may impose probation as an additional element of a sentence. Generally, probation will be imposed if it is necessary to assure that other aspects of the sentence, for example remedial steps or community service, are carried out. It will also be imposed if the court believes that there is a significant risk of recurring criminal conduct, particularly if the organization has at least fifty employees at the time of sentencing and does not have an effective compliance program in place or if it has a past history of criminal conduct. The court may impose such conditions of probation as it deems necessary to fulfill the purpose of the sentence and these may include providing notice of a compliance program to employees and shareholders, making periodic progress reports to the court, and submitting to regular or random inspections and interviews by regulators. If an organization violates any condition of probation, the court may extend the term of probation, impose new or more restrictive conditions, or revoke the probation entirely and resentence the organization imposing such sentence as it deems appropriate.[8]

The Guidelines significantly reward companies that investigate wrongdoing and make a complete, prompt disclosure to appropriate government authorities.[9] The disclosure must be relatively specific. It must provide the pertinent details of the offense and probably include the names of key individuals involved in the misconduct.[10]

The Guidelines' emphasis on early detection, reporting and, in essence, "self-policing" has caused many corporations to implement compliance programs. Under the guidelines, a compliance program benefits a corporation only if it is an "effective" program which allows the organization to exercise "due diligence" in seeking to prevent and

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[7] U.S.S.G. §§ 8C4.1-8C4.6, 8C4.11.
[8] U.S.S.G. § 8D1.1, 8D1.4-8D1.5.
[9] U.S.S.G. § 8A1.2, comment n.3 (k).
[10] U.S.S.G. § 8C2.5(g).

detect illegal conduct by its employees.[11] The essential components of an effective compliance program include:

- the designation of specific high-level personnel to have overall responsibility for administering the program;
- the implementation of standards that are "reasonably capable" of reducing the likelihood of criminal conduct;
- effective communication of the program's standards and procedures to all members of the organization;
- the inclusion of monitoring and auditing systems reasonably designed to allow employers to detect and report violations without fear of reprisal;
- consistent enforcement of the program's standards and procedures, including appropriate disciplinary sanctions for those violating the standards as well as for those who should have detected but failed to detect violations; and
- structure which is suited to address problems inherent to the industry and company rather than businesses generally
- periodic modification of the program to address changes in the law or problems that arose despite its presence.[12]

In their first decade, the Organizational Guidelines resulted in thousands of corporate prosecutions and dozens of corporate fines in excess of $100 million. Under the Sarbanes-Oxley Act of 2002, the Sentencing Commission is to review the organizational (corporate) guidelines in Chapter 8[13] to ensure they are "sufficient to deter and punish organizational criminal conduct."

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[11] U.S.S.G. § 8C2.5, comment (n.12).

[12] U.S.S.G. § 8A1.2, comment n.3(k). See: Webb and Molo, "Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Organizational Sentencing Guidelines," 71 Wash. U. L.Q. 375 (1993); Banoun, Damelin & Troccoli, *The Federal Sentencing Guidelines for Organizations*, National Institute on White Collar Crime, Section of Criminal Justice, American Bar Ass'n (March 5-6, 1992).

[13] U.S.S.G., Ch. 8.

§ 1.10 Criminal Liability of Partnerships and Partners

Not surprisingly, partnerships generally can be held liable under the same terms as corporations. In other words, acts undertaken by an agent of the partnership, within the scope of the agent's authority and for the benefit of the partnership, will bind the partnership.[1] The Supreme Court of the United States has recognized that while the common law distinguishes between partnerships and corporations, partnerships are entities capable of being sued and violating the law to the same extent as corporations.[2] Thus, in analyzing questions of the criminal liability of the entity of a partnership, the same fundamental analysis used in considering the criminal liability of a corporation can be followed.

The more interesting question—certainly for the individual partners—is whether the criminal acts of one of more individual partners, undertaken ostensibly for the benefit of the partnership, can create criminal liability for the other individual partners in the partnership. The general answer is no.[3] The Supreme Court has stated that, "The conviction of a partnership cannot be used to punish the individual partners, who might be completely free of personal guilt. As in the case of corporations, the conviction of the entity can lead only to a fine leveled on the firm's assets."[4]

While an individual partner may not necessarily face potential criminal liability, in the form of a prosecution, based on the acts of another partner, any criminal fine assessed against the partnership may be the responsibility of all partners, jointly. The Uniform Partnership Act allows for the imposition of joint and several liability for a penalty

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[1] *Supreme Court:* United States v. A&P Trucking, 358 U.S. 121, 79 S.Ct. 203, 3 L.Ed.2d 165 (1958).

First Circuit: Kansallis Finance Ltd. v. Fern, 40 F.3d 476 (1st Cir. 2001).

Second Circuit: United States v. Victor Teicher & Co., 726 F. Supp. 1424 (S.D.N.Y. 1989). See also, Jund v. Hempstead, 941 F.2d 1271, 1284 (2d Cir. 1991).

Third Circuit: Dowd v. Webb, 337 F.2d 93 (3d Cir. 1964).

Fourth Circuit: Sharpe v. Bradley Lumber Co., 446 F.2d 152 (4th Cir. 1971).

Fifth Circuit: Entente Mineral Co. v. Parker, 956 F.2d 524 (5th Cir. 1992).

Seventh Circuit: United States v. Ansani, 138 F. Supp. 454 (N.D. Ill. 1956), *aff'd* 240 F.2d 216 (7th Cir. 1957).

Ninth Circuit: United States v. Heffner, 916 F. Supp. 1010 (S.D. Cal. 1996).

[2] United States v. A&P Trucking, 358 U.S. 121, 126, 79 S.Ct. 203, 3 L.Ed.2d 165 (1958).

[3] *Id.*, 358 U.S. at 127.

[4] *Id*. Of course, the Federal Organizational Sentencing Guidelines apply to partnerships as well as to corporations. Thus, the penalty that a partnership may face, in fact, may be greater than merely fines, they may include the full panoply of penalties posited by the Guidelines. See U.S.S.G. § 8 (Nov. 1991), 56 Fed. Reg. 22762 (1991).

incurred as a consequence of the violation of a criminal law. Thus, while an individual partner may avoid the individual penalties and stigma attendant to a criminal prosecution, that partner may not escape paying a share of any financial penalty imposed upon the partnership as part of a sentence.[5]

More recently, state attorneys general have been banding together and flexing their substantial enforcement muscle. While typically their vehicle for doing so has been state consumer protection laws which generally are civil in nature, from time to time they have pursued criminal charges, as well. The state attorneys general tend to be dangerous opponents for corporate America because their authority is broad and their enforcement mechanisms comparatively loose.

Perhaps the leader in this regard has been the office of the New York Attorney General. That office led a series of spectacular investigations into Wall Street practices that previously were believed to have been in the exclusive purview of the SEC. The Attorney General's most potent weapon in this effort has been the Martin Act.[6]

The Martin Act contains a much broader definition of fraud than that set forth in the federal securities laws. Various federal and New York state courts have found that the Martin Act broadly prohibits deceitful practices contrary to the plain rules of honesty.[7] Further, the Attorney General has the authority to proceed either civilly or criminally under the Act. This means that the prosecutor has the extraordinary authority to coerce favorable civil or regulatory settlements by dangling the prospect of criminal prosecution before the defendant. This, along with the unusual methods by which investigations pursued under the Act may be conducted, provides the Attorney General with substantial weapons not necessarily available to any single federal agency investigating the same conduct.[8]

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[5] Uniform Partnership Act, § 15(a). See generally, Official Comment to the Uniform Partnership Act, § 13.

[6] N.Y. Gen. Bus. Law § 352 *et seq.*

[7] Bishop v. Commodity Exchange, Inc., 564 F. Supp. 1557 (S.D.N.Y. 1983); People v. Federated Radio Corp., 244 N.Y. 33, 124 N.E. 655 (1926).

[8] See generally, Morvillo and Annello, "Securities Investigations and Prosecutions Under the Martin Act," New York Law Journal, p. 3 (April 1, 2003).

§ 1.11 Trends in State Prosecutions of Corporations

In the wake of the major corporate scandals of the early 2000s, state investigations and prosecutions of corporate misconduct have increased, notwithstanding the traditional deference of state attorneys general to federal prosecutors and regulators in such matters.[1] This increased activism is not without controversy. Opponents have argued that "double pressure from federal and state regulators will smother corporate America" by "criminalizing honest mistakes and legitimate accounting differences. . . ."[2] Such criticisms have failed however to curb the recent wave of state investigations and enforcement actions.

At the forefront of this increased activism are the attorneys general of California, Massachusetts, New York and Oklahoma. In 2001, the New York attorney general began to investigate conflicts of interest matters at some of the nation's largest investment banks. In April 2003, New York's chief legal office reached a global settlement totaling $1.4 billion with ten investment banks. In August of 2003, the State of Oklahoma charged WorldCom, its long time chief executive officer, and five other former employees with violations of the Oklahoma Securities Act in the $11 billion WorldCom accounting scandal. Four of the employees that Oklahoma charged had pleaded guilty to federal fraud and conspiracy charges and were cooperating in the Department of Justice probe. The Oklahoma attorney general stated that he had not interviewed any of the individuals charged in the complaint and had not coordinated his work with federal authorities.[3] Although the Oklahoma attorney general dismissed the state charges in August of 2005, the state prosecution threatened to disrupt federal efforts to prosecute crimes committed in the scandal and raised clear and unprecedented prospects that Oklahoma authorities might have been

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[1] Prior to 2000, only five states including New York, New Jersey, Maryland, Delaware and South Carolina allowed their attorney generals' offices to prosecute both civil and criminal securities violations. This number is on the rise however. In late 2003, California enacted legislation expanding the securities enforcement power of the attorney general. Pennsylvania, Florida, Illinois, and Massachusetts subsequently filed bills or announced plans to enact similar legislation. In addition, many states recently adopted their own versions of Sarbanes-Oxley. See Reason, "Cheese It, THE STATES! Corporate Wrong-Doers Are Finding State Cops More Aggressive than the Feds," CFO Magazine, p. 53 (Feb. 2004).

[2] Peikin and Juris, "State Enforcement: An Interview with Eliot Spitzer," Business Crimes Bulletin, Law Journal Newsletter, V.12, n.1 (Feb. 2005).

[3] Feder and Eichenwald, "A State Pursues WorldCom; Effects on U.S. Case," New York Times, p. C1 (Aug. 28, 2003).

able to use admissions of WorldCom employees in the federal case against them in state court proceedings.[4]

In addition to the highly publicized actions in New York and Oklahoma, enforcement authorities in California and Massachusetts are actively pursuing securities investigations and lawsuits. On March 25, 2005, the California Attorney General filed a securities fraud lawsuit against American Funds, "alleging the defendants failed to adequately inform investors about $426 million in shelf-space payments made to dozens of broker-dealers to sell and recommend American Funds." This is the fourth lawsuit brought by the California Attorney General under a law that took effect in January, 2004.[5] The attorney general claims to be working closely with the SEC and acknowledges "the SEC's substantial assistance and cooperation."[6] In late 2004, the Massachusetts attorney general announced that he would undertake his own separate investigation into insurance bidding practices. As a result of this investigation, the attorney general threatens to sue Marsh & McLennan for allegedly defrauding customers across Massachusetts through bid rigging and hidden payoffs. These allegations come eight months after the New York attorney general settled a similar action against Marsh & McLennan for $850 million.[7]

The trend towards increased state prosecution results not only in tension between federal regulators and local authorities but raises concerns regarding coordination and facilitation between multiple agencies. In September 2003, SEC Chairman William H. Donaldson testified before the Senate Banking Committee hearing that neither New York nor Oklahoma had notified the SEC of the Investment Bank and WorldCom investigations. In response to this communication breakdown, the SEC and state regulators met to discuss the coordination problem and announced a plan to form a joint committee "to study

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[4] A month after filing charges against six WorldCom executives in 2003, the Oklahoma attorney general agreed to delay Oklahoma's case at the request of the U.S. Attorney until the federal proceedings were over. After the executives were sentenced to prison time in the federal case, the Oklahoma attorney general dismissed the state charges because "[t]he federal sentences in each of these cases satisfies the state's prosecution and in the interests of judicial economy, I see no reason to further pursue these cases in state court." Mecoy, "State Drops WorldCom Fraud Charges," The Oklahoman (Aug. 17, 2005).

[5] See Office of Attorney General, State of California, "Attorney General Lockyer Sues American Funds for Not Telling Investors Truth About Broker Payments: Alleges American, Capital Paid Brokers $426 Million to Push their Mutual Funds," (March 23, 2005), available at http://caag.state.us./newsalerts/2005/05-021.htm.

[6] *Id.*

[7] Arends, "AG Plans Suit vs. Marsh Mac in Fraud, Payoffs," The Boston Herald, p. 30 (Sept. 16, 2005).

and propose ways to improve federal and state cooperation in significant enforcement activities."[8] Later that same month, the New York attorney general brought grand larceny and securities fraud charges against a former Bank of America broker for his role in allegedly arranging illegal "late trading" of Bank of America mutual funds by a customer and its managing principal.[9] These were the first criminal charges filed by the New York attorney general since he began investigating financial markets in 2001. The SEC filed concurrent charges to the attorney general's criminal charges; the joint action signaled an effort to quell criticism that state authorities have failed to act in concert with federal regulators.

Despite the appearance of improved state and federal coordination, conflicts still exist and the joint committee of state and federal authorities has yet to produce any guidelines for facilitating coordination. Concerns regarding the increased state role in such matters remain and have since extended even to Congress.[10]

In July 2003, H.R. 2179 was approved by a House subcommittee and forwarded to the House Financial Services Committee. The bill provided the SEC with enhanced enforcement powers and expressly limited the ability of states to impose disclosure or conflict of interest requirements on broker-dealers beyond those required by the SEC or self-regulatory organizations. Although the 2004 version of H.R. 2179 removed the federal preemption provisions and substituted a voluntary study on ways to improve state and federal coordination, the bill is illustrative of the continuing tensions between state and federal authorities in the enforcement of securities laws.

The California, Massachusetts, New York and Oklahoma enforcement actions highlight the increased importance of parallel investigations and global resolutions. Without federal-state law enforcement coordination, subjects and targets of corporate probes have no assurance that their cooperation and pleas with federal authorities will be recognized favorably by state counterparts, or vice versa. The Oklahoma WorldCom prosecution foreshadowed the possibility that statements of cooperating federal defendants may unexpectedly be used against them in state court criminal proceedings. Because large corporations do business in many states and the misconduct may have taken place or affect the interests of many states, defense counsel now need to examine all

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[8] Atlas, "S.E.C. Chief Addresses Recent Tension with States," New York Times, p. C1 (Sept. 15, 2003).

[9] Smith and Mollenkarp, "Spitzer, SEC Charge Fund-Case Broker," Wall Street Journal, p. C1 (Sept. 17, 2003).

[10] Peikin and Juris, *supra* N. 2.

jurisdictions that have a likely interest in investigating or prosecuting corporate or executive clients before advising clients of the risks of entering into federal cooperation or plea agreements.

§ 1.12 Trends in Federal Prosecutions of Corporate Executives and Corporations

[1]—Corporate Executives

Corporate executives are facing increased scrutiny as a result of the criminal misconduct and collapses of Arthur Andersen, Enron and Worldcom. In response to those events, Congress enacted the Sarbanes-Oxley Act of 2002, which has provided the Department of Justice with new expansive prosecution tools and enhanced criminal penalties to combat corporate fraud.

On July 9, 2002, President George W. Bush, pursuant to an Executive Order, established a Corporate Fraud Task Force consisting of the Deputy Attorney General, the Assistant Attorneys General from the Criminal and Tax Divisions, the Director of the FBI and U.S. Attorneys from seven major districts. The primary purpose of this task force is to provide direction for the investigation and prosecution of cases of securities fraud, accounting fraud, mail and wire fraud, money laundering, tax fraud based on such predicate offenses and other related financial crimes by commercial entities and directors, officers, professional advisors and employees.

In July 2002, the Fraud Section of the Criminal Division issued a set of field guidelines to attorneys and law enforcement investigators which outline the new tools and penalties under the Sarbanes-Oxley Act as well as information sharing and coordination efforts with other federal regulatory agencies.[1] The Department of Justice can be expected to marshal substantial resources for the foreseeable future to combat corporate fraud.

The Judicial Branch will be impacted by the Act as well since the Attorney General has written to the U.S. Sentencing Commission, directing it to review, and as appropriate, amend the sentencing guidelines related to obstruction of justice, criminal fraud, accounting and securities fraud, as well as the new "white collar" provisions in the Act related to document destruction or tampering. The Sentencing Commission is to determine whether the penalties and enhancements in the Act are sufficient to deter, prevent and punish financial crime as well as to add penalty enhancements for officers or directors of publicly traded companies who engage in such offenses. While the Supreme Court has held the Guidelines to be non-binding, judges still refer to them for advisory purposes.

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[1] See www.usdoj.gov.

[2]—Corporations

Federal prosecutions of corporations have risen dramatically over the past two decades. In the 1970s, no more than a few dozen corporations were prosecuted per year in the federal courts. By the late 1980s that number rose to more than 300 per year.[2] This trend shows no signs of reversing itself. In the 1990s, over 400 federal corporate prosecutions were filed each year.[3]

The factor most responsible for the continuing increase in the prosecution of corporations was the enactment of Organizational Sentencing Guidelines in 1991.[4] The Guidelines provide prosecutors with the opportunity to impose serious penalties on corporate offenders. The potential for obtaining fines which can exceed $290 million provides prosecutors with an incentive to indict corporations in an attempt to send a message to the defendant's industry and the national business community. In late 2008, the Department of Justice, the Securities and Exchange Commission and the Munich prosecutor's office obtained criminal penalties, fines and disgorgement against Siemen AG and three subsidiaries for Foreign Corrupt Practices Act violations exceeding $1.6 billion.[5]

Prosecutors enjoy significant discretion when deciding whether to pursue charges against a corporate entity. In making such a decision, prosecutors will consider a number of factors including the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation and management's involvement, the corporation's history of similar conduct, the corporation's voluntary disclosure of wrongdoing and willingness to cooperate in any investigation, the adequacy of the corporation's compliance program, the remedial

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[2] Cohen, "Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990," 71 B.U. L. Rev. 247 (1991).

[3] By way of example, the Department of Justice and Securities and Exchange Commission have dramatically increased the number of investigations of corporations and executives for violations of the Foreign Corrupt Practices Act ("FCPA"). See Shearman & Sterling, FCPA Digest, *Digests of Cases and Review Releases Relating to Bribes To Foreign Officials Under the Foreign Corrupt Practices Act of 1977* (March 1, 2009), available at http://www.shearman.com/documents/LT_digest030509.pdf (hereinafter "*FCPA Digest*"). The FCPA prohibits corruptly made payments by U.S. corporations or individuals to foreign officials that are designed to obtain or retain business in that foreign country. 15 U.S.C. § 78dd-1. From 2002 to 2004, FCPA DOJ prosecutions and SEC enforcement actions have nearly quadrupled. *FCPA Digest*. For further discussion of the FCPA, see § 2.04[8] *infra*.

[4] See § 1.09 *supra*.

[5] United States v. Siemens Aktiengelsallschaft, CR No. 08-367 RJL (D.D.C. Dec. 12, 2008); see also, SEC v. Siemens Aktiengelsallschaft, No. 08-2167 (D.D.C. Dec. 12, 2008).

actions taken by the corporation itself, the collateral consequences of the corporation's wrongdoing for third parties, the adequacy of individual prosecutions, and the adequacy of other remedies such as civil or regulatory enforcement actions.[6]

Undoubtedly the most significant development in the area of federal prosecutions of corporations is the dramatic increase in the use of deferred prosecution agreements and non-prosecution agreements.[7] Under such agreements, the Department of Justice agrees either not to prosecute a corporation or, alternatively, to not proceed on and eventually discuss a criminal charge in exchange for the company agreeing to cooperate in the investigation, undertake certain remedial measures, and usually pay a substantial fine.[8]

Deferred prosecution agreements and non-prosecution agreements have become quite controversial. In essence, they turn the corporation into an investigative arm or agency of the government. This is because to obtain benefits of the agreement, the corporation is required to investigate the allegations and identify the "wrongdoers" within the company. There is extreme pressure on the company to "play ball" and usually that has adverse consequences for employees. An employee who wishes to assert his Fifth Amendment privilege and decline to submit to a government request for an interview can pretty much rest assured that he will be fired.[9]

Given the potential consequences of a criminal conviction and the vagueness and breadth of many of the laws used to prosecute corporations, it is understandable that at some point in the process, actual guilt—based on the intentional violation of the law—may become irrelevant. A corporation may decide to enter into such an agreement, which may require an admission of wrongdoing even though there is no conviction, even though its senior management or board lacks a clear, sincere belief that the company engaged in criminal conduct.

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[6] Larry D. Thompson, Deputy Attorney General, "Subject: Principles of Federal Prosecution of Business Organizations" (Department of Justice Jan. 20, 2003) ("The Thompson Memo") (Appendix Q).

[7] See § 16.05 *infra*.

[8] See generally, Bohrer and Trencher, "Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation," 44 Am. Crim. L. Rev. 1481 (2007).

[9] Courts have placed certain limits on the use of statements obtained under such circumstances. See: Leftkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation New York, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). See also, Griffen, "Compelled Cooperation and the New Corporate Criminal Procedure," 82 N.Y.U.L. Rev. 311 (2007).

The government benefits by deferred prosecution and non-prosecution agreements because it effectively gains a scalp without being put to its proof. Given some recent high profile failures on appeal,[10] this provides prosecutors a tremendous benefit.

The explosive growth in the use of these agreements[11] is far and away the most significant development in the area of corporate criminal liability since the enactment of the Organizational Sentencing Guidelines in 1991. Whether the government will be able to continue to rely upon them as extensively in the future remains to be seen.

[3]—*United States v. Siemens AG*[12]

In December 2008, Siemens AG and three subsidiaries (Siemens Argentina, Siemens Bangladesh and Siemens Venezuela) pled guilty in Washington, D.C. to various FCPA violations and agreed to pay DOJ, SEC and German authorities over $1.6 billion in penalties in the largest Foreign Corrupt Practices Act enforcement case to date. This case involved the most extensive corporate internal investigation ever undertaken by a company—and one whose thoroughness arguably avoided bribery charges, fines, debarment and suspension that could have threatened the German conglomerate's closure.

In the wake of multiple searches of officers' and employees' homes in Germany, Siemens AG and its subsidiaries discovered FCPA violations after initiating an internal investigation of unprecedented scope. According to the DOJ, from the 1990s through 2007 Siemens engaged in a "systematic and widespread effort to make and to hide hundreds of millions of dollars in bribe payments across the globe." From 2001 to 2007 Siemens and various subsidiaries paid more than $800 million in bribes. Efforts by Siemens executives involved off-the-books slush fund accounts and shell companies to facilitate bribes; false entries on the company's books and records by, for example, falsely recording bribes as consulting fees; by accumulating profit reserves as a liability on company books and then using these funds to facilitate bribe payments.

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[10] See:

Supreme Court: United States v. Arthur Andersen, 544 U.S. 696, 25 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) (reversing obstruction of justice conviction).

Fifth Circuit: United States v. Brown, 459 F.3d 509 (5th Cir. 2006) (reversing fraud convictions in Enron "Nigerian Barge" prosecution).

[11] See Finder and McConnell, "Annual Pre-Trial Agreement Update," American Bar Ass'n, 22d Institute on White Collar Crime (March, 2008) (noting thirty-five agreements in 2007, up from 20 in 2006).

[12] This discussion is largely taken from Tarun, *Foreign Corrupt Practices Act Handbook* ((c) 2009 Robert W. Tarun), and is reprinted with the permission of its author.

Siemens shared the results of its investigation with the Department of Justice and Securities and Exchange Commission officials and continuously cooperated extensively and authentically with the DOJ in its ongoing investigation; took appropriate disciplinary actions against individual wrongdoers, including senior management, and took remedial action, including the complete restructuring of Siemens AG and the implementation of a sophisticated compliance program and organization.

Siemens AG pleaded guilty to a two-count indictment charging criminal violations of the FCPA's internal controls and books and records provisions. By pleading guilty to the Act's accounting provisions, the parent company avoided government suspension and debarment in numerous jurisdictions. The U.S. and German authorities concluded that Siemens and various subsidiaries had made improper payments exceeding $1.3 billion at various locations including Argentina, Bangladesh, France, Iraq, Turkey and Venezuela. Siemens agreed to pay U.S. authorities penalties totaling $450 million and $350 million in disgorgement of profits through the SEC. The company also agreed to pay German authorities $850 million in similar penalties and disgorgement.

There are several significant features about the Siemens settlement in addition to the massive $1.6 billion in penalties. First, the parent company was not charged with bribery, enabling it to likely avoid government debarment. Second, Siemens AG pled guilty to the FCPA's internal controls provision—the first time this section has been charged criminally. Third, while monitorships have become standard in FCPA resolutions, the Siemens' one is four years—a year longer than the common three-year terms, and the monitor will for the first time be a non-U.S. citizen, Dr. Theo Waizul, the former German Minister of Finance. Fourth, the announcement of the Siemens resolution was a joint one by the DOJ, SEC and Munich prosecutors, signaling even greater coordination with foreign authorities in the anti-bribery arena. Fifth, the penalty, while massive by any measure, could have been more severe. Under the applicable corporate guidelines, Siemens' fine range was $1.35 billion to $2.7 billion. The company received credit at sentencing for: (1) substantial assistance in the investigation; (2) extraordinary efforts to uncover evidence of prior corrupt activities (thirty-four countries, 1,750 interviews, and 800 informational meetings, and 1.5 million hours of billable time by outside counsel and accounting professionals); and (3) extensive commitment to restructure and remediate its operations to make it a worldwide leader in transparent and responsible corporate practices going forward. The company collected and preserved over 100 million documents and produced to the DOJ over 24,000 documents, amounting to over 100,000 pages.

The *Siemens* case makes clear that there is almost no limit to corporate penalties; large companies, in particular, will be expected to conduct thorough internal and in some cases global investigations, multi-jurisdictional cooperation is here to stay; and remedial measures must be comprehensive and effective.[13]

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[13] The ten elements of the corporate compliance program that *Siemens* agreed to as part of its December 2008 Department of Justice plea agreement are found in § 3.02[1][d] *infra*.

§ 1.13 Seven Facts Every Business Person Needs to Understand About Corporate Criminal Liability

Corporate clients have become increasingly sophisticated in understanding potential criminal problems that may arise as a result of the day-to-day conduct of their businesses. Nonetheless, counsel is frequently faced with the task of explaining to a CEO or another executive how a given situation may imperil the company and certain employees.

A brief summary of the key concepts of corporate criminal liability follows. Counsel may wish to provide this to the client to help in quickly explaining the potential parameters of the problem.

1. *The Company, as well as corporate officers and employees, may be prosecuted based on misconduct by corporate officers and employees.*

Corporations, as well as individuals, can be prosecuted. Both federal and state prosecutors are increasingly exercising their discretion to prosecute companies as well as their executives and employees.

2. *The potential consequences of a criminal prosecution of a company are serious.*

The sentences imposed on corporations based on convictions for most crimes are stiff. Under the Federal Organizational Sentencing Guidelines, enacted in November of 1991,[1] a significant number of companies have received fines in excess of $100 million. In addition to fines, corporations must pay restitution, may have to undertake other remedial steps, such as clean ups of environmental problems and product recalls, and may face the additional burden of being placed on corporate probation. Corporate probation, which can involve various forms of court monitoring of the company's business activities, is a distinct possibility if the company had fifty or more employees at the time of the offense and did not have an effective compliance program in place.

In addition to the criminal penalties imposed by a sentence, corporations may face additional costs as a result of a criminal prosecution. Damage to reputation, significant legal fees, lost productivity, damage to employee morale, heightened scrutiny by government regulators, civil lawsuits from vendors or customers, shareholder derivative

(Text continued on page 1-55)

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[1] See § 1.09 *supra*.

actions, and possible debarment from government contracting, are all potential costs a company may be forced to bear due to a criminal prosecution.

3. The company can be held accountable for virtually any acts of an employee or other agent if: (a) the acts were done to benefit the company in some way; and (b) the acts were within the scope of the employee's or agent's authority.

In many respects, the prosecution of a corporation is actually easier than the prosecution of any individual employee. In essence, a corporation can be held criminally liable for the acts of any agent. That includes any director, officer, low level employee, or even independent contractors of the company. Two requirements for attributing the acts of the agent must be met. First, the agent's acts must be within the scope of his authority. Second, the agent's acts must be undertaken for the benefit of the corporation—at least in part.

In considering whether an agent's acts were in the scope of his authority, a court only looks to whether the acts were committed in the course of the agent's generally authorized duties. An example is a salesman agreeing to fix prices with the salesman for a competitor. In considering whether the acts were for the benefit of the corporation, a court determines whether there was any direct or ancillary benefit to the company. Even acts undertaken primarily for the personal gain of the agent are *for the benefit of the corporation* if there was any way the company could have benefited by the acts, even if it did not realize that benefit.

4. The company can be bound by an agent's acts even if they were contrary to explicit company policy.

Courts focus on whether an employee acted within his general job function and whether the acts in some way could have benefited the company. The fact that there were specific directives or a compliance program in place to prevent the conduct is not a defense. However, it may make a prosecutor less inclined to seek indictment of the company as opposed to its agent.

5. Prosecutors have vast discretion in deciding whether to seek an indictment.

Given the broad standard for the imposition of corporate criminal liability, prosecutors have extraordinary discretion in deciding whether to seek an indictment in given circumstances. The factors that go into the decision about whether to indict a corporation are numerous and complex.[2] However, basically, prosecutors will consider the legal and factual strength of their case, the extent to which the misconduct reflected company policy as opposed to the aberrant acts of rogue employees, the company's level of cooperation, the company's prior criminal history, and the policy interests that will be furthered by prosecution.

6. Although individual employees have a Fifth Amendment right against self-incrimination, the corporation has no Fifth Amendment right against self-incrimination.

A corporation cannot refuse to produce documents subpoenaed by a grand jury based upon an assertion of the Fifth Amendment privilege against self-incrimination. That privilege applies to individuals only and not corporations. The rationale behind this rule is that a corporation is presumed to be a "creature of the state," incorporated for the public benefit. The special privileges it enjoys gives the government the right to investigate whether it has exceeded its lawful authority. The company's employees and other individual agents, however, retain their Fifth Amendment privilege against self-incrimination although the company cannot direct them to assert it. Any attempt by the company to impede a criminal investigation may lead to charges of obstruction of justice.

7. A company can limit its exposure to criminal liability by promptly investigating allegations of serious misconduct and thereafter taking appropriate action.

A corporation which receives allegations of serious misconduct can benefit by conducting a thorough internal investigation to determine the scope and seriousness of the misconduct and thereafter taking appropriate action. Taking this action can minimize the likelihood of an indictment and significantly decrease the penalties of any sentence should an indictment and conviction occur. The Federal Organizational Sentencing Guidelines significantly reward voluntary disclosure of misconduct prior to it being uncovered by the government.[3]

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[2] See Chapter 16 *infra.zz*

[3] See § 1.09 *supra.*

§ 1.14 Additional Resources

Androphy, *White Collar Crime 2d* (West Group 2002).

Arkin, Dudley, Eisenstein, Rakoff, Re & Siffert, *Business Crime: Criminal Liability of the Business Community* (Matthew Bender 1992).

Brian and MacNeil, eds., *Internal Corporate Investigations* (ABA 2d Ed. 2003).

Brickey, *Corporate Criminal Liability 3d* (Clark Boardman Callaghan 1994).

Cissell, *Federal Criminal Trials* (Michie 6th ed. 1992).

LaFave, *Criminal Law* (West Group 3d Ed. 2002).

Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* (Matthew Bender 1993).

Obermaier and Morvillo, *White Collar Crime: Business and Regulatory Offenses* (Law Journal Seminars-Press 2007).

O'Sullivan, *Federal White Collar Crime* (3d ed., West Group 2007).

"Twenty-Second Survey of White Collar Crime," 44 Am. Crim. L. Rev. No. 2 (Spring 2007).

Webb and Molo, "Some Practical Considerations in Implementing Effective Compliance Programs: A Framework for Meeting the Requirements of the Organizational Sentencing Guidelines," 71 Wash. U. L.Q. 801 (1993).

Webb, Molo & Hurst, *Understanding and Avoiding Corporate and Executive Criminal Liability* (Corporate Counsel Institute 1992).

Wray, "Corporate Probation Under the New Organizational Sentencing Guidelines," 101 Yale L.J. 2017 (1992).

Zacharias and Green, "The Uniqueness of Federal Prosecutors," 88 Geo. L. J. 207 (2000).