# CORPORATE COMPLIANCE PROGRAMS: AN APPROACH TO AVOID OR MINIMIZE CRIMINAL AND CIVIL LIABILITY

*John F. Fatino**

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* Member, Whitfield & Eddy, P.L.C., 317 Sixth Avenue, Suite 1200, Des Moines, Iowa 50309-4195, (515) 288-6041 (v), (515) 246-1474 (f), fatino@whitfieldlaw.com. The author is a 1991 graduate of Drake University Law School and a former Assistant Appellate Defender for the Iowa Public Defender's Office. This Article is based upon a presentation given in 2001 to the American Corporate Counsel Association and the Illinois State Bar Association in Chicago, Illinois.

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## I. INTRODUCTION

Increasingly, corporate counsel have found themselves thrust into the role of a criminal defense lawyer. As one author observed, "[i]ronically, the first line of defense to a potential criminal charge is often the responsibility of corporate counsel."[1] Concurrently, those practitioners that did not see themselves as "white collar" defense lawyers were not exposed to governmental investigations of corporations and their individuals. Nonetheless, in recent years it appears that both types of practitioners are being required—at an alarming rate—to be knowledgeable of the workings of a criminal investigation and skilled in ways to minimize criminal exposure to both corporate and individual clients.[2]

A corporate compliance program is one method of reducing a corporation's exposure to criminal liability. Formally defined by the United States Sentencing Guidelines [hereinafter Guidelines] as an "effective program to prevent and detect violations of law,"[3] such programs also benefit corporations in the civil arena.[4] This Article examines the benefits corporate compliance programs bring to corporations, and demonstrates the ways these programs minimize corporations' criminal and civil liabilities.

Data compiled by the United States Sentencing Commission [hereinafter Commission] revealed that the creation and maintenance of corporate compliance programs impacts today's legal practitioners.[5] This impact derives from the fact that

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1. Steven M. Kowal, *When the Government Agents Take Aim: How to Handle an "Ambush,"* THE BRIEF, Winter 2001, at 8, 9.

2. *See, e.g.*, Michael S. Pasano & Thierry Oliver Desmet, *Environmental Criminal Law Today—Jail: It's Not Just for Directors and Officers Anymore*, THE CHAMPION, June 2001, at 26, 27 (discussing a current prosecutorial trend which imputes wrongful conduct of the corporate offender to mere employees of a corporation). It is a common belief that criminal penalties are a more effective deterrent than administrative penalties. Michael Schroeder, *SEC Welcomes Prosecutions*, WALL ST. J., June 11, 2002, at A2.

3. U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. 3(k) (2001); *see* discussion *infra* Part II.C.1.c.i.

4. *See* discussion *infra* Part II.C.2.

5. *See* U.S. SENTENCING COMM'N, 1999 ANN. REP. 45, *available at* http://www.ussc.gov/ANNRPT/1999/ar99toc.htm.

a number of corporations have failed to establish corporate compliance programs, resulting in higher fines for non-compliance than corporations may have incurred had such a program been in effect.[6] In 1999, the Commission received data from 255 organizations.[7] That data revealed only one organization received a one-point reduction in its culpability score for having in place an "'effective program to prevent and detect violations of law,' as provided by section 8C2.5(f) . . . ."[8] Additionally, 200 organizations had fines imposed, the largest of which was $500 million.[9] Of the 255 cases reported, 91.4% ended in guilty pleas.[10]

The trend grew worse in 2000. While the largest fine imposed was only $53 million, none of the organizations for which data was submitted to the Commission received a reduction in their culpability scores for having a corporate compliance program in place.[11] These statistics indicate that millions of dollars in fines have been paid solely because of corporations' failure to establish effective corporate compliance programs.[12] Moreover, they highlight how officers and directors have needlessly exposed themselves to liability.[13]

This Article will analyze the nature of corporate criminal liability (including the liability of its officers and employees) and the responsibility placed upon officers and directors to minimize fines. Further, this Article will examine the use of compliance programs in negotiations, trial, sentencing, and civil cases. Counsel will also be alerted to potential problems which may arise through the use of a corporate compliance program. Finally, the ethical responsibilities of corporate counsel regarding contact with potential witness or "target" defendant employees will be discussed.

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6. *See id.*
7. *Id.*
8. *Id.*
9. *Id.* at 46.
10. *Id.*
11. U.S. SENTENCING COMM'N, 2000 ANN. REP. 46-47, *available at* http://www.ussc.gov/ANNRPT/2000/ar00toc.htm.
12. *See id.*
13. *See id.*

## II. CORPORATE CRIMINAL LIABILITY

### A. *Corporations (and Their Officers and Employees) May Be Held Criminally Liable*

#### 1. *Corporate Liability for Criminal Acts*

At the outset, one must acknowledge that it is now beyond argument that a corporation can be held criminally liable for criminal acts committed by its employees or agents.[14] "Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment."[15] Furthermore, imputation of criminal conduct to the corporation is broadly applied. In *United States v. Basic Construction Co.*,[16] the Fourth Circuit held:

> A corporation is legally bound by the acts or statements of its agents done or made within the scope of their employment . . . . When the act of an agent is within the scope of his employment or within the scope of his apparent authority, the corporation is held legally responsible for it.[17]

Indeed, criminal liability may attach if "the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions."[18]

Criminal liability may be imposed upon a corporation based on the intentions of an employee or agent.[19] If an employee acts with the intention to benefit the employer, it is irrelevant whether the employee's actions result in *actual* benefit to the employer. It is the employee's intention, not the result of the conduct, that imputes criminal liability to the corporation:

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14. An examination of each and every statute which could impose criminal liability upon a corporation or officer is beyond the scope of this Article. Nonetheless, counsel should be aware of section 5 of the Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. No. 106-414, § 5, 114 Stat. 1803 (2000). This newly created legislation provides criminal penalties for misleading the Secretary of Transportation with respect to vehicle and equipment-related safety defects. *Id.*

15. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) (citations omitted).

16. United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir. 1983).

17. *Id.* at 572.

18. United States v. Hilton Hotels Corp., 467 F.2d at 1004; *see* United States v. Basic Constr. Co., 711 F.2d at 573 (holding that a corporation is bound by the acts of its agents even if the agents' actions are contrary to the instructions given by the corporation).

19. Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 128-29 (5th Cir. 1962).

> If the [employee's action] is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is indiscernible, or, for that matter, the result turns out to be adverse.[20]

As noted by the Fifth Circuit, the language of the statute is the gauge by which corporate liability is measured:

> Under a statute requiring that there be "a specific wrongful intent," and the "presence of culpable intent as a necessary element of the offense," the corporation does not acquire that knowledge or possess the requisite "state of mind essential for responsibility," through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer.[21]

The Fourth Circuit has uniquely synthesized the test:

> [W]hether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation . . . is to insulate the corporation from criminal liability for actions of its agents which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.[22]

The Second Circuit has approved a jury instruction that incorporates the notion of "benefit" to the corporation.[23] According to the Second Circuit, criminal liability arises from the acts of managerial employees:

> [D]one on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employee has authority to perform . . . . By a managerial agent I mean an officer of the corporation or an agent of the

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20. *Id.*

21. *Id.* at 129 (citations omitted).

22. United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985) (citing Standard Oil Co. of Tex. v. United States, 307 F.2d at 120); *see* Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945) ("We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact.").

23. United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir. 1981).

> corporation having duties of such responsibility that his conduct may fairly be assumed to represent the corporation.[24]

Nonetheless, "[i]t is a question of fact whether measures taken to enforce corporate policy in this area will adequately insulate the corporation against such acts."[25] A corporate compliance program can be used as some evidence to defeat the argument that the employee's conduct was for the benefit of the corporation.[26]

Finally, certain materials are so dangerous that their very existence would warrant the conclusion that they must be subject to regulation notwithstanding the individual employee's actual knowledge. Where "dangerous or deleterious devices or products or obnoxious waste materials are [being shipped], the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of [the] regulation."[27]

### 2. *Individual Officer Liability*

Previously, criminal responsibility was imposed only upon officers who held positions of authority within the corporation.[28] Practitioners should note, however, that today, mid-level employees are being held responsible for certain "corporate" crimes even though these same mid-level employees do not have a stake in the corporation and are not involved in corporate decision making.[29] For example, in *United States v. Hanousek*,[30] the Ninth Circuit upheld the conviction of a railroad manager for an oil spill under the Clean Water Act (CWA).[31] This conviction was upheld despite the fact that the manager was off duty when the oil spill occurred and his presence on the job site would not have prevented the oil spill from occurring.[32] This decision indicates that under certain environmental statutes, employees may be found criminally responsible in their individual capacity regardless of their actual knowledge.[33]

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24. *Id.*
25. United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979); *see also* United States v. Automated Med. Labs., Inc., 770 F.2d at 407 (stating that the jury could have concluded that agents acted "at least in part" with the intent of benefiting the corporation).
26. *See* discussion *infra* Part II.C.1.b.
27. United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971).
28. *See* United Sates v. Park, 421 U.S. 658, 676 (1975).
29. Pasano & Desmet, *supra* note 2, at 27.
30. United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999).
31. *Id.* at 1124-25.
32. *Id.* at 1119.
33. *See* United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993) (holding that the government need not demonstrate that defendants had knowledge that their actions violated the Clean Water Act, 42 U.S.C. § 1319(c)(2)(A) (2000) [hereinafter CWA]); United States v. Dee, 912 F.2d 741,

This application of liability is a vast extension of the standards established by the United States Supreme Court in *United States v. Park*.[34] In *Park*, the Supreme Court held that liability should only attach to "individuals who were ***both*** officers or owners of the companies in question ***and*** who possessed real power to correct the violation."[35] Based upon certain environmental legislation and courts' reading of those statutes, criminal penalties may now lie against mere employees of the corporation.[36]

Due to the fact that corporations are legal fictions, the question of an officer's civil liability in the officer's *individual* capacity is subject to a different standard. The Minnesota Court of Appeals summarized three essential elements that must exist before liability will be imposed against a corporate officer under the so-called "responsible corporate officer doctrine."[37] First, "the individual must be in a position of responsibility which allows the person to influence corporate policies or activities."[38] Second, "there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations."[39] Finally, the individual's acts or failures to act need to have "facilitated the violations."[40] Merely being an officer is insufficient for liability. "[T]he weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title."[41]

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745-46 (4th Cir. 1990) (holding that the evidence was sufficient to sustain conviction where evidence demonstrated defendants had knowledge they were dealing with hazardous chemicals although defendants did not know violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2)(A) (2000) [hereinafter RCRA], was a crime); United States v. Hoflin, 880 F.2d 1033, 1037-38 (9th Cir. 1989) (holding that knowledge of the absence of a permit is not an element of an offense under the RCRA, but evidence must demonstrate defendant knew waste was hazardous). *But see* United States v. Wilson, 133 F.3d 251, 265 (4th Cir. 1997) (holding that under the CWA, jury instructions must impose on the government "the burden of proving knowledge *with regard to each statutory element*"); United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996) (reversing a conviction under the CWA where the knowing violation related to evidence of discharge and evidence demonstrated defendant believed he was discharging water—not gasoline).

34. United States v. Park, 421 U.S. 658 (1975).

35. Pasano & Desmet, *supra* note 2, at 27 (citing United States v. Park, 421 U.S. at 676).

36. *Id.*

37. *In re* Dougherty, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992).

38. *Id.*

39. *Id.*

40. *Id.*

41. Ind. Dep't of Envtl. Mgmt. v. RLG, Inc., 735 N.E.2d 290, 299 (Ind. Ct. App. 2000); *see also* BEC Corp. v. Dep't of Envtl. Prot., 775 A.2d 928, 938 (Conn. 2001) (holding that a "corporate officer's conduct must have a responsible relationship to a violation").

An individual officer *may* be held accountable for his or her conduct, however, if the officer personally participated in tortious conduct.[42] These theories are distinguishable from an attempt to pierce the corporate veil.[43]

### B. *Corporate Officers Have an Obligation to Minimize Criminal Fine Exposure*

Given the present state of the law, the responsible director (including directors of both profit and non-profit entities) and prudent practitioner must seek ways to minimize a corporation's exposure to liability.[44] This duty has received surprisingly little scholarly commentary.[45] Corporations have major incentives for creating and enforcing corporate compliance programs that ensure their employees are following the law. In 1991, the Commission enacted sentencing guidelines in order to uniformly impose sanctions on corporations that violated federal criminal statutes.[46] The Organizational Sentencing Guidelines, adopted by the Commission, provided penalties in excess of any previously imposed upon corporations.[47] Consequently, the "Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts."[48]

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42. Haupt v. Miller, 514 N.W.2d 905, 909 (Iowa 1994); Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975) (citations omitted).

43. Bloodgood v. Organic Techs. Corp., No. 99-0755, 2001 WL 98656, at *1 (Iowa Ct. App. Feb. 7, 2001).

44. Gordan J. Apple, *Corporate Compliance Plans: Legal Opportunities and Pitfalls*, BENCH & BAR, Nov. 1997, at 31, 31-32.

45. *But see, e.g.*, Mathew G. Doré, *The Duties and Liabilities of an Iowa Corporate Director*, 50 DRAKE L. REV. 207 (2002) (discussing the duties of Iowa corporate directors and ways to minimize corporate liability); H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post* Caremark *Era*, 26 DEL. J. CORP. L. 1 (2001) (discussing the importance of a director's role in avoiding violations of laws and the resulting sanctions). For a discussion on whether multinational corporations should have a global compliance program, see Frank Blue & Rosanne Model, *Exporting Corporate Compliance*, BUS. L. TODAY, May-June 2002, at 8, 9. The authors note that the Guidelines make no distinction between U.S.-based compliance programs and those made applicable to overseas branches of U.S. corporations. *Id.* at 13.

46. Brown, *supra* note 45, at 79; *see* U.S. SENTENCING COMMISSION GUIDELINES MANUAL, Chapter 8 (U.S. Government Printing Office Nov. 2001).

47. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996) (citing U.S. SENTENCING COMMISSION GUIDELINES MANUAL, Chapter 8 (U.S. Government Printing Office Nov. 1994) ("The Guidelines set forth a uniform sentencing structure for organizations to be sentenced for violation of federal criminal statutes and provide for penalties that equal or often massively exceed those previously imposed on corporations.")); Brown, *supra* note 45, at 78-106 (discussing potential penalties for corporations violating federal statutes).

48. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d at 969 (citations omitted).

Not only do the Guidelines' stiff penalties provide incentives for corporations to establish and enforce corporate compliance programs, but officers have an obligation to attempt to minimize corporate exposure to fines. Directors and officers have an obligation to establish corporate compliance programs that will ensure their employees follow the law.[49] Such programs may result in a potential reduction of fines should wrongdoing occur.[50] Failure to implement such programs, however, can result in individual liability on behalf of a director, as a director may be liable for any "losses caused by non-compliance with applicable legal standards."[51] This is the case even if the officer did not intentionally act to harm the corporation.[52] The decision is based, at least in part, in light of the fact that a "rational" officer would establish a corporate compliance program in light of the penalties and potential for reduction of fines provided for in the Guidelines.[53]

### C. *The Compliance Program as a Defense for the Company*[54]

#### 1. *The Compliance Program as a Defense in the Criminal Case*

a. *The Negotiation Stage.* A corporate compliance program can be used as a bargaining chip when corporations negotiate with the government as to whether a corporate client should be criminally charged.[55] As the United States Court of

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49. *See id.* at 970 (stating that a director's duty includes ensuring the corporation has an adequate monitoring system).

50. *See supra* notes 5-6, 8 and accompanying text.

51. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d at 970 (citations omitted).

52. *See In re* Abbott Labs. Derivative S'holders Litig., 293 F.3d 378, 391 (7th Cir. 2002) (holding that a breach of the duty of care could occur without intentional conduct by directors); McCall v. Scott, 250 F.3d 997, 999 (6th Cir. 2001) (discussing *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d at 959).

53. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d at 970.

54. This Article is intended to give the reader an introduction to compliance programs and the consequences a corporation may face should it fail to implement one. One author has suggested a number of factors a company should examine when crafting a corporate compliance program. *See* Brown, *supra* note 45, at 131-43. These factors include an assessment of compliance risks in the industry and an examination of compliance programs used by other companies in like industries. *Id.* at 131-32. The program must be endorsed by management at all levels. *Id.* at 134. Compliance must also be a factor in promotions and compensation. *Id.* at 136. Therefore, training would include education of all new employees, auditing, and annual certification. *Id.* at 137, 139, 143. In the final analysis, the company's existing standards should bespeak a culture in which the corporation expects compliance with all laws and regulations. *Id.* at 132. Consequently, discipline must be applied equally regardless of position and likewise applied when a failure to detect wrongdoing has occurred. *Id.* at 142-43.

55. Steve Seidenberg, *Compliance Alert: Companies Across the Board Are Re-Examining Their Ethics Policies*, NAT'L L.J., Aug. 26, 2002, at A14; *see* C. Loewenson, Jr. & Daniel Levy, *DOJ Guidelines Offer Strategy Clues*, NAT'L L.J., Apr. 24, 2000, at B13, B21 (stating that "[f]or defense

Appeals for the District of Columbia observed: "Where there is adequate evidence for imputation . . ., the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion."[56] Yet, the establishment of a corporate compliance program will not be the only factor a United States Attorney will examine when determining whether to criminally charge a corporation.[57] As the Department of Justice's interpretive memorandum on compliance programs provides:

> Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department [of Justice] encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a corporate compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees or agents.[58]

Thus, a violation in the face of a corporate compliance program may well result in charges despite the program's existence.[59]

b. *The Trial Stage.* A corporate compliance program can also be used as evidence to defeat an argument that the employee's conduct was for the benefit of the

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counsel, the new guidelines [on prosecution of corporations] provide a road map for pre-indictment advocacy" and discussing nonprosecution agreements with corporations). For a general discussion of negotiation strategies to avoid, see George J. Terwilliger, *Business Crime Inquiries: Pitfalls to Avoid*, NAT'L L.J., Apr. 22, 2002, at A19. For specific pointers for corporate counsel to be mindful of at the outset of the government inquiry, see Margaret Graham Tebo, *Guilty by Reason of Title*, A.B.A. J., 44, 46-47 (2000), and Loewenson & Levy, *supra*, at B21.

56. United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970 (D.C. Cir. 1998).

57. Memorandum from Eric Holder Jr., United States Deputy Attorney General, to Heads of Department Components and all United States Attorneys, Federal Prosecution of Corporations § VII(A) (June 16, 1999), *available at* http://www.usdoj.gov/04foia/readingrooms/6161999.htm. Other factors include: (1) "The nature and seriousness of the offense . . ."; (2) "The pervasiveness of wrongdoing . . ."; (3) "The corporation's history of similar conduct . . ."; (4) "The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation . . ."; (5) "The corporation's remedial actions . . ."; (6) "Collateral consequences" to the corporation; and (7) "The adequacy of non-criminal remedies . . . ." *Id.*

58. *Id.* (advising consultation of United States Department of Justice, United States Attorneys' Manual, 9 Criminal Resource Manual § 162 (Feb. 2000) [hereinafter Federal Prosecutions]).

59. *Id.* Corporations must continue to revise their programs in light of empirical evidence. Failure to do so may result in a determination that the program was not effective. Loewenson & Levy, *supra* note 55, at B21.

corporation.[60] However, the court need not instruct the jury that the policy may be used to determine the absence of intent on the corporation's behalf.[61] Courts have held that the exclusion of compliance program evidence in cases regarding violation of an antitrust consent decree was not erroneous.[62]

In addition, there are certain other defenses (although not exhaustive) that a corporation can raise in an attempt to relieve itself of liability for wrongdoings committed by their employees. One such defense is that the occurrence was beyond the control of the company.[63] While statutory language measures a corporation's liability in the first instance, when the statute requires a "knowing violation" and does not impose strict liability, counsel should contemplate whether the occurrence was beyond the control of the corporation.[64] If the occurrence was beyond the control of the corporation, then liability may not be imputed.[65]

Counsel should also be aware that certain defenses will not relieve the corporation of liability for wrongdoing. Neither reliance on a subordinate nor failure to read a document signed by an officer is sufficient to preclude liability.[66] Heretofore, the Fifth Amendment of the United States Constitution has not been found to be a defense for the corporation.[67] The practitioner should note the curious evidentiary issues that flow from this concept.[68] However, as to *individuals*, a recent

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60. United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983).

61. *Id.*

62. *See* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660-61 (2d Cir. 1989) (holding a corporation's compliance program does not insulate it from liability); United States v. Am. Radiator & Standard Corp., 433 F.2d 174, 204 (3d Cir. 1970) (holding it was not error to refuse to admit evidence concerning antitrust policy because the evidence was of "marginal relevance and substantially cumulative"). *But see* United States v. Basic Constr. Co., 711 F.2d at 572 (holding a jury may consider an antitrust compliance policy in determining if the agents were acting for the corporation's benefit).

63. *See, e.g.*, United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295, 1297 (10th Cir. 1972) (noting that the circumstances of the violation must be completely beyond the corporation's control for the corporation to be relieved of liability for wrongdoings committed by their employees).

64. *Id.*

65. *See id.* (stating "circumstances may show an occurrence completely beyond the control of the corporation" and in such cases liability cannot be imposed).

66. *See* United States v. Armour & Co., 168 F.2d 342, 343 (3d Cir. 1948) (holding that reliance on subordinates is not a defense a corporation can raise in order to be relieved of liability); *see also* Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 (9th Cir. 2000) (affirming that failure to actually read a document signed by a corporation's officer is not a defense that will relieve a corporation from liability).

67. *See, e.g.*, Braswell v. United States, 487 U.S. 99, 102, 111-12 (1988) (stating that the Fifth Amendment does not prevent the production of corporate records, even if the production may be personally incriminating).

68. *See id.* at 117-18. The court stated:

United States Supreme Court decision has practitioners rethinking the viability of the Fifth Amendment privilege at least with respect to individuals and documents in their possession.[69]

c. *The Defense at Sentencing.* In order to understand how the compliance program is critical to a reduction of criminal fines, one must first examine the Guidelines.[70]

i. *Sentencing Guideline Definitions.* Commentary 3(k) to the United States Sentencing Guidelines section 8A1.2 defines an "effective program to prevent and detect violations of law" as:

> [A] program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other

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> [A]lthough a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating, we do think certain consequences flow from the fact that the custodian's act of production is one in his representative rather than personal capacity. Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the "individual act" against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon—and the corporation's documents were delivered by—one particular individual, the custodian. The Government has the right, however, to use the corporation's act of production against the custodian. . . . Because the jury is not told that the defendant produced the records, any nexus between the defendant and documents results solely from the corporation's act of production and other evidence in the case.

*Id.*

69. *See* United States v. Hubbell, 530 U.S. 27 (2000) (holding that respondent's act of production had a testimonial aspect such that respondent could not be compelled to produce requested documents without first receiving a grant of immunity under 18 U.S.C. § 6002).

70. See John D. Copeland, *The Tyson Story: Building an Effective Ethics and Compliance Program*, 5 DRAKE J. AGRIC. L. 305 (2000), for an excellent overview of the methodology of determining how fines are calculated under the Guidelines. The reader should be aware, however, that a review of Article 8 of the Guidelines is presently pending. David Rovella, *Enron Fallout: Sentencing Reformers*, NAT'L L.J., Mar. 8, 2002, at A15. Indeed, the President has signed into law directions to the Commission to review and amend, as appropriate, Chapter 8 of the Guidelines. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 805(a)(5), 116 Stat. 745, 802 (2002); *see also New Law Cracks Down on Corporate Crooks*, DES MOINES REGISTER, July 31, 2002, at A1 (discussing the new law designed to make companies responsible for accounting fraud).

> agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:
>
> (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
>
> (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
>
> (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.
>
> (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.*, by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
>
> (5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
>
> (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.
>
> (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses—including any necessary modifications to its program to prevent and detect violations of law.[71]

The precise actions necessary to create an effective program designed to prevent and detect violations of law will depend on a number of factors. Among the relevant factors are:

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[71] U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. 3(k) (2001).

> (i) Size of the organization—The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.
>
> (ii) Likelihood that certain offenses may occur because of the nature of its business—If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.
>
> (iii) Prior history of the organization—An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.
>
> An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.[72]

ii. *Reduction in Culpability Score.* A corporation may receive a three-point reduction in its culpability score[73] if the offense occurred despite "an effective program to prevent and detect violations of law."[74] However, the Guidelines provide the following exceptions:

> [T]his subsection does not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the

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72. *Id.*; *see also* Seidenberg, *supra* note 55, at 417-18 (discussing high-ranking authority resting with general counsel and the fact that, in light of the current environment and recent legislative changes, even small companies are setting up compliance programs); Loewenson & Levy, *supra* note 55, at B20 (discussing the role of high-level management).

73. A corporation's "culpability score" is a score determining the minimum and maximum fines a corporation may pay. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5. It is determined by multiplying the base fine by an assigned number. *Id.* § 8C2.5-.6.

74. *Id.* § 8C2.5(f).

> organization within which the offense was committed where the unit had 200 or more employees, or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense. Participation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law.
>
> *Provided, further*, that this subsection does not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.[75]

Self-reporting may warrant another five point reduction:

> If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct . . . .[76]

iii. *The Guidelines Are Not Exclusive.* In determining the sentence(s) to impose upon a corporation or its officers, a court need not rely solely upon the remedies provided in the Guidelines. 18 U.S.C. § 3553(b) provides that the Court shall impose a sentence within the Guideline range unless:

> [T]he court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.[77]

In the event there is no applicable guideline, the court shall, pursuant to 18 U.S.C. § 3553(a), "impose an appropriate sentence" consistent with the need for the sentence imposed:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

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75. *Id.*
76. *Id.* § 8C2.5(g)(1).
77. 18 U.S.C. § 3553(b) (2000).

> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.][78]

Consequently, a corporation that provides the government with "substantial assistance in the investigation or prosecution of another organization that has committed an offense, or in the investigation or prosecution of an individual not directly affiliated with the defendant," may be eligible for a departure from the Guidelines.[79] However, this departure is not available "for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced."[80] A court's failure to depart downward is generally not appealable.[81]

iv. *Upward Departures from the Guidelines Are Now a Jury Question.* The Guidelines, as drafted, would allow for an upward departure.[82] Section 8C4.10 provides:

> If the organization's culpability score is reduced under § 8C2.5(f) (Effective Program to Prevent and Detect Violations of Law) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.[83]

On June 26, 2000, the United States Supreme Court, pursuant to the Due Process Clause of the United States Constitution, held that any fact that increases a penalty for a state crime beyond the statutory maximum must be decided by a jury and proven beyond a reasonable doubt.[84] Federal circuit courts have applied this

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78. *Id.* § 3553(a); *see, e.g.*, United States v. Tenzer, 213 F.3d 34, 43 (2d Cir. 2000) (holding that sentencing courts are free to consider whether the unusual factors warrant a departure from the Sentencing Guidelines); United States v. Nathan, 188 F.3d 190, 198 (3d Cir. 1999) (stating that a court can depart from the Sentencing Guidelines if the case is atypical and the guideline section is inappropriate).

79. U.S. SENTENCING GUIDELINES MANUAL § 8C4.1(a).

80. *Id.* § 8C4.1, application n.1.

81. United States v. Tenzer, 213 F.3d at 42; United States v. Laird, 948 F.2d 444, 447 (8th Cir. 1991).

82. U.S. SENTENCING GUIDELINES MANUAL § 8C4.10.

83. *Id.*

84. Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) (holding that a New Jersey statute by which a trial judge can impose an "extended term" of imprisonment in certain situations "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system").

holding to the federal system as well.[85] As the dissent recognized, *Apprendi v. New Jersey*[86] calls into question determinate-sentencing schemes such as the Guidelines.[87] The dissent noted:

> Given the pure formalism of the above readings of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching. The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt . . . . The principle thus would apply not only to schemes like New Jersey's . . . but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the federal Sentencing Guidelines). Justice Thomas essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines.[88]

Thus, facts warranting a departure from the Guidelines under § 3553(b) and resulting in an increased penalty beyond the statutory maximum, would now appear to be a question for the jury.[89]

### 2. *The Compliance Program as a Defense in a Civil Case*

In the civil arena, a corporate compliance program can be used to defend the corporation in many ways. For example, a corporation can use its corporate compliance policy as a defense to compensatory damage claims.[90] This circumstance readily occurs when a corporation fails to implement a corporate program ensuring

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85. *See, e.g.*, United States v. Rebmann, 226 F.3d 521, 524 (6th Cir. 2000) (concluding, after a review of *Apprendi*, that the provisions at issue were factual determinations increasing the maximum penalty, and, therefore, elements of the offense which must be proved beyond a reasonable doubt); United States v. Nordby, 225 F.3d 1053, 1057-58 (9th Cir. 2000) (adopting the ruling of *Apprendi*); United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000) (holding that "if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence in the indictment, and must prove those facts to a jury beyond a reasonable doubt").

86. Apprendi v. New Jersey, 530 U.S. 466 (2000).

87. *Id.* at 543-44.

88. *Id.*

89. *See* United States v. Atkins, 250 F.3d 1203, 1213 n.11 (8th Cir. 2001) (emphasizing that a sentence must be beyond the statutory maximum before *Apprendi* applies).

90. *See, e.g.*, Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617, 621 (7th Cir. 2000) (implying that if Z Frank had procedures in place to disseminate information on odometer tampering, it may have had a defense to compensatory damages).

compliance with court orders regarding preservation of documents during the pendency of litigation.[91] Moreover, a corporation's failure to implement a compliance program during the course of discovery in a civil suit may expose the corporation to sanctions.[92] The problem with corporations, in a civil context, is the notion of individual employees' "knowledge" and how it is imputed to the corporation. A corporation must have programs in place to communicate knowledge of potential wrongdoing from individual employees to the corporation so that it can take corrective action. For example, the Seventh Circuit rejected a used car dealer's argument that evidence was insufficient to support a compensatory damage award when the dealer was not the actual party that had committed an odometer rollback.[93] The actual rollback had been committed by a previous owner, Moe Pour, who had not directly sold the vehicle to the dealer, Z Frank.[94] Z Frank sold the vehicle to plaintiff Perez who alleged at trial that "Z Frank should have figured out from General Motors' warranty records, which maintenance workers accessed by computer, that a rollback had occurred."[95] The Seventh Circuit agreed:

> Pour rather than Z Frank did the tampering, and it is not clear that anyone at Z Frank lied to Perez; the most one could say is that the sales staff should have known what the maintenance staff either knew or should have deduced from GM's database. Still, Z Frank the corporation "knew" what its maintenance workers knew, and it did not have in place any procedures to disseminate this information, though managers must have appreciated that failure to communicate could lead its sales force to misrepresent matters on occasion.[96]

Case law also establishes that a corporate compliance program can be a defense to punitive damage claims. In an action brought pursuant to 42 U.S.C. § 1981a, a

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91. *See In re* Prudential Ins. Co. of Am. Sales Practice Litig., 169 F.R.D. 598, 615 (D.N.J. 1997). With respect to court orders for preservation of documents, the court described the role of senior management as follows:

> When the . . . Court Order to preserve documents was entered, it became the obligation of senior management to initiate a comprehensive document preservation plan and to distribute it to all employees. Moreover, it was incumbent on senior management to advise its employees of the pending multi-district litigation . . . to provide them with a copy of the Court's Order, and to acquaint its employees with the potential sanctions, both civil and criminal . . . .

*Id.*

92. *See* FED. R. CIV. P. 16(f) (allowing the trial judge to impose sanctions for failure to obey a scheduling or pretrial order, or for being unprepared or unwilling to participate in the pretrial conference).

93. Perez v. Z Frank Oldsmobile, Inc., 223 F.3d at 620.

94. *Id.* at 619.

95. *Id.* at 620.

96. *Id.* at 621.

written policy may be sufficient to preclude an employer from being liable for punitive damages.[97] "Where an employer has undertaken such good faith efforts at Title VII compliance, it 'demonstrat[es] that it never acted in reckless disregard of federally protected rights.'"[98] However, mere adoption of a policy is insufficient to insulate an employer from civil liability.[99] Although "[t]he purposes underlying Title VII are similarly advanced where employers are encouraged to adopt anti-discrimination policies and educate their personnel on Title VII's prohibitions,"[100] the court left the decision as to whether the employer was making good faith efforts to enforce its anti-discrimination policy for consideration on remand.[101]

At the same time, in the civil arena, a compliance program could be created as a result of a number of factors, including settlement with the government.[102] In a decision decided prior to the adoption of the Guidelines, a United States District Court approved a plea agreement that provided for the implementation of specified corporate remedial measures.[103] Courts have also approved the creation of compliance programs in cases involving environmental violations,[104] consent decrees under Title VII,[105] and the False Claims Act.[106]

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97. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999) (citing Harris v. L & L Wings, Inc., 132 F.3d 978, 983-84 (4th Cir. 1997)).

98. *Id.* (quoting Harris v. L & L Wings, Inc., 132 F.3d at 974).

99. Bruso v. United Airlines, Inc., 239 F.3d 858 (7th Cir. 2001); *see also* EEOC v. Wal-Mart, 187 F.3d 1241, 1248-49 (10th Cir. 1999) (stating that evidence of preparation and distribution of an ADA compliance manual did not prevent imposition of punitive damages because the record did not convince the court "that Wal-Mart made a good faith effort to educate its employees about the ADA's prohibitions").

100. Kolstad v. Am. Dental Ass'n, 527 U.S. at 545.

101. *Id.*

102. See Brown, *supra*, note 45, at 113 n.535 (citing Kirk S. Jordan & Joseph E. Murphy, *Compliance Programs: What the Government Really Wants*, ACCA DOCKET, 10 (July/Aug. 1996)), for a discussion concerning the actual experience of corporations and administrative compliance programs. The compliance programs entered into by corporations as part of settlement agreements incorporate specific procedures targeted to prevent additional violations. *Id.*

103. United States v. C.R. Bard, Inc., 848 F. Supp. 287, 289-92 (D. Mass. 1994).

104. "The United States and the State of Louisiana agree that the . . . Compliance Report may not be used as direct evidence in a proceeding to a assess a civil penalty . . . if the violation is corrected within the time allowed . . . ." United States v. Browning-Ferris Indus. Chem. Servs., Inc., 704 F. Supp. 1355, 1378 (M.D. La. 1988). Yet, if the violations were to remain uncorrected after the period, the Compliance Report may be used as "direct evidence of the duration or degree of defendants' knowledge of a RCRA, CWA, or CAA violation." *Id.* at 1378-79.

105. EEOC v. Foster Wheeler Constructors, Inc., No. 98-C1601, 2000 WL 51807, at *8 (N.D. Ill. Jan. 12, 2000); *see* EEOC v. H.S. Camp & Sons, Inc., No. CIV.A.77-69-CIV-OC, 1982 WL 446, at *1 (M.D. Fla. Nov. 1, 1982) (ordering the establishment of a position).

106. United States v. Chester Care Ctr., No. 98CV-139, 1998 U.S. Dist. LEXIS 4836, at *32 (E.D. Pa. Feb. 2, 1998). The Consent Order further provided that the program was to be approved by the Office of Counsel to the Inspector General, Department of Health and Human Services under

## III. CORPORATE COMPLIANCE DOCUMENT PITFALLS

### A. *The Documents Are Discoverable*

The attorney-client privilege will most likely not attach to documents created as a result of a compliance program, or to those created to determine compliance with a compliance program.[107] As such, the documents will be discoverable.[108] By the same token, based upon the very nature of the material, the documents would also not be protected by the attorney work-product privilege.[109]

### B. *The Program May Subject a Company to Liability*

A company's own compliance documents may reveal a statutory violation.[110] The Department of Justice has recognized this possibility, commenting that such a violation can demonstrate inadequate management and oversight of the plan.[111] In at least one decision, a corporate training film produced following the return of an adverse verdict was found to have generated a genuine issue of material fact which precluded summary judgment on a defamation claim against New York Life Insurance Company.[112] Furthermore, such a violation would damage the corporation's attempt to minimize the penalty.[113]

### C. *Defects in the Compliance Program Itself May Preclude Relief*

A sexual harassment policy providing that an employee who believed that he or she had been subject to sexual harassment should immediately report "'conduct to the

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penalty of exclusion from the Medicare Program. *See* False Claims Act, 31 U.S.C. § 3729 (2000) (providing for the establishment of a corporate compliance program to report on and address "all components relevant to the provision of adequate care, e.g., medical, nursing, nutrition, wound care, dietary, housekeeping, laundry, infection, plant operations and facility management").

107. *See, e.g.*, United States v. Chevron U.S.A., Inc., CIV.A. No. 88-6681, 1989 WL 121616, at *16-17 (E.D. Pa. Oct. 16, 1989) (holding internal environmental audits prepared to report compliance with environmental audit were discoverable).

108. *Id.*

109. *See* FED. R. CIV. P. 26(b)(3) (setting out an attorney work-product privilege in civil actions); FED. R. CRIM. P. 17(c) (setting forth the attorney work-product privilege in criminal trials).

110. Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1325 n.4 (9th Cir. 1982) (vacating part of an FTC Order, and observing that Ward's own audits indicated a violation of its corporate compliance program).

111. Federal Prosecutions, *supra* note 58, § VII(A).

112. Dawson v. N.Y. Life Ins. Co., 932 F. Supp. 1509, 1535 (N.D. Ill. 1996).

113. Federal Prosecutions, *supra* note 58, § VII(A) ("[T]he commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program.").

immediate supervisor, division manager, or Human Resource Representative, whichever the employee feels is appropriate, under the circumstances'" was insufficient to prevent liability under Title VII.[114]

### D. *The Compliance Team Can Be a Basis for Criminal Liability*

A problem that arises with corporate compliance programs is that the compliance team itself can be a basis for liability.[115] Who is supposed to watch those that are supposed to be watching the employees in the first place? In at least one case, the compliance team became part of the problem when compliance team members began to instruct employees to "falsify and fabricate records in order" to conceal deficiencies from the Food and Drug Administration.[116] The Fourth Circuit found the compliance team's motivation was for the benefit of the corporation and imposed liability on the corporation.[117]

## IV. A WORD ABOUT ETHICS

The attorney-client privilege extends to information gathered from employees regarding matters within the scope of the employees' corporate duties.[118] Ethical issues arise swiftly in a corporate criminal investigation. Corporate counsel should be especially careful when dealing with unrepresented employees; counsel should alert the employee that the employee's statement could later be given to the government by the employer.[119]

> Often the attorney for a company that employs the client will ask to interview the client pursuant to the company's attorney-client privilege. The company, however, may and often will later waive the privilege and disclose the client's statement to the authorities in an effort to persuade the prosecution not to bring

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114. Gentry v. Export Packaging Co., 238 F.3d 842, 847-48 (7th Cir. 2001). The court stated:

> If Export desired its policy to provide a viable means by which an employee could report sexual harassment, then the company should have made it more evident who assumed that Human Resources Representative position. A reasonable jury could have found that such a deficiency in Export's sexual harassment policy reveals that it failed to take appropriate steps to prevent sexual harassment.

*Id.*

115. *See* United States v. Automated Med. Labs., Inc., 770 F.2d 399, 401 (4th Cir. 1985) (finding that the actions of the compliance team exposed the corporation to liability).

116. *Id.*

117. *Id.* at 407.

118. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

119. Loewenson & Levy, *supra* note 55, at B21.

> charges, to treat the company leniently, to demonstrate its "cooperation" with the government, or as part of its "voluntary disclosure" obligations. The privilege in such a situation belongs to the company, not to its employee. While a corporate attorney ethically must disclose to the client that he or she is the attorney for the corporation and not for the individual employee, that advice is not made clear, and certainly not stressed to the client by corporate counsel.[120]

Thus, counsel for the company should be cognizant of the likelihood of a conflict of interest at the outset when contact is made with individual officers and employees. Certainly, the issue of separate counsel for the employee warrants serious consideration.[121]

> [T]he best approach is to inform the individual that separate legal counsel will be obtained. Until the individual has had an opportunity to consult with a lawyer, the individual must decide independently whether to meet with the government agents. The individual should be told that there is a choice—unless there is a subpoena, the individual can consent to or refuse a voluntary interview. Corporate counsel should state clearly that the decision is entirely up to the individual and that the company is not encouraging either immediate cooperation with the government or rejection of the interview request. The individual should be told that an independent decision also covers any request to sign a statement. If the individual decides to provide a statement, a copy should be requested and retained.
>
> If the individual decides to proceed with an interview and circumstance allows, the corporate lawyer may request the opportunity be present as an observer.[122]

An employee's waiver of certain privileges may be to the corporation's benefit in the long run, although it may be to the detriment of the individual employee or officer involved. The burden is on the individual to show the corporate attorney was meeting with the individual as the individual's counsel.[123]

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120. Lawrence S. Goldman & Jill R. Shellow-Lavine, *Pre-Indictment Representation in White-Collar Cases*, THE CHAMPION, June 2000, at 18, 22 (footnotes omitted); *see* Loewenson & Levy, *supra* note 55, at B21 (stating that defense counsel conducting an internal investigation must warn officers and employees of the potential for waiver of privileges by the corporation; such information to a person contemplating cooperation "may be the deciding factor that drives him or her to silence").

121. Kowal, *supra* note 1, at 16.

122. *Id.* Kowal discusses separate counsel in the context of a government requested interview. *See id.* This concept extends by analogy to the corporation's own internal investigation. *See id.*

123. *In re* Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001) (citing United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989)).

One factor the government may use to gauge the adequacy of corporate cooperation is the completeness of the disclosure, including the willingness of the corporation to waive attorney-client and work-product privileges.[124] Indeed, the perceived protection of culpable employees may result in charges being filed against the company.[125] Accordingly, as to individual defendants, counsel for the individual should contemplate crafting a joint defense agreement before agreeing to allow the client to speak with corporate counsel.[126] Even in the absence of a knowing waiver of the privileges, the government may still seek to compel disclosure based upon a waiver theory even when the corporation has specifically indicated it is unwilling to waive the privileges.[127]

The government, on the other hand, is in the position of using corporate counsel as a conduit for information which may not have been obtained if the government did not approach the individual directly and grant her some type of immunity.[128] In the long run, the role of counsel could be jeopardized by these developments. As clients become aware of the fact that the government may "use" counsel (by virtue of the requirement of waiver of certain privileges) to the perceived

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124. Federal Prosecutions, *supra* note 58, § VI(A); *see* Loewenson & Levy, *supra* note 55, at B21 (noting that cooperation with a government investigation may include waiving the attorney-client privilege and work-product protection).

125. Federal Prosecutions, *supra* note 58, § VI(B).

126. Two commentators have suggested the following:

> If the attorney believes that it is in the client's best interest to speak to the company's attorney . . . the attorney can suggest that the interview be conducted pursuant to a joint defense agreement specifying that the company may not reveal the client's statements to the prosecution without first obtaining the client's consent. In any case, the attorney should insist on attending the interview.

Goldman & Shellow-Lavine, *supra* note 120, at 22; *see also* Loewenson & Levy, *supra* note 55, at B21 (discussing joint defense agreements, under which a company must withdraw from the joint defense group upon its cooperation with the government, after which it cannot be compelled to reveal information it learned from other participates of the joint defense agreement). Yet, a very different result may occur when a company is acquired and the new owners elect to waive certain privileges. *See In re* Grand Jury Subpoena, 274 F.3d at 572-74 (holding that the individual attorney-client privilege that exists between a corporate officer and corporate counsel can be unilaterally waived by the corporation).

127. *In re* Grand Jury Proceedings, 219 F.3d 175, 180 (2d Cir. 2000) (vacating district court's decision and remanding for consideration after district court found waiver by a grand jury witness's reference to the fact that the course of action was "validated by counsel").

128. *See* Kathryn Keneally, *White-Collar Crime: Threat to the Corporation's Attorney-Client Privilege and Work Product Immunity*, 25 THE CHAMPION, Jan.-Feb. 2001, at 53 (quotation omitted).

detriment of the corporation, clients may forego the use of counsel all together during the internal investigation phase.[129]

## V. CONCLUSION

Based upon the Commission's data, corporations have not created sufficient corporate compliance programs (if at all) to date.[130] The case law places this burden upon officers and directors.[131] Once created, these programs can become an effective tool in the negotiation, trial, and if necessary, sentencing phase of a criminal proceeding. Additionally, corporations can achieve benefits from corporate compliance programs in civil cases. In being aware of the nature of corporate criminal liability and the means of reducing fines, counsel can effectively aid their clients in creating and obtaining favorable results from corporate compliance programs.

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129. Steven M. Cohen & Joanna L. Bergmann, *Corporate Crime-Attorney-Client Privilege*, NAT'L L.J., Aug. 28, 2000, at B6.

130. *See* U.S. SENTENCING COMM'N, 1999 ANN. REP. 45, *available at* http://www.ussc.gov/ANNRPT/1999/ar99toc.htm.

131. *See* discussion *supra* Part II.A.2.