Monday, October 1, 2012
9:00 AM - 10:30 AM

1200 – Across the Atlantic: Comparing Environmental Law in the United States and the European Union

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Faculty Biographies

Ann Marley Chilton

Ann Marley Chilton is the global compliance officer and regional managing attorney for the U.S./Canada at Environmental Resources Management, Inc. (ERM). ERM is a 4,700 person international environmental firm that provides environmental and sustainability services to Fortune 1000 clients in over 44 countries. Ms. Chilton runs ERM's global compliance function and also leads the U.S./Canada law team. A key focus of her compliance practice is international anti-bribery/corruption counseling and process improvement pursuant to not only the U.S. Federal Sentencing Guidelines for Organizations, but also international GRI and UN Global Compact standards.

Ms. Chilton previously served in-house with the Motorola and Freescale law departments. For these entities, in addition to her duties related to the IPO, she supervised complex commercial, intellectual property, and insured matters litigation. In private practice with Fulbright & Jaworski in Austin, TX, Ms. Chilton served on the national counsel team for Bayer Corporation. In private practice in Chicago, she was on the national counsel team for certain companies at Lloyd's of London.

Ms. Chilton participates in developing international compliance program standards and is one of the seventeen members of the G4 version working group on anti-corruption reporting standards for GRI. Ms. Chilton also participates in ERM's charity, the ERM Foundation. Recently, Ms. Chilton received *Ethisphere* magazine's designation as a Top Compliance and Ethics Officer on the 2011 Attorney-Who-Matter list.

Ms. Chilton is an undergraduate alumni of Rice University and a law alumni of the University of Texas School of Law. Ms. Chilton is also a Certified Compliance and Ethics professional (CCEP).

Mark Errington

Mark Errington is the global managing partner of ERM's M&A transaction services practice. He has over 25 years' experience working with multinational corporations, financial institutions and their legal counsel.

He has extensive experience leading major international due diligence assessments and implementing integration and/or liability management programs associated with mergers, acquisitions, divestitures and capital raising/flotations. He assists clients to develop and manage their transaction process to ensure that EHS risks and value-added opportunities are managed in a way that is aligned with the client's business goals and drivers.

Having lived and worked across four continents, Europe, Asia Pacific, North America and South America, his consulting experience is uniquely international.

Carlos de Miguel Perelas

Carlos de Miguel is a partner in the Madrid office of Uría Menéndez. His area of expertise is environmental law although he also advises on energy and real estate law. He works closely with his clients in all economic sectors and on all types of environmental matters in the context of commercial transactions (M&A, loans, IPOs.), litigation (before administrative, civil and criminal courts), and ad hoc. He frequently prepares reports on environmental issues, and advises on dealings with public authorities in relation to environmental matters (authorizations, environmental impact assessments, etc.). He has also participated in drafting environmental legislation. The main international legal directories regards him as a leading lawyer in environmental law.

Since 1988 he has been a civil law lecturer and since 1997 he has also lectured on environmental law at the Universidad Pontificia Comillas ('ICADE'). He is a regular speaker and commentator at masters courses and seminars and conferences on matters relating to his field of expertise, both in Spain and abroad.

Andrew Perellis

Andrew Perellis is a partner in the Chicago office of Seyfarth Shaw LLP. He has practiced environmental law for 30 years. His practice focus includes counseling in interpretation and application of state and federal environmental statutes and regulations; representation in a broad range of environmental litigation including state and federal enforcement and toxic tort lawsuits; administration of complex CERCLA sites; participation in rulemaking and permitting proceedings under air, water and hazardous waste statutes; performance of on-site environmental assessments; and counseling regarding land use, environmental aspects of real estate transactions and corporate mergers, acquisitions and divestitures. Based on a survey of industrial companies, *Chambers USA*: America's leading business lawyers, has identified Mr. Perellis as one of Chicago's top environmental lawyers.

Prior to being a partner with Seyfarth Shaw, he was a partner at Coffield, Ungaretti and Harris, and an associate at Rooks, Pitts and Poust.

He is the past chairman of the Chicago Bar Association, Energy and Environmental Committee young lawyers section, and has served on the boards of the Illinois State Bar Association environmental control law section council, the City of Lake Forest Legal Committee, the Chemical Industry Council of Illinois, and the George Washington University Law School Alumni Association. He currently serves on the board of the Jewish Child and Family Services.

Mr. Perellis received an AB (with distinction) from the University of Michigan and his JD (with high honors; Order of the Coif) from the George Washington University.

Doreen Zankowski

Doreen M. Zankowski is a partner in the Saul Ewing Boston office and focuses her practice on construction, environmental law, engineering, business, and real estate development. She counsels clients by giving them practical and efficient advice to advance their project through the often daunting legal and regulatory process.

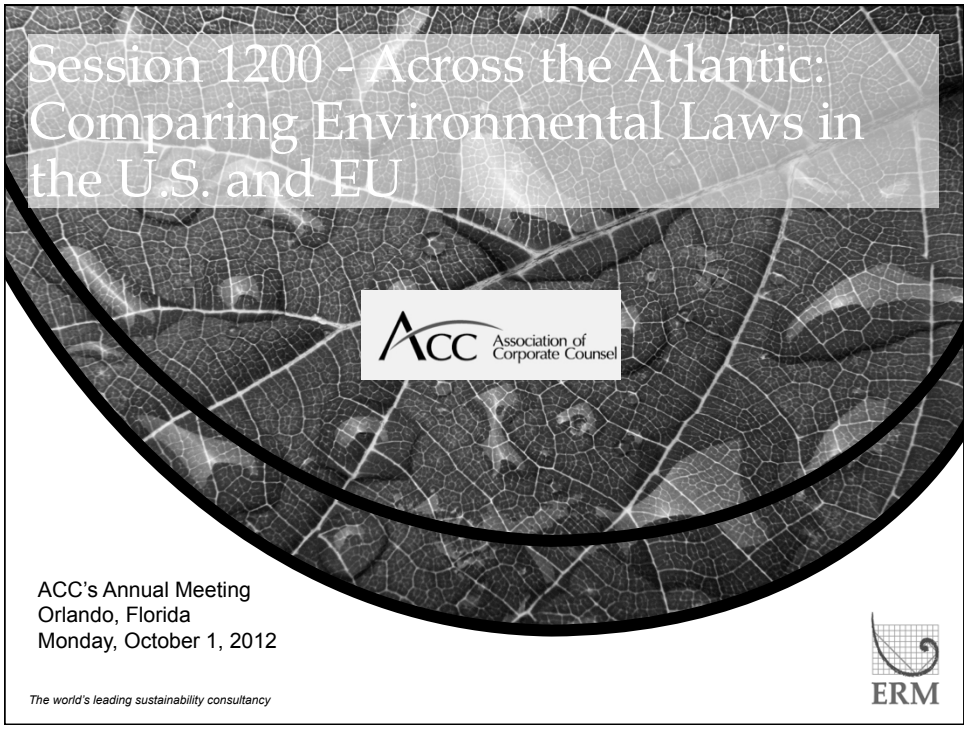
Due to her in-depth experience with bringing parties together to complete complex transactions, she has frequently advised clients on the merits of alternative dispute resolution. In this role, she has advised clients on environmental matters across international jurisdictions. She is familiar with the multiplicity of contractual arrangements for public-private partnerships. On the claims side, she advises clients on claims development, analysis, defense and prosecution. She has handled environmental issues on behalf of her clients in Europe, Asia, South America and the Middle East.

She advises clients on vertical construction projects, heavy highway public works projects, water and wastewater facilities, solid waste programs, power, airport, ports and marine facilities, green construction, schools and universities, hospitals and skilled nursing programs. She brings hands-on experience to the transactional side of the business - focusing on risk management; contract drafting; contract review and negotiation using various project delivery methods, such as integrated project delivery for both public and private works.

Ms. Zankowski has served as in-house general counsel to CDM Smith, an international engineering, construction, environmental and development company, also serving CDM as an engineering and program management consultant. Prior to her joining Saul Ewing, she was a partner and practice group leader at Hinckley Allen & Snyder LLP, a nationally recognized construction and government contracts firm.

Index for ACC Session #1200 – Across the Atlantic: Comparing Environmental Law in the United States and the European Union

	Title	Short Description	Type of Document
1.	Index for ACC Session 1200	-	-
2.	Agenda for ACC Session 1200	-	PowerPoint
3.	EU_US Compliance Program Comparison Chart	Prepared by ERM	Word Document
4.	OECD Good Practice Guide for Internal Controls, Ethics, and Compliance	This Good Practice Guidance was adopted by the OECD Council as an integral part of the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* of 26 November 2009.	Substantive course material
5.	UK Bribery Act Guidance from the Ministry of Justice	-	Substantive course material
6.	U.S. Federal Sentencing Guidelines for Organizations Chapter 8	-	Substantive course material
7.	Across the Atlantic: Comparing Environmental Law in the EU, A Case Study	US and EU Environmental Law Comparison Chart. Prepared by SEYFARTH SHAW LLP and URIA MENENDEZ.	PowerPoint
8.	Key Features of US Environmental Law	Prepared by SEYFARTH SHAW LLP	PowerPoint
9.	Doing Business in the United States: Managing Environmental Liabilities	Prepared by SEYFARTH SHAW LLP	Substantive course material
10.	Key Environmental Considerations for Doing Business in the US	Prepared by SEYFARTH SHAW LLP	Substantive course material
11.	Across the Atlantic – A Case Study	Prepared by URIA MENENDEZ.	
12.	Press Release from European Court of Human Rights	An official summary in English of a decision of the European Court on Human Rights, concerning pollution and the right to respect private and family life	Substantive course material
13.	Case Study C-87/02- Commission of the European Communities v Italian Republic (Failure of a Member State to fulfill obligations – Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects – Project 'Lotto zero')	A decision of the European Court of Justice, on environmental impact assessment	Substantive course material
14.	Communication on Implementing EU Environment Legislation	A Q&A document prepared by the EU Commission on the application of environmental law	Substantive course material
15.	Doing Business in the European Union – An Overview of the Main Environmental Issues No One Can Miss.	An overview prepared by URIA MENENDEZ.	Substantive course material
16.	Comparison of Selected US and EU Environmental Legislation	Prepared by Saul Ewing LLP	



Agenda

1.	Introduction and Overview of Compliance Program Structure	20 minutes	Ann Chilton
2.	US Environmental Law Overview	10 minutes	Andy Perellis
3.	EU Law Overview	10 minutes	Carlos de Miguel Perales
4.	Asset Manager and Site Portfolio Considerations	15 minutes	Doreen M. Zankowski and Mark Errington
5.	Panel Discussion and Audience Q & A	30 minutes	

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Panel Members

MODERATOR

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Common Multi-National Compliance Risks

- Anti-Bribery and Corruption (includes both internal and external)
  - Internal – Embezzlement
  - External – Money Laundering
  - Combination of Internal and External – Bribery
- Trade Sanctions
- Anti-Trust
- Import/Export
- **Environmental**

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Compliance Program Basics

- OECD Good Practice Guidance ("GPG")
  www.oecd.org/dataoecd/5/51/44884389.pdf
- UK Bribery Act Guidance ("UKBAG")
  http://www.justice.gov.uk/legislation/bribery
- US Federal Sentencing Guidelines ("FSGO")
  http://www.ussc.gov/Guidelines/2011_guidelines/Manual_HTML/Chapter_8.htm

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Continue -

- Tone from the Top
- Policy and Procedure
- Oversight
- Due Diligence in Hiring/Promoting Personnel
- Third Party Risk Management (Due Diligence and Supply Chain)
- Internal Controls
- Periodic Communication and Documented Training
- "Carrots"
- "Sticks"
- Resources
- Reporting – both incident specific and to governing body
- Response to Incidents
- Periodic Review and Improvement

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Compliance Program Structure Comparison Chart
OECD / UK Bribery Act Guidance / US FSGO

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CONCEPT	OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance (GPG) 12 Principles	UK Bribery Act 2010 Guidance (Ministry of Justice) 6 Principles	US Federal Sentencing Guidelines for Organizations (FSGO) § 8B2.1 Effective Compliance and Ethics Program
Tone From the Top	1: "strong, explicit and visible support and commitment from senior management"	2: The "top-level management" should "foster a culture" in which bribery is "never acceptable" 5.3: Internal communications should convey the "tone from the top" as well as focus on implementation of procedure and the implications for employees. Note: Per 3.6, a common company risk is "lack of a clear anti-bribery message from the top-level management."	§(b)(2)(A): "governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness"; §(b)(2)(B): "High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program"; and §(b)(6): "The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization. . ."
Policy and Procedure	2: "clearly articulated and visible corporate policy" 5: measures must include gifts, hospitality, entertainment, expenses, travel, political contributions, charitable donations and sponsorships, facilitation payments, solicitation and extortion	1 and 1.1: Policies and the procedures that implement them should be "clear, practical, accessible, effectively implemented and enforced." 3.6: common company risks are "lack of clarity on policies and procedures" and "lack of clear financial controls"	§(b)(1): "The organization shall establish standards and procedures to prevent and detect criminal conduct."

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	7: "a system of financial and accounting procedures, including internal controls" reasonably designed to ensure "maintenance of fair and accurate books, records, and accounts" that "cannot be used for the purpose of foreign bribery"		
Oversight	4: "oversight of ethics and compliance" that includes "authority to report" and with "adequate level of autonomy from management and resources, and authority."	2: Oversight of top level management specified to include communication, risk assessment, development of procedures, and involvement when breach of procedure occurs.	See concept "tone from the top" entries plus additional §(b)(2)(B): "Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program."
Due Diligence in Hiring/ Promoting Personnel	No mention of due diligence in hiring but Principle 3 specifically notes that compliance "is the duty of individuals at all levels of the company"(therefore, there is an implied promotion qualifier).	4: Apply "due diligence" taking a "proportionate and risk based approach" in respect "of persons who perform or will perform services on behalf of the organization."	§(b)(3): "The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, *or should have known through the exercise of due diligence*, has engaged in illegal activities *or other conduct inconsistent with an effective compliance and ethics program.* (emphasis added)
Third Party Risk Management (Due Diligence and Supply Chain)	6i: "risk-based due diligence" 6ii: informing business partners of company's commitment to abiding by laws 6iii: seeking a reciprocal commitment from business partners	3: Perform risk assessment of external risks 4: Apply "due diligence" taking a "proportionate and risk based approach" in respect "of persons who perform or will perform services on behalf of the organization." 5.4 External communication of bribery prevention policies to	§(b)(1): "standards and procedures to prevent and detect criminal conduct"; and §(b)(4): ". . .reasonable steps to communicate periodically and in a practical manner its standards and procedures" to "the organization's employees, *and, as appropriate, the organization's agents*." (emphasis added).

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		business partners can "act as a deterrent to those intending to bribe" on a company's behalf.	
Internal Controls	7: "a system of financial and accounting procedures, including internal controls" reasonably designed to ensure "maintenance of fair and accurate books, records, and accounts" that "cannot be used for the purpose of foreign bribery"	1: Policies and procedures should be "clear, practical, accessible, effectively implemented and enforced." 3.6: common company risks are "lack of clarity on policies and procedures" and "lack of clear financial controls" 6.2; Monitoring and review of "internal financial control mechanism"	§(b)(1): "standards and procedures to prevent and detect criminal conduct"; and §(b)(5)(A): reasonable steps include "monitoring and auditing to detect criminal conduct"
Periodic Communication and Documented Training	8: "periodic communication and documented training for all levels of the company"	2.4: Top level engagement means "selection and training of senior managers to lead anti-bribery work." 3.6: Common risk is "deficiencies in employee training, skills and knowledge" 5: Both internal and external communication and training 5.6; In addition to general training, "specific risks associated with specific posts" should be considered 6.2; "Staff surveys, questionnaires, and feedback from training can also provide an important source of information" for improvement and for risk assessment.	§(b)(2)(A): "governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness"; and §(b)(2)(C): "Individuals with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate sub-group of the governing authority, on the effectiveness of the compliance and ethics program." §(b)(4)(A): "communicate periodically and in a practical manner its standards and procedures"; and §(b)(4)(B): "by conducting effective

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			training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities."
"Carrots"	9: "appropriate measures to encourage and provide positive support for the observance of ethics and compliance" at "all levels of the company"	2: Management role to "foster a culture" 3.6: Common risk is "bonus culture that rewards excessive risk taking."	§(b)(6)(A): "appropriate incentives to perform in accordance with the compliance and ethics program"
"Sticks"	10: "appropriate disciplinary procedures" at "all levels of the company"	2.3: Top-level management must have a commitment to "the consequences of breaching the policy for employees and managers"	§(b)(6)(B): "appropriate disciplinary measures" including for "*failing to take reasonable steps* to prevent or detect criminal conduct." (emphasis added). <u>*Note:*</u> *Whereas the UK Bribery Act clearly establishes a negligence standard, a common myth is that the USFSGO do not accommodate a negligence standard analysis -- simply untrue due to both the tone at the top mandates and the "stick" provision of 6(B).*
Resources	4: "oversight of ethics and compliance" that includes "adequate level" of "autonomy from management and resources"; and 11(i): "providing guidance and advice to directors, officers, employees" and "business partners", *including "when they need urgent advice on difficult situations in foreign jurisdictions."* (emphasis added). <u>Note</u>: 11(i) is a resource issue in that resources for "urgent" advice spanning	General resources implied in Principle 2 Top-level commitment, but specific additional thought leadership resourcing is indicated in 2.3: "involvement in collective action against bribery in, for example, the same business sector" as well as 2.4: engagement "with relevant associated persons and external bodies" including the media, to "help articulate" the organization's position/policies.	§(b)(2)(B): "High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program"; §(b)(2)(C): "Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. . . .To carry out such operational responsibility, such individuals shall be given adequate resources, appropriate authority, and direct access to the

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	time zones must be considered.		governing authority or an appropriate subgroup of the governing authority."; and also §(b)(5)(C): "to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance"
Reporting – both incident specific and to governing body	To governing body, 4: authority to report matters directly (details independent monitoring bodies, internal audit, board of directors, etc.); and Specific incident, 11(ii): internal and, where possible, confidential reporting	Specific incident, 1: Procedures should include "speak up" or "whistleblowing" To governing body: 2.4 "feedback to the board or equivalent." Information flow to management is incorporated throughout as the emphasis on Principle 1 (Proportionate Procedures), involvement of top-level management (Principle 2) and the need for risk assessment (Principle 3). Logically, Principles 2 and 3 cannot occur if an organization has not implemented a reporting procedure per Principle 1.	§(b)(2)(C): "Individuals with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate sub-group of the governing authority, on the effectiveness of the compliance and ethics program."; and §(b)(5)(C): "to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance."
Response to Incidents	11(iii): undertaking appropriate action in response	2.4: Specific involvement of top-level personnel in high profile decision making and general oversight of breaches of procedures	§ (b)(7): After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organizations compliance and ethics program."
Periodic Review and Improvement	12: "periodic reviews of the ethics and compliance" program,	6: Monitoring and review with "improvements where necessary."	§(c): "periodically assess the risk of criminal conduct" and "take

	designed to "evaluate and improve" and "taking into account relevant developments in the field" and "evolving international and industry standards."	6.2: Strong emphasis is placed on internal financial control mechanisms.	appropriate steps to design, implement, or modify each requirement."

LINKS –

OECD Good Practice Guidance ("GPG") link –
www.**oecd**.org/data**oecd**/5/51/44884389.pdf

UK Bribery Act Guidance ("UKBAG")link –
http://www.justice.gov.uk/legislation/bribery

US Federal Sentencing Guidelines ("FSGO") link -
http://www.ussc.gov/Guidelines/2011_guidelines/Manual_HTML/Chapter_8.htm

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Good Practice Guidance on Internal Controls, Ethics, and Compliance

Adopted 18 February 2010

This Good Practice Guidance was adopted by the OECD Council as an integral part of the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* of 26 November 2009.

ANNEX II

GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE

This Good Practice Guidance acknowledges the relevant findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter "OECD Anti-Bribery Convention"); contributions from the private sector and civil society through the Working Group on Bribery's consultations on its review of the OECD anti-bribery instruments; and previous work on preventing and detecting bribery in business by the OECD as well as international private sector and civil society bodies.

Introduction

This Good Practice Guidance (hereinafter "Guidance") is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions (hereinafter "foreign bribery"), and to business organisations and professional associations, which play an essential role in assisting companies in these efforts. It recognises that to be effective, such programmes or measures should be interconnected with a company's overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery.

This Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter "SMEs"), according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

A) Good Practice Guidance for Companies

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.

Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery:

1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery;

2. a clearly articulated and visible corporate policy prohibiting foreign bribery;

3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;

4. oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;

5. ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas:

   i) gifts;

   ii) hospitality, entertainment and expenses;

   iii) customer travel;

   iv) political contributions;

   v) charitable donations and sponsorships;

   vi) facilitation payments; and

   vii) solicitation and extortion;

6. ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements:

   i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;

   ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery; and

   iii) seeking a reciprocal commitment from business partners.

7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;

9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against foreign bribery, at all levels of the company;

10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery;

11. effective measures for:

    i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions;

    ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and

    iii) undertaking appropriate action in response to such reports;

12. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

B) Actions by Business Organisations and Professional Associations

Business organisations and professional associations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Such support may include, *inter alia*:

1. dissemination of information on foreign bribery issues, including regarding relevant developments in international and regional forums, and access to relevant databases;

2. making training, prevention, due diligence, and other compliance tools available;

3. general advice on carrying out due diligence; and

4. general advice and support on resisting extortion and solicitation.

Ministry of JUSTICE

THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

Foreword

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Tackling this scourge is a priority for anyone who cares about the future of business, the developing world or international trade. That is why the entry into force of the Bribery Act on 1 July 2011 is an important step forward for both the UK and UK plc. In line with the Act's statutory requirements, I am publishing this guidance to help organisations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate.

Readers of this document will be aware that the Act creates offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf. These are certainly tough rules. But readers should understand too that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms.

I have listened carefully to business representatives to ensure the Act is implemented in a workable way – especially for small firms that have limited resources. And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality. It also offers case study examples that help illuminate the application of the Act. Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix. Separately, we are publishing non-statutory 'quick start' guidance. I encourage small businesses to turn to this for a concise introduction to how they can meet the requirements of the law.

Ultimately, the Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading

role in stamping out corruption and supporting trade-led international development. But I would argue too that the Act is directly beneficial for business. That's because it creates clarity and a level playing field, helping to align trading nations around decent standards. It also establishes a statutory defence: organisations which have adequate procedures in place to prevent bribery are in a stronger position if isolated incidents have occurred in spite of their efforts.

Some have asked whether business can afford this legislation – especially at a time of economic recovery. But the choice is a false one. We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good for business because it creates the conditions for free markets to flourish.

Everyone agrees bribery is wrong and that rules need reform. In implementing this Act, we are striking a blow for the rule of law and growth of trade. I commend this guidance to you as a helping hand in doing business competitively and fairly.

Kenneth Clarke
Secretary of State for Justice
March 2011

Contents

Introduction

1 The Bribery Act 2010 received Royal Assent on 8 April 2010. A full copy of the Act and its Explanatory Notes can be accessed at: www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1
The Act creates a new offence under section 7 which can be committed by commercial organisations[1] which fail to prevent persons associated with them from committing bribery on their behalf. It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. Section 9 of the Act requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. This document sets out that guidance.

2 The Act extends to England & Wales, Scotland and Northern Ireland. This guidance is for use in all parts of the United Kingdom. In accordance with section 9(3) of the Act, the Scottish Ministers have been consulted regarding the content of this guidance. The Northern Ireland Assembly has also been consulted.

3 This guidance explains the policy behind section 7 and is intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 7(1).

4 The guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.

5 If your organisation is small or medium sized the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation. The guidance suggests certain procedures, but they may not all be applicable to your circumstances. Sometimes, you may have alternatives in place that are also adequate.

1 See paragraph 35 below on the definition of the phrase 'commercial organisation'.

6 As the principles make clear commercial organisations should adopt a risk-based approach to managing bribery risks. Procedures should be proportionate to the risks faced by an organisation. No policies or procedures are capable of detecting and preventing all bribery. A risk-based approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-based approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.

7 The language used in this guidance reflects its non-prescriptive nature. The six principles are intended to be of general application and are therefore expressed in neutral but affirmative language. The commentary following each of the principles is expressed more broadly.

8 All terms used in this guidance have the same meaning as in the Bribery Act 2010. Any examples of particular types of conduct are provided for illustrative purposes only and do not constitute exhaustive lists of relevant conduct.

Government policy and Section 7 of the Bribery Act

9 Bribery undermines democracy and the rule of law and poses very serious threats to sustained economic progress in developing and emerging economies and to the proper operation of free markets more generally. The Bribery Act 2010 is intended to respond to these threats and to the extremely broad range of ways that bribery can be committed. It does this by providing robust offences, enhanced sentencing powers for the courts (raising the maximum sentence for bribery committed by an individual from 7 to 10 years imprisonment) and wide jurisdictional powers (see paragraphs 15 and 16 on page 9).

10 The Act contains two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery) at sections 1 and 2 respectively. It also sets out two further offences which specifically address commercial bribery. Section 6 of the Act creates an offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business[2], and section 7 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation. More detail about the sections 1, 6 and 7 offences is provided under the separate headings below.

11 The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.

12 The application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery and is relevant if an organisation wishes to report an incident of bribery to the prosecution authorities – for example to the Serious Fraud Office (SFO) which operates a policy in England and Wales and Northern Ireland of co-operation with commercial organisations that self-refer incidents of bribery (see 'Approach of the SFO to dealing with overseas corruption' on the SFO website). The commercial organisation's willingness to co-operate with an investigation under the Bribery Act and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.

2 Conduct amounting to bribery of a foreign public official could also be charged under section 1 of the Act. It will be for prosecutors to select the most appropriate charge.

13 In order to be liable under section 7 a commercial organisation must have failed to prevent conduct that would amount to the commission of an offence under sections 1 or 6, but it is irrelevant whether a person has been convicted of such an offence. Where the prosecution cannot prove beyond reasonable doubt that a sections 1 or 6 offence has been committed the section 7 offence will not be triggered.

14 The section 7 offence is in addition to, and does not displace, liability which might arise under sections 1 or 6 of the Act where the commercial organisation itself commits an offence by virtue of the common law 'identification' principle.[3]

Jurisdiction

15 Section 12 of the Act provides that the courts will have jurisdiction over the sections 1, 2[4] or 6 offences committed in the UK, but they will also have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

16 However, as regards section 7, the requirement of a close connection with the UK does not apply. Section 7(3) makes clear that a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK. In addition, section 12(5) provides that it does not matter whether the acts or omissions which form part of the section 7 offence take part in the UK or elsewhere. So, provided the organisation is incorporated or formed in the UK, or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then UK courts will have jurisdiction (see more on this at paragraphs 34 to 36).

3 See section 5 and Schedule 1 to the Interpretation Act 1978 which provides that the word 'person' where used in an Act includes bodies corporate and unincorporate. Note also the common law 'identification principle' as defined by cases such as Tesco Supermarkets v Nattrass [1972] AC 153 which provides that corporate liability arises only where the offence is committed by a natural person who is the directing mind or will of the organisation.

4 Although this particular offence is not relevant for the purposes of section 7.

Section 1:
Offences of bribing another person

17 Section 1 makes it an offence for a person ('P') to offer, promise or give a financial or other advantage to another person in one of two cases:

- **Case 1** applies where P intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.
- **Case 2** applies where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

18 'Improper performance' is defined at sections 3, 4 and 5. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered.

19 For the purposes of deciding whether a function or activity has been performed improperly the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of that function or activity. Where the performance of the function or activity is not subject to UK law (for example, it takes place in a country outside UK jurisdiction) then any local custom or practice must be disregarded – unless permitted or required by the written law applicable to that particular country. Written law means any written constitution, provision made by or under legislation applicable to the country concerned or any judicial decision evidenced in published written sources.

20 By way of illustration, in order to proceed with a case under section 1 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought. So, for example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.

Section 6:
Bribery of a foreign public official

21 Section 6 creates a standalone offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.

22 A 'foreign public official' includes officials, whether elected or appointed, who hold a legislative, administrative or judicial position of any kind of a country or territory outside the UK. It also includes any person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises. Foreign public officials can also be an official or agent of a public international organisation, such as the UN or the World Bank.

23 Sections 1 and 6 may capture the same conduct but will do so in different ways. The policy that founds the offence at section 6 is the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official's request, assent or acquiescence. Such activity is very likely to involve conduct which amounts to 'improper performance' of a relevant function or activity to which section 1 applies, but, unlike section 1, section 6 does not require proof of it or an intention to induce it. This is because the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve. To require the prosecution to rely entirely on section 1 would amount to a very significant deficiency in the ability of the legislation to address this particular mischief. That said, it is not the Government's intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take account of the evidential difficulties referred to above. In view of its wide scope, and its role in the new form of corporate liability at section 7, the Government offers the following further explanation of issues arising from the formulation of section 6.

Local law

24 For the purposes of section 6 prosecutors will be required to show not only that an 'advantage' was offered, promised or given to the official or to another person at the official's request, assent or acquiescence, but that the advantage was

one that the official was not permitted or required to be influenced by as determined by the written law applicable to the foreign official.

25 In seeking tenders for publicly funded contracts Governments often permit or require those tendering for the contract to offer, in addition to the principal tender, some kind of additional investment in the local economy or benefit to the local community. Such arrangements could in certain circumstances amount to a financial or other 'advantage' to a public official or to another person at the official's request, assent or acquiescence. Where, however, relevant 'written law' permits or requires the official to be influenced by such arrangements they will fall outside the scope of the offence. So, for example, where local planning law permits community investment or requires a foreign public official to minimise the cost of public procurement administration through cost sharing with contractors, a prospective contractor's offer of free training is very unlikely to engage section 6. In circumstances where the additional investment would amount to an advantage to a foreign public official and the local law is silent as to whether the official is permitted or required to be influenced by it, prosecutors will consider the public interest in prosecuting. This will provide an appropriate backstop in circumstances where the evidence suggests that the offer of additional investment is a legitimate part of a tender exercise.

Hospitality, promotional, and other business expenditure

26 Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.

27 In order to amount to a bribe under section 6 there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage. In this regard, it may be in some circumstances that hospitality or promotional expenditure in the form of travel and accommodation costs does not even amount to 'a financial or other advantage' to the relevant official because it is a cost that would otherwise be borne by the relevant foreign Government rather than the official him or herself.

28 Where the prosecution is able to establish a financial or other advantage has been offered, promised or given, it must then show that there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage. Where the prosecution cannot prove this to the requisite standard then no offence under section 6 will be committed. There may be direct evidence to support the existence of this connection and such evidence may indeed relate to relatively modest expenditure. In many cases, however, the question as to whether such a connection can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances. It would include matters such as the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business. In this circumstantial context, the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.

29 The standards or norms applying in a particular sector may also be relevant here. However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant.

30 Levels of expenditure will not, therefore, be the only consideration in determining whether a section 6 offence has been committed. But in the absence of any further evidence demonstrating the required connection, it is unlikely, for example, that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event.

31 Some further examples might be helpful. The provision by a UK mining company of reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company's installations and operating systems are circumstances that fall outside the intended scope of the offence. Flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match are facts that are, in themselves, unlikely to raise the necessary inferences. However, if the choice of New York as the most convenient venue was in doubt because the organisation's senior executives could easily have seen the official with all the relevant documentation when they had visited the relevant country the previous week then the necessary inference might be raised. Similarly, supplementing information provided to a foreign public official on a commercial organisation's background, track record and expertise in providing private health care with an offer of ordinary travel and lodgings to enable a visit to a hospital run by the commercial organisation is unlikely to engage section 6. On the other hand, the provision by that same commercial organisation of a five-star holiday for the foreign public official which is unrelated to a demonstration of the organisation's services is, all things being equal, far more likely to raise the necessary inference.

32 It may be that, as a result of the introduction of the section 7 offence, commercial organisations will review their policies on hospitality and promotional or other similar business expenditure as part of the selection and implementation of bribery prevention procedures, so as to ensure that they are seen to be acting both competitively and fairly. It is, however, for individual organisations, or business representative bodies, to establish and disseminate appropriate standards for hospitality and promotional or other similar expenditure.

Section 7: Failure of commercial organisations to prevent bribery

33 A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.

Commercial organisation

34 Only a 'relevant commercial organisation' can commit an offence under section 7 of the Bribery Act. A 'relevant commercial organisation' is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which 'carries on a business'. The courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases. However, the following paragraphs set out the Government's intention as regards the application of the phrase.

35 As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

36 As regards bodies incorporated, or partnerships formed, outside the United Kingdom, whether such bodies can properly be regarded as carrying on a business or part of a business 'in any part of the United Kingdom' will again be answered by applying a common sense approach. Where there is a particular dispute as to whether a business presence in the United Kingdom satisfies the test in the Act, the final arbiter, in any particular case, will be the courts as set out above. However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the

London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a 'relevant commercial organisation' for the purposes of section 7. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

Associated person

37 A commercial organisation is liable under section 7 if a person 'associated' with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined at section 8 as a person who 'performs services' for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. Section 8 provides that the capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 8(4), however, makes it clear that the question as to whether a person is performing services for an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who 'performs services for or on behalf of' the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf.

38 This broad scope means that contractors could be 'associated' persons to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an 'associated' person.

39 Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of sub-contractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain.

40 As for joint ventures, these come in many different forms, sometimes operating through a separate legal entity, but at other times through contractual arrangements. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. However, the existence of a joint venture entity will not of itself mean that it is 'associated' with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will therefore not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture.

41 The situation will be different where the joint venture is conducted through a contractual arrangement. The degree of control that a participant has over that arrangement is likely to be one of the 'relevant circumstances' that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was 'performing services for or on behalf of' a participant in that arrangement. It may be, for example, that an employee of such a participant who has paid a bribe in order to benefit his employer is not to be regarded as a person 'associated' with all the other participants in the joint venture. Ordinarily, the employee of a participant will be presumed to be a person performing services for and on behalf of his employer. Likewise, an agent engaged by a participant in a contractual joint venture is likely to be regarded as a person associated with that participant in the absence of evidence that the agent is acting on behalf of the contractual joint venture as a whole.

42 Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, liability

for a parent company could arise where a subsidiary is the 'person' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa.

43 The question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation. The scope of the definition at section 8 needs to be appreciated within this context. This point is developed in more detail under the six principles set out on pages 20 to 31.

Facilitation payments

44 Small bribes paid to facilitate routine Government action – otherwise called 'facilitation payments' – could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7.

45 As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development[5] recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.

46 The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.

47 Issues relating to the prosecution of facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.[6]

5 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.
6 Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.

Duress

48 It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances.

Prosecutorial discretion

49 Whether to prosecute an offence under the Act is a matter for the prosecuting authorities. In deciding whether to proceed, prosecutors must first decide if there is a sufficiency of evidence, and, if so, whether a prosecution is in the public interest. If the evidential test has been met, prosecutors will consider the general public interest in ensuring that bribery is effectively dealt with. The more serious the offence, the more likely it is that a prosecution will be required in the public interest.

50 In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute. The operation of prosecutorial discretion provides a degree of flexibility which is helpful to ensure the just and fair operation of the Act.

51 Factors that weigh for and against the public interest in prosecuting in England and Wales are referred to in the joint guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions referred to at paragraph 47.

The six principles

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets.

A series of case studies based on hypothetical scenarios is provided at Appendix A. These are designed to illustrate the application of the principles for small, medium and large organisations.

Principle 1
Proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Commentary

1.1 The term 'procedures' is used in this guidance to embrace both bribery prevention policies and the procedures which implement them. Policies articulate a commercial organisation's anti-bribery stance, show how it will be maintained and help to create an anti-bribery culture. They are therefore a necessary measure in the prevention of bribery, but they will not achieve that objective unless they are properly implemented. Further guidance on implementation is provided through principles 2 to 6.

1.2 Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor. Some small organisations can face quite significant risks, and will need more extensive procedures than their counterparts facing limited risks. However, small organisations are unlikely to need procedures that are as extensive as those of a large multi-national organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.

1.3 The level of risk that organisations face will also vary with the type and nature of the persons associated with it. For example, a commercial organisation that properly assesses that there is no risk of bribery on the part of one of its associated persons will accordingly require nothing in the way of procedures to prevent bribery in the context of that relationship. By the same token the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and accordingly require much more in the way of procedures to mitigate those risks. Organisations are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.

1.4 Bribery prevention procedures may be stand alone or form part of wider guidance, for example on recruitment or on managing a tender process in public procurement. Whatever the chosen model, the procedures should seek to ensure there is a practical and realistic means of achieving the organisation's stated anti-bribery policy objectives across all of the organisation's functions.

1.5 The Government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach and with due allowance for what is practicable and the level of control over existing arrangements.

Procedures

1.6 Commercial organisations' bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover in its policies:

- its commitment to bribery prevention (see Principle 2)
- its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions; (see Principle 3 on risk assessment)
- an overview of its strategy to implement its bribery prevention policies.

1.7 The procedures put in place to implement an organisation's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. The following is an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:

- The involvement of the organisation's top-level management (see Principle 2).
- Risk assessment procedures (see Principle 3).
- Due diligence of existing or prospective associated persons (see Principle 4).
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration.
- Governance of business relationships with all other associated persons including pre and post contractual agreements.
- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
- Transparency of transactions and disclosure of information.
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules.
- The reporting of bribery including 'speak up' or 'whistle blowing' procedures.
- The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation.
- The communication of the organisation's policies and procedures, and training in their application (see Principle 5).
- The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).

Principle 2
Top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Commentary

2.1 Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. The purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. It is also to encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation's management structure.

Procedures

2.2 Whatever the size, structure or market of a commercial organisation, top-level management commitment to bribery prevention is likely to include (1) communication of the organisation's anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

Internal and external communication of the commitment to zero tolerance to bribery

2.3 This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site. Effective formal statements that demonstrate top level commitment are likely to include:

- a commitment to carry out business fairly, honestly and openly
- a commitment to zero tolerance towards bribery
- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)
- articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
- reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing)
- key individuals and departments involved in the development and implementation of the organisation's bribery prevention procedures
- reference to the organisation's involvement in any collective action against bribery in, for example, the same business sector.

Top-level involvement in bribery prevention

2.4 Effective leadership in bribery prevention will take a variety of forms appropriate for and proportionate to the organisation's size, management structure and circumstances. In smaller organisations a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures and bribery critical decision making. In a large multi-national organisation the board should be responsible for setting bribery prevention policies, tasking management to design, operate and monitor bribery prevention procedures, and keeping these policies and procedures under regular review. But whatever the appropriate model, top-level engagement is likely to reflect the following elements:

- Selection and training of senior managers to lead anti-bribery work where appropriate.
- Leadership on key measures such as a code of conduct.
- Endorsement of all bribery prevention related publications.
- Leadership in awareness raising and encouraging transparent dialogue throughout the organisation so as to seek to ensure effective dissemination of anti-bribery policies and procedures to employees, subsidiaries, and associated persons, etc.
- Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation's policies.
- Specific involvement in high profile and critical decision making where appropriate.
- Assurance of risk assessment.
- General oversight of breaches of procedures and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance.

Principle 3
Risk Assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Commentary

3.1 For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives. For others, its application may produce a more specific stand alone bribery risk assessment. The purpose of this principle is to promote the adoption of risk assessment procedures that are proportionate to the organisation's size and structure and to the nature, scale and location of its activities. But whatever approach is adopted the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely to be.

3.2 Some aspects of risk assessment involve procedures that fall within the generally accepted meaning of the term 'due diligence'. The role of due diligence as a risk mitigation tool is separately dealt with under Principle 4.

Procedures

3.3 Risk assessment procedures that enable the commercial organisation accurately to identify and prioritise the risks it faces will, whatever its size, activities, customers or markets, usually reflect a few basic characteristics. These are:

- Oversight of the risk assessment by top level management.
- Appropriate resourcing – this should reflect the scale of the organisation's business and the need to identify and prioritise all relevant risks.
- Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
- Due diligence enquiries (see Principle 4).
- Accurate and appropriate documentation of the risk assessment and its conclusions.

3.4 As a commercial organisation's business evolves, so will the bribery risks it faces and hence so should its risk assessment. For example, the risk assessment that applies to a commercial organisation's domestic operations might not apply when it enters a new market in a part of the world in which it has not done business before (see Principle 6 for more on this).

Commonly encountered risks

3.5 Commonly encountered external risks can be categorised into five broad groups – country, sectoral, transaction, business opportunity and business partnership:

- ***Country risk:*** this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
- ***Sectoral risk:*** some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
- ***Transaction risk:*** certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.
- ***Business opportunity risk:*** such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.
- ***Business partnership risk:*** certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.

3.6 An assessment of external bribery risks is intended to help decide how those risks can be mitigated by procedures governing the relevant operations or business relationships; but a bribery risk assessment should also examine the extent to which internal structures or procedures may themselves add to the level of risk. Commonly encountered internal factors may include:

- deficiencies in employee training, skills and knowledge
- bonus culture that rewards excessive risk taking
- lack of clarity in the organisation's policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
- lack of clear financial controls
- lack of a clear anti-bribery message from the top-level management.

Principle 4
Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Commentary

4.1 Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. Due diligence procedures are both a form of bribery risk assessment (see Principle 3) and a means of mitigating a risk. By way of illustration, a commercial organisation may identify risks that as a general proposition attach to doing business in reliance upon local third party intermediaries. Due diligence of specific prospective third party intermediaries could significantly mitigate these risks. The significance of the role of due diligence in bribery risk mitigation justifies its inclusion here as a Principle in its own right.

4.2 The purpose of this Principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

Procedures

4.3 As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk. They can also be undertaken internally or by external consultants. A person 'associated' with a commercial organisation as set out at section 8 of the Bribery Act includes any person performing services for a commercial organisation. As explained at paragraphs 37 to 43 in the section 'Government Policy and section 7', the scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship. So, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf. In contrast, an organisation that is selecting an intermediary to assist in establishing a business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

4.4 Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence. An example is where local law or convention dictates the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship

that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.

4.5 'Due diligence' for the purposes of Principle 4 should be conducted using a risk-based approach (as referred to on page 27). For example, in lower risk situations, commercial organisations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged 'associated' persons may also be required, proportionate to the identified risks. Generally, more information is likely to be required from prospective and existing associated persons that are incorporated (e.g. companies) than from individuals. This is because on a basic level more individuals are likely to be involved in the performance of services by a company and the exact nature of the roles of such individuals or other connected bodies may not be immediately obvious. Accordingly, due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.

4.6 A commercial organisation's employees are presumed to be persons 'associated' with the organisation for the purposes of the Bribery Act. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

Principle 5
Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Commentary

5.1 Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation's procedures and to the organisation's commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation's procedures and deal with any bribery related problems or issues that may arise.

Procedures

Communication

5.2 The content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities.

5.3 Internal communications should convey the 'tone from the top' but are also likely to focus on the implementation of the organisation's policies and procedures and the implications for employees. Such communication includes policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels. Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called 'speak up' procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

5.4 External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation's behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal

surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associated persons, or to the general public.

Training

5.5 Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.

5.6 General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.

5.7 It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.

5.8 Nowadays there are many different training formats available in addition to the traditional classroom or seminar formats, such as e-learning and other web-based tools. But whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

Principle 6
Monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Commentary

6.1 The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change. Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery or negative press reports.

Procedures

6.2 There is a wide range of internal and external review mechanisms which commercial organisations could consider using. Systems set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms, will help provide insight into the effectiveness of procedures designed to prevent bribery. Staff surveys, questionnaires and feedback from training can also provide an important source of information on effectiveness and a means by which employees and other associated persons can inform continuing improvement of anti-bribery policies.

6.3 Organisations could also consider formal periodic reviews and reports for top-level management. Organisations could also draw on information on other organisations' practices, for example relevant trade bodies or regulators might highlight examples of good or bad practice in their publications.

6.4 In addition, organisations might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures. Some organisations may be able to apply for certified compliance with one of the independently-verified anti-bribery standards maintained by industrial sector associations or multilateral bodies. However, such certification may not necessarily mean that a commercial organisation's bribery prevention procedures are 'adequate' for all purposes where an offence under section 7 of the Bribery Act could be charged.

Appendix A
Bribery Act 2010 case studies

Introduction

These case studies (which do not form part of the guidance issued under section 9 of the Act) look at how the application of the six principles might relate to a number of hypothetical scenarios commercial organisations may encounter. The Government believes that this illustrative context can assist commercial organisations in deciding what procedures to prevent persons associated with them from bribing on their behalf might be most suitable to their needs.

These case studies are illustrative. They are intended to complement the guidance. They do not replace or supersede any of the principles. The considerations set out below merely show in some circumstances how the principles can be applied, and should not be seen as standard setting, establishing any presumption, reflecting a minimum baseline of action or being appropriate for all organisations whatever their size. Accordingly, the considerations set out below are not:

- comprehensive of all considerations in all circumstances
- conclusive of adequate procedures
- conclusive of inadequate procedures if not all of the considerations are considered and/or applied.

All but one of these case studies focus on bribery risks associated with foreign markets. This is because bribery risks associated with foreign markets are generally higher than those associated with domestic markets. Accordingly case studies focussing on foreign markets are better suited as vehicles for the illustration of bribery prevention procedures.

Case study 1 – Principle 1
Facilitation payments

A medium sized company ('A') has acquired a new customer in a foreign country ('B') where it operates through its agent company ('C'). Its bribery risk assessment has identified facilitation payments as a significant problem in securing reliable importation into B and transport to its new customer's manufacturing locations. These sometimes take the form of 'inspection fees' required before B's import inspectors will issue a certificate of inspection and thereby facilitate the clearance of goods.

A could consider any or a combination of the following:

- Communication of its policy of non-payment of facilitation payments to C and its staff.
- Seeking advice on the law of B relating to certificates of inspection and fees for these to differentiate between properly payable fees and disguised requests for facilitation payments.
- Building realistic timescales into the planning of the project so that shipping, importation and delivery schedules allow where feasible for resisting and testing demands for facilitation payments.
- Requesting that C train its staff about resisting demands for facilitation payments and the relevant local law and provisions of the Bribery Act 2010.
- Proposing or including as part of any contractual arrangement certain procedures for C and its staff, which may include one or more of the following, if appropriate:
  - questioning of legitimacy of demands
  - requesting receipts and identification details of the official making the demand
  - requests to consult with superior officials
  - trying to avoid paying 'inspection fees' (if not properly due) in cash and directly to an official
  - informing those demanding payments that compliance with the demand may mean that A (and possibly C) will commit an offence under UK law
  - informing those demanding payments that it will be necessary for C to inform the UK embassy of the demand.
- Maintaining close liaison with C so as to keep abreast of any local developments that may provide solutions and encouraging C to develop its own strategies based on local knowledge.
- Use of any UK diplomatic channels or participation in locally active non-governmental organisations, so as to apply pressure on the authorities of B to take action to stop demands for facilitation payments.

Case study 2 – Principle 1
Proportionate Procedures

A small to medium sized installation company is operating entirely within the United Kingdom domestic market. It relies to varying degrees on independent consultants to facilitate business opportunities and to assist in the preparation of both pre-qualification submissions and formal tenders in seeking new business. Such consultants work on an arms-length-fee-plus-expenses basis. They are engaged by sales staff and selected because of their extensive network of business contacts and the specialist information they have. The reason for engaging them is to enhance the company's prospects of being included in tender and pre-qualification lists and of being selected as main or sub-contractors. The reliance on consultants and, in particular, difficulties in monitoring expenditure which sometimes involves cash transactions has been identified by the company as a source of medium to high risk of bribery being undertaken on the company's behalf.

In seeking to mitigate these risks the company could consider any or a combination of the following:

- Communication of a policy statement committing it to transparency and zero tolerance of bribery in pursuit of its business objectives. The statement could be communicated to the company's employees, known consultants and external contacts, such as sectoral bodies and local chambers of commerce.
- Firming up its due diligence before engaging consultants. This could include making enquiries through business contacts, local chambers of commerce, business associations, or internet searches and following up any business references and financial statements.
- Considering firming up the terms of the consultants' contracts so that they reflect a commitment to zero tolerance of bribery, set clear criteria for provision of bona fide hospitality on the company's behalf and define in detail the basis of remuneration, including expenses.
- Consider making consultants' contracts subject to periodic review and renewal.
- Drawing up key points guidance on preventing bribery for its sales staff and all other staff involved in bidding for business and when engaging consultants
- Periodically emphasising these policies and procedures at meetings – for example, this might form a standing item on meeting agendas every few months.
- Providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf.

Case study 3 – Principles 1 and 6
Joint venture

A medium sized company ('D') is interested in significant foreign mineral deposits. D proposes to enter into a joint venture with a local mining company ('E'). It is proposed that D and E would have an equal holding in the joint venture company ('DE'). D identifies the necessary interaction between DE and local public officials as a source of significant risks of bribery.

D could consider negotiating for the inclusion of any or a combination of the following bribery prevention procedures into the agreement setting up DE:

- Parity of representation on the board of DE.
- That DE put in place measures designed to ensure compliance with all applicable bribery and corruption laws. These measures might cover such issues as:
  - gifts and hospitality
  - agreed decision making rules
  - procurement
  - engagement of third parties, including due diligence requirements
  - conduct of relations with public officials
  - training for staff in high risk positions
  - record keeping and accounting.
- The establishment of an audit committee with at least one representative of each of D and E that has the power to view accounts and certain expenditure and prepare regular reports.
- Binding commitments by D and E to comply with all applicable bribery laws in relation to the operation of DE, with a breach by either D or E being a breach of the agreement between them. Where such a breach is a material breach this could lead to termination or other similarly significant consequences.

Case study 4 – Principles 1 and 5
Hospitality and Promotional expenditure

A firm of engineers ('F') maintains a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. Private bodies and individuals are happy to meet their own travel and accommodation costs associated with attending these events. The costs of the travel and accommodation of any foreign public officials attending are, however, met by F.

F could consider any or a combination of the following:

- Conducting a bribery risk assessment relating to its dealings with business partners and foreign public officials and in particular the provision of hospitality and promotional expenditure.
- Publication of a policy statement committing it to transparent, proportionate, reasonable and bona fide hospitality and promotional expenditure.
- The issue of internal guidance on procedures that apply to the provision of hospitality and/or promotional expenditure providing:
  - that any procedures are designed to seek to ensure transparency and conformity with any relevant laws and codes applying to F
  - that any procedures are designed to seek to ensure transparency and conformity with the relevant laws and codes applying to foreign public officials
  - that any hospitality should reflect a desire to cement good relations and show appreciation, and that promotional expenditure should seek to improve the image of F as a commercial organisation, to better present its products or services, or establish cordial relations
  - that the recipient should not be given the impression that they are under an obligation to confer any business advantage or that the recipient's independence will be affected
  - criteria to be applied when deciding the appropriate levels of hospitality for both private and public business partners, clients, suppliers and foreign public officials and the type of hospitality that is appropriate in different sets of circumstances
  - that provision of hospitality for public officials be cleared with the relevant public body so that it is clear who and what the hospitality is for
  - for expenditure over certain limits, approval by an appropriately senior level of management may be a relevant consideration
  - accounting (book-keeping, orders, invoices, delivery notes, etc).
- Regular monitoring, review and evaluation of internal procedures and compliance with them.
- Appropriate training and supervision provided to staff.

Case study 5 – Principle 3
Assessing risks

A small specialist manufacturer is seeking to expand its business in one of several emerging markets, all of which offer comparable opportunities. It has no specialist risk assessment expertise and is unsure how to go about assessing the risks of entering a new market.

The small manufacturer could consider any or a combination of the following:

- Incorporating an assessment of bribery risk into research to identify the optimum market for expansion.
- Seeking advice from UK diplomatic services and government organisations such as UK Trade and Investment.
- Consulting general country assessments undertaken by local chambers of commerce, relevant non-governmental organisations and sectoral organisations.
- Seeking advice from industry representatives.
- Following up any general or specialist advice with further independent research.

Case study 6 – Principle 4
Due diligence of agents

A medium to large sized manufacturer of specialist equipment ('G') has an opportunity to enter an emerging market in a foreign country ('H') by way of a government contract to supply equipment to the state. Local convention requires any foreign commercial organisations to operate through a local agent. G is concerned to appoint a reputable agent and ensure that the risk of bribery being used to develop its business in the market is minimised.

G could consider any or a combination of the following:

- Compiling a suitable questionnaire for potential agents requiring for example, details of ownership if not an individual; CVs and references for those involved in performing the proposed service; details of any directorships held, existing partnerships and third party relationships and any relevant judicial or regulatory findings.
- Having a clear statement of the precise nature of the services offered, costs, commissions, fees and the preferred means of remuneration.
- Undertaking research, including internet searches, of the prospective agents and, if a corporate body, of every person identified as having a degree of control over its affairs.
- Making enquiries with the relevant authorities in H to verify the information received in response to the questionnaire.
- Following up references and clarifying any matters arising from the questionnaire or any other information received with the agents, arranging face to face meetings where appropriate.
- Requesting sight or evidence of any potential agent's own anti-bribery policies and, where a corporate body, reporting procedures and records.
- Being alert to key commercial questions such as:
  - Is the agent really required?
  - Does the agent have the required expertise?
  - Are they interacting with or closely connected to public officials?
  - Is what you are proposing to pay reasonable and commercial?
- Renewing due diligence enquiries on a periodic basis if an agent is appointed.

Case study 7 – Principle 5
Communicating and training

A small UK manufacturer of specialist equipment ('J') has engaged an individual as a local agent and adviser ('K') to assist with winning a contract and developing its business in a foreign country where the risk of bribery is assessed as high.

J could consider any or a combination of the following:

- Making employees of J engaged in bidding for business fully aware of J's anti-bribery statement, code of conduct and, where appropriate, that details of its anti-bribery policies are included in its tender.
- Including suitable contractual terms on bribery prevention measures in the agreement between J and K, for example: requiring K not to offer or pay bribes; giving J the ability to audit K's activities and expenditure; requiring K to report any requests for bribes by officials to J; and, in the event of suspicion arising as to K's activities, giving J the right to terminate the arrangement.
- Making employees of J fully aware of policies and procedures applying to relevant issues such as hospitality and facilitation payments, including all financial control mechanisms, sanctions for any breaches of the rules and instructions on how to report any suspicious conduct.
- Supplementing the information, where appropriate, with specially prepared training to J's staff involved with the foreign country.

Case study 8 – Principle 1, 4 and 6
Community benefits and charitable donations

A company ('L') exports a range of seed products to growers around the globe. Its representative travels to a foreign country ('M') to discuss with a local farming co-operative the possible supply of a new strain of wheat that is resistant to a disease which recently swept the region. In the meeting, the head of the co-operative tells L's representative about the problems which the relative unavailability of antiretroviral drugs cause locally in the face of a high HIV infection rate.

In a subsequent meeting with an official of M to discuss the approval of L's new wheat strain for import, the official suggests that L could pay for the necessary antiretroviral drugs and that this will be a very positive factor in the Government's consideration of the licence to import the new seed strain. In a further meeting, the same official states that L should donate money to a certain charity suggested by the official which, the official assures, will then take the necessary steps to purchase and distribute the drugs. L identifies this as raising potential bribery risks.

L could consider any or a combination of the following:

- Making reasonable efforts to conduct due diligence, including consultation with staff members and any business partners it has in country M in order to satisfy itself that the suggested arrangement is legitimate and in conformity with any relevant laws and codes applying to the foreign public official responsible for approving the product. It could do this by obtaining information on:
  - M's local law on community benefits as part of Government procurement and, if no particular local law, the official status and legitimacy of the suggested arrangement
  - the particular charity in question including its legal status, its reputation in M, and whether it has conducted similar projects, and
  - any connections the charity might have with the foreign official in question, if possible.
- Adopting an internal communication plan designed to ensure that any relationships with charitable organisations are conducted in a transparent and open manner and do not raise any expectation of the award of a contract or licence.
- Adopting company-wide policies and procedures about the selection of charitable projects or initiatives which are informed by appropriate risk assessments.
- Training and support for staff in implementing the relevant policies and procedures of communication which allow issues to be reported and compliance to be monitored.
- If charitable donations made in country M are routinely channelled through government officials or to others at the official's request, a red flag should be raised and L may seek to monitor the way its contributions are ultimately applied, or investigate alternative methods of donation such as official 'off-set' or 'community gain' arrangements with the government of M.
- Evaluation of its policies relating to charitable donations as part of its next periodic review of its anti-bribery procedures.

Case study 9 – Principle 4
Due diligence of agents

A small UK company ('N') relies on agents in country ('P') from which it imports local high quality perishable produce and to which it exports finished goods. The bribery risks it faces arise entirely as a result of its reliance on agents and their relationship with local businessmen and officials. N is offered a new business opportunity in P through a new agent ('Q'). An agreement with Q needs to be concluded quickly.

N could consider any or a combination of the following:

- Conducting due diligence and background checks on Q that are proportionate to the risk before engaging Q; which could include:
  - making enquiries through N's business contacts, local chambers of commerce or business associations, or internet searches
  - seeking business references and a financial statement from Q and reviewing Q's CV to ensure Q has suitable experience.
- Considering how best to structure the relationship with Q, including how Q should be remunerated for its services and how to seek to ensure Q's compliance with relevant laws and codes applying to foreign public officials.
- Making the contract with Q renewable annually or periodically.
- Travelling to P periodically to review the agency situation.

Case study 10 – Principle 2
Top level commitment

A small to medium sized component manufacturer is seeking contracts in markets abroad where there is a risk of bribery. As part of its preparation, a senior manager has devoted some time to participation in the development of a sector wide anti-bribery initiative.

The top level management of the manufacturer could consider any or a combination of the following:

- The making of a clear statement disseminated to its staff and key business partners of its commitment to carry out business fairly, honestly and openly, referencing its key bribery prevention procedures and its involvement in the sectoral initiative.
- Establishing a code of conduct that includes suitable anti-bribery provisions and making it accessible to staff and third parties on its website.
- Considering an internal launch of a code of conduct, with a message of commitment to it from senior management.
- Senior management emphasising among the workforce and other associated persons the importance of understanding and applying the code of conduct and the consequences of breaching the policy or contractual provisions relating to bribery prevention for employees and managers and external associated persons.
- Identifying someone of a suitable level of seniority to be a point-person for queries and issues relating to bribery risks.

Case study 11
Proportionate procedures

A small export company operates through agents in a number of different foreign countries. Having identified bribery risks associated with its reliance on agents it is considering developing proportionate and risk based bribery prevention procedures.

The company could consider any or a combination of the following:

- Using trade fairs and trade publications to communicate periodically its anti-bribery message and, where appropriate, some detail of its policies and procedures.
- Oral or written communication of its bribery prevention intentions to all of its agents.
- Adopting measures designed to address bribery on its behalf by associated persons, such as:
  - requesting relevant information and conducting background searches on the internet against information received
  - making sure references are in order and followed up
  - including anti-bribery commitments in any contract renewal
  - using existing internal arrangements such as periodic staff meetings to raise awareness of 'red flags' as regards agents' conduct, for example evasive answers to straightforward requests for information, overly elaborate payment arrangements involving further third parties, ad hoc or unusual requests for expense reimbursement not properly covered by accounting procedures.
- Making use of any external sources of information (UKTI, sectoral organisations) on bribery risks in particular markets and using the data to inform relationships with particular agents.
- Making sure staff have a confidential means to raise any concerns about bribery.

www.justice.gov.uk/guidance/bribery.htm

2011 FEDERAL SENTENCING GUIDELINES MANUAL

CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

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 greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

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.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

PART A - GENERAL APPLICATION PRINCIPLES

§8A1.1. Applicability of Chapter Eight

This chapter applies to the sentencing of all organizations for felony and Class A misdemeanor offenses.

Commentary

Application Notes:

1. "Organization" means "a person other than an individual." 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

2. The fine guidelines in §§8C2.2 through 8C2.9 apply only to specified types of offenses. The other provisions of this chapter apply to the sentencing of all organizations for all felony and Class A misdemeanor offenses. For example, the restitution and probation provisions in Parts B and D of this chapter apply to the sentencing of an organization, even if the fine guidelines in §§8C2.2 through 8C2.9 do not apply.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8A1.2. Application Instructions - Organizations

(a) Determine from Part B, Subpart 1 (Remedying Harm from Criminal Conduct) the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.

(b) Determine from Part C (Fines) the sentencing requirements and options relating to fines:

(1) If the organization operated primarily for a criminal purpose or primarily by criminal means, apply §8C1.1 (Determining the Fine - Criminal Purpose Organizations).

(2) Otherwise, apply §8C2.1 (Applicability of Fine Guidelines) to identify the counts for which the provisions of §§8C2.2 through 8C2.9 apply. For such counts:

(A) Refer to §8C2.2 (Preliminary Determination of Inability to Pay Fine) to determine whether an abbreviated determination of the guideline fine range may be warranted.

(B) Apply §8C2.3 (Offense Level) to determine the offense level from Chapter Two (Offense Conduct) and Chapter Three, Part D (Multiple Counts).

(C) Apply §8C2.4 (Base Fine) to determine the base fine.

(D) Apply §8C2.5 (Culpability Score) to determine the culpability score. To determine whether the organization had an effective compliance and ethics program for purposes of §8C2.5(f), apply §8B2.1 (Effective Compliance and Ethics Program).

(E) Apply §8C2.6 (Minimum and Maximum Multipliers) to determine the minimum and maximum multipliers corresponding to the culpability score.

(F) Apply §8C2.7 (Guideline Fine Range - Organizations) to determine the minimum and maximum of the guideline fine range.

(G) Refer to §8C2.8 (Determining the Fine Within the Range) to determine the amount of the fine within the applicable guideline range.

(H) Apply §8C2.9 (Disgorgement) to determine whether an increase to the fine is required.

For any count or counts not covered under §8C2.1 (Applicability of Fine Guidelines), apply §8C2.10

(Determining the Fine for Other Counts).

(3) Apply the provisions relating to the implementation of the sentence of a fine in Part C, Subpart 3 (Implementing the Sentence of a Fine).

(4) For grounds for departure from the applicable guideline fine range, refer to Part C, Subpart 4 (Departures from the Guideline Fine Range).

(c) Determine from Part D (Organizational Probation) the sentencing requirements and options relating to probation.

(d) Determine from Part E (Special Assessments, Forfeitures, and Costs) the sentencing requirements relating to special assessments, forfeitures, and costs.

Commentary

Application Notes:

1. Determinations under this chapter are to be based upon the facts and information specified in the applicable guideline. Determinations that reference other chapters are to be made under the standards applicable to determinations under those chapters.

2. The definitions in the Commentary to §1B1.1 (Application Instructions) and the guidelines and commentary in §§1B1.2 through 1B1.8 apply to determinations under this chapter unless otherwise specified. The adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), and E (Acceptance of Responsibility) do not apply. The provisions of Chapter Six (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights) apply to proceedings in which the defendant is an organization. Guidelines and policy statements not referenced in this chapter, directly or indirectly, do not apply when the defendant is an organization; e.g., the policy statements in Chapter Seven (Violations of Probation and Supervised Release) do not apply to organizations.

3. The following are definitions of terms used frequently in this chapter:

(A) "Offense" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "instant" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).

(B) "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest. "High-level personnel of a unit of the organization" is defined in the Commentary to §8C2.5 (Culpability Score).

(C) "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.

(D) "Agent" means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

(E) An individual "condoned" an offense if the individual knew of the offense and did not take reasonable steps to prevent or terminate the offense.

(F) "Similar misconduct" means prior conduct that is similar in nature to the conduct underlying the instant offense, without regard to whether or not such conduct violated the same statutory provision. For example, prior Medicare fraud would be misconduct similar to an instant offense involving another type of fraud.

(G) "Prior criminal adjudication" means conviction by trial, plea of guilty (including an Alford plea), or plea of nolo contendere.

(H) "Pecuniary gain" is derived from 18 U.S.C. § 3571(d) and means the additional before-tax profit to the defendant resulting from the relevant conduct of the offense. Gain can result from either additional revenue or cost savings. For example, an offense involving odometer tampering can produce additional revenue. In such a case, the pecuniary gain is the additional revenue received because the automobiles appeared to have less mileage, i.e., the difference between the price received or expected for the automobiles with the apparent mileage and the fair market value of the automobiles with the actual mileage. An offense involving defense procurement fraud related to defective product testing can produce pecuniary gain resulting from cost savings. In such a case, the pecuniary gain is the amount saved because the product was not tested in the required manner.

(I) "Pecuniary loss" is derived from 18 U.S.C. § 3571(d) and is equivalent to the term "loss" as used in Chapter Two (Offense Conduct). See Commentary to §2B1.1 (Theft, Property Destruction, and Fraud), and definitions of "tax loss" in Chapter Two, Part T (Offenses Involving Taxation).

(J) An individual was "willfully ignorant of the offense" if the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); November 1, 1997 (see Appendix C, amendment 546); November 1, 2001 (see Appendix C, amendment 617); November 1, 2004 (see Appendix C, amendment 673); November 1, 2010 (see Appendix C, amendment 747); November 1, 2011 (see Appendix C, amendment 758).

PART B - REMEDYING HARM FROM CRIMINAL CONDUCT, AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

1. REMEDYING HARM FROM CRIMINAL CONDUCT

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

Introductory Commentary

As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense. A restitution order or an order of probation requiring restitution can be used to compensate identifiable victims of the offense. A remedial order or an order of probation requiring community service can be used to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would otherwise not be remedied. An order of notice to victims can be used to notify unidentified victims of the offense.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8B1.1. Restitution - Organizations

(a) In the case of an identifiable victim, the court shall --

(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) *Provided*, that the provisions of subsection (a) do not apply --

(1) when full restitution has been made; or

(2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. See 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. See 18 U.S.C. § 3664(f)(4).

(e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(f) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former §8B1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

Commentary

Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); November 1, 1997 (see Appendix C, amendment 571).

§8B1.2. Remedial Orders - Organizations (Policy Statement)

(a) To the extent not addressed under §8B1.1 (Restitution - Organizations), a remedial order imposed as a condition of probation may require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.

(b) If the magnitude of expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm.

Commentary

Background: The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense, e.g., a product recall for a food and drug violation or a clean-up order for an environmental violation. In some cases in which a remedial order potentially may be appropriate, a governmental regulatory agency, e.g., the Environmental Protection Agency or the Food and Drug Administration, may have authority to order remedial measures. In such cases, a remedial order by the court may not be necessary. If a remedial order is entered, it should be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8B1.3. Community Service - Organizations (Policy Statement)

Community service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense.

Commentary

Background: An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction. However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8B1.4. Order of Notice to Victims - Organizations

Apply §5F1.4 (Order of Notice to Victims).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

§8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including

monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Compliance and ethics program" means a program designed to prevent and detect criminal conduct.

"Governing authority" means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

"High-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

"Standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. Factors to Consider in Meeting Requirements of this Guideline.—

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) Applicable Governmental Regulation and Industry Practice.—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 compliance and ethics program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

(D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subparagraph, "similar misconduct" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).

3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. Application of Subsection (b)(3).—

(A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. Application of Subsection (b)(6).—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.

6. Application of Subsection (b)(7).—Subsection (b)(7) has two aspects.

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

7. Application of Subsection (c).—To meet the requirements of subsection (c), an organization shall:

(A) Assess periodically the risk that criminal conduct will occur, including assessing the following:

(i) The nature and seriousness of such criminal conduct.

(ii) The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.

(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subparagraph (A) of this note as most serious, and most likely, to occur.

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subparagraph (A) of this note as most serious, and most likely, to occur.

Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673). Amended effective November 1, 2010 (see Appendix C, amendment 744); November 1, 2011 (see Appendix C, amendment 758).

PART C - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATIONS

§8C1.1. Determining the Fine - Criminal Purpose Organizations

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets. When this section applies, Subpart 2 (Determining the Fine - Other Organizations) and §8C3.4 (Fines Paid by Owners of Closely Held Organizations) do not apply.

Commentary

Application Note:

1. "Net assets," as used in this section, means the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors.

Background: This guideline addresses the case in which the court, based upon an examination of the nature and circumstances of the offense and the history and characteristics of the organization, determines that the organization was operated primarily for a criminal purpose (e.g., a front for a scheme that was designed to commit fraud; an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance) or operated primarily by criminal means (e.g., a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste). In such a case, the fine shall be set at an amount sufficient to remove all of the organization's net assets. If the extent of the assets of the organization is unknown, the maximum fine authorized by statute should be imposed, absent innocent bona fide creditors.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

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2. DETERMINING THE FINE - OTHER ORGANIZATIONS

§8C2.1. Applicability of Fine Guidelines

The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

(a) §§2B1.1, 2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.6;
§§2D1.7, 2D3.1, 2D3.2;
§§2E3.1, 2E4.1, 2E5.1, 2E5.3;
§2G3.1;
§§2K1.1, 2K2.1;
§2L1.1;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1; or

(b) §§2E1.1, 2X1.1, 2X2.1, 2X3.1, 2X4.1, with respect to cases in which the offense level for the underlying offense is determined under one of the guideline sections listed in subsection (a) above.

Commentary

Application Notes:

1. If the Chapter Two offense guideline for a count is listed in subsection (a) or (b) above, and the applicable guideline results in the determination of the offense level by use of one of the listed guidelines, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, §§8C2.2 through 8C2.9 apply to an offense under §2K2.1 (an offense guideline listed in subsection (a)), unless the cross reference in that guideline requires the offense level to be determined under an offense guideline section not listed in subsection (a).

2. If the Chapter Two offense guideline for a count is not listed in subsection (a) or (b) above, but the applicable guideline results in the determination of the offense level by use of a listed guideline, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, where the conduct set forth in a count of conviction ordinarily referenced to §2N2.1 (an offense guideline not listed in subsection (a)) establishes §2B1.1 (Theft, Property Destruction, and Fraud) as the applicable offense guideline (an offense guideline listed in subsection (a)), §§8C2.2 through 8C2.9 would apply because the actual offense level is determined under §2B1.1 (Theft, Property Destruction, and Fraud).

Background: The fine guidelines of this subpart apply only to offenses covered by the guideline sections set forth in subsection (a) above. For example, the provisions of §§8C2.2 through 8C2.9 do not apply to counts for which the applicable guideline offense level is determined under Chapter Two, Part Q (Offenses Involving the Environment). For such cases, §8C2.10 (Determining the Fine for Other Counts) is applicable.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 1992 (see Appendix C, amendment 453); November 1, 1993 (see Appendix C, amendment 496); November 1, 2001 (see Appendix C, amendments 617, 619, and 634); November 1, 2005 (see Appendix C, amendment 679).

§8C2.2. Preliminary Determination of Inability to Pay Fine

(a) Where it is readily ascertainable that the organization cannot and is not likely to become able (even on an installment schedule) to pay restitution required under §8B1.1 (Restitution - Organizations), a determination of the guideline fine range is unnecessary because, pursuant to §8C3.3(a), no fine would be imposed.

(b) Where it is readily ascertainable through a preliminary determination of the minimum of the guideline fine range (see §§8C2.3 through 8C2.7) that the organization cannot and is not likely to become able (even on an installment schedule) to pay such minimum guideline fine, a further determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay).

Commentary

Application Notes:

1. In a case of a determination under subsection (a), a statement that "the guideline fine range was not determined because it is readily ascertainable that the defendant cannot and is not likely to become able to pay restitution" is recommended.

2. In a case of a determination under subsection (b), a statement that "no precise determination of the guideline fine range is required because it is readily ascertainable that the defendant cannot and is not likely to become able to pay the minimum of the guideline fine range" is recommended.

Background: Many organizational defendants lack the ability to pay restitution. In addition, many organizational defendants who may be able to pay restitution lack the ability to pay the minimum fine called for by §8C2.7(a). In such cases, a complete determination of the guideline fine range may be a needless exercise. This section provides for an abbreviated determination

of the guideline fine range that can be applied where it is readily ascertainable that the fine within the guideline fine range determined under §8C2.7 (Guideline Fine Range - Organizations) would be reduced under §8C3.3 (Reduction of Fine Based on Inability to Pay).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.3. Offense Level

(a) For each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline.

(b) Where there is more than one such count, apply Chapter Three, Part D (Multiple Counts) to determine the combined offense level.

Commentary

Application Notes:

1. In determining the offense level under this section, "defendant," as used in Chapter Two, includes any agent of the organization for whose conduct the organization is criminally responsible.

2. In determining the offense level under this section, apply the provisions of §§1B1.2 through 1B1.8. Do not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), and E (Acceptance of Responsibility).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2011 (see Appendix C, amendment 758).

§8C2.4. Base Fine

(a) The base fine is the greatest of:

(1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or

(2) the pecuniary gain to the organization from the offense; or

(3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

(b) *Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate.

(c) *Provided, further*, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine.

(d) Offense Level Fine Table

Offense Level	Amount
6 or less	$5,000
7	$7,500
8	$10,000

9	$15,000
10	$20,000
11	$30,000
12	$40,000
13	$60,000
14	$85,000
15	$125,000
16	$175,000
17	$250,000
18	$350,000
19	$500,000
20	$650,000
21	$910,000
22	$1,200,000
23	$1,600,000
24	$2,100,000
25	$2,800,000
26	$3,700,000
27	$4,800,000
28	$6,300,000
29	$8,100,000
30	$10,500,000
31	$13,500,000
32	$17,500,000
33	$22,000,000
34	$28,500,000
35	$36,000,000
36	$45,500,000
37	$57,500,000
38 or more	$72,500,000.

Commentary

Application Notes:

1. "Pecuniary gain," "pecuniary loss," and "offense" are defined in the Commentary to §8A1.2 (Application Instructions - Organizations). Note that subsections (a)(2) and (a)(3) contain certain limitations as to the use of pecuniary gain and

pecuniary loss in determining the base fine. Under subsection (a)(2), the pecuniary gain used to determine the base fine is the pecuniary gain to the organization from the offense. Under subsection (a)(3), the pecuniary loss used to determine the base fine is the pecuniary loss from the offense caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly.

2. Under 18 U.S.C. § 3571(d), the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. See Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). If loss is approximated for purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.

3. In a case of an attempted offense or a conspiracy to commit an offense, pecuniary loss and pecuniary gain are to be determined in accordance with the principles stated in §2X1.1 (Attempt, Solicitation, or Conspiracy).

4. In a case involving multiple participants (i.e., multiple organizations, or the organization and individual(s) unassociated with the organization), the applicable offense level is to be determined without regard to apportionment of the gain from or loss caused by the offense. See §1B1.3 (Relevant Conduct). However, if the base fine is determined under subsections (a)(2) or (a)(3), the court may, as appropriate, apportion gain or loss considering the defendant's relative culpability and other pertinent factors. Note also that under §2R1.1(d)(1), the volume of commerce, which is used in determining a proxy for loss under §8C2.4(a)(3), is limited to the volume of commerce attributable to the defendant.

5. Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); and 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).

Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, e.g., price-fixing. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 1993 (see Appendix C, amendment 496); November 1, 1995 (see Appendix C, amendment 534); November 1, 2001 (see Appendix C, amendment 634); November 1, 2004 (see Appendix C, amendments 666 and 673).

§8C2.5. Culpability Score

(a) Start with **5** points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Criminal Activity

If more than one applies, use the greatest:

(1) If --

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **5** points; or

(2) If --

(A) the organization had 1,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 1,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **4** points; or

(3) If --

(A) the organization had 200 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 200 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was

willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **3** points; or

(4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **2** points; or

(5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **1** point.

(c) Prior History

If more than one applies, use the greater:

(1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **1** point; or

(2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **2** points.

(d) Violation of an Order

If more than one applies, use the greater:

(1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add **2** points; or

(2) If the commission of the instant offense violated a condition of probation, add **1** point.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add **3** points.

(f) Effective Compliance and Ethics Program

(1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract **3** points.

(2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) (A) Except as provided in subparagraphs (B) and (C), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i) within high-level personnel of a small organization; or

(ii) within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.

(C) Subparagraphs (A) and (B) shall not apply if—

(i) the individual or individuals with operational responsibility for the compliance and ethics program (see §8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);

(ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) the organization promptly reported the offense to appropriate governmental authorities; and

(iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

(1) 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, subtract **5** points; or

(2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or

(3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline, "condoned", "prior criminal adjudication", "similar misconduct", "substantial authority personnel", and "willfully ignorant of the offense" have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions - Organizations).

"Small Organization", for purposes of subsection (f)(3), means an organization that, at the time of the instant offense, had fewer than 200 employees.

2. For purposes of subsection (b), "unit of the organization" means any reasonably distinct operational component of the organization. For example, a large organization may have several large units such as divisions or subsidiaries, as well as many smaller units such as specialized manufacturing, marketing, or accounting operations within these larger units. For

purposes of this definition, all of these types of units are encompassed within the term "unit of the organization."

3. "High-level personnel of the organization" is defined in the Commentary to §8A1.2 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the organization in its entirety, four points (rather than three) would be added under subsection (b)(2).

4. Pervasiveness under subsection (b) will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. For example, if an offense were committed in an organization with 1,000 employees but the tolerance of the offense was pervasive only within a unit of the organization with 200 employees (and no high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense), three points would be added under subsection (b)(3). If, in the same organization, tolerance of the offense was pervasive throughout the organization as a whole, or an individual within high-level personnel of the organization participated in the offense, four points (rather than three) would be added under subsection (b)(2).

5. A "separately managed line of business," as used in subsections (c) and (d), is a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business. Under subsection (c), in determining the prior history of an organization with separately managed lines of business, only the prior conduct or criminal record of the separately managed line of business involved in the instant offense is to be used. Under subsection (d), in the context of an organization with separately managed lines of business, in making the determination whether a violation of a condition of probation involved engaging in similar misconduct, only the prior misconduct of the separately managed line of business involved in the instant offense is to be considered.

6. Under subsection (c), in determining the prior history of an organization or separately managed line of business, the conduct of the underlying economic entity shall be considered without regard to its legal structure or ownership. For example, if two companies merged and became separate divisions and separately managed lines of business within the merged company, each division would retain the prior history of its predecessor company. If a company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company. In contrast, if one company purchased the physical assets but not the ongoing business of another company, the prior history of the company selling the physical assets would not be transferred to the company purchasing the assets. However, if an organization is acquired by another organization in response to solicitations by appropriate federal government officials, the prior history of the acquired organization shall not be attributed to the acquiring organization.

7. Under subsections (c)(1)(B) and (c)(2)(B), the civil or administrative adjudication(s) must have occurred within the specified period (ten or five years) of the instant offense.

8. Adjust the culpability score for the factors listed in subsection (e) whether or not the offense guideline incorporates that factor, or that factor is inherent in the offense.

9. Subsection (e) applies where the obstruction is committed on behalf of the organization; it does not apply where an individual or individuals have attempted to conceal their misconduct from the organization. The Commentary to §3C1.1 (Obstructing or Impeding the Administration of Justice) provides guidance regarding the types of conduct that constitute obstruction.

10. Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) or (f)(3)(C)(iii) if the organization reasonably concluded, based on the information then available, that no offense had been committed.

11. For purposes of subsection (f)(3)(C)(i), an individual has "direct reporting obligations" to the governing authority or an

appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.

12. "Appropriate governmental authorities," as used in subsections (f) and (g)(1), means the federal or state law enforcement, regulatory, or program officials having jurisdiction over such matter. To qualify for a reduction under subsection (g)(1), the report to appropriate governmental authorities must be made under the direction of the organization.

13. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation.

14. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility under subsection (g), unless outweighed by conduct of the organization that is inconsistent with such acceptance of responsibility. This adjustment is not intended to apply to an organization that puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude an organization from consideration for such a reduction. In rare situations, an organization may clearly demonstrate an acceptance of responsibility for its criminal conduct even though it exercises its constitutional right to a trial. This may occur, for example, where an organization goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to its conduct). In each such instance, however, a determination that an organization has accepted responsibility will be based primarily upon pretrial statements and conduct.

15. In making a determination with respect to subsection (g), the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.

Background: The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673); November 1, 2006 (see Appendix C, amendment 695); November 1, 2010 (see Appendix C, amendment 744).

§8C2.6. Minimum and Maximum Multipliers

Using the culpability score from §8C2.5 (Culpability Score) and applying any applicable special instruction for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table below.

Culpability	Minimum	Maximum

Score	Multiplier	Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.

Commentary

Application Note:

1. A special instruction for fines in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) sets a floor for minimum and maximum multipliers in cases covered by that guideline.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.7. Guideline Fine Range - Organizations

(a) The minimum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable minimum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

(b) The maximum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable maximum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.8. Determining the Fine Within the Range (Policy Statement)

(a) In determining the amount of the fine within the applicable guideline range, the court should consider:

(1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization;

(2) the organization's role in the offense;

(3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct;

(4) any nonpecuniary loss caused or threatened by the offense;

(5) whether the offense involved a vulnerable victim;

(6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;

(7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c);

(8) any culpability score under §8C2.5 (Culpability Score) higher than 10 or lower than 0;

(9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score);

(10) any factor listed in 18 U.S.C. § 3572(a); and

(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program).

(b) In addition, the court may consider the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score.

Commentary

Application Notes:

1. Subsection (a)(2) provides that the court, in setting the fine within the guideline fine range, should consider the organization's role in the offense. This consideration is particularly appropriate if the guideline fine range does not take the organization's role in the offense into account. For example, the guideline fine range in an antitrust case does not take into consideration whether the organization was an organizer or leader of the conspiracy. A higher fine within the guideline fine range ordinarily will be appropriate for an organization that takes a leading role in such an offense.

2. Subsection (a)(3) provides that the court, in setting the fine within the guideline fine range, should consider any collateral consequences of conviction, including civil obligations arising from the organization's conduct. As a general rule, collateral consequences that merely make victims whole provide no basis for reducing the fine within the guideline range. If criminal and civil sanctions are unlikely to make victims whole, this may provide a basis for a higher fine within the guideline fine range. If punitive collateral sanctions have been or will be imposed on the organization, this may provide a basis for a lower fine within the guideline fine range.

3. Subsection (a)(4) provides that the court, in setting the fine within the guideline fine range, should consider any nonpecuniary loss caused or threatened by the offense. To the extent that nonpecuniary loss caused or threatened (e.g., loss of or threat to human life; psychological injury; threat to national security) by the offense is not adequately considered in setting the guideline fine range, this factor provides a basis for a higher fine within the range. This factor is more likely to be applicable where the guideline fine range is determined by pecuniary loss or gain, rather than by offense level, because the Chapter Two offense levels frequently take actual or threatened nonpecuniary loss into account.

4. Subsection (a)(6) provides that the court, in setting the fine within the guideline fine range, should consider any prior criminal record of an individual within high-level personnel of the organization or within high-level personnel of a unit of the organization. Since an individual within high-level personnel either exercises substantial control over the organization or a unit of the organization or has a substantial role in the making of policy within the organization or a unit of the organization, any prior criminal misconduct of such an individual may be relevant to the determination of the appropriate fine for the

organization.

5. Subsection (a)(7) provides that the court, in setting the fine within the guideline fine range, should consider any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c). The civil and criminal misconduct counted under §8C2.5(c) increases the guideline fine range. Civil or criminal misconduct other than that counted under §8C2.5(c) may provide a basis for a higher fine within the range. In a case involving a pattern of illegality, an upward departure may be warranted.

6. Subsection (a)(8) provides that the court, in setting the fine within the guideline fine range, should consider any culpability score higher than ten or lower than zero. As the culpability score increases above ten, this may provide a basis for a higher fine within the range. Similarly, as the culpability score decreases below zero, this may provide a basis for a lower fine within the range.

7. Under subsection (b), the court, in determining the fine within the range, may consider any factor that it considered in determining the range. This allows for courts to differentiate between cases that have the same offense level but differ in seriousness (e.g., two fraud cases at offense level 12, one resulting in a loss of $21,000, the other $40,000). Similarly, this allows for courts to differentiate between two cases that have the same aggravating factors, but in which those factors vary in their intensity (e.g., two cases with upward adjustments to the culpability score under §8C2.5(c)(2) (prior criminal adjudications within 5 years of the commencement of the instant offense, one involving a single conviction, the other involving two or more convictions).

Background: Subsection (a) includes factors that the court is required to consider under 18 U.S.C. §§ 3553(a) and 3572(a) as well as additional factors that the Commission has determined may be relevant in a particular case. A number of factors required for consideration under 18 U.S.C. § 3572(a) (e.g., pecuniary loss, the size of the organization) are used under the fine guidelines in this subpart to determine the fine range, and therefore are not specifically set out again in subsection (a) of this guideline. In unusual cases, factors listed in this section may provide a basis for departure.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8C2.9. Disgorgement

The court shall add to the fine determined under §8C2.8 (Determining the Fine Within the Range) any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures.

Commentary

Application Note:

1. This section is designed to ensure that the amount of any gain that has not and will not be taken from the organization for remedial purposes will be added to the fine. This section typically will apply in cases in which the organization has received gain from an offense but restitution or remedial efforts will not be required because the offense did not result in harm to identifiable victims, e.g., money laundering, obscenity, and regulatory reporting offenses. Money spent or to be spent to remedy the adverse effects of the offense, e.g., the cost to retrofit defective products, should be considered as disgorged gain. If the cost of remedial efforts made or to be made by the organization equals or exceeds the gain from the offense, this section will not apply.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.10. Determining the Fine for Other Counts

For any count or counts not covered under §8C2.1 (Applicability of Fine Guidelines), the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572. The court should determine the

appropriate fine amount, if any, to be imposed in addition to any fine determined under §8C2.8 (Determining the Fine Within the Range) and §8C2.9 (Disgorgement).

Commentary

Background: The Commission has not promulgated guidelines governing the setting of fines for counts not covered by §8C2.1 (Applicability of Fine Guidelines). For such counts, the court should determine the appropriate fine based on the general statutory provisions governing sentencing. In cases that have a count or counts not covered by the guidelines in addition to a count or counts covered by the guidelines, the court shall apply the fine guidelines for the count(s) covered by the guidelines, and add any additional amount to the fine, as appropriate, for the count(s) not covered by the guidelines.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

* * * * *

3. IMPLEMENTING THE SENTENCE OF A FINE

§8C3.1. Imposing a Fine

(a) Except to the extent restricted by the maximum fine authorized by statute or any minimum fine required by statute, the fine or fine range shall be that determined under §8C1.1 (Determining the Fine - Criminal Purpose Organizations); §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement); or §8C2.10 (Determining the Fine for Other Counts), as appropriate.

(b) Where the minimum guideline fine is greater than the maximum fine authorized by statute, the maximum fine authorized by statute shall be the guideline fine.

(c) Where the maximum guideline fine is less than a minimum fine required by statute, the minimum fine required by statute shall be the guideline fine.

Commentary

Background: This section sets forth the interaction of the fines or fine ranges determined under this chapter with the maximum fine authorized by statute and any minimum fine required by statute for the count or counts of conviction. The general statutory provisions governing a sentence of a fine are set forth in 18 U.S.C. § 3571.

When the organization is convicted of multiple counts, the maximum fine authorized by statute may increase. For example, in the case of an organization convicted of three felony counts related to a $200,000 fraud, the maximum fine authorized by statute will be $500,000 on each count, for an aggregate maximum authorized fine of $1,500,000.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C3.2. Payment of the Fine - Organizations

(a) If the defendant operated primarily for a criminal purpose or primarily by criminal means, immediate payment of the fine shall be required.

(b) In any other case, immediate payment of the fine shall be required unless the court finds that the

organization is financially unable to make immediate payment or that such payment would pose an undue burden on the organization. If the court permits other than immediate payment, it shall require full payment at the earliest possible date, either by requiring payment on a date certain or by establishing an installment schedule.

Commentary

Application Note:

1. When the court permits other than immediate payment, the period provided for payment shall in no event exceed five years. 18 U.S.C. § 3572(d).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C3.3. Reduction of Fine Based on Inability to Pay

(a) The court shall reduce the fine below that otherwise required by §8C1.1 (Determining the Fine - Criminal Purpose Organizations), or §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement), to the extent that imposition of such fine would impair its ability to make restitution to victims.

(b) The court may impose a fine below that otherwise required by §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement) if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required by §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement).

Provided, that the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

Commentary

Application Note:

1. For purposes of this section, an organization is not able to pay the minimum fine if, even with an installment schedule under §8C3.2 (Payment of the Fine - Organizations), the payment of that fine would substantially jeopardize the continued existence of the organization.

Background: Subsection (a) carries out the requirement in 18 U.S.C. § 3572(b) that the court impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the organization to make restitution for the offense; however, this section does not authorize a criminal purpose organization to remain in business in order to pay restitution.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C3.4. Fines Paid by Owners of Closely Held Organizations

The court may offset the fine imposed upon a closely held organization when one or more individuals, each of whom owns at least a 5 percent interest in the organization, has been fined in a federal criminal proceeding for the same offense conduct for which the organization is being sentenced. The amount of such offset shall not exceed the amount resulting from multiplying the total fines imposed on those individuals by those individuals' total percentage interest in the organization.

Commentary

Application Notes:

1. For purposes of this section, an organization is closely held, regardless of its size, when relatively few individuals own it. In order for an organization to be closely held, ownership and management need not completely overlap.

2. This section does not apply to a fine imposed upon an individual that arises out of offense conduct different from that for which the organization is being sentenced.

Background: For practical purposes, most closely held organizations are the alter egos of their owner-managers. In the case of criminal conduct by a closely held corporation, the organization and the culpable individual(s) both may be convicted. As a general rule in such cases, appropriate punishment may be achieved by offsetting the fine imposed upon the organization by an amount that reflects the percentage ownership interest of the sentenced individuals and the magnitude of the fines imposed upon those individuals. For example, an organization is owned by five individuals, each of whom has a twenty percent interest; three of the individuals are convicted; and the combined fines imposed on those three equals $100,000. In this example, the fine imposed upon the organization may be offset by up to 60 percent of their combined fine amounts, i.e., by $60,000.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

* * * * *

4. DEPARTURES FROM THE GUIDELINE FINE RANGE

Introductory Commentary

The statutory provisions governing departures are set forth in 18 U.S.C. § 3553(b). Departure may be warranted if the 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." This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. In deciding whether departure is warranted, the court should consider the extent to which that factor is adequately taken into consideration by the guidelines and the relative importance or substantiality of that factor in the particular case.

To the extent that any policy statement from Chapter Five, Part K (Departures) is relevant to the organization, a departure from the applicable guideline fine range may be warranted. Some factors listed in Chapter Five, Part K that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Five, Part K may be applicable in particular cases. While this subpart lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.1. Substantial Assistance to Authorities - Organizations (Policy Statement)

(a) Upon motion of the government stating that the defendant has provided 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 who has committed an offense, the court may depart from the guidelines.

(b) The appropriate reduction shall be determined by the court for reasons stated on the record that may include,

but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the organization's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the nature and extent of the organization's assistance; and

(3) the timeliness of the organization's assistance.

Commentary

Application Note:

1. Departure under this section is intended for cases in which substantial assistance is provided in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other organizations. It is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.2. Risk of Death or Bodily Injury (Policy Statement)

If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.3. Threat to National Security (Policy Statement)

If the offense constituted a threat to national security, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.4. Threat to the Environment (Policy Statement)

If the offense presented a threat to the environment, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.5. Threat to a Market (Policy Statement)

If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted. This section is applicable to both private markets (e.g., a financial market, a commodities market, or a market for consumer goods) and public markets (e.g., government contracting).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.6. Official Corruption (Policy Statement)

If the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.7. Public Entity (Policy Statement)

If the organization is a public entity, a downward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.8. Members or Beneficiaries of the Organization as Victims (Policy Statement)

If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of an organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.9. Remedial Costs that Greatly Exceed Gain (Policy Statement)

If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within high-level personnel was involved in the offense, a departure would not be appropriate under this section. The lower the level and the more limited the extent of substantial authority personnel involvement in the offense, and the greater the degree to which remedial costs exceeded or will exceed gain, the less will be the need for a substantial fine to achieve adequate punishment and deterrence.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)

If the organization's culpability score is reduced under §8C2.5(f) (Effective Compliance and Ethics Program) 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.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8C4.11. Exceptional Organizational Culpability (Policy Statement)

If the organization's culpability score is greater than 10, an upward departure may be appropriate.

If no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under §8C2.4(a)(1), §8C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct), a downward departure may be warranted. In a case meeting these criteria, the court may find that the organization had exceptionally low culpability and therefore a fine based on loss, offense level, or a special Chapter Two instruction results in a guideline fine range higher than necessary to achieve the purposes of sentencing. Nevertheless, such fine should not be lower than if determined under §8C2.4(a)(2).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

PART D - ORGANIZATIONAL PROBATION

Introductory Commentary

Section 8D1.1 sets forth the circumstances under which a sentence to a term of probation is required. Sections 8D1.2 through 8D1.4, and 8F1.1, address the length of the probation term, conditions of probation, and violations of probation conditions.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8D1.1. Imposition of Probation - Organizations

(a) The court shall order a term of probation:

(1) if such sentence is necessary to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3);

(2) if the organization is sentenced to pay a monetary penalty (e.g., restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments;

(3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;

(4) if the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(5) if an individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(6) if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct;

(7) if the sentence imposed upon the organization does not include a fine; or

(8) if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Commentary

Background: Under 18 U.S.C. § 3561(a), an organization may be sentenced to a term of probation. Under 18 U.S.C. § 3551(c), imposition of a term of probation is required if the sentence imposed upon the organization does not include a fine.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8D1.2. Term of Probation - Organizations

(a) When a sentence of probation is imposed --

(1) In the case of a felony, the term of probation shall be at least one year but not more than five years.

(2) In any other case, the term of probation shall be not more than five years.

Commentary

Application Note:

1. Within the limits set by the guidelines, the term of probation should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation. The terms of probation set forth in this section are those provided in 18 U.S.C. § 3561(b).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8D1.3. Conditions of Probation - Organizations

(a) Pursuant to 18 U.S.C. § 3563(a)(1), any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation.

(b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: (1) restitution or (2) community service, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

(c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 1997 (see Appendix C, amendment 569); November 1, 2009 (see Appendix C, amendment 733).

§8D1.4. Recommended Conditions of Probation - Organizations (Policy Statement)

(a) The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the

steps that will be taken to prevent the recurrence of similar offenses.

(b) If probation is imposed under §8D1.1, the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in paragraph (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in paragraph (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in paragraph (1). Among other things, reports under subparagraph (B) shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) The organization shall notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(5) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(6) The organization shall make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.

Commentary

Application Note:

1. In determining the conditions to be imposed when probation is ordered under §8D1.1, the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.

Periodic reports submitted in accordance with subsection (b)(3) should be provided to any governmental regulatory body that oversees conduct of the organization relating to the instant offense.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673); November 1, 2010 (see Appendix C, amendment 744).

§8D1.5. [Deleted]

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); was moved to §8F1.1 effective November 1, 2004 (see Appendix C, amendment

673).

PART E - SPECIAL ASSESSMENTS, FORFEITURES, AND COSTS

§8E1.1. Special Assessments - Organizations

A special assessment must be imposed on an organization in the amount prescribed by statute.

Commentary

Application Notes:

1. This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. See §5E1.3 for special assessments applicable to individuals.

2. The following special assessments are provided by statute (see 18 U.S.C. § 3013):

For Offenses Committed By Organizations On Or After April 24, 1996:

(A) $400, if convicted of a felony;
(B) $125, if convicted of a Class A misdemeanor;
(C) $50, if convicted of a Class B misdemeanor; or
(D) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations On Or After November 18, 1988 But Prior To April 24, 1996:

(E) $200, if convicted of a felony;
(F) $125, if convicted of a Class A misdemeanor;
(G) $50, if convicted of a Class B misdemeanor; or
(H) $25, if convicted of a Class C misdemeanor or an infraction.

For Offenses Committed By Organizations Prior To November 18, 1988:

(I) $200, if convicted of a felony;
(J) $100, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); November 1, 1997 (see Appendix C, amendment 573).

§8E1.2. Forfeiture - Organizations

Apply §5E1.4 (Forfeiture).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8E1.3. Assessment of Costs - Organizations

As provided in 28 U.S.C. § 1918, the court may order the organization to pay the costs of prosecution. In addition, specific statutory provisions mandate assessment of costs.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

PART F - VIOLATIONS OF PROBATION - ORGANIZATIONS

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

§8F1.1. Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

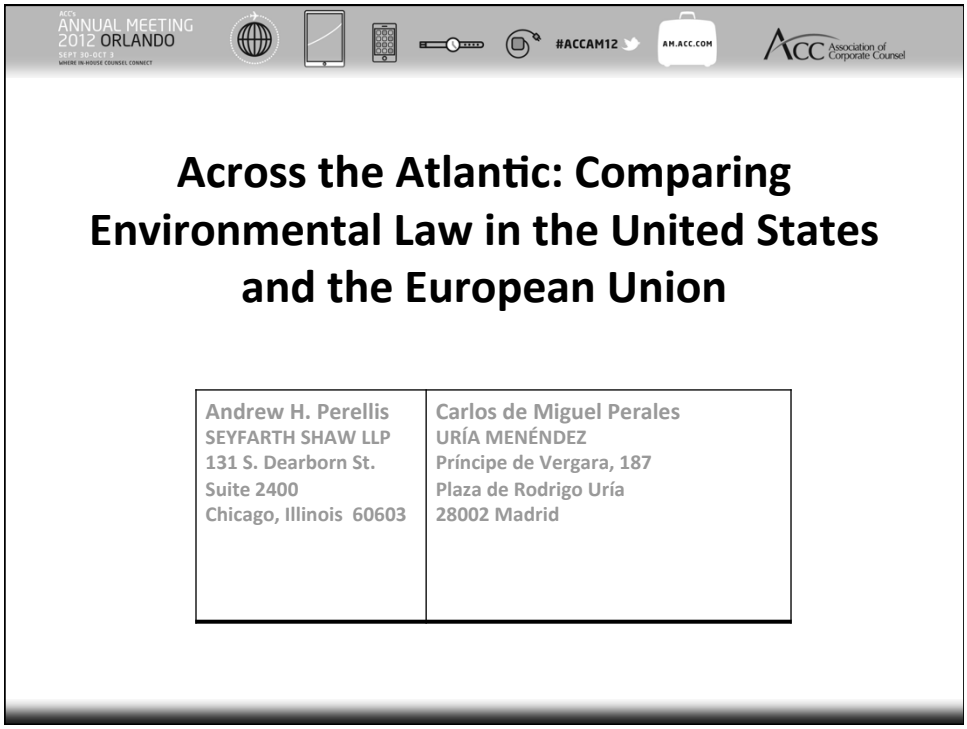
Commentary

Application Notes:

1. Appointment of Master or Trustee.—In the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.

2. Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation - Organizations) and 8D1.4 (Recommended Conditions of Probation - Organizations).

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).



Across the Atlantic: Comparing Environmental Law in the United States and the European Union

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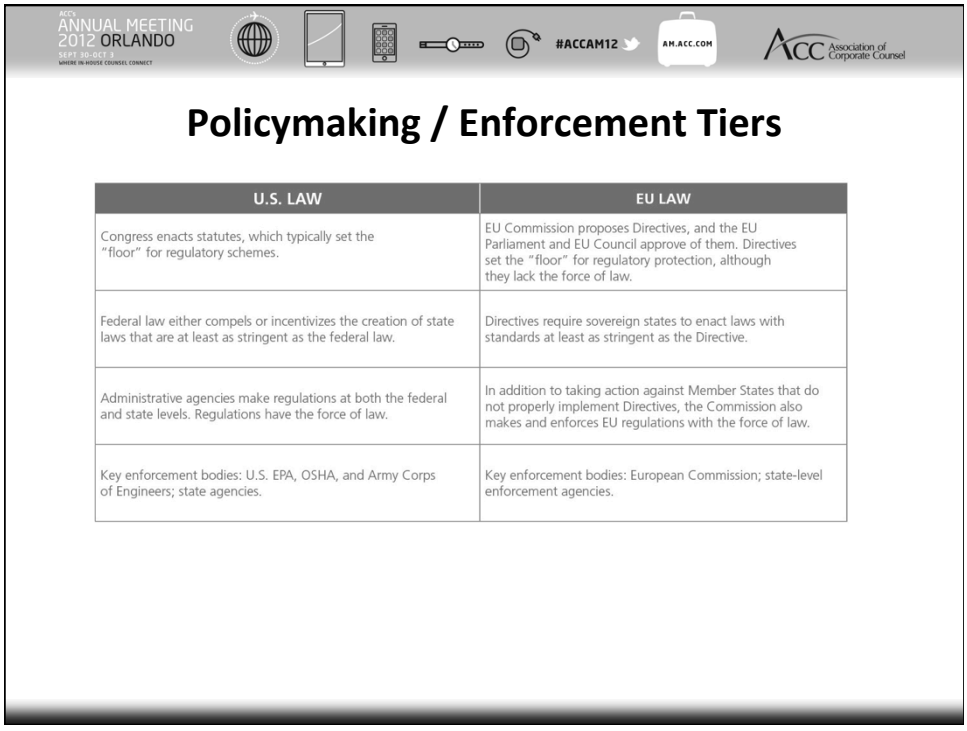
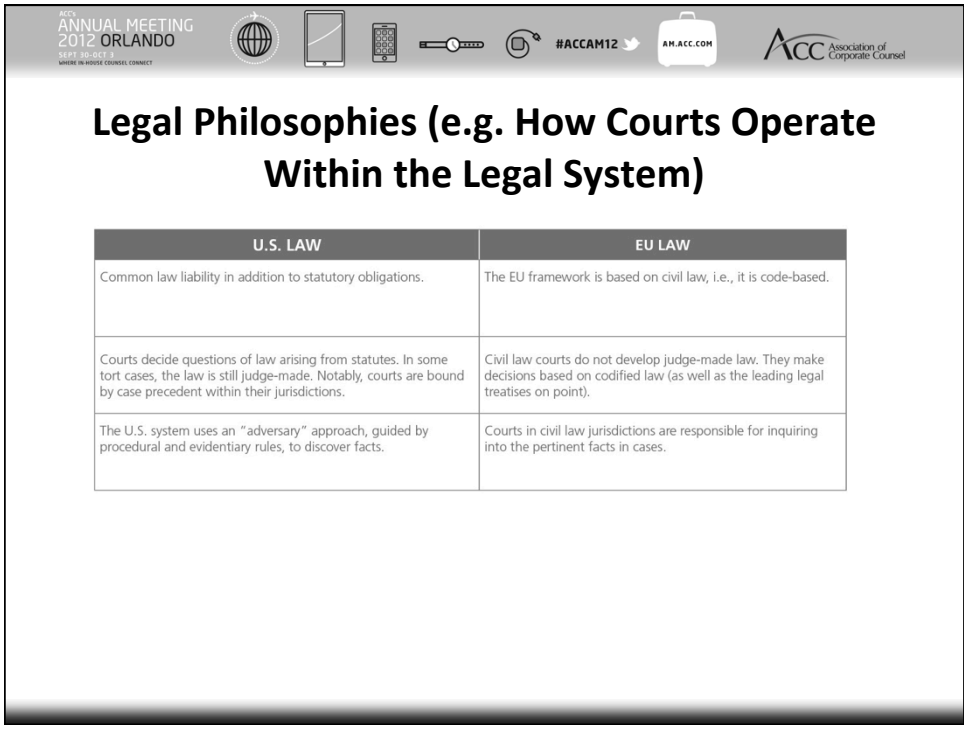


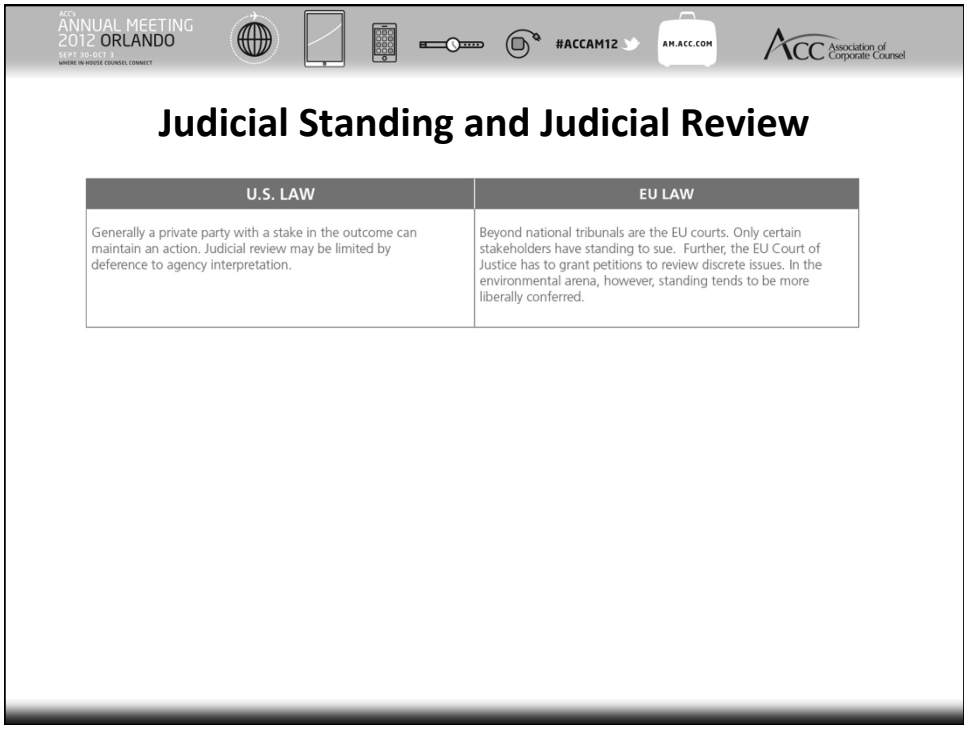
Policymaking / Enforcement Tiers

U.S. LAW	EU LAW
Congress enacts statutes, which typically set the "floor" for regulatory schemes.	EU Commission proposes Directives, and the EU Parliament and EU Council approve of them. Directives set the "floor" for regulatory protection, although they lack the force of law.
Federal law either compels or incentivizes the creation of state laws that are at least as stringent as the federal law.	Directives require sovereign states to enact laws with standards at least as stringent as the Directive.
Administrative agencies make regulations at both the federal and state levels. Regulations have the force of law.	In addition to taking action against Member States that do not properly implement Directives, the Commission also makes and enforces EU regulations with the force of law.
Key enforcement bodies: U.S. EPA, OSHA, and Army Corps of Engineers; state agencies.	Key enforcement bodies: European Commission; state-level enforcement agencies.



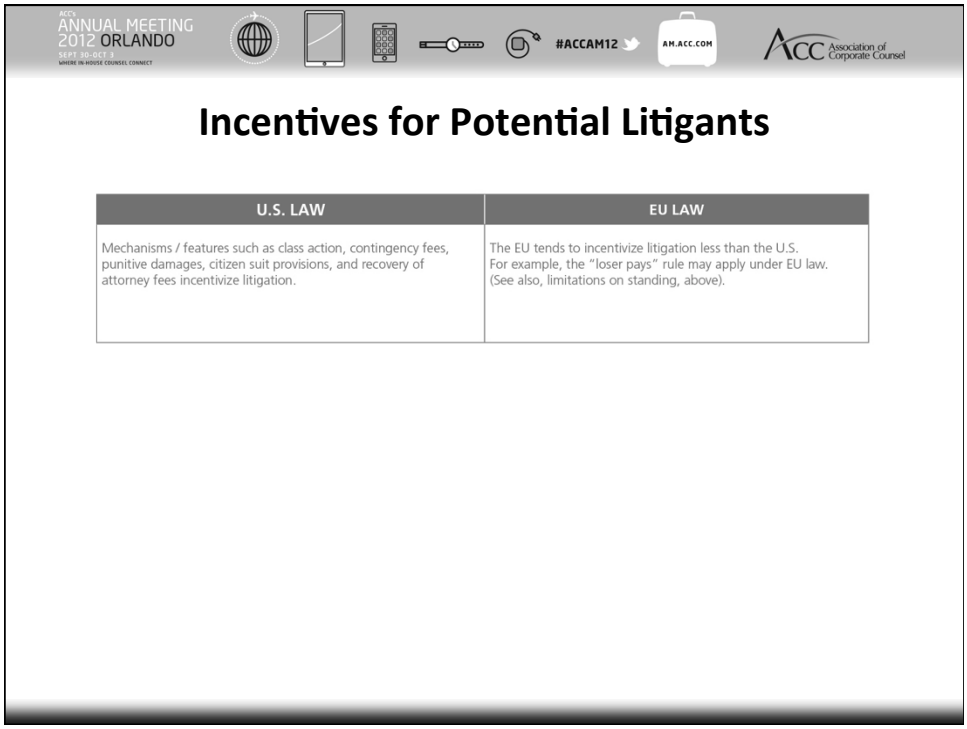
Legal Philosophies (e.g. How Courts Operate Within the Legal System)

U.S. LAW	EU LAW
Common law liability in addition to statutory obligations.	The EU framework is based on civil law, i.e., it is code-based.
Courts decide questions of law arising from statutes. In some tort cases, the law is still judge-made. Notably, courts are bound by case precedent within their jurisdictions.	Civil law courts do not develop judge-made law. They make decisions based on codified law (as well as the leading legal treatises on point).
The U.S. system uses an "adversary" approach, guided by procedural and evidentiary rules, to discover facts.	Courts in civil law jurisdictions are responsible for inquiring into the pertinent facts in cases.



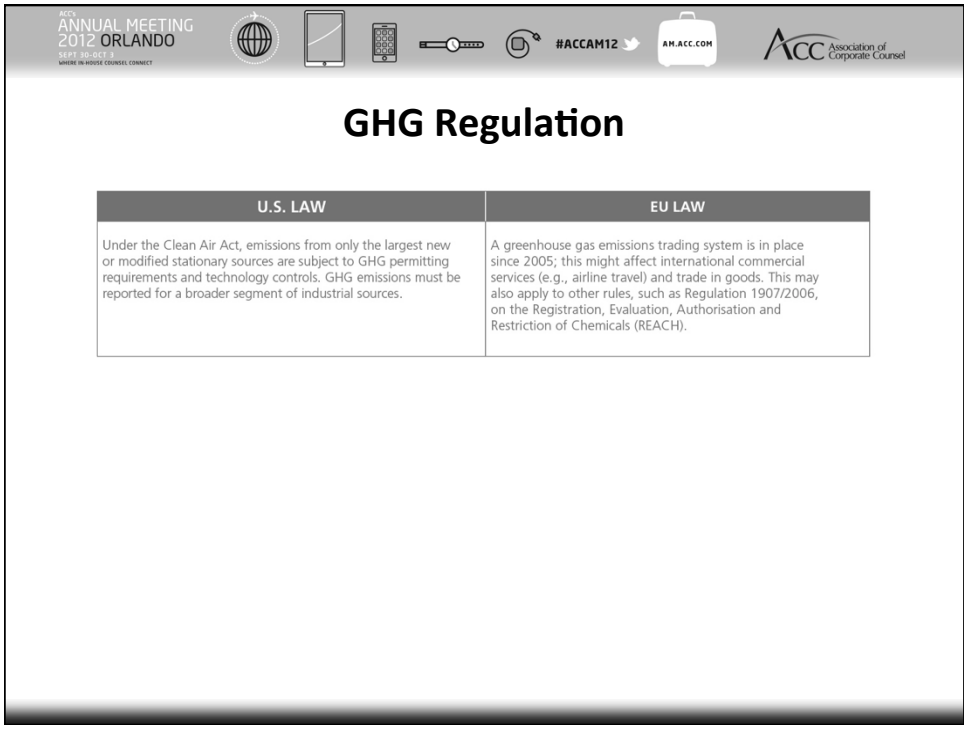
Judicial Standing and Judicial Review

U.S. LAW	EU LAW
Generally a private party with a stake in the outcome can maintain an action. Judicial review may be limited by deference to agency interpretation.	Beyond national tribunals are the EU courts. Only certain stakeholders have standing to sue. Further, the EU Court of Justice has to grant petitions to review discrete issues. In the environmental arena, however, standing tends to be more liberally conferred.



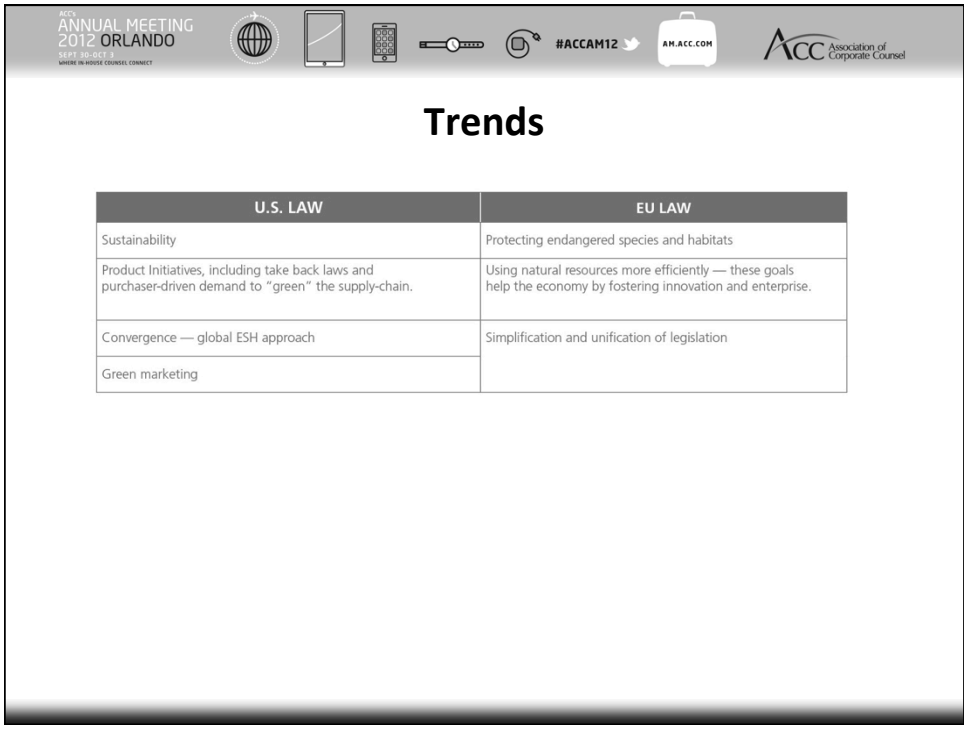
Incentives for Potential Litigants

U.S. LAW	EU LAW
Mechanisms / features such as class action, contingency fees, punitive damages, citizen suit provisions, and recovery of attorney fees incentivize litigation.	The EU tends to incentivize litigation less than the U.S. For example, the "loser pays" rule may apply under EU law. (See also, limitations on standing, above).



GHG Regulation

U.S. LAW	EU LAW
Under the Clean Air Act, emissions from only the largest new or modified stationary sources are subject to GHG permitting requirements and technology controls. GHG emissions must be reported for a broader segment of industrial sources.	A greenhouse gas emissions trading system is in place since 2005; this might affect international commercial services (e.g., airline travel) and trade in goods. This may also apply to other rules, such as Regulation 1907/2006, on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).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Trends
U.S. LAW
EU LAW
Sustainability
Protecting endangered species and habitats
Product Initiatives, including take back laws and purchaser-driven demand to "green" the supply-chain.
Using natural resources more efficiently — these goals help the economy by fostering innovation and enterprise.
Convergence — global ESH approach
Simplification and unification of legislation
Green marketing

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Key Features of Environmental Law in the United States

Andrew H. Perellis
Seyfarth Shaw LLP

ACC's Annual Meeting 2012
Across the Atlantic: Comparing Environmental Laws in the U.S. and EU

OVERVIEW

- Topics Covered:
  - ► Structure of the U.S. system of environmental regulation
  - ► Types of environmental regulation
  - ► Environmental considerations for business organizations

I. STRUCTURE OF THE U.S. SYSTEM OF ENVIRONMENTAL REGULATION

- Key Points:
  - ►Federal statutes (generally, these drive regulatory schemes)
  - ►Regulations promulgated by federal and state administrative agencies
  - ►Enforcement by agencies and private litigants
  - ►Injured individuals have judicial recourse (e.g., they may recover monetary damages or obtain injunctive relief)

(A) Environmental Regulation is Primarily Driven By Federal Statutes

- Typically, federal statutes drive the rest of the regulatory scheme
  - ►Federal statutes
    - Directly regulate and/or provide incentives for States to regulate pursuant to the federal model.
  - ►State statutes/laws
    - Typically at least as stringent as federal standards.
  - ►Local regulation
    - City and/or County codes and ordinances.

(B) Agencies Implement Statutes via Regulations

- Key Agencies: U.S.EPA, OSHA
- Rulemaking
  - ►Agencies typically implement statutes by rulemaking
    - Typically, agencies do this though notice and comment procedures authorized by the Administrative Procedure Act.
  - ►Promulgated rules have the force of law
    - *Note:* Agencies often by-pass rulemaking and rely on internal, written "policy" or "guidance" for interpreting and implementing statutory requirements.
  - ►A rule can be challenged in court before it becomes effective
    - Sometimes, rules must be challenged immediately after promulgation (i.e., some statutes preclude applied challenges to rules in enforcement proceedings).

(C) Enforcing the Laws

- Governmental Enforcement
  - ►Civil penalties: significant in size
    - Typically, up to $37,500 per day per violation.
    - Enforcement for reporting and recordkeeping as well as exceeding applicable limits.
    - Continuing violations – each day is a new violation.
  - ►Administrative orders
    - Can seek to compel action and seek penalties.
    - Judicial review of an order many not be available until the agency seeks to enforce the order in court.
  - ►Criminal liability
    - Intent to violate the law is not required.
    - Officers of corporation can be held liable.
    - Debarment – government contracting.

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(C) Enforcing the Laws

- Governmental Enforcement
  - ►Courts typically defer to agency interpretations of rules
    - Agency expertise in a complex regulatory area.
    - Legislative delegation of authority.
  - ►"*Chevron* deference" applies to interpretations by rulemaking
    - If a statute is ambiguous, courts must accept the agency interpretation, so long as it is reasonable.
  - ►Other agency interpretations
    - The extent of deference may vary depending on how the agency arrived at its decision.
      - For example, agencies receive less deference when their interpretations are based on guidance, changes from prior view, or anticipation of litigation.

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(C) Enforcing the Laws

- Citizen Suit Provisions (built into several environmental statutes)
  - ►Private parties may sue:
    - An agency, to enforce the law.
    - An entity alleged to be in violation of an applicable requirement.
  - ►Some basic rules applicable to citizen suits:
    - These provisions apply only to ongoing violations.
    - Plaintiff must have standing to sue as a member of the public – a low threshold.
    - Plaintiff can recover attorney fees after prevailing.
    - Notice of violation must precede lawsuit.

(D) Private Actions for Harms to Individuals

- Environmental Torts
  - ►Common law theories (e.g., trespass, nuisance, strict liability)
  - ►Violation of statute or regulation as evidence of negligence
- Incentives to Litigation in the United States
  - ►Contingency fees permitted
  - ►Punitive damages permitted
  - ►Class actions – toxic torts very attractive to the plaintiffs' bar

II. TYPES OF ENVIRONMENTAL REGULATION

- Key Points:
  - ►Command-and-control regulation of pollution
  - ►Regulation of legacy contamination
  - ►Regulation of products to minimize environmental and health concerns

(A) Command-and-Control Regulation of Pollution

- Major Environmental Statutes:
  - ►Clean Air Act (“CAA”)
  - ►Clean Water Act (“CWA”)
  - ►Resource Conservation and Recovery Act (“RCRA”) (Hazardous Waste)

(A) Command-and-Control Regulation: Clean Air Act

- Clean Air Act
  - ►"Nat'l Ambient Air Quality Standards" ("NAAQS")
    - Six "criteria pollutants"
      - Carbon Monoxide (CO)
      - Lead (Pb)
      - Nitrogen Dioxide (NO^2)
      - Ozone (O^3)
      - Particulate Matter (PM^{10}; $PM^{2.5}$)
      - Sulfur Dioxide (SO^2)
  - ►"State Implementation Plan" ("SIP")
    - States can meet NAAQS by imposing controls upon stationary sources via construction and operating permits.

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(A) Command-and-Control Regulation: Clean Air Act

- Clean Air Act (continued…)
  - ►"Non-Attainment Areas"
    - Geographic areas consistently above federal thresholds for criteria pollutants must employ "Reasonably Available Control Technology" ("RACT").
  - ►"New Source Review" ("NSR")
    - Construction of "new," "major" sources and "major modifications" of existing sources trigger NSR.
  - ►"New Source Performance Standards" ("NSPS")
    - Certain sets of technology-forcing requirements apply based on industry category.
  - ►Title V permits
  - ►Mobile source controls

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(A) Command-and-Control Regulation: Clean Water Act

- Clean Water Act
  - ►Nat'l Pollution Discharge Elimination System ("NPDES"):
    - "Point Source" discharges into U.S. waters.
      - Substantive effluent limits.
    - "Publicly Owned Treatment Works" ("POTW")
      - Subject to NPDES if it discharges into a U.S. Water.
      - Industrial users discharging to POTW are subject to user requirements imposed by POTW.
      - Stormwater run-off regulated.
  - ►Water Quality Standards: also exist if waters remain impaired despite sources meeting effluent limits
  - ►Wetlands regulated

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(A) Command-and-Control Regulation: RCRA

- Resource Conservation and Recovery Act
  - ►Cradle-to-grave control over hazardous waste
  - ►Manifests track movement of waste from generation to disposal
  - ►Persons regulated:
    - Generators.
    - Transporters.
    - Treatment, Storage and Disposal Facilities – need permits.
  - ►Hazardous Wastes determination:
    - By characteristic (e.g., ignitable, corrosive, toxicity).
    - By listing.

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(B) Legacy Contamination

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as "Superfund"
  - ►Historic Contaminated Sites
    - Fund created by tax to pay for abandoned sites.
    - "Polluter pays."
      - EPA seeks to recover from "PRPs" or to force PRPs to undertake cleanup under administrative order.
    - Liability is strict, and unless divisible, also joint and several.
    - Liable parties (subject to limited defenses) consist of:
      - **Current owners or operators** of the property being cleaned up.
      - **Past owners or operators** of the property who owned the property or operated on it at the time hazardous substances were released.
      - **Generators** who "arranged for" the disposal of hazardous substances.
      - **Transporters** who selected disposal sites.

(C) Regulation of Products to Minimize Environmental and Health Concerns

- Examples:
  - ►**Toxic Substances Control Act (TSCA) requirements:**
    - Pre-manufacturing (or pre-import) notification.
      - New chemicals must be identified to EPA before manufacture or import.
    - Testing.
      - The burden of testing on the manufacturers, processors or users of certain chemicals.
    - Regulation of existing chemicals.
      - If a chemical substance presents an unreasonable risk of injury to human health or the environment, EPA can prohibit or limit production of that chemical, impose labeling requirements, or regulate the processing, distribution, use or disposal of such chemical.
    - Recordkeeping and reporting.

(C) Regulation of Products to Minimize Environmental and Health Concerns

►**OSHA Hazard Communication**

- Covers communication of hazards to employees by employers.
- Products accompanied by "Safety Data Sheet ("SDS") and specific labels.
- Recent changes to rules intended to align with the Globally Harmonized System of Classification and Labeling of Chemicals (GHS).

(C) Regulation of Products to Minimize Environmental and Health Concerns

►Recycling initiatives

- "Take-back" programs.
  - The manufacturer or retailer is obligated to take back a product at the end of its useful life.
    - Electronics.
    - Unused paint.

►Chemical use prohibition

- Similar to EU RoHS Directive.
- Prohibiting manufacturers and importers from marketing products containing certain substances.
  - E.g., lead, mercury, cadmium, and PBB and PBDE (subject to limited exceptions).

III. ENVIRONMENTAL CONSIDERATIONS FOR BUSINESS ORGANIZATIONS

- Key Points:
  - ►Triggering events
  - ►Compliance programs and auditing

Possible Environmental Triggers

- Mergers and acquisitions; asset purchases
  - ►Successor liability.
  - ►Permit transfers.
- Plant changes
  - ►Siting new facilities.
  - ►Expansion.
  - ►Closure.
- Real estate purchase or sale
  - ►Due diligence – innocent purchaser and bona fide prospective purchaser defense; brownfield opportunities.

Possible Environmental Triggers

- Permit compliance
  - ►Recordkeeping.
  - ►Reporting.
  - ►Monitoring.
- Spill and release reporting
- Waste disposal destinations
- Financial reporting of potential environmental liabilities
  - ►Regulation S-K.
  - ►Movement towards “fair value.”
- Whistleblowers

Compliance Programs and Auditing

- Compliance Management System:
  - ►An effective system must train and motivate staff to prevent, detect and correct violations on a daily basis
- Key Elements:
  - ►Policies, standards and procedures
  - ►Top-down support with specific high-level personnel assigned overall responsibility to oversee compliance
  - ►Effective communication of standards and procedures to all employees
  - ►Incentives to managers and employees, including disciplinary mechanisms
  - ►Appropriate responses after offenses are detected

Compliance Programs and Auditing

- Key Elements (continued):
  - ►Mechanisms for systematically assuring compliance is met:
    - Monitoring and auditing.
    - Periodic evaluation of overall performance of the system.
    - Hotline or other means for employees to report violations without fear of retaliation.

Compliance Programs and Auditing

- Why Implement?
  - ►Corporate values
  - ►Promote and enhance shareholder value
  - ►Prevent pollution
  - ►Reduce cost
  - ►Minimize civil and criminal liability

Compliance Programs and Auditing

- Criminal Liability:
  - ►Corporation liable for acts of its employees
    - *Respondeat superior* (vicarious liability).
  - ►Individuals in corporation personally liable
    - Responsible corporate officer doctrine.
    - Based on the officer's position of responsibility and authority, the law will impute knowledge and intent to violate the law.
- Federal Sentencing Guidelines:
  - ►Reduces the severity of the sentence where the company has an "effective program intended to prevent and detect violations of law."
- EPA Audit Policy

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Compliance Programs and Auditing

- Audit:
  - ►A voluntary, internal, and comprehensive evaluation of one or more facilities or any activity at one or more facilities regulated under State, federal, regional, or local laws or ordinances, or of management systems related to the facilities or activity, that is designed to identify and prevent noncompliance and to improve compliance with those laws.
- Audit Disclosure Issues:
  - ►State Audit Laws
    - Reports may be protected from disclosure.
  - ►Legal Privilege
    - Communications are privileged if they are prepared at the direction and under the oversight of legal counsel in order to give legal advice to the client.

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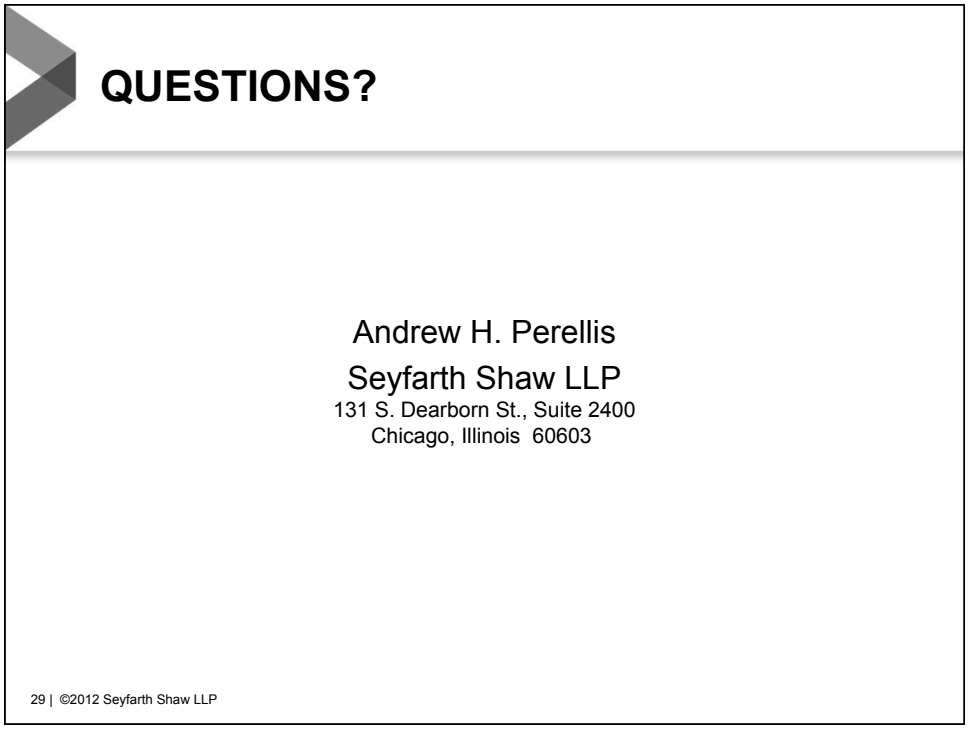
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Strategy & Insights

Doing Business in the United States: Managing Environmental Liabilities

By: Andrew H. Perellis, Jeryl L. Olson and William R. Schubert, Seyfarth Shaw, LLP

Environmental regulation in the United States creates business liabilities during all phases of operations. Firms traditionally subject to the highest levels of scrutiny -- those whose businesses involve routine discharges of regulated pollution -- know this from experience. Many of them have learned that having a superior compliance program in place minimizes liabilities and produces a competitive advantage.

The reach of environmental regulation, however, goes well beyond the likes of power plants and chemical manufacturers. Grocers, retailers, construction companies and real estate developers, among other industries, are subject to environmental regulation. U.S. businesses of all types and sizes need to understand environmental law and how to manage environmental obligations. Such obligations range from seemingly minor recordkeeping requirements to more substantive pollution limits that demonstrably affect environmental quality.

Violations of environmental obligations are costly. The United States Environmental Protection Agency (EPA) has the authority to issue fines of up to $37,500 per day -- with each day of a continued occurrence counting as a separate violation. But the scope of environmental liabilities does not end there. Most environmental statutes provide that criminal liability can attach to certain serious offenses. The United States Department of Justice and United States Attorney's office have prosecutors assigned to environmental enforcement. Additionally, private tort litigation can arise, particularly after substantial breakdowns in regulatory compliance. The lawsuits that followed the Exxon-Valdez and Deepwater Horizon oil spills are among the most noticeable examples of this.

Environmental regulation rivals the tax code in terms of its complex structure and ever-changing nature, but businesses must be prepared for it. Due to the volume and complexity of the environmental liabilities arising at the Federal, State, and local levels, a detailed analysis is beyond the scope of this presentation. For firms doing business in the U.S., this article provides a roadmap of environmental obligations and the compliance tools used by the regulated community.

I. STRUCTURE OF U.S. ENVIRONMENTAL REGULATION

There are currently no less than 20 major Federal statutes pertaining to environmental protection administered by the EPA. Many Federal environmental laws require States to set environmental standards at least as stringent as those at the Federal level. Often State or local law can be more stringent than Federal law.

It is not uncommon for businesses to be subject to three to six different laws that relate to the same environmental issue. For example, a plant in Chicago that has an underground storage tank (UST) containing solvents may be regulated under any of the following laws:

- Federal – The Resource Conservation and Recovery Act (RCRA) regulations for underground storage tanks.
- State – The Illinois Environmental Protection Agency RCRA regulations for underground storage tanks.
- State – The Illinois State Fire Marshal Regulations for underground storage tanks.
- Local – The Chicago Municipal Code.

II. MAJOR ENVIRONMENTAL STATUTES AND INITIATIVES

A. Water Quality

There are several federal laws directed at protecting waters from pollution. Those most likely to affect business on a day-to-day basis, however, are the Federal Water Pollution Control Act and the Safe Drinking Water Act.

1. Federal Water Pollution Control Act

The Federal Water Pollution Control Act, also known as the Clean Water Act, provides the basic framework for protection of surface waters such as rivers, streams, lakes and oceans and adjacent watersheds from industrial, commercial, private and domestic discharges, including industrial discharges and discharges from sewers, drainage ditches and septic systems. The Act accomplishes this by:

- setting up programs for the funding, construction and operation of publicly owned treatment works (POTW); and
- issuing permits regulating effluent and storm water discharges into public waterways.

a. Permit System For Discharges to "Waters of the United States"

Any source of discharge into "waters of the United States" requires a National Pollutant Discharge Elimination System (NPDES) permit or the state equivalent. Permit applications are made by the discharger to the State, and the State in turn grants a permit to the discharger. It is the discharger's responsibility to obtain and complete the permit forms and to comply with the terms and conditions of State regulations and the permit. The NPDES system requires a discharger to meet technology-based or water-quality-based effluent limitations. The scope of waters regulated by the NPDES permit is exceedingly broad, encompassing wetlands and intermittent streams, and other waters where navigation is impossible. Essentially any discharge within a watershed to a conveyance capable of eventually reaching a navigable water, such as a drainage ditch, is regulated.

If a publicly owned treatment works (POTW) discharges into surface waters such as a river, stream, lake or pond, that POTW must apply for and obtain an NPDES permit from the state.

b. Industrial Discharges into POTWs

If a company discharges to a POTW, which in turn discharges into a U.S. water, the company need not obtain an NPDES permit because the POTW is covered by an NPDES permit. However, in order for a POTW to meet the terms of its NPDES permit, it often must limit the amount of pollutants it receives from industrial discharges. Thus, companies that discharge to POTWs may be required to obtain POTW permits or have limits set by a user ordinance. Industrial discharges to POTWs may also be subject to a comprehensive set of "pre-treatment" standards which are specifically established for various industrial categories.

c. Stormwater

In addition to industrial discharges, EPA has established a comprehensive set of regulations requiring regulation of, and NPDES permitting requirements for, stormwater discharges. The stormwater regulations require permits for stormwater discharges associated with a variety of business operations.

d. Wetlands

The Clean Water Act also provides the authority for regulating the use, management and degradation of wetlands, and establishes procedures for permits issued by the Army Corps of Engineers for the development of real property upon which wetlands may be present.

2. The Safe Drinking Water Act

The Safe Drinking Water Act is the authority for development of both above-ground and underground drinking water standards. EPA has defined maximum contaminant level goals (MCLGs) for chemicals that may be present in drinking water and has set up maximum contaminant levels (MCLs) for those chemicals. The standards are developed by EPA based upon health considerations and on the costs associated with obtaining clean water. Requirements relating to maximum contaminant levels of chemicals in drinking water apply not only to the public water supplies, but also to businesses that provide their own source of drinking water to employees or the community.

The Safe Drinking Water Act also authorizes EPA to protect underground sources of drinking water by preventing contamination from underground injection of chemicals and wastes of businesses.

B. Air Quality – The Clean Air Act

The Clean Air Act is the authority for regulating emissions of air pollutants into the environment. In general, the Clean Air Act requires EPA to develop air standards and regulations; EPA in turn delegates responsibility to the States to set up regulations to implement federal programs to prevent and control air pollution at the source of that pollution. Pursuant to a State Implementation Plan (SIP), each State must have requirements equivalent to or more stringent than the Federal program. Following Federal approval, States administer and enforce the SIP air pollution control programs.

1. Permits

EPA identifies and determines criteria pollutants and sets standards, known as the National Ambient Air Quality Standards (NAAQS). Criteria pollutants include: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. Pursuant to each State's SIP, each State develops regulations intended to obtain compliance with the NAAQS. States do so by issuing air operating permits as well as construction permits. The type of permit required depends upon the following factors:

- whether a facility is in an attainment area or a non-attainment area,
- whether the permit is an operating permit or a construction permit, and
- whether the facility is a major source of air pollutants or is not a major source of air pollutants.

In addition to existing State and Federal permit programs, comprehensive regulations require all States to develop air quality permitting systems for major sources. The new permit scheme is referred to as "Title V" permitting. Federal regulations have defined the minimum elements for State programs and set procedures and standards for States. All major emission sources subject to the Title V regulations must obtain a permit to operate.

2. Hazardous Air Pollutants (Air Toxics)

EPA has developed emissions limitations and technology-based standards for hundreds of hazardous air pollutants. Significant effects of the HAP program are as follows.

- Major stationary sources are those that have the potential to emit 10 tons per year or more of any one HAP, or 25 tons per year or more of any combination of HAPs.

- For such major sources, EPA has established industrial categories and subcategories, with rules setting emissions limits and technology standards.
- Sources which are not major sources may be considered "area sources," for which EPA identifies standards for emissions and controls.
- Facilities using HAPs must develop, maintain and implement programs for prevention, detection, and response to "accidental releases." These Risk Management Plans are required to be submitted to EPA for review.

3. Ozone Protection

EPA has several regulations and programs for the phasing-out of use of chlorofluorocarbons (CFCs) and other ozone-depleting chemicals. EPA has identified Class I and Class II substances subject to the phase-out and will develop regulations which have set standards and limits for the use and disposal of those chemicals as well as for the service, repair and disposal of appliances or equipment associated with those chemicals.

C. Wastes and Cleanup

1. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) regulations are commonly referred to as the "hazardous waste" regulations. These regulations establish a "cradle to grave" system of regulating hazardous waste from its generation, its transportation and its ultimate disposal.

The applicability of the RCRA regulations is determined by the operations of a particular business. While one business may be regulated merely under the generator or underground storage tank standards, another business may, by virtue of storage or recycling of chemicals, be subject to generator standards, treatment, storage and disposal facilities standards, recyclable materials standards, land disposal restrictions, and underground storage tank regulations. Thus, the manner in which a facility handles its raw materials and wastes determines, in large part, the extent of RCRA regulation.

States may develop their own RCRA programs. EPA may delegate authority to a State to administer and enforce the State program in lieu of the Federal RCRA program. Such approved State programs may have provisions more stringent than required by the federal regulations.

a. Identification and Listing of Hazardous Waste

The RCRA regulations initially require all generators of solid wastes (which includes "liquid" wastes) to identify whether the waste is hazardous. The identification can be made in three ways. First, wastes are automatically considered to be hazardous if they appear on an EPA list of hazardous wastes. Second, the generator can test its waste-streams to determine if they exhibit the "characteristics of a hazardous waste." Third, a generator may determine, based on familiarity and knowledge of its wastes, that they are hazardous.

b. Generator, Transporter, Interim Status and Permitted Facility Standards

Once it is determined that a business generates hazardous waste, that business will be regulated according to how it handles the waste. Businesses that generate waste but do not treat, store, or dispose of those wastes on-site are subject to the "generator standards," requiring the labeling, manifesting and proper off-site recycling or disposal of hazardous wastes and disposal under written manifests, of which copies must be retained for three years.

Facilities, depending on the status of pending permit applications, that treat, store, recycle or dispose of hazardous wastes on-site, are subject to the "interim status" or "permitted" facility standards. These facility standards contain comprehensive requirements that identify how wastes can be handled and disposed of and how to properly "close" treatment, storage and disposal units or areas. These regulations also impose cleanup or "corrective action" requirements and require financial assurance to guarantee the cleanup of such facilities.

c. Recyclable Material Standards

The RCRA regulations contain specific regulations for handling recyclable materials, and contain a comprehensive set of limitations on the recycling and reuse of solid and hazardous waste materials.

d. Land Disposal Restrictions

EPA has developed a program which prohibits the placement of waste materials into or upon the land unless those wastes meet, either by their nature or through treatment, certain criteria. These regulations are known as the "Land Disposal Restrictions" or "land ban" and set limits that determine whether wastes may be land disposed or landfilled.

e. Underground Storage Tank Standards

The RCRA regulations specifically address the construction, operation, maintenance, closure and cleanup of releases from underground storage tanks containing either petroleum (gasoline or diesel) or other regulated substances.

f. Medical Waste Standards

The RCRA regulations contain standards for the tracking, handling and disposal of medical wastes.

g. Used Oil Standards

EPA has developed regulations which establish management standards for generators of used oil, used oil collection centers and aggregation points, used oil transporters, used oil processors and re-refiners and persons or businesses involved in the marketing and burning of used oil as a fuel. Thus, every stage of used oil, from generation to ultimate recycle and reuse, is covered by these regulations.

2. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA/Superfund)

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), contains procedures for the following:

- Selecting sites which should be cleaned up because they present an imminent and substantial danger to public health or welfare.
- Identifying the acceptable procedures and remedies to be used for such cleanups.
- Identifying potentially responsible parties liable for cleanups (PRPs).
- Identifying procedures for funding cleanups.

CERCLA imposes liability for cleanup costs on certain categories or entities as follows:

- Current owners or operators of the property being cleaned up,
- Past owners or operators of the property who owned the property or operated on it at the time hazardous substances were released onto the property,
- Generators or persons who "arranged for" the disposal of hazardous substances,
- Transporters who selected the disposal site.

Depending upon the circumstances, operator liability can extend to officers and shareholders (including parent corporations). Following a merger, the surviving corporation succeeds to the CERCLA liability of its predecessor.

The extraordinarily complex process of cleaning up a contaminated site is highly regulated and is normally conducted under the direction of, or with significant input from, EPA and the State agency having authority over the cleanup site. The National Contingency Plan (NCP) establishes the minimum requirements for cleaning up a site. The cleanups can be accomplished by responsible parties voluntarily, or EPA or a State agency may issue an administrative order requiring parties to conduct a cleanup. Once a party or parties have incurred costs involved in a cleanup of a site, they can seek contribution from other potentially responsible parties for that site who are not part of the voluntary cleanup or are not named in the administrative order.

The CERCLA regulations, in addition to providing for the cleanup of contaminated sites, establish the procedures a business must follow when there is a spill, release or accident involving a "hazardous substance." Those regulations require immediate reporting of "releases" of hazardous substances into the environment if the hazardous substance has been released in a quantity which exceeds the "reportable quantity" established by EPA.

D. Public Information and Reporting Requirements

Many of major environmental laws contain provisions that address releases, both planned and accidental, and impose recordkeeping and reporting obligations. Additionally, State and local laws and regulations, some more stringent than Federal law, address chemical releases as well.

1. Emergency Planning and Community Right-to-Know Act

The Emergency Planning and Community Right-to-Know Act (EPCRA) requires businesses and employers to identify to the government and members of the public the chemicals handled, stored, or used by that business. There are three basic provisions to the community right-to-know requirements, as more fully described below:

- Emergency planning and notification procedures.
- Hazardous chemical inventory reporting.
- Toxic chemical release reporting.

a. Emergency Planning and Notification

The emergency planning and notification procedures require companies to identify to the community those "extremely hazardous substances" that are present on the property and require companies to work with local emergency authorities to develop plans to respond to emergencies involving those extremely hazardous substances. EPA has designated what chemicals are considered "extremely hazardous" and has published the list of chemicals in 40 CFR Part 355 Appendices A and B. Further, each extremely hazardous substance has been given a "reportable quantity." If a release exceeds that reportable quantity, then a spill notification is triggered. In the event of the release of a "reportable quantity" of a hazardous substance (under Superfund) or an extremely hazardous substance, the facility must make proper notification of the release to the community by reporting to the State Emergency Response Commission (SERC), Local Emergency Planning Committee (LEPC), and the local fire department.

b. Hazardous Chemical Inventory Reporting

Under the hazardous chemical inventory reporting provisions, owners and operators of facilities that have hazardous chemicals present in excess of the threshold quantity established for that particular chemical, must annually report to the State Emergency Response Commission, the Local Emergency Planning Committee, and the local fire department. The report filed with the Tier I or Tier II forms must include the existence of such chemicals on the property, the quantities of those chemicals and the health hazards associated with such chemicals. The facilities must identify the location of storage or use of each regulated chemical on the property so as to assist the fire department in responding to emergencies relating to those hazards.

c. Toxic Chemical Release Reporting

Companies must annually report to EPA and the State Emergency Response Commission a summary of any "releases" of toxic chemicals into the environment. Under this portion of the regulations, releases are not only considered to be those that are accidental, such as spills, but must include any emission or discharge of a chemical into the environment, whether permitted or not. Thus, the toxic chemical release reporting provisions require companies to disclose on the "Form R" to the community (sending a copy of the report to the Local Emergency Planning Committee), to the state, and to the EPA, a description of how and where chemicals are used at the facility, and how and where those chemicals are discharged, emitted, spilled, recycled, or disposed of – on or off-site. Companies are required to identify the efforts they have made toward pollution prevention during the reporting year.

E. *Brownfields and "Risk Based" Cleanups*

In recent years businesses have devoted an increasing amount of attention to the voluntary cleanup of properties, often regulated under Brownfields or voluntary cleanup rules using risk-based cleanup standards. Brownfields are commonly understood to be properties or businesses which are impaired because of the presence of environmental contamination. To encourage development and cleanup of these properties, EPA, as well as many States, have enacted legislation which provides such incentives as tax credits, releases from liabilities or "No Further Action"-type reliance letters which can be used by businesses, lenders or other owners of property to assist in the sale or redevelopment of the contaminated property.

Many States have developed voluntary cleanup programs designed to stimulate the re-use of environmentally impaired properties. Many of these State laws identify risk-based cleanup objectives which allow owners to leave contamination in place so long as it presents little risk to the intended users of the property.

F. *Product Regulation: Tracking Known Hazards / Risks to Human Health or the Environment*

While laws tend to focus on the control and regulation of pollution once it is generated, there are laws that focus on chemical use or products, so as to preclude or minimize the creation of pollution in the first instance.

1. Toxic Substances Control Act (TSCA)

The Toxic Substances Control Act (TSCA) applies to chemicals manufactured, processed or imported in the United States. TSCA has two major goals. First, it requires the manufacturers, processors and users of chemicals, rather than the government, to assume responsibility for testing and providing data on the health effects of chemicals and mixtures of chemicals. Second, TSCA allows EPA to regulate, through limitations or prohibitions, the manufacturing, processing or use of toxic chemicals.

a. Premanufacture Notification (PMN)

The Premanufacture Notification (PMN) provisions require any manufacturer or importer of a new chemical substance to identify the substance to the EPA ninety days before the company intends to manufacture or import this chemical. The 90-day notice requirement allows EPA to review a chemical before its introduction into commerce.

b. Testing

EPA has developed several regulations relating to chemical testing, which impose the burden of testing on the manufacturers, processors or users of certain chemicals.

c. Regulation of Existing Chemicals

If a determination is made that the manufacturing, processing, distribution in commerce, use or disposal of an existing (as opposed to a new) chemical substance presents an unreasonable risk of injury to human health or the environment, EPA has the authority to develop regulations to prohibit or limit production of that chemical, to impose labeling requirements, or to regulate the processing, distribution, use or disposal of such chemical.

EPA has prohibited the manufacturing, processing and distribution in commerce of polychlorinated biphenyls (PCBs), with few exceptions. EPA regulations also govern the marking, storage, disposal and spill cleanup of PCBs.

d. Recordkeeping and Reporting

The TSCA requirements for recordkeeping and reporting are a significant part of each of the major TSCA regulations. The regulations require businesses to prepare, maintain, and where necessary, submit to the EPA records and reports of information relating to manufacturing, processing and use of chemicals, as well as the environmental or human health effects of chemicals.

2. Hazard Communication in the Workplace

Part of the Occupational Safety and Health Act (implemented by the Occupational Safety and Health Administration, or OSHA) covers communication of hazards to employees by employers.

According to OSHA, "Haz Com" rules are designed to ensure that "hazards of all chemicals produced or imported are classified, and that information concerning the classified hazards is transmitted to employers and employees."

OSHA has recently promulgated changes to its "Haz Com" rules that are intended to align with the provisions of the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS). This system regulates labeling and involves the use of standardized safety data sheets (SDS) used to communicate risks of hazardous chemicals. The new rules will be phased in over a period of time.

III. CORPORATE RESPONSIBILITY AND MANAGING POTENTIAL LIABILITIES

Under many environmental laws, certain violations must be self-reported, such as exceedence of an NPDES permit limit, or the accidental release of hazardous substances beyond the reportable quantity. U.S. regulators such as EPA and OSHA also have the authority to inspect facilities and demand records in order to determine if violations exist. Regulators also rely on public vigilance to report suspect environmental practices. Employees, whether legitimately concerned over the environment or merely disgruntled due to a perceived workplace injustice, often become "whistleblowers," going directly to a governmental agency with their concerns.

Regulators take violations quite seriously and the statutes provide a broad array of enforcement tools backed by stiff environmental penalties. The threat of criminal liability also helps to keep industrial managers, employers, officers, directors, shareholders and employees accountable for environmental compliance. Large fines and jail time have been imposed on violators. Additionally, the eligibility of companies to receive government contracts may be lost as a result of convictions under some federal laws.

As public interest in the environment continues to grow, companies have realized that environmental compliance means good business and protection of shareholder value. Consider as an example the immediate and dramatic drop in the value of BP PLC's stock following the Deepwater Horizon Oil spill in 2010. Consider also the desire of companies to be recognized for their sustainability efforts, or to qualify for specialized stock funds that invest only in "environmentally aware" companies.

To ensure environmental compliance, many companies employ a systematic approach. A systematic approach typically includes various elements intended to maximize its effectiveness. These elements include:

- policies, standards and procedures to be followed by employees,
- top-down support with specific high-level personnel assigned overall responsibility to oversee compliance,
- effective communication of the company's standards and procedures to all employees,
- means to achieve and maintain compliance (monitoring, auditing and reporting system,
- disciplinary mechanisms for violations, and

- appropriate response after an offense has been detected.

These elements are warranted not only to ensure effectiveness, but also to minimize liability should a violation arise. For example, the Department of Justice Guidelines "[e]ncourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion." Similarly, EPA has an auditing policy that results in reduced penalties for self-policing.

With proper precautions these audit programs may be protected by the attorney-client work product or self-evaluative privileges. Additionally, many States now have enacted "audit" laws to encourage companies to voluntarily assess and correct environmental infractions.

Conclusion

Knowledge of and compliance with environmental laws and regulations are critical factors in business today. Any business or company moving into the United States must carefully review the entire range of environmental regulations to determine the applicability to its business. Once a determination has been made, programs should be developed for ensuring compliance.

Key Environmental Considerations for Doing Business in the United States

1. Does the Company have an Environmental Policy/Code of Responsibility?
2. Does the Company have internal procedures in place to ensure compliance with environmental requirements?
   - 2.1. Do the procedures meet applicable industry standards such as ISO 14001, Responsible Care, etc.?
   - 2.2. Do the procedures satisfy Federal Corporate Sentencing Guidelines?
   - 2.3. Are the procedures effective in ensuring/improving compliance?
   - 2.3.1. Have auditing privilege/lack of privilege issues been addressed?
   - 2.3.2. Does the Company have a hotline? Is it prepared to deal with a whistleblower?
   - 2.3.3. How will a violation be addressed?
   - 2.4. Does the Company's program satisfy EPA's Audit Policy and is the Company prepared to make a voluntary disclosure to minimize penalties?
3. Have the financial liabilities associated with historic activity been appropriately evaluated, reserved and reported in public filings?
4. Is the Company able to effectively evaluate environmental liabilities that arise from a real estate property transfer? A merger or acquisition? A plant or facility closure?
5. Has the Company integrated environmental considerations into other areas of its business, such as facility expansion, product expansion?
6. Has the Company integrated environmental considerations (social responsibility) into its existing operations, such as product substitution, waste minimization, supplier auditing, good-neighbor/open door policies, etc.?
7. Does the Company make products that may create toxic exposure to end-users, and are necessary MSDS and warnings being provided?
8. Does the Company generate hazardous substances and are they being managed in accordance with state law and RCRA?
9. Does the Company generate air emissions and are they in compliance with the CAA and State law?

10. Does the Company discharge waste water to a POTW or to a waterbody and are they in compliance with the CWA and State law?

11. Is the Company subject to CERCLA cleanup orders?

12. Is the Company in litigation for toxic exposure - toxic torts - arising from its products or from contamination resulting from its operations?

13. Does the Company have insurance coverage for its environmental liabilities?

14. Is the Company ready for a governmental inspection?

15. Is the Company aware of its reporting requirements and prepared to address reporting associated with an spill of a hazardous substance?

16. Is the Company ready to deal with an emergency (explosion or death) from its operations?

17. Are workers being protected in compliance with OSHA?

18. What does the Company do to monitor environmental developments and proposed legislation or regulations that may affect its operations? Is the Company positioned to participate in the lobbying or rulemaking process?

Commonly Asked Questions and Answers

Q. Are small companies likely to be exempt from environmental protection regulations?

A. Small companies generally are not exempt. However, there are reduced recordkeeping, reporting and administrative burdens for small businesses under some regulations.

Q. What can be done to minimize enforcement risks?

A. Knowledge of, and strict adherence to the requirements of environmental laws is needed. Compliance policies and procedures, coupled with periodic operational audits are helpful.

Q. Is negligence or intentional wrongdoing necessary for companies to have liability for environmental protection violations?

A. No, under most programs, strict liability may impose daily penalties without regard to fault. However, the size of potential fines and risks of criminal enforcement increase in cases of negligence or intentional misconduct.

Q. How can companies be aware of new environmental protection requirements?

A. There are a number of environmental periodicals reporting on new regulatory developments, some of which are directed to specific States. Also, subscriptions to applicable federal and state regulations are available. Many publishers offer update services to effectively deliver new regulations in some areas. Further, many trade associations also provide guidance and notices of environmental requirements impacting their industry or association members. The Internet offers good opportunities to access information made available by the government and private parties.

Q. Who at my company should be responsible for environmental compliance?

A. Everyone at a company should be responsible for environmental compliance. Administratively, each company has its own personnel structure and it is up to the company to determine how to staff its environmental department. Large companies with air, water, and waste issues may have an entire department dedicated to environmental compliance with several engineers specializing in air matters, wastewater treatment, etc. Smaller companies with simple environmental concerns may only have one or two people assigned to environmental compliance. Companies should be aware the EPA has, in the past, and intends in the future, to prosecute companies who fail to have adequate environmental programs and staffing, where the absence of such employees results in non-compliance with environmental regulations.

Q. Can individual employees be criminally liable for environmental non-compliance?

A. Yes, individuals, as well as corporations, have been investigated, indicted, and convicted of environmental crimes. EPA and the FBI, as well as the U.S. Department of Justice and many State agencies, are expanding the number of inspectors, investigators, and attorneys in their Environmental Crime Units in an effort to enforce environmental laws.

Q. What do we do if we have a spill of a chemical at our facility?

A. Companies should have Contingency Plans in place which describe in detail the procedures which must be followed and the reporting and recordkeeping which must be made in response to a spill. The major federal environmental laws, the Clean Air Act, Clean Water Act, RCRA, SARA and CERCLA all have comprehensive spill reporting and response procedures, and many States have additional requirements. Because there are so many spill response and reporting obligations, companies should have plans and programs in place before spills occur to facilitate proper notifications, recordkeeping and reporting. In fact, the major federal laws and many States require companies to prepare and maintain Contingency Plans and Spill Response Programs.

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ATTORNEYS

Key Environmental Considerations for Doing Business in the United States[1]

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Across the Atlantic: Comparing Environmental Law in the US and in the EU
A Case Study

Carlos de Miguel Perales

Orlando, October 3, 2012

1. The project

- NB: this case study is not a real one. The data included may not match with an actual situation, but have been included with the only purpose to explain certain parts of the presentation.
- This document cannot be construed as legal advice. Any interested person should seek the appropriate legal counseling.

1. The project (Cont´d)

- Chemical Sons is an American multinational company that intends to implement a chemical plant project in an EU Member State for the production of simple hydrocarbons
- Main environmental impacts: air emissions; waste production; waste water

2. Certain preliminary questions

- Is the site suitable for the intended use from the planning standpoint?
- If the planning is to be amended: beware of environmental assessment
- Any protected natural space nearby?
- Try to make sure you know the surrounding area and the neighbors
- Other possible issue: historical and cultural heritage

3. Identification of main environmental permits and consents

a) Integrated pollution prevention and control (IPPC) permit

- Only if included in the list of Annex I Directive 2008/1 (e.g, section 4.1.a): installations for the production of basic organic chemicals)

3. Identification of main environmental permits and consents (Cont'd)

- Aimed at an integrated protection on:

  - ✓ Waste water
  - ✓ Air emissions
  - ✓ Greenhouse gases emissions
  - ✓ Hazardous waste production and waste management

3. Identification of main environmental permits and consents (Cont'd)

- If IPPC permit is not required, individual permits on those elements must be obtained
- Need to have different authorities coordinated

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3. Identification of main environmental permits and consents (Cont'd)

b) Environmental impact assessment ("EIA")

- Only if included in the list, whether
- Annex I (EIA required in any case - eg, section 6.a): integrated chemical installations for the production of basic organic chemicals) or;

3. Identification of main environmental permits and consents (Cont'd)

b) Environmental impact assessment ("EIA") (Cont'd)

- Annex II (EIA required on a case by case analysis – eg section 6.a), chemical industry for treatment of intermediate products and production of chemicals

- Key steps: preparation of the environmental study; public consultation

3. Identification of main environmental permits and consents (Cont'd)

c) Soil analysis must always be made

d) Use of registered (or authorised) substances (REACH)

3. Identification of main environmental permits and consents (Cont'd)

e) Compliance of rules on prevention of serious accidents

- Only if using certain dangerous substances in excess of certain amounts (eg, ammonium nitrate, 5000 quantity tonnes)

3. Identification of main environmental permits and consents (Cont'd)

- Taking of measures to prevent accidents
- Safety report
- Need to have prepared emergency plans

3. Identification of main environmental permits and consents (Cont'd)

f) Payment of environmental taxes

g) Other requirements, depending on national rules (eg, local permits, permits on coastal protection)

4. Other issues

- Build good relations with the authorities – create trust
- (Depending on the project) Take care of public relations and media

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

no. 387
03.05.2011

Failure to enforce a decision ordering the closure of a concrete production plant built unlawfully in a residential area

In today's Chamber judgment in the case Apanasewicz v. Poland (application no. 6854/07), which is not final[1], the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights and

A violation of Article 8 (right to respect for the home).

The case concerned the unlawful construction by the applicant's neighbour of a concrete production plant which was a source of considerable nuisance. In 2001 a civil court ordered the closure of the plant. Despite two sets of enforcement proceedings – one civil and the other administrative – the plant remains open.

Principal facts

The applicant, Helena Apanasewicz, is a Polish national who was born in 1934. She lives in a house located in a residential area in Gostyń (Poland).

In 1988 the owner of the plot of land adjoining Mrs Apanasewicz's property built a concrete production plant on the land without planning permission. He began operating the plant immediately and gradually expanded it.

In 1989 Mrs Apanasewicz instituted civil proceedings seeking an end to the nuisance to which she was allegedly being subjected (including pollution, various health problems and inedible crops). Her request was initially allowed in 1997. That decision was set aside in 1998 and subsequently reversed in 2000. The applicant appealed. In a judgment of 3 July 2001 (which became final on 30 November 2001), Poznań Regional Court finally allowed Mrs Apanasewicz's claims. Basing its decision, among other considerations, on the measures taken at the site, and also on the unlawful nature of the construction carried out by the plant's owner, the lengthy period of the disturbances and their intensity, the fact that the properties were in direct proximity and the incompatibility of the plant's operations with the designated use of the land under the relevant urban planning regulations, the court held that Mrs Apanasewicz's right to peaceful enjoyment of her property had been infringed in a manner which went beyond the normal level of inconvenience caused by neighbours. It ordered the cessation of the plant's operations.

Two sets of proceedings – one civil and the other administrative – were conducted in parallel with a view to enforcing this judgment.

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

First of all, in January 2002, Mrs Apanasewicz commenced civil enforcement proceedings. On seven occasions between 2002 and 2009 she requested the civil courts to impose fines on the plant owner in a bid to force him to cease operations. Most of the fines she requested were imposed, but her neighbour continued his activities. In 2005 the Regional Court acknowledged the excessive length of the enforcement proceedings.

In the course of the parallel administrative proceedings the Gostyń district building inspector on 27 September 2000 ordered the demolition of the plant on the ground that it had been constructed unlawfully. In 2001 he agreed to stay execution of the measure for five years, accepting that the immediate closure of the plant would be damaging to the local economy as it was liable to result in job losses. The decision to stay execution required alternative solutions to be found (for instance, the relocation of the plant in compliance with the local urban development plan). On 18 December 2006, after the stay of execution ended, the district inspector reminded the plant owner of his obligation to demolish the plant. The proceedings for its demolition are still in progress.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1, the applicant complained in particular of the failure to enforce the 2001 judicial decision requiring the owner of the plant to cease operations. Under Article 8, she further argued that the Polish State had failed to secure her right to respect for her home.

The application was lodged with the European Court of Human Rights on 15 January 2007.

Judgment was given by a Chamber of seven, composed as follows:

Nicolas **Bratza** (the United Kingdom), *President*,
Lech **Garlicki** (Poland),
Ljiljana **Mijović** (Bosnia and Herzegovina),
Sverre Erik **Jebens** (Norway),
Päivi **Hirvelä** (Finland),
Ledi **Bianku** (Albania),
Zdravka **Kalaydjieva** (Bulgaria)*, Judges*,

and also Fatoş **Aracı**, *Deputy Section Registrar.*

Decision of the Court

Article 6 § 1

The Court reiterated that the right to a court under Article 6 implied that final judicial decisions should be enforced. In Mrs Apanasewicz's case it therefore examined whether, in the proceedings for enforcement of the decision of Poznań Regional Court ordering the plant owner to cease operations, the Polish authorities had taken adequate and sufficient measures to achieve that aim.

With regard to the civil enforcement proceedings, in so far as Mrs Apanasewicz and her neighbour were private individuals, the Polish authorities, as the holders of public authority, had been required to act diligently to assist Mrs Apanasewicz in her attempts to have the judgment in her favour enforced. The latter had merely been able to request that fines be imposed on her neighbour; she had duly done so, and most of her requests had in fact been granted by the courts. However, the fact remained that, despite the considerable length of time that had elapsed since the judgment had been delivered, it had still not been enforced. Furthermore, it could not be argued that the authorities had

acted "diligently" as the civil proceedings had lasted for over 20 years to date (a domestic court had rightly judged the length of the proceedings to be excessive).

As to the administrative enforcement proceedings, it had been up to the authorities to take action of their own initiative to secure enforcement of the decision and remedy the situation in accordance with the law (the obligation on the authorities was more binding than in the civil proceedings). However, the proceedings for demolition of the plant had been in progress for around ten years and the plant had still not been demolished. While the social considerations which had led to the proceedings being stayed between 2001 and 2006 might be valid in principle, the Court observed that the decision to stay execution had required alternative solutions to be sought (for instance, relocation of the plant in compliance with the local urban development plan), and that no steps had been taken towards that end. Furthermore, the plant owner had extended the plant further during that time. The use of delaying tactics by an individual could on no account serve to justify the authorities' lack of diligence. Finally, the Court took the view that, in imposing just one administrative penalty on the plant owner, the authorities had made insufficient use of the coercive measures available to them under Polish law.

Accordingly, the Court held that there had been a violation of Article 6 § 1.

Article 8

The right to respect for private and family life encompassed the right to respect for the home, which in turn included the right to peaceful enjoyment of that home. Where an individual was directly and seriously affected by noise or other pollution in his or her home, an issue could arise under Article 8.

It was clear that Mrs Apanasewicz was directly affected by the nuisance created by her neighbour's activities. However, the Court had to determine whether, on account of its intensity, that nuisance had attained the minimum threshold of severity required for the responsibility of the Polish authorities under Article 8 to be engaged.

In view of the findings of the judgment of 3 July 2001 (intense nuisance, proximity of the plant, etc.), the Court held that the minimum threshold of severity required for Article 8 to be applicable had been attained in Mrs Apanasewicz's case. It went on to examine to what extent the Polish authorities had discharged their duty to protect the applicant's right to respect for her private and family life against the interference caused by her neighbour's activities. On that point it could not but observe that, while the domestic authorities had taken certain measures towards that end (largely at Mrs Apanasewicz's prompting), those measures had proved wholly ineffective.

There had therefore also been a breach of Article 8.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Poland was to pay Mrs Apanasewicz 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,850 in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

Case C-87/02

Commission of the European Communities

v

Italian Republic

(Failure of a Member State to fulfil obligations – Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects – Project 'Lotto zero')

Summary of the Judgment

1. *Member States – Obligations – Implementation of directives – Failure to implement – Justification based on the fact that failure can be attributed to decentralised authorities – Not permissible*

   (Art. 226 EC)

2. *Actions for failure to fulfil obligations – National measures incompatible with Community law – Existence of domestic remedies – No effect on the bringing of an action for failure to fulfil obligations*

   (Art. 226 EC)

3. *Environment – Assessment of the effect of certain projects on the environment – Directive 85/337 – Projects of the classes listed in Annex II to be made subject to assessment – Member States' discretion – Scope and limits*

   (Council Directive 85/337, Art. 4(2))

1. The fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC. A Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law.

   (see para. 38)

2. The fact that proceedings have been brought before a national court to challenge the decision of a national authority which is the subject of an action for failure to fulfil obligations and the decision of that court not to suspend implementation of that decision cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of remedies available through the national courts cannot in any way prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects.

   (see para. 39)

3. The second subparagraph of Article 4(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment mentions, by way of indication, methods to which the Member States may have recourse when determining which of the projects falling within Annex II are to be subject to an assessment within the meaning of the directive.

   Consequently, Directive 85/337 confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the directive. So the directive in no way

excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the directive as not being subject to the procedure for assessing its environmental effects.

However, the fact that the Member State has a discretion is not in itself sufficient to exclude a given project from the assessment procedure under the directive. It that were not the case, the discretion accorded to the Member States by Article 4(2) of the directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects.

Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the directive, which is that no project likely to have significant effects on the environment, within the meaning of the directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive screening, be regarded as not being likely to have such effects.

In that regard, a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

(see paras 41-44, 49)

JUDGMENT OF THE COURT (First Chamber)
10 June 2004(1)

(Failure by a Member State to fulfil obligations – Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects – Project 'Lotto zero')

In Case C-87/02,

Commission of the European Communities, represented by M. van Beek and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by M. Massella Ducci Teri, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo (Italy) e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive,

THE COURT (First Chamber),,

composed of: P. Jann, President of the Chamber, A. Rosas (Rapporteur), A. La Pergola, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 8 January 2004,

gives the following

Judgment

1 By an application lodged at the Registry of the Court on 13 March 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (Italy) (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80', hereinafter the 'Lotto zero' project), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

Legal background

Community legislation

2 Directive 85/337 applies, according to Article 1(1) thereof, to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

3 Article 1(2) of the Directive defines a project as:

'– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

4 Article 2(1) of Directive 85/337 states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

5 Article 4 of Directive 85/337 provides:

‘1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.’

6 Annex II to Directive 85/337, relating to projects subject to Article 4(2) thereof, lists in paragraph (d) of point 10, headed ‘Infrastructure projects’:

‘Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I)’.

7 Article 5 of Directive 85/337 in essence specifies the minimum information to be provided by the developer. Article 6 requires Member States to take the measures necessary to ensure that the authorities and members of the public concerned are informed and are able to express an opinion before the project is initiated. Article 8 requires the competent authorities to take into consideration information gathered pursuant to Articles 5 and 6. Article 9 imposes an obligation on the competent authorities to inform the public of the decision taken and any conditions attached to it.

8 Article 12 of Directive 85/337 provides that Member States are to take the measures necessary to comply with the Directive within three years of its notification. It was notified to Member States on 3 July 1985.

9 That directive was amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), Article 3(1) of which provides for implementation by 14 March 1999 at the latest. Directive 97/11 was therefore not applicable in the present case at the material time.

10 Article 4(2) et seq. of Directive 85/337, as amended by Directive 97/11, states:

‘2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

National legislation

11 The Decree of the President of the Republic of 12 April 1996, entitled 'Atto di indirizzo e coordinamento per l'attuazione dell'art. 40, comma 1, della L. 22 febbraio 1994, n. 146, concernente disposizioni in materia di valutazione di impatto ambientale' (Policy and coordination measure for the application of Article 40(1) of Law No 146 of 22 February 1994 on the provisions relating to the assessment of environmental effects) (GURI No 210, of 7 September 1996, p. 28, hereinafter 'the Decree of 12 April 1996') states, in Article 1:

'1. The Regions and the Autonomous Provinces of Trento and Bolzano shall ensure that an environmental impact assessment is carried out for projects listed in Annexes A and B, in conformity with Directive 85/337/EEC, following the guidelines contained in the present measure.

…

4. Projects included in Annex B which are situated, even in part, within the protected natural areas defined by Law No 394 of 6 December 1991 shall be made subject to an assessment of their effects on the environment.

…

6. For projects listed in Annex B which are not situated in a protected natural area, the competent authority shall ascertain, in accordance with the rules laid down in Article 10 and on the basis of the information provided in Annex D, whether the characteristics of a project require an assessment of its effects on the environment to be undertaken.'

12 Article 10(1) and (2) of the Decree of 12 April 1996 states:

'1. For the projects referred to in paragraph 6 of Article 1, the developer or authority which submits the proposal shall request the screening provided for in that paragraph. The information which the proposing developer or authority must provide for that screening shall contain a description of the project and the information necessary in order to understand and assess the main effects which the project could have on the environment.

2. The competent authority shall take a decision within 60 days on the basis of the information required under Annex D and shall identify potential measures making it possible to mitigate effects and to monitor works and/or installations. In the event that the competent authority does not respond within the period referred to above, the project shall be considered exempted from the procedure. The Regions and Autonomous Provinces of Trento and Bolzano shall adopt the measures necessary to make public the list of projects for which screening has been requested and the results thereof.'

13 Annex B to the Decree of 12 April 1996 on the types of projects referred to in Article 1(4) of that decree lists in point 7(g) and (h):

'(g) Secondary outer roads,

(h) Construction of relief roads in urban areas or reinforcement of existing roads of four or more lanes of a length greater than 1 500 metres in an urban area.'

14 Annex D to the Decree of 12 April 1996 specifies the information which the competent authority must take into account when examining the characteristics and location of a

project in the context of the screening provided for in the sixth paragraph of Article 1 of that decree.

15 The Abruzzo Region transposed the Decree of 12 April 1996 by Regional Law No 112, of 23 September 1997, entitled ‘Norme urgenti per il recepimento del decreto del Presidente della Repubblica 12 aprile 1996’ (Urgent rules for the transposition of the Decree of the President of the Republic, of 12 April 1996).

Pre-litigation procedure

16 It is apparent from the application made by the Commission that on 11 May 1998 it asked the Italian authorities to provide information on the ‘Lotto zero’ project. According to the information available to the Commission at the time, consent for that project was given without its being made subject to an environmental impact assessment and to screening intended to determine whether an assessment of its effects on the environment was necessary.

17 The Commission had been informed, in the context of a question put by a Member of the European Parliament, that the purpose of the project was to construct a stretch of express relief road 10.50 metres wide, comprising four viaducts and four tunnels. The road, which would cross an area close to residences some metres from the historic centre of the commune of Teramo in Abruzzo (Italy), would affect the bed of the Tordino river, the subject of the environmental improvement project known as ‘Fiume Tordino medio corso’, financed by the Community. That area was proposed by the Italian Republic as a site of Community importance under the procedure intended to set up the European ecological network known as ‘Natura 2000’, within the meaning of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

18 By letter of 23 July 1998, the Republic of Italy confirmed to the Commission that the project concerned construction of a two-lane road 10.50 metres in width and of an unspecified length, one section of which, crossing the territory of the commune of Teramo, would affect the right part of the basin of the Tordino river and would measure 5 440 metres in length, including 2 260 metres of viaduct and 930 metres of tunnel.

19 It emerges from the correspondence between the Commission, the Italian Environment Ministry and the Permanent Representation that, on 12 March 1999, the Abruzzo Region gave its consent to carrying out the works and that the special commissioner appointed for that work decided not to subject the operation to either an environmental impact assessment or screening.

20 By letter of 21 May 1999, the Ministry drew attention to the requirements imposed by the Decree of 12 April 1996 and asked the special commissioner for the project and the Abruzzo Region to give reasons for the decision not to subject that project to either an impact assessment or screening. The special commissioner then asked the Abruzzo Region to initiate the regional procedures for screening environmental compatibility, in accordance with the Decree of 12 April 1996.

21 The project was subjected to the procedure intended to ascertain whether it was required to undergo an assessment of its effects on the environment. Since the Abruzzo Region considered that the area in question was not part of a protected area within the meaning of Law No 394/91 and Regional Law No 38/96, it decided, by means of Regional Decree No 25/99, prot. No 3624 of 15 November 1999, to approve the screening of environmental compatibility and thereby exempt the project from the environmental impact assessment procedure.

22 By letter of 30 May 2000, sent to the Commission by a note of 16 June 2000 from the Permanent Representation, the Italian Environment Ministry pointed out that Regional Decree No 25/99 had been adopted following the favourable opinion by the Comitato di Coordinamento Regionale sulla Valutazione di Impatto Ambientale (Regional Coordinating Committee on environmental impact assessment, hereinafter 'the Coordinating Committee') No 3/76 of 22 October 1999, which for its part referred back to a civil engineering opinion which was not mentioned in Regional Decree No 25/99. The Decree provided no explanation for that omission and no argument in support of the decision taken by the regional administration.

23 On 24 October 2000, the Commission sent a letter of formal notice to the Italian Republic, stating that the information available to it did not indicate that the Abruzzo Region had subjected the project in question, which is listed in Annex II to Directive 85/337, to screening intended to establish whether its characteristics required an assessment within the meaning of Articles 5 to 10 of the Directive.

24 Since the Commission did not consider the various responses by the Italian authorities to that formal notice to be satisfactory, it delivered a reasoned opinion to the Italian Republic by letter of 18 July 2001, giving it two months in which to adopt the measures required in order to comply with it.

Procedure before the Court

25 The Court decided to ask various questions of the Italian Republic and of the Commission and to request that they produce several documents. In particular, it asked the Italian Republic to produce the civil engineer's opinion referred to in the context of the pre-litigation procedure. After examining the responses and documents, the Court decided, in accordance with Article 44a of the Rules of Procedure, to give judgment without a hearing.

Substance

Arguments of the parties

26 The Commission points out that, under the first paragraph of Article 4(2) of Directive 85/337, projects listed in Annex II are to be made subject to an assessment, in accordance with Articles 5 to 10 of the Directive, when Member States consider that their characteristics require it. The second paragraph of Article 4(2) of Directive 85/337 authorises Member States, inter alia, to set criteria or thresholds in order to determine which of the projects listed in the classes set out in Annex II must be made subject to an assessment in accordance with Articles 5 to 10 of that directive.

27 The Commission states that, as is clear from Case C-435/97 *WWF and Others* [1999] ECR I-5613, in the absence of a legislative measure which specifies, from the outset and in its entirety, which projects to subject to an environmental impact assessment procedure, Member States have the power to exclude a specific project from that procedure only following a concrete examination of that project which makes clear, on the basis of a full screening, the reasons why it cannot have an effect on the environment.

28 In the Decree of 12 April 1996, the Italian Republic failed to specify, from the outset and in their entirety, in accordance with the second paragraph of Article 4(2) of Directive 85/337, what projects must be made subject to an environmental impact assessment. It merely referred to those likely to be made subject to screening intended to establish the need to carry out an environmental impact assessment. Such is the case for the projects listed in Annex B to the Decree of 12 April 1996, in particular in point 7(g) (secondary outer roads)

or 7(h) (construction of relief roads in urban areas or widening of an existing road to four or more lanes, of a length greater than 1 500 metres within an urban area), which correspond to the projects listed in Annex II to Directive 85/337, in particular in point 10(d) and (e) (construction of airfields, roads, harbours, including fishing harbours).

29 Since the project 'Lotto zero' corresponds to the projects provided for by those provisions, it should have been made subject to screening, and clear and precise reasons should have been given for the decision not to carry out an assessment in accordance with Articles 5 to 10 of Directive 85/337. However, the decision not to make the project subject to assessment makes no mention of any established assessment criteria and fails to explain whether the screening referred to in the sixth paragraph of Article 1 of the Decree of 12 April 1996 was carried out or, if it was, how it was carried out. The statement of reasons provided for Regional Decree No 25/99 therefore suggests that the Abruzzo Region did not ascertain whether it was necessary for the project to be made subject to an assessment in accordance with Articles 5 to 10 of Directive 85/337. In its reply, the Commission states that the opinion of the Coordinating Committee referred to in Decree No 25/99 was never brought to its attention.

30 It points out that, even if the content and mechanism of the screening referred to in Article 4(2) of Directive 85/337 were elaborated only by Directive 97/11, which amends Directive 85/337 but which is not applicable in the present case, it is not acceptable that it be completely ignored without any reasons being given for the decision.

31 In addition, the argument that the rejection by national courts of applications brought by environmental protection associations prevents the Commission from ascertaining whether a Member State has fulfilled its obligations under the Directive is without any foundation and contrary to the Court's case-law. It is in fact clear from *WWF*, cited above, that it is for the national court to ascertain whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. However, that does not preclude the Court's ruling on the obligations for Member States which result from Article 4 (2) of Directive 85/337 and, accordingly, the Commission, on the basis of the powers conferred on it under Article 226 EC, has the duty to draw attention to a failure to comply with a provision of Community law.

32 Finally, the Commission points out that a Member State must deal with infringements not only by its central government but also those by its local and decentralised authorities.

33 The Italian Republic recalls the circumstances in which the Abruzzo Region adopted Regional Decree No 25/99 of 15 November 1999.

34 As regards the reasons for that decision, it maintains that Article 4(2) of Directive 85/337 allows a case-by-case examination to determine whether the project must be made subject to assessment. That directive thus provides for the adoption of an express measure before subjecting a project to an assessment. Accordingly, it is warranted to allow the competent authorities not to respond when no assessment is needed and not to require them to adopt formal measures unless the project must be made subject to an impact assessment.

35 Such would be the procedure under Article 10(2) of the Decree of 12 April 1996, by which the competent authority may fail to respond where it takes the view that no assessment is needed, which is tantamount to a decision to close the screening procedure.

36 The Italian Republic in any event denies the alleged infringement, since the national competent authority adopted an explicit measure, namely Decree No 25/99, on the basis of an opinion by the Coordinating Committee.

37 It points out that, as is clear from the judgment in *WWF*, cited above, it is for the national

court to review whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. In the present case, the project 'Lotto zero' was subjected to review by the Tribunale amministrativo regionale del Lazio as the result of an application introduced by the Associazione Italiana Nostra-Onlus and the Associazione Italiana per il World Wildlife Fund. By an order of 21 June 2000, that court rejected the application to suspend implementation of the contested decisions relating to that project.

Findings of the Court

38 First of all, it should be recalled that the fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC. The Court has consistently held that a Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law (Case C-33/90 *Commission* v *Italy* [1991] ECR I-5987, paragraph 24; also, to that effect, the order in Case C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245, paragraph 7). Therefore, it is not relevant in the present case that the infringement results from a decision by the Abruzzo Region.

39 The fact that proceedings have been brought before a national court to challenge the decision of a national authority which is the subject of an action for failure to fulfil obligations and the decision of that court not to suspend implementation of that decision cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of remedies available through the national courts cannot in any way prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9, and Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24).

40 As regards the present action, in accordance with the first paragraph of Article 4(2) of Directive 85/337, projects of the classes listed in Annex II are to be made subject to an assessment where Member States consider that their characteristics so require. The second paragraph of Article 4(2) of the Directive provides that 'Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'.

41 The Court has already held that the second paragraph of Article 4(2) mentions, by way of indication, methods to which the Member States may have recourse when determining which of the projects falling within Annex II are to be subject to an assessment within the meaning of Directive 85/337 (*WWF*, paragraph 42).

42 Consequently, Directive 85/337 confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects (*WWF*, paragraph 43).

43 However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it

could have significant environmental effects (*WWF*, paragraph 44).

44 Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive screening, be regarded as not being likely to have such effects (*WWF*, paragraph 45).

45 In the present case, the infringement relates to a project to construct a road which, in accordance with the Italian legislation which transposes Directive 85/337 and with the Directive itself, should have been screened to determine whether it needed to be subjected to an assessment. The Commission claims that the Italian Republic in essence failed to state reasons for the decision by the Abruzzo Region not to carry out an impact assessment, which suggests that no preliminary screening was carried out.

46 Examination of the documents produced shows that Decree No 25/99, by which the Abruzzo Region gives a favourable opinion as regards the outcome of the screening procedure and decides to exempt the project from the assessment procedure, is based on a cursory statement of reasons and merely refers to the favourable opinion by the Coordinating Committee. The latter opinion, which appears in the handwritten minutes of the Committee's meeting of 22 October 1999, contains a sentence which conveys the favourable opinion and states that in adopting that opinion, the Committee had available to it the civil engineer's opinion No 8634 of 6 July 1999.

47 As the Advocate General rightly observes in point 33 of his Opinion, that opinion by Teramo's civil engineering department, produced at the Court's request, is not an opinion on the environmental effects of the project, but merely an authorisation 'solely for hydraulic purposes' to cross the Tordino river and carry out certain works. The document attached by the Italian Republic to its defence, the cover page of which gives the necessary details as to the nature of the document and which was produced at the Court's request, does not appear to be required under the Law as part of the screening procedure. Moreover, the Court does not have information which would allow it to conclude that it was used by the competent authority as a basis for its decision.

48 That information indicates that no screening was carried out to determine whether to subject the project 'Lotto zero' to an impact study and that the failure to fulfil obligations as set out by the Commission in its claims is established.

49 It should be pointed out, however, that if the civil engineer's opinion had not been produced at the request of the Court, it would have been impossible to determine whether the screening had been carried out or not. It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

50 In conclusion, it must be held that since the Abruzzo Region did not ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero – Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Directive 85/337, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4 (2) of that directive

Costs

51 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Declares that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4 (2) of that directive.

2. Orders the Italian Republic to pay the costs.

Jann Rosas La Pergola

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 10 June 2004.

R. Grass P. Janr

Registrar President of the First Chamber

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1 – Language of the case: Italian.

MEMO/12/159

Brussels, 7 March 2012

Communication on Implementing EU environment legislation – Questions & Answers

1. The Commission published a Communication on implementing EU environment law in 2008. Why do we need another one in 2012?

The two communications are complementary but distinct. The 2008 Communication centred round the strategic use of enforcement powers by the Commission to tackle breaches of EU environment law. The focus of the 2012 Communication is about how to improve implementation at Member State level and collectively achieve better environment on the ground. The new Communication contains ideas that will help Member States improve their performance and is an expression of the Environment Commissioner's wish to be "strictly helpful, helpfully strict".

2. Can the focus on implementing EU environment legislation be really justified in a time of austerity?

Implementing EU environment law is cost-effective. Studies show that when factors such as health costs are taken into account, non-implementation actually costs more than implementation.

General examples:

- The phase-out of dangerous chemicals has significant environmental and health benefits. Prudent assumptions are that the total health benefits would be in the order of magnitude of €50 billion over next 30 years. The costs of implementing the legislation are estimated to be €4-5 billion in total.
- 20 % - 50 % of the European population lives in areas where the air quality breaches European limit values. The estimated annual costs in terms of health expenditure or days of work lost through illness run to billions of Euros.

Location specific examples:

- Benefits related to the implementation of the Natura 2000 network in France were estimated to be seven times higher than costs which were calculated at €142 per hectare and year.
- A programme to restore several wetlands in the Danube river basin will cost €183 million but will retain vital adaptive ecosystem functions and will likely lead to earnings of €85.6 million per year.

Apart from serving an overall objective that is cost-effective, several ideas in the Communication represent approaches that have stand-alone economic benefits. Placing more environmental information online, for example, should contribute to the knowledge economy and fit with a wider emphasis on e-government.

3. What happens next? The Communication mentions the 7th Environmental Action Programme (EAP) – what is the link? Will the Commission move forward with specific legislative proposals?

The 7th EAP will cover issues other than implementation but implementation will be a key overarching theme. Stakeholder views on the ideas set out in the Communication will be taken into account in the formulation of the 7th EAP proposal (which will appear later in 2012). In addition, some ideas in the Communication may lead to specific legislative proposals with respect to inspections for instance.

4. One of the two main themes of the Communication is knowledge. What does this mean, why is it important and how can it be improved?

"Knowledge" means information on the state of the environment and information about how EU environment laws are implemented. This sort of knowledge is important for all sorts of reasons. Citizens need to have confidence that EU environment laws are working in practice in their neighbourhood. Environmental authorities and professionals need to have access to information that shows where and how they should be devoting their efforts and resources. EU institutions and the European Environment Agency (EEA) need to analyse and present the picture at European level. Broadly speaking, the Communication draws attention to the benefits in terms of transparency, efficiency and usefulness of having more and better information available online.

5. The Council has been expecting the Commission to move forward with SEIS (Shared Environmental Information System). The knowledge part of the Communication refers to SEIS but what exactly is happening with the SEIS Implementation Plan and how will this tie in with the follow-up to the Communication?

SEIS forms part of the background to the Communication and is central to how the Commission proposes to improve knowledge in the field of the environment. SEIS is key because it recognises that improving knowledge requires co-ordinated progress across several fronts – in relation to the rules covering the creation and dissemination of environmental information, in the streamlining of reporting provisions, and in the way that information and communication systems are set up and interact with each other. A SEIS Implementation Plan explaining the state-of-play and setting out how improvements can be made is close to completion and is due to be presented around summer 2012. This should underpin the goal of improving environmental knowledge.

6. How do the EEA, JRC and Eurostat fit into all of this?

JRC and Eurostat are part of the Commission. They work closely with the Commission's Environment Directorate-General on issues to do with monitoring techniques and statistics. The Commission also cooperates closely with the EEA which has a growing role in supporting the analysis of Member State implementation reports.

7. What does the Communication mean exactly by Structured Implementation and Information Frameworks (SIIFs) and how will the Commission support these?

Each individual EU environment law – whether it deals with end-of-life vehicles or drinking water supplies or any other subject areas – is there to improve how the world works. These improvements can only be properly understood by citizens – in particular as regards their own localities – if they have a clear picture of the key actions being carried out to implement those laws.

To give just one example, EU drinking water rules aim at providing citizens with safe drinking water. Providing safe drinking water involves a chain of interventions including protection of the drinking water source (groundwater, lake, river), physical abstraction, treatment to remove any harmful bacteria and other types of contamination, monitoring of the distribution pipework to avoid leaks and waste, infrastructure investments and measures such as water pricing to help avoid wasteful use of water. It can be time consuming to obtain joined-up information on how all of these interventions fit together. A SIIF would aim, together with the range of SEIS initiatives, to help Member States set up transparent information systems that make this information accessible online. For example, one would be able to identify on a map abstraction points, source protection zones, treatment plants and distribution networks and have links to related information such as leakage reduction programmes.

Citizens, experts and businesses would all benefit from such transparency. The Commission's role would be to assist Member States in identifying the types of information that would feature in a given information system, so that similar information could be found across the EU.

8. The other main theme of the Communication is responsiveness. Why focus on this concept?

Knowledge on its own is not enough. Checks and balances are also crucial. Concrete implementation problems – such as a discharge that is causing illegal pollution or a required procedure that is not being followed – require concrete responses. The Communication recognises that there is no "magic bullet" for all such problems. Different actors need to be mobilised and it is necessary to support these in different but complementary ways. Hence the references to inspections and surveillance, complaint-handling, access to justice, network cooperation and partnership agreements.

9. What does the Commission envisage for inspections and surveillance? Will there be an EU environment inspectorate?

Considerable progress has already been made on criteria for "classic" industrial inspections within Member States, with a move from non-binding to binding criteria over the past decade. However, less progress has been made on criteria for dealing with issues such as wildlife crime and illegal developments and interventions. The Communication refers to several options for improving the situation, and these will be examined closely in the coming period. The Communication does not specifically propose the creation of an EU environment inspectorate but it refers to a number of possible options for complementing national efforts at the EU level.

10. Why is the Commission interested in criteria for complaint-handling within Member States? Isn't that covered by subsidiarity?

Citizens can already complain to the Commission and it has its own established complaint-handling procedure. The Communication draws attention to this issue because experience shows that citizens sometimes complain to the Commission out of frustration at the lack of a national remedy. It would be illogical to argue in this context that complaints at national level should remain a matter of subsidiarity. Indeed, in relation to consumers, precedents already exist for national grievance mechanisms. The Communication suggests that it would be worthwhile to explore how such mechanisms could be established in the field of the environment.

11. Why is the Commission still referring to an access to justice initiative when its 2003 proposal won very little Member State support?

Time may have stood still on the 2003 proposal, which has not progressed to become an adopted legal instrument, but this is not the case for access to justice. The Court of Justice of the European Union has made a number of decisions that go in the direction of greater access to national courts for citizens and NGOs. This case-law is welcome, but there is now considerable uncertainty about the best way to put it into practice. The Communication suggests that it is in the interests of all concerned to look again at the issue of access to justice.

12. Why is the Commission so interested in networks of experts? What can they contribute?

The Commission is interested in networks of experts because they facilitate sharing of knowledge and experience across the EU. The Commission has already had a positive experience of cooperation with IMPEL, the EU network of inspectorates, and has drawn on that network's expertise to lay the foundations for an EU instrument on inspection criteria.

13. What are partnership implementation agreements?

The Communication leaves this concept quite open. The context will determine the nature of such an agreement. However, the basic idea is to explore how targeted agreements with Member States can improve implementation and/or resolve specific problems. An example might be an agreement under which EU support is provided for a Member State information system that supports implementation.

See also IP/12/220

URÍA MENÉNDEZ

Doing business in the European Union - An overview of the main environmental issues no one can miss

When thinking of doing business in the European Union, environmental matters cannot be spared.

Every member State has its own set of legislation, organisation and peculiarities. However, as far as the environmental rules are concerned, there is a wide common basis that applies throughout the EU.

Here are the basics:

(i) General permits or requirements: such as those concerning the integrated environmental permit, or the environmental impact assessment.

(ii) Atmosphere (not only air emissions, but also noise, vibrations and odours): at least documentation on authorisations and registration of data must be obtained. Specifically, in relation to climate change: not only title to emit GHG must be obtained, but allowances (one per each ton emitted) must also be available (spot price as of July 26, 2012: EUR 6.94).

(iii) Water: the use of water may be subject to obtaining a previous title. Similarly, waste water discharges may generally be subject to prior authorisation. Finally, it must be considered whether other water bodies might be affected by the business (e.g. because of soil pollution).

(iv) Waste: waste production and waste management are subject to strict control and obligations. In addition, it is important to get information on the types of waste produced, since specific rules, on top of the general ones, may apply (e.g. waste packaging, hazardous waste or WEEE).

(v) Contaminated land: this may be relevant depending on the member State in question. Attention should be paid not only to the contaminated land that the target company may have, but also to third parties' land that the company may have contaminated, or that may affect the company's assets or activity.

(vi) Protected natural areas and protected fauna and flora species: this is becoming an increasingly important issue. If the activity may affect one of these areas or species, the activity may be subject to a specific environmental assessment from which restrictions might apply - or even prevention of the activity altogether. (The datum: protected areas today cover almost 21 % of the territory of EEA member countries; this compares to roughly 13 % in the USA, 17 % in China and more than 26 % in Brazil[1].)

[1] Source: http://www.eea.europa.eu/articles/protected-areas-a-key-element

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(vii) Use and trade of chemical substances: substances must be registered under REACH. If not, they cannot be used nor traded.

(viii) Use of dangerous substances: depending on the amount of substances used, documentary and communication obligations may be imposed. Other specific rules may apply (e.g., RoHS).

(ix) Potential claims: it is wise to gather information as to the neighbourhood (complaints, previous claims), pressure groups, investigations carried out by the authorities, previous offences or sanctions, previous environmental audits or reports, etc.

(x) Other: depending of the actual situation at stake, other environmental aspects may be relevant, such as:

- asbestos;
- radioactive materials;
- radio-electric or radio-communication stations;
- environmental insurance;
- environmental taxes.

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COMPARISON OF SELECTED U.S. AND E.U. ENVIRONMENTAL LEGISLATION

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"The model of regulatory law that had long predominated in western Europe was more informal and cooperative than its American counterpart. It relied less on lawyers, courts, and private enforcement, and more on opaque networks of bureaucrats and other interests that developed and implemented regulatory policies in concert. European regulators chose flexible, informal means of achieving their objectives, and counted on the courts to challenge their decisions only rarely. Regulation through litigation—central to the U.S. model—was largely absent in Europe.

But that changed with the advent of the European Union. Kelemen argues that the EU's fragmented institutional structure and the priority it has put on market integration have generated political incentives and functional pressures that have moved EU policymakers to enact detailed, transparent, judicially enforceable rules—often framed as "rights"—and back them with public enforcement litigation as well as enhanced opportunities for private litigation by individuals, interest groups, and firms." Harvard University Press review of Eurolegalism: The Transformation of Law and Regulation in the European Union by R. Daniel Kelemen (2001).

Most EU environmental legislation is in the form of Directives. Under Article 249 of the European Community Treaty, a Directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of forum and methods of" implementation. As a result, each Member State has the obligation to undertake the required legislative or regulatory actions to incorporate the Directive's goals into national law, which often requires recognition of rights and obligations beyond the words of the Directive. Initially Directives were intended to impose obligations on Member States, but not impose obligations directly on private sector operators. However, over time some of this distinction appears to have eroded. Accordingly, any major project developer or operator of an

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installation, facility or an activity potentially subject to a Directive will need to refer to the national law of the Member State to understand the precise duties and obligation imposed.

Some EU environmental legislation, however, is in the form of Regulations, which are legally binding on all Member States and can impose legal obligations directly on persons and entities. Unlike Directives, however, there is no need for the Member State to adopt a national law implementing the Directive. Nevertheless, Member States may adopt additional, complementary regulations to further achieve the goals of the regulation. Finally, Member States for both Directives and Regulations are required to designate the "authorities" at the national level competent to implement and enforce the EU adopted environmental legislation.

Based on the EU legislative scheme, the general comparison below should not be relied upon for designing corporate compliance programs or ensuring compliance with EU law. Rather, it is intended only as an partial overview to provide a framework for spotting issues and recognizing the structure of EU environmental legislation in the context of more familiar US environmental laws, which are outlined in a less detailed format.

US FEDERAL LEGISLATION	EU LEGISLATION
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. • CERCLA, commonly known as Superfund, authorizes EPA to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment. • CERCLA provides a federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other	**Directive 2004/35/EC on environmental liability for preservation and remedying environmental liability (Environmental Liability Directive)** • Purpose is to impose the "polluter pays principle" on businesses causing environmental damage on or after April 30, 2007. • "Environmental damage" is defined as damage to protected species and natural habitats, water, and land. • The Directive defers to existing

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emergency releases of pollutants and contaminants into the environment. • EPA cleans up orphan sites when potentially responsible parties cannot be identified or located, or when they fail to act. • CERCLA also enables EPA to force parties responsible for environmental contamination to clean up a site or to reimburse the government for response or remediation costs incurred by EPA. • Through various enforcement tools, EPA obtains private party cleanup of sites through orders, consent decrees, and other small party settlements. • CERCLA is applicable to all 50 states and U.S. territories. • Superfund site identification, monitoring, and response activities in states are coordinated through the state environmental protection or waste management agencies. • Any person in charge of a "facility" (e.g., an industrial, agricultural establishment or agribusiness) must notify EPA's National Response Center of any non-permitted releases of any CERCLA hazardous substances above threshold amounts. • In the event of a release or threatened	international conventions for damage caused by nuclear and marine activities, subject to review in 2014 for the effectiveness of those international conventions. • Subject to specific exceptions for which there will not be any liability (e.g. war, national and international security, protection from natural disasters, damage caused by "diffuse pollution" lacking a causal link") the Directive imposes liability based on two separate liability regimes: • 1) strict liability for operators of "risky or potentially risky" activities (e.g. releasing heavy metals into water or air, production of dangerous chemicals, intentional release of genetically modified organisms, waste management operations, discharge of pollutants to surface water or groundwater, water abstraction and impoundment) listed in Annex III of the Directive; and 2) fault-based liability. • An operator otherwise liable may not be required by a Member State to bear the cost of preventive or remedial action if (a) damage or threat caused by a third party despite appropriate safety

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release governed by CERCLA, the responsible party is required to take prompt action to prevent, limit or cleanup a release and any damage caused by a release. • For sites where there are multiple "responsible parties", liability is joint and several unless the liable party can establish that the harm caused by its hazardous substances is "divisible" from the remaining damage.	measures, (b) damage or threat was caused by an emission or event expressly authorized by national law, and c) damage or threat was caused by an activity not considered likely to cause environmental damage according to the state of technical and scientific knowledge. • If damage has not occurred but there is an imminent threat of damage, the operator must take necessary preventive measures "without delay" and report the event to the competent authorities. • If damage has occurred, the operator must report the event to the competent authority "without delay", take all practical steps immediately to control, contain, remove or otherwise manage the contaminants, and take all necessary remedial measures in accordance with rules set out in the Directive. • Remediation rules require an operator to identify potential remedial options and submit them to the competent authority for approval; and the authority must select the appropriate remedy in cooperation with the operator, after consideration of the views of interested parties invited to participate.

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	• For damage specifically to water and protected species and habitats, the environment must be restored to "baseline" by three types of remediation: 1) primary remediation (remedial measures directly restoring the resources to baseline, 2) complementary remediation (development of alternative resources or measures taken at a different site), and 3) compensatory remediation (additional improvement to damaged water or protected species and habitats to compensate for "interim losses" to natural resources or services, i.e, compensation for natural resource damages). • Cost allocation of response and remediation costs if more than one liable party is liable is either "joint and several liability" or "proportional liability" depending on the law of the Member State. • Financial security for the remedial activities not required, but under Article 14(2) of Directive 2004/35/EC Member States are requested to encourage development of financial security products so that an amendment requiring financial guarantees may be

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	considered.
See Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq.,, Federal Water Pollution Control Act, 33 U.S.C. §§ 1361 et seq., 1901 et seq., and Clean Air Act, 42 U.S.C. §7401 et seq. (below)	**Integrated Pollution Prevention and Control (IPPC) Directive, 2008/1/EC as incorporated into the Industrial Emissions Directive, 2010/75/EC** • IPPC sets forth obligations of the largest facilities conducting industrial and agricultural activities, establishes the procedure for authorizing such activities, and sets forth conditions to be included in all permits, specifically pollutant discharge permits. • The Directive covers six categories of activities: 1) energy, 2) metals processing and production and processing; 3) chemicals; 4) waste management, 5) minerals; and 6) "other" specifically identified activities such as pulp and paper production, food production, textile treatment, and intensive poultry and pig rearing. • Facilities subject to IPPC are required to take all appropriate preventive measures against pollution using "best available techniques, to ensure no significant pollution is caused, to avoid waste production, to recover and safely dispose of any waste generated, to take all necessary measures to prevent

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	accidents, and to clean-up the site upon cessation of activities. • Operators are required to provide competent authorities with emission monitoring results, a report of any significant accidents without delay, and necessary access to the facility for inspections and other monitoring. • Permit applications must describe, inter alia, the installation's activities; materials, substances, and energy used or generated; emissions and significant environmental effects; techniques to reduce emission; measures for prevention and recovery of waste; and proposed monitoring measures. • Permit applications must be available for public review and comment, including any permit relating to a new installation or a substantial change in activities or operations. • Any permit issued must include emission limit values (ELVs) for certain priority pollutants (e.g. CO, VOCs, sulphur dioxide, dust, arsenic for air and organhalogens, organphosphorus, cyanides, persistent hydrocarbons, metals, arsenic for water) likely to be emitted in significant quantities, whether through

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	water, air or otherwise. • The Directive does not set specific ELV limits, which are determined on an individual basis based on the "best available techniques" (BAT) for the installation. • The permit may not include ELVs for CO_2, which is covered by ETS Directive 2003/87/EC (emissions trading scheme).. • The permit must include requirements for protection of soils and groundwater, management of waste, monitoring of emissions, reporting of data, and operating procedures for "normal operating conditions" such as start-ups, leaks, malfunctions, and stoppages. • The competent authority when issuing any permit must inform the public of the decision, the grounds on which the decision was based, including information on public participation.
Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. • RCRA, as amended by The Hazardous	**Directive 2008/98/EC on waste (the Waste Framework Directive) repealing Directive 2006/12/EC on waste, Directive 91/689/EC**

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and Solid Waste Amendments of 1984 (HSWA), was enacted to address the increasing problem of accumulating hazardous wastes and the potential risks to human health and the environment. • RCRA places controls on the generation, transportation, treatment, storage, and disposal of hazardous waste, as well as establishes a framework for the management of non-hazardous waste. • Additionally, it sets forth statutory authority to impose liability on owners and operators of facilities that fail to comply with the statutory and regulatory requirements. • RCRA has provisions relating to the regulation and enforcement of regulations for Hazardous Waste (Subtitle C), Solid Waste (Subtitle D) and Underground Storage Tanks (Subtitle I) and the associated facilities and handlers. • Remediation or cleanup of hazardous wastes that have come from active RCRA facilities, regulated underground	**on hazardous waste, and 75/439/EEC on waste oils)**[2] • The Waste Framework Directive requires Member States to establish national waste prevention programs by the end of 2013 and in 2015 report on the status of setting waste prevention and decoupling objectives to be implemented by 2020. • It establishes a hierarchy in priority order for the handling of waste, from prevention, preparing for reuse, recycling, other recovery, and lastly disposal, with some ability to depart from the hierarchy in order to achieve "best environmental outcomes" based on life cycle impacts. • It is designed to provide an integrated, streamlined-approach to management of all waste streams, including hazardous wastes. • The Directive requires permitting for all "waste" disposal and recovery operations, subject to limited exceptions, including hazardous waste. • Management of hazardous waste must

[2] The general focus of this summary is on the Directive's provisions pertaining to hazardous wastes only.

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storage tanks, and oil spills is subject to an enforcement action by UPA Cleanup Enforcement. • The HSWA requires EPA to develop a comprehensive program for regulation of underground storage tanks and underground tank systems (USTs) as necessary to protect human health and the environment by requiring tank notification, tank standards, reporting and record keeping requirements for existing tanks, corrective action when necessary, as well as the development of a compliance and enforcement program. • RCRA does not address the problems of hazardous waste found at inactive or abandoned sites or those resulting from spills that require emergency response, which are covered by CERCLA. • RCRA provides the federal government with the authority to authorize states to implement and enforcement hazardous waste regulations and requirements as long as the state programs are as stringent or broader in scope than the federal regulations.	be in a manner that protects human health and the environment. • "Hazardous waste" is defined by reference to Annex III to the Directive based on the properties of the waste: explosive, oxidizing, highly flammable, flammable, irritant, harmful, toxic, carcinogenic, corrosive, infectious, toxic for reproduction, mutagenic, waste which releases toxic gases when in contact with air, water or acid, sensitizing, ecotoxic, and waste capable after disposal of yielding another substance which possesses any hazardous characteristics. • "Disposal" includes "storage pending" disposal of waste by land filling, land treatment (e.g. biodegradation), deep injection, and surface impoundments (but does not include "temporary" storage, pending collection, on site where it is produced). • Mixing of hazardous wastes in different categories and the mixing of hazardous wastes with non-hazardous wastes is generally prohibited (with some specific exceptions for land filling). • The Directive requires collection and management of waste oil separately

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	from other wastes. • Produces of hazardous wastes shall be subject to periodic inspections by the competent authorities. • Under the Directive, producers and transporters of hazardous wastes are required to keep detailed records, which must be preserved for three years and one year, respectively. • Documented evidence of waste management operations must be supplied to the competent authorities on demand. • Hazardous waste must be identified and recorded at every site where it is transferred and must be properly packaged and labeled in accordance with community and international standards during collection, transport, and temporary storage. • Disposal and recovery operations of hazardous wastes are subject to the permitting requirement of the IPPC Directive (above). • The permit must require the use of "best available techniques"..

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Electronic and Electrical Waste (E-Waste) • At present, there are no federal laws mandating or specifically governing the recycling of e-waste, other than limited applicability of RCRA to certain e-waste. • The Responsible Electronics Recovery Act, which would have amend RCRA to establish a category of "restricted electronic waste" that cannot be exported to developing nations, has been introduced in the House of Representatives but has not been enacted. • Recycling of electronic waste within the United States is primarily governed by state laws, with more than 20 states (including California, Illinois, New Jersey, New York, Texas and Virginia) instituting mandatory electronics recovery programs.	**Directive 2011/65/EU on the restriction of certain hazardous substances (RoHS); and Directive 2012/19/EU on waste electrical and electronic equipment (WEEE Directive)) adopted on July 4, 2012 repealing Directive 2002/95/EC** • RoHS establishes rules restricting the use of certain hazardous substances listed in Annex II of the Directive in new electronic and electrical equipment. • The purpose of the WEEE Directive, is to "contribute to sustainable production and consumption by, as a first priority, the prevention of WEEE and, in addition, by re-use, recycling, and other forms of recovery such wastes as to reduce the disposal of waste[.]" • The Directive applies to all EEE (defined as "electrical and electronic equipment" with a voltage rating "not exceeding 1,000 volts for alternating current and 1,500 volts for direct current") products and producers regardless of selling technique, including distance and electronic selling. • Member States are obligated to adopt appropriate measures to minimize the

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	disposal of WEEE, to ensure proper transportation and treatment of all WEEE, and to achieve a high level of separate collection of WEEE from other waste streams. • The Directive is based on a "producer responsibility" principle for WEEE collection requiring that "producers or third parties acting on their behalf set ups systems to provide for the recovery of WEEE suing best available techniques." • Producers are required to provide at least for the financing of the collection, treatment, recovery and disposal of WEEE collected from private households at collection facilities establishes under the Directive and from all other users. • The Directive imposes annual collection percentage goals for WEEE (excluding household WEEE). • Members States shall establish a procedure for establishing a register of producers of EEE, including producers of EEE by distance communication, i.e. internet or other electronic means. • Member States are required to establish "effective, proportionate, and

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	dissuasive" rules on penalties for violation of national provisions implementing the Directive.
Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq. • TSCA was enacted by Congress in an effort to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances. • TSCA covers all organic and inorganic chemical substances and mixtures, both synthetic and naturally occurring, with the exception of food, food additives, drugs, cosmetics, nuclear materials, tobacco, and pesticides, which are all covered by other legislation. • The Act includes provisions requiring pre-market testing and notification to EPA before a toxic chemical is introduced into the stream of commerce. • A new chemical substance may not be manufactured without providing EPA with a 90-day period of time review the chemical substance for any risk of harm to health and the environment.	**Registration, Evaluation and Authorization of Chemicals (REACH), EC Regulation 1907/2006** • REACH is based on the principle that manufacturers, importers, and downstream users have the obligation to ensure that the substances they manufacture, place in the market, or use do not adversely affect human health or the environment. • The provisions of REACH are supplemental to chemical-related provisions of EU occupational health and safety regulations. • With its effective date of June 1, 2007, REACH established a new regulatory framework for regulation of chemical substances in the EU. • The European Chemicals Agency established under REACH is responsible for managing technical, scientific and administrative aspects of REACH. • REACH imposes obligations on a wide range of business entities, including

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• Chemicals subject to regulation under TSCA are subject to specific EPA administrative orders requiring workplace or manufacturing controls.	manufacturers, producers of articles, downstream uses, and "actors in the supply chain". • REACH governs chemical substances and preparations, as well as under certain circumstances articles produced using such substances and preparations. • The fundamental principle of REACH is that substances and preparations governed by REACH shall not be manufactured or placed in the market unless registered. • No production operations involving a substance subject to REACH may be commenced prior to completion of registration. • REACH requires chemical companies to submit hazard information for both new and existing chemicals for chemicals produced at differing tonnage levels based on levels of short term toxicity for invertebrates, toxicity to algae, ready biodegradability, assessment of the chemical's human health and environmental hazards, and its potential as a persistent, bioaccumulative, and toxic pollutant. • REACH Requires public disclosure of information relating to the chemical,

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	with limited ability to protect confidential business information.
Federal Water Pollution Control Act, 33 U.S.C. §§ 1361 et seq., 1901 et seq. • The Clean Water Act is the primary federal law that protects waters, including lakes, rivers, and coastal areas. • It provides a comprehensive framework of standards, technical tools and financial assistance to address the many causes of pollution and poor water quality, including municipal and industrial wastewater discharges, polluted runoff from urban and rural areas, and habitat destruction. • The Clean Water Act: requires municipalities and major industries to meet performance standards to ensure pollution control; charges states and tribes with setting specific water quality criteria appropriate for their waters and developing pollution control programs to meet them; provides funding to states and communities to help them meet their clean water infrastructure needs; and protects valuable wetlands	**Water Framework Directive, 2000/60/EC; Dangerous Substances Directive, 2006/11/EC; and Directive 2006/118/EC on groundwater**[3] • The Water Framework Directive provides a comprehensive approach to the protection and management of water, including surface waters and groundwater. • The Directive applies to all water, all human impacts to waters, including industrial impacts to waters. • For surface and groundwaters, the Directive sets an obligation on Member States to achieve and maintain by 2015 "good ecological status" (based on biological, chemical, and hydromorphological elements), including specifically an obligation not to allow waters to deteriorate in status. • The Directive requires classification and characterization of all water bodies across Member States as to quality,

[3] This is not a comprehensive list of the applicable Directive. There are many other Directive governing the discharge and treatment of waters from industrial and other establishments beyond those discussed here.

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and other aquatic habitats through a permitting process that ensures development and other activities are conducted in an environmentally sound manner.	human use, and economic analysis of waster use. • The Dangerous Substances Directive sets both emissions limits and water quality standards for specific substances, including both a "Black List" of substances requiring treatment to achieve elimination before discharge (e.g. carcinogenic substances, organohologen and organophosphorus compound, mercury, cadmium) and a "Gray List" of substances requiring reduction in levels discharged (e.g. zinc, copper, lead, cyanide, ammonia). • Groundwater is protected under the Water framework Directive as well as specifically under Directive 2006/118/EC. • Directive 2006/118/EC specifically requires Member States to assess groundwater chemical status for specified pollutants. • Member States are also required based on "best environmental practices" and "best available techniques", to prevent or limit the infiltration of pollutants into groundwater using "all necessary measures" for hazardous substances. • For other pollutants Members States are

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	required to take all measures necessary to limit infiltration so as to not cause deterioration in groundwater quality. • Other than nitrates (50 mg/l) and active substances in pesticides, each Member State is required to establish threshold values or standards for groundwater quality. • See also Environmental Liability and IPPC Directives (above)
Clean Air Act, 42 U.S.C. §7401 et seq. • The Clean Air Act (CCA) created a national program to control the human health and environmental effects of air pollution. • The CAA requires major stationary sources (e.g. industrial manufacturers, processors, refiners, and utilities) to obtain operating permits and install pollution control equipment and to	**Directives 2008/50/EC and 2004/107/EC setting air quality standards; and Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants, as amended by the Accession Treaties for new Member States[4]** • In combination, the Directives address protection of the air and atmosphere by establishing limits on the emission of toxic pollutants from stationary sources, setting national emission ceilings for specific pollutants, and

[4] Directive 2010/75/EC on industrial emissions also contains emissions legislation relating to emissions from the titanium oxide industry; emissions of volatile organic compounds due to use of organic solvents in certain activities; emissions from waste incineration; and emissions from large combustion plants.

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meet specific emissions limitations.. • The CAA mandates controls on air pollution from mobile sources by regulating both the composition of fuels and emission-control components on motor vehicles and non-road engines. in the fuel distribution system. • Regulation of vehicles under the Act includes vehicle emission limits for Hydrocarbons (HC), Carbon Monoxide (CO), and Nitrogen Oxides (NOx), and particulates in the case of diesel vehicles.	ambient standards that should be achieved in relation to air quality. • Directive 2008/50/EC establishes specific ambient air quality standards for sulphur dioxide, nitrogen oxide, particulate matter, lead, benzene, carbon monoxide and ozone and Directive 2004/107/EC establishes standards for arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons. • The limit values for ambient air under Directives 2008/50/EC and 2004/107/EC are mandatory and must be considered when setting emission limit values (ELVs) for establishments governed by the IPPC Directive.. • Directives 2008/50/EC and 2004/107/EC also establish air quality standards, including limit values, alert thresholds, and compliance timetables for stationary emission sources, with the regulation of mobile sources to toxic pollutants covered by other EU Directives. • Under Directives 2008/50/EC and 2004/107/EC, Member States are obligated to take the necessary measures to comply with the limits

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	established in the Directives, including the designation of competent authorities to implement the Directives and to monitor and assess air quality. • Where there is a risk that the limit values and alerts may be exceeded, Member States are required to develop actions plans designed to achieve compliance. • Directive 2001/81/EC establishes national emission ceilings for each Member State for sulphur dioxide (SO_2), nitrogen oxide (NOx), volatile organic compounds (VOCs), and ammonia, but allows Member States to determine how to comply. • Directive 2001/81/EC sets 2010 as an interim benchmark for Member States to limit annual national emissions as set forth in Table 7 to the Directive. • See also IPPC Directive (above) for further regulation.
Global Climate Protection Act, 15 U.S.C. § 2901 et seq. and Energy Policy Act of 1992 • The United States has not adopted a comprehensive, legislative approach to	**Climate and Renewable Energy Package (CARE); and Directive 2003/87/EC on a EU emissions trading scheme** • In 2009, the European Council and

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addressing climate change. • The Global Climate Protection Act and the Energy Policy Act of 1992 only provide for research and planning to "expand the nation's understanding of natural and man-induced climate processes." • The American Clean Energy and Security Act of 2009 was approved by the House of Representatives but was not enacted by the Senate.	Parliament adopted CARE, which is a package of measures designed at achieving a 20% reduction in emissions of greenhouse gases (GHSs) by 2020. • CARE includes Directive 2009/28/EC establishing binding targets for Member States of 20% renewable energy use and 10% renewable transport fuels use by 2010, with limits allocated to Member States based on a "effort sharing" decision. • The EU emissions trading scheme (ETS) commenced on January 1, 2005 implementing a "cap and trade" approach for the reduction of CO_2. • The ETS provides for the allocation of carbon dioxide credits for installations covered by the trading scheme (e.g. energy production, ferrous metals processing and production, mineral manufacturing, including cement and ceramics, aviation, and other specified industrial activities). • In January 2013, petrochemicals, ammonia, aluminum, nitrous oxide and perfluorcarbons installations will be added to the trading scheme. • Proposals may be considered by the EU expanding the ETS to GHGs other than

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	CO_2.
National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. • The purpose of NEPA is*:* "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." • NEPA seeks to ensure that public projects take into account potential environmental impacts and social goals, including environmental justice. • Under NEPA, it is the responsibility of the federal government to: act as trustees of the environment; assure, safe, healthful, productive, aesthetically and culturally pleasing surroundings for its citizens; attain the widest range of benefit without degradation or undesirable and unintended	**Environmental Impact Assessment (EAI) Directive; and Directive 85/337/EEC as amended by 97/11/EC and 2003/35/EC.** • Purpose the EAI Directive is to ensure public participation and transparent decision making. • Any Member State may impose stricter requirements. • It has wide–ranging implications for development projects covered by the Directive. • Major projects with potentially large environmental impacts identified in Annex 1 of the Directive (e.g. long distance roads, pipelines, power plants, industrial plants) are required to perform an EAI. • Other projects identified in Annex 2 of the Directive (e.g. mining, deep drilling, foundries, shopping centers) are required to undergo screening to determine if the project is likely to have significant environmental impacts. • The Directive requires developers to submit to the competent authorities in the Member State certain minimal

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consequences; preserve important historic, cultural, and natural aspects of the country; achieve a balance between population and resource use; and enhance the quality of the environment. • NEPA covers major federal projects and activities (e.g. construction of airports, highways, military complexes) as well as any private or state government project that impacts "federal" interests. • For examples, non-federal projects that are subject to NEPA are those that must receive Clean Water Act, Section 404 permits from the Army Corp of Engineers due to the potential impact (direct or indirect) of the project on a federal navigable waterway. • NEPA establishes the requirement that all federal agencies' funding or permitting decisions be made with full consideration of the impact of the project on the natural and human environment. • Environmental Assessments (EA's) and Environmental Impact Statements (EIS's), which are assessments of the likelihood of impacts from alternative design or scope of a project, are required from all federal agencies.	information about the project. • For projects covered by the Directive, it requires as systematic assessment of likely environmental impacts to ensure that project development decisions take into account potential environmental impacts and incorporate adequate measures to reduce or avoid (if possible) negative environmental impacts. • It only imposes procedural obligations rather than substantive standards.

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• The central element in the environmental review process is a thorough evaluation of alternatives to the project's scope or design, including a "no action" alternative. • Importantly, NEPA only imposes procedural obligations to ensure environmental impacts are considered, not substantive standards. • NEPA requires opportunities for public participation through means other than written communication, such as personal interviews or use of audio or video recording devices to capture oral comments at hearings. • The Act requires agencies to disclose the environmental impacts of a project to interested parties and the general public and that the federal agencies involved in reviewing the proposed project provide a detailed statement of reasons for any decision.	
Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq. • "Hazardous and toxic substances" are defined as those "chemicals" present in the workplace which are capable of causing harm. • The term "chemicals" includes dusts,	**Directive 96/82/EC on the control of major accident hazards involving dangerous substances (Seveso II Directive)** • The Directive applies to "establishments" where dangerous substances are present in specified

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mixtures, and common materials such as paints, fuels, and solvents. • OSHA currently regulates exposure to approximately 400 substances and imposes standards for training and practices in the general industry, shipyard employment, and the construction industry.	quantities. • However, certain types of establishments or activities are excluded (e.g. military establishment, mining, pipelines, waste landfills) where other legislation regulates the activities. • "Dangerous substances" are those specific substances, mixtures, or preparations listed in Annex I, Part I of the Directive (e.g. ammonium nitrate, chlorine, petroleum products,) and those that satisfy criteria listed in Annex I, Part II (e.g. toxicity, oxidizing, highly flammable), with a further distinction between "higher tier" and "lower tier" sites based on the nature of the substance and quantity. • The primary obligations imposed by the Directive relate to notification for both higher tier and lower tier sites, preparation and implementation of a major accident policy for lower tier sites, safety reports for upper tier sites, and emergency plans for upper tier sites • The Directive also requires Member States to consider to likelihood of major accidents and limiting their consequences when adopting land use policies and allows Member States to

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	prohibit an operator from conducting activities when the measures taken are deficient.

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Emergency Planning & Community Right to Know Act (EPCRA), 42 U.S.C. § 11001 et seq. • EPCRA was enacted by as a result of concern over the protection of the public from chemical emergencies and dangers such as the accidental release of methyl isocyanate in Bhopal, India facility. • The Act requires reporting of the chemical substances used by a facility or in their inventory that are deemed hazardous, with maintenance of Materials Safety Data Sheet mandated under the hazard communication regulations of the Occupational Safety and Health Administration. • The Act requires facilities to report emissions or environmental releases to EPA and the state where located on an annual basis, of specifically listed toxic chemicals that the facility manufactures, processes, uses, or otherwise handles in excess of specified threshold quantities • It establishes requirements for emergency planning and notification in the event of an unplanned release of hazardous substances. • The Act imposes restrictions on a	**Directive on public access to environmental information, Directive 2003/4/EC** • The Directive requires disclosure to the public of certain information in the possession of "any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment." • "Environmental information" is defined to include all information covering "the state of the elements of the environment", "substances, energy or noise, affecting elements of the environment", and "the state of human health and safety." • The Directive has been amended by regulation EC 166/2006 to require by operators of certain installations the disclosure of data on emissions, releases and transfers to specified pollutants, including major air pollutants, greenhouse gases included in the Kyoto Protocol, heavy metals, chlorinated organic compounds, and off-site transfer of waste.

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facility owner/operator's ability to make trade-secrecy claims or confidential business information claims in connection with reporting.. • EPCRA provides for civil, criminal, and administrative penalties associated with violations of the reporting requirements. • The Act also provides that EPA, the states, private citizens, and emergency planning and response personnel can initiate enforcement actions to compel compliance with EPCRA	
Sarbanes-Oxley Act (SOX), 15 U.S.C. and 18 U.S.C. various sections_ • SOX was enacted to require companies subject to Securities and Exchange Commission (SEC) reporting requirements to assess and disclose, in accordance with the Act, material environmental liabilities. • Specifically, SOX requires assessment, accounting and reporting of loss contingencies, such as site cleanup or remediation, including contingent environmental liabilities. • American Institute of Certified Public Accountants Statement of Position 96-1	**Fourth Council Directive 78/660/EEC as amended by, inter alia, Modernization Directive 2003/51/EC** • For covered companies, the Directives require disclosure of environmental information to the extent it is material to financial performance or the financial condition of the company. • They also impose obligations to include non-financial "key performance indicators relevant to the particular business in the analysis of their business development and performance in their annual reports", including environmental matters. • Member States may exempt small and

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provides guidance with respect to the recognition, measurement, display and disclosure of environmental liabilities, including benchmarks for making materiality determinations at various stages of investigation, assessment, and remediation of a site or other environmental liability. • The required assessments include materiality determinations with respect to a company's contingent liabilities, pre-allocation share of remediation costs at a joint site, determining diminished value or marketability of an impacted site, and assessing potential claims and penalties arising from a spill or industrial accident impacting the environment. • SOX increased the potential personal liability of corporate officers and directors for misleading disclosure by a company. • SOX imposes significant monetary and criminal penalties for violations of the reporting and disclosure requirement.	medium-sized companies from disclosing non-financial information. • This is an area where the governing regulations continue to be amended regularly to require greater disclosure and reporting obligations (e.g. Directive 2006/46/EC, Directive 204/34/EC).

Practice Recommendation: Just as every company with facilities or transactions in various states of the United States needs to have a program in place to ensure compliance with the each state's environmental laws governing operations in the state, every company having operations in any EU member country has to have a similar program in place. Moreover, in the area of environmental law, it appears that in the areas of climate change, electronic waste, and recycling, the policies of the European Union are serving as models for laws adopted by states in the United States. While the United States Congress remains relatively gridlocked preventing any major changes in federal environmental law, the EU has emerged as proactive in adopting directives that allow for more formal and enforceable environmental laws. As a result, it is essential to remain abreast of all proposed Directives and policies in the European Union.

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1037053.2 08/03/2012

