304 - Avoiding Horizontal Stripes: Keeping Your Company's Officers & Yourself Out of Jail

John DeGroote
Deputy General Counsel and Chief Litigation Counsel
Bearing Point, Inc.

Tom Hanusik
Crowell & Moring LLP

Seth Rodner
Vice President, Deputy General Counsel and Chief Compliance Officer
Medicis Pharmaceutical Corporation

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Faculty Biographies

John DeGroote

John DeGroote currently serves as deputy general counsel - legal risk management and chief litigation counsel at BearingPoint, Incorporated, a global management and technology consulting firm in Dallas, with over 17,000 employees doing business in more than 130 countries worldwide. As BearingPoint's chief litigation counsel, Mr. DeGroote has been responsible for the company's global litigation docket and litigation prevention strategies for over seven years. As one of 4 deputy general counsel, he is involved in management of the company's legal department as a whole. He is also responsible for the company's insurance portfolio and has managed BearingPoint's intellectual property protection strategies at various times.

Prior to joining BearingPoint, Mr. DeGroote practiced with McKool Smith, P.C., a Dallas-based trial firm. He also served as vice president and counsel at First USA, Inc., where he maintained responsibility for litigation and intellectual property issues, and as an associate in the Dallas office of Jackson Walker, L.L.P. He has served on the ACC's litigation section executive committee.

Mr. DeGroote graduated from Duke Law School and received his B.A. from Mississippi State University.

Tom Hanusik

Tom Hanusik is co-chair of Crowell & Moring's White Collar and Securities Litigation Group in Washington, D.C. At Crowell, Tom represents companies and individuals involved in investigations by the Department of Justice, Securities and Exchange Commission and Commodity Futures Trading Commission concerning allegations of financial fraud, securities fraud, commodities fraud, political corruption, health care fraud and improper payments under the Foreign Corrupt Practices Act.

Mr. Hanusik joined Crowell & Moring in January 2006 after almost 12 years at the Department of Justice and the Securities and Exchange Commission. Most recently, Tom was an Assistant Chief in the Justice Department's Criminal Division, Fraud Section, where he served previously as Senior Counsel for Securities Fraud and as a Trial Attorney. Prior to joining the Justice Department, Tom was Senior Counsel in the SEC's Division of Enforcement.

Mr. Hanusik is active in the American Bar Association, where he is a member of the White Collar Committee and the Criminal Justice Section and co-chairs the Securities and Commodities Fraud Subcommittee. He is a Barrister in the Edward Bennett Williams Inn of Court in Washington, DC.

Mr. Hanusik graduated cum laude from Fordham College and from Duke Law School.

Seth Rodner

Seth Rodner has a unique combination of government, private practice, and business experience, having served as a federal prosecutor, a litigation partner in a prominent corporate law firm, and currently the Chief Compliance Officer for Medicis Pharmaceutical Corporation, an NYSE-listed pharmaceutical and medical device company headquartered in Scottsdale, Arizona. At Medicis, he has enterprise-wide responsibility for regulatory compliance and government enforcement matters across all the company's therapeutic and aesthetics businesses.

Prior to joining Medicis, Mr. Rodner served as a criminal Trial Attorney with the U.S. Department of Justice in Washington, D.C., where he specialized in international cartel prosecutions, and a partner in a leading Florida law firm, where his nationwide practice defended a wide range of business crimes investigations, agency proceedings, and complex commercial litigation in multiple highly-regulated industries. A frequent author and speaker on white collar crime and corporate compliance, Mr. Rodner is the past-Chair of the Federal Bar Association's national Criminal Law Section, and has been named in multiple publications as a rising star in the legal profession.

Mr. Rodner was awarded the highest possible AV Peer Review Rating by Martindale-Hubbell for both legal ability and ethical standards, and earned his B.A. from Amherst College and J.D. from Duke University.

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TITLE 15 > CHAPTER 2B > § 78j–1

§ 78j–1. Audit requirements

(a) In general

Each audit required pursuant to this chapter of the financial statements of an issuer by a registered public accounting firm shall include, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—

(1) procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts;

(2) procedures designed to identify related party transactions that are material to the financial statements or otherwise require disclosure therein; and

(3) an evaluation of whether there is substantial doubt about the ability of the issuer to continue as a going concern during the ensuing fiscal year.

(b) Required response to audit discoveries

(1) Investigation and report to management

If, in the course of conducting an audit pursuant to this chapter to which subsection (a) of this section applies, the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—

(A)

(i) determine whether it is likely that an illegal act has occurred; and

(ii) if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer, including any contingent monetary effects, such as fines, penalties, and damages; and

(B) as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of such firm in the course of the audit, unless the illegal act is clearly inconsequential.

(2) Response to failure to take remedial action

If, after determining that the audit committee of the board of directors of the issuer, or the board of directors of the issuer in the absence of an audit committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of the firm in the course of the audit of such firm, the registered public accounting firm concludes that—

(A) the illegal act has a material effect on the financial statements of the issuer;

(B) the senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions with respect to the illegal act; and

(C) the failure to take remedial action is reasonably expected to warrant departure from a standard report of the auditor, when made, or warrant resignation from the audit engagement;

the registered public accounting firm shall, as soon as practicable, directly report its conclusions to the board of directors.

(3) Notice to Commission; response to failure to notify

An issuer whose board of directors receives a report under paragraph (2) shall inform the Commission by notice not later than 1 business day after the receipt of such report and shall furnish the registered public accounting firm making such report with a copy of the notice furnished to the Commission. If the registered public accounting firm fails to receive a copy of the notice before the expiration of the required 1-business-day period, the registered public accounting firm shall—

(A) resign from the engagement; or

(B) furnish to the Commission a copy of its report (or the documentation of any oral report given) not later than 1 business day following such failure to receive notice.

(4) Report after resignation

If a registered public accounting firm resigns from an engagement under paragraph (3)(A), the firm shall, not later than 1 business day following the failure by the issuer to notify the Commission under paragraph (3), furnish to the Commission a copy of the report of the firm (or the documentation of any oral report given).

(c) Auditor liability limitation

No registered public accounting firm shall be liable in a private action for any finding, conclusion, or statement expressed in a report made pursuant to paragraph (3) or (4) of subsection (b) of this section, including any rule promulgated pursuant thereto.

(d) Civil penalties in cease-and-desist proceedings

If the Commission finds, after notice and opportunity for hearing in a proceeding instituted pursuant to section 78u–3 of this title, that a registered public accounting firm has willfully violated paragraph (3) or (4) of subsection (b) of this section, the Commission may, in addition to entering an order under section 78u–3 of this title, impose a civil penalty against the registered public accounting firm and any other person that the Commission finds was a cause of such violation. The determination to impose a civil penalty and the amount of the penalty shall be governed by the standards set forth in section 78u–2 of this title.

(e) Preservation of existing authority

Except as provided in subsection (d) of this section, nothing in this section shall be held to limit or otherwise affect the authority of the Commission under this chapter.

(f) Definitions

As used in this section, the term "illegal act" means an act or omission that violates any law, or any rule or regulation having the force of law. As used in this section, the term "issuer" means an issuer (as defined in section 78c of this title), the securities of which are registered under section 78l of this title, or that is required to file reports pursuant to section 78o (d) of this title, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.

(g) Prohibited activities

Except as provided in subsection (h) of this section, it shall be unlawful for a registered public accounting firm (and any associated person of that firm, to the extent determined appropriate by the Commission) that performs for any issuer any audit required by this chapter or the rules of the Commission under this chapter or, beginning 180 days after the date of commencement of the operations of the Public Company Accounting Oversight Board established under section 7211 of this title (in this section referred to as the "Board"), the rules of the Board, to provide to that issuer, contemporaneously with the audit, any non-audit service, including—

(1) bookkeeping or other services related to the accounting records or financial statements of the audit client;

(2) financial information systems design and implementation;

(3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;

(4) actuarial services;

(5) internal audit outsourcing services;

(6) management functions or human resources;

(7) broker or dealer, investment adviser, or investment banking services;

(8) legal services and expert services unrelated to the audit; and

(9) any other service that the Board determines, by regulation, is impermissible.

(h) Preapproval required for non-audit services

A registered public accounting firm may engage in any non-audit service, including tax services, that is not described in any of paragraphs (1) through (9) of subsection (g) of this section for an audit client, only if the activity is approved in advance by the audit committee of the issuer, in accordance with subsection (i) of this section.

(i) Preapproval requirements

(1) In general

(A) Audit committee action

All auditing services (which may entail providing comfort letters in connection with securities underwritings or statutory audits required for insurance companies for purposes of State law) and non-audit services, other than as provided in subparagraph (B), provided to an issuer by the auditor of the issuer shall be preapproved by the audit committee of the issuer.

(B) De minimus 1 exception

The preapproval requirement under subparagraph (A) is waived with respect to the provision of non-audit services for an issuer, if—

(i) the aggregate amount of all such non-audit services provided to the issuer constitutes not more than 5 percent of the total amount of revenues paid by the issuer to its auditor during the fiscal year in which the nonaudit services are provided;

(ii) such services were not recognized by the issuer at the time of the engagement to be non-audit services; and

(iii) such services are promptly brought to the attention of the audit committee of the issuer and approved prior to the completion of the audit by the audit committee or by 1 or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.

(2) Disclosure to investors

Approval by an audit committee of an issuer under this subsection of a non-audit service to be performed by the auditor of the issuer shall be disclosed to investors in periodic reports required by section 78m (a) of this title.

(3) Delegation authority

The audit committee of an issuer may delegate to 1 or more designated members of the audit committee who are independent directors of the board of directors, the authority to grant preapprovals required by this subsection. The decisions of any member to whom authority is delegated under this paragraph to preapprove an activity under this subsection shall be presented to the full audit committee at each of its scheduled meetings.

(4) Approval of audit services for other purposes

In carrying out its duties under subsection (m)(2) of this section, if the audit committee of an issuer approves an audit service within the scope of the engagement of the auditor, such audit service shall be deemed to have been preapproved for purposes of this subsection.

(j) Audit partner rotation

It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the 5 previous fiscal years of that issuer.

(k) Reports to audit committees

Each registered public accounting firm that performs for any issuer any audit required by this chapter shall timely report to the audit committee of the issuer—

(1) all critical accounting policies and practices to be used;

(2) all alternative treatments of financial information within generally accepted accounting principles that have been discussed with management officials of the issuer, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and

(3) other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences.

(l) Conflicts of interest

It shall be unlawful for a registered public accounting firm to perform for an issuer any audit service required by this chapter, if a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit.

(m) Standards relating to audit committees

(1) Commission rules

(A) In general

Effective not later than 270 days after July 30, 2002, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6).

(B) Opportunity to cure defects

The rules of the Commission under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition under subparagraph (A), before the imposition of such prohibition.

(2) Responsibilities relating to registered public accounting firms

The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

(3) Independence

(A) In general

Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.

(B) Criteria

In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—

(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

(ii) be an affiliated person of the issuer or any subsidiary thereof.

(C) Exemption authority

The Commission may exempt from the requirements of subparagraph (B) a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

(4) Complaints

Each audit committee shall establish procedures for—

(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

(5) Authority to engage advisers

Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(6) Funding

Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation—

(A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and

(B) to any advisers employed by the audit committee under paragraph (5).

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[1] So in original. Probably should be "De minimis".

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MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Federal Prosecution of Business Organizations[1]

I. Duties of the Federal Prosecutor; Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating wrongdoing and bringing charges for criminal conduct, the Department plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate. In this respect, federal prosecutors and corporate leaders share a common goal. Directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which we do our job as prosecutors – the professionalism we demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation – impacts public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action.

[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

II. Charging a Corporation: General Principles

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (I) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated--at least in part--by an intent to benefit the corporation). In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Furthermore, in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 969-70 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999), the D.C. Circuit rejected a corporation's argument that it should not be held criminally liable for the actions of its vice-president since the vice-president's "scheme was designed to -- and did in fact -- defraud [the corporation], not benefit it." According to the court, the fact that the vice-president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president's job was to cultivate the corporation's relationship with the congressional candidate's brother, the Secretary of Agriculture. Therefore, the court held, the jury was entitled to conclude that the vice-president had acted with an intent, "however befuddled," to further the interests of his employer. *See also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; *quoting Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945)).

III. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq*. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target:

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

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section V, *infra)*;

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (see section VI, *infra*);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, *infra*);

5. the existence and adequacy of the corporation's pre-existing compliance program (see section VIII, *infra*);

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

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (see section X, *infra*);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions (see section XI, *infra)*.

B. Comment: In determining whether to charge a corporation, the foregoing factors must be considered. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

IV. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*,voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

V. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... 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. *See* USSG §8C2.5, comment. (n. 4).

VI. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a

corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.,* subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment.(n. 6).

VII. Charging a Corporation: The Value of Cooperation

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. Relevant considerations in determining whether a corporation has cooperated are set forth below.

1. Qualifying for Immunity, Amnesty or Pretrial Diversion

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

2. Waiving Attorney-Client and Work Product Protections[2]

The attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). As the Supreme Court has stated "its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The work product doctrine also serves similarly important interests.

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely

[2] The Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5(g). The reference to consideration of a corporation's waiver of attorney-client and work product protections in reducing a corporation's culpability score in Application Note 12, was deleted effective November 1, 2006. *See* USSG §8C2.5(g), comment. (n.12).

desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation.

Whether there is a legitimate need depends upon:

(1) the likelihood and degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to a corporation of a waiver.

If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I"). Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.

Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor's request to the United States Attorney for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category I information must be maintained in the files of the United States Attorney. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

A corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation.

Only if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product ("Category II"). This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.

This category of privileged information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.

Prosecutors are cautioned that Category II information should only be sought in rare circumstances.

Before requesting that a corporation waive the attorney-client or work product protections for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney's request for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category II information must be maintained in the files of the Deputy Attorney General. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision. Prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation.

Requests for Category II information requiring the approval of the Deputy Attorney General do not include:

(1) legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and

(2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

In these two instances, prosecutors should follow the authorization process established for requesting waiver for Category I information.

For federal prosecutors in litigating Divisions within Main Justice, waiver requests for Category I information must be submitted for approval to the Assistant Attorney General of the Division and waiver requests for Category II information must be submitted by the Assistant Attorney General for approval to the Deputy Attorney General. If the request is authorized, the Assistant Attorney General must communicate the request in writing to the corporation.

Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government. However, voluntary waivers must be reported to the United States Attorney or the Assistant Attorney General in the Division where the case originated. A record of these reports must be maintained in the files of that office.

3. Shielding Culpable Employees and Agents

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, *e.g.,* through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.[3] This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees.[4]

4. Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct intended to impede the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

5. Offering Cooperation: No Entitlement to Immunity

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VIII. Charging a Corporation: Corporate Compliance Programs

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

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[3] In extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny. *See discussion in* Brief of Appellant-United States, *United States v. Smith and Watson*, No. 06-3999-cr (2d Cir. Nov. 6, 2006). Where these circumstances exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions. Prosecutors should follow the authorization process established for waiver requests of Category II information (see section VII-2, *infra*).

[4] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, frequently arise in the course of an investigation. They may be necessary to assess other issues, such as conflict-of-interest. Such questions are appropriate and this guidance is not intended to prohibit such inquiry.

not adequately enforcing its program. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. *See United States v. Basic Construction Co*., 711 F.2d 570 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. According to the court, a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts; "even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." Similarly, in *United States v. Hilton Hotels Corp.,* 467 F.2d 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.[5] It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *See also United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.,* 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[6] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

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[5] Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

[6] For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG §8B2.1.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

IX. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

X. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (*e.g.,* publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

XI. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XII. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XIII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VIII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VII, *supra.*

This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Inside this Issue ...

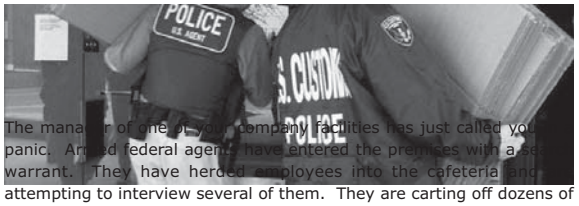
BUSINESS CRIMES

An Emergency Guide to

August 2004, Issue 15

Federal Search Warrants

SEARCH AND SEIZURE: What to do when federal agents arrive at a company facility with a search warrant. (See page 8 for an ***emergency checklist***.)



The manager of one of your company facilities has just called you in a panic. Armed federal agents have entered the premises with a search warrant. They have herded employees into the cafeteria and are attempting to interview several of them. They are carting off dozens of boxes of documents and copying files from computers. And they have threatened the manager with arrest and prosecution if he interferes. What should you do?

Search warrants are an established law enforcement tool that is increasingly being used in federal investigations of white collar offenses. Search warrants usually involve surprise, the use or potential use of force, and the unavailability of defense attorneys knowledgeable about the rights of companies and individuals who find themselves confronted by federal agents brandishing a warrant. No company is immune from such an experience, particularly in light of the ever-expanding reach of federal criminal laws and the increasing aggressiveness of federal law enforcement agencies in white collar cases.

The following guide is designed to assist counsel who find themselves in such a situation. An emergency checklist is included at the end of this article.

For more information, please contact:

Richard Beizer

Stephen Byers

Brian Elmer

David O'Brien

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The Basics Of Federal Search Warrants

A federal search warrant must be issued:

- By a federal magistrate judge;
- Within the federal district where the property to be seized is located at the time the warrant is issued;
- At the request of a federal law enforcement officer or attorney for the government;
- Upon affidavit or sworn oral statement establishing probable cause to believe that a crime has been committed and the evidence of that crime is located at the place specified in the warrant.[1]

The warrant must identify with particularity:

- The place to be searched;
- The property to be seized.[2]

The warrant permits a law enforcement officer to search for and seize property:

- That constitutes evidence of the commission of a crime, contraband, or property that has been or may be used to commit a crime;[3]
- Within a specified period not to exceed 10 days from the date of issuance;[4]
- During the daytime (i.e., 6:00 a.m. to 10:00 p.m. local time), unless specifically authorized for nighttime search;[5]
- With force, including breaking into the facility, internal areas of the facility, and anything within the facility, e.g., safe, filing cabinet, desk drawers, after giving notice of authority and purpose and being refused admittance (if someone is present).[6]

What To Do ... And What Not To Do

Listed below are the common steps that should, and should not, be taken when dealing with the execution of a search warrant. These items are listed roughly in order of priority and are summarized in an emergency checklist at the end of this article.

- Do not attempt to prevent the search from taking place or obstruct the agents executing the warrant. Employees should be instructed likewise. Such actions can result in criminal sanctions.[7] In addition, agents executing a search warrant are authorized to use force.[8]
- Identify and meet with the lead agent as soon as possible. It is also helpful to obtain the business cards, or at least the names and affiliations, of the agents involved in the search, as well as the name of and contact information for the Assistant United States Attorney responsible for execution of the warrant.[9] You may ask the lead agent for information concerning the status of the company (e.g., target or subject of the investigation, or neither) and the nature of the allegations being investigated. They will rarely provide such information, but it usually does not hurt to ask. You should also ask whether any employees have been or are being interviewed, and request to be present at any such interviews.
- Ask for a copy of the warrant and review it carefully. You are entitled to a copy.[10] The agents will typically provide a copy of the warrant at the time of entry. Review it as soon as possible to ensure that the search is properly authorized and limited to the area described and the items specified in the warrant.[11] The Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the . . . things to be seized." General searches that result in "exploratory rummaging" are prohibited; however, agents generally will be allowed more flexibility by the courts in complex cases where the items to be seized are difficult to describe.[12] Do not obstruct the agents if you feel the search is outside the scope of the warrant. Instead, make the agents aware of your concerns and document your objections. In extreme circumstances, you may wish to contact the Assistant United States Attorney in charge of the investigation or even the magistrate judge who issued the warrant.
- Determine whether agents are detaining employees. Persons in the area to be searched can generally be temporarily detained and searched before leaving the area only if the agents have an "articulable and individualized" suspicion of wrongdoing by those persons. However, under the

1 *See* Fed. R. Crim. P. 41(b) & (d). Rule 41 also allows state judges to issue warrants if a federal magistrate judge is not reasonably available. Fed. R. Crim. P. 41(b)(1). In terrorism investigations, a warrant may be issued by any magistrate judge regardless of whether the person or property sought is located in the same judicial district, as long as activities related to the terrorism occurred within the magistrate's district. Fed. R. Crim. P. 41(b)(3).

2 Fed. R. Crim. P. 41(e)(2); U.S. Const. amend IV. The Fourth Amendment extends to both individuals and corporations. *See See v. Seattle*, 387 U.S. 541, 545-46 (1967).

3 Fed. R. Crim. P. 41(c).

4 Fed. R. Crim. P. 41(e)(2)(A).

5 Fed. R. Crim. P. 41(e)(2)(B) & (a)(2)(B).

6 *See* 18 U.S.C. § 3109. Generally, agents must follow this "knock and announce" rule at the outset of the search. *See Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). However, the "knock and announce" rule need not be followed when agents have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

In addition, the government may obtain "sneak and peak" or "surreptitious" search warrants, which allow searches without notification to anyone at the time of the search. The circumstances under which such warrants may be obtained were significantly expanded by legislation passed in the wake of September 11th. *See* USA PATRIOT Act § 213 (amending 18 U.S.C. § 3103a). However, notification must follow within a reasonable time period, and at least two circuits have limited this period to seven days, "'except upon a strong showing of necessity.'" *United States v. Pangurn*, 983 F.2d 449, 453-454 (2d Cir. 1993) (quoting *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986)).

7 *See* 18 U.S.C. §§ 1501 ("Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States . . . in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States . . . shall . . . be fined under this title or imprisoned not more than one year, or both."), 1509, 1512, 2231 ("Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined under this title or imprisoned not more than three years or both . . ."), 2233 ("Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained or seized . . . shall be fined under this title or imprisoned not more than two years, or both.").

8 However, a search warrant cannot be executed with "unnecessary severity." 18 U.S.C. § 2234.

9 Government attorneys typically do not accompany the agents in order to avoid the possibility of becoming witnesses concerning the manner in which the search is conducted. However, they will usually be available by phone.

10 "The officer executing the warrant must . . . give a copy of the warrant . . . to the person from whom, or from whose premises, the property was taken . . ." Fed. R. Crim. P. 41(f)(3).

11 The affidavit or other sworn statement underlying the warrant will typically be sealed and not available to counsel. Most courts have held that there is no automatic right to unseal the affidavit. *See In re Eyecare Physicians of America*, 100 F.3d 514, 516-517 (7th Cir. 1996). *But see In re Search of Wag-Aero, Inc.*, 796 F. Supp. 394, 395 (E.D. Wis. 1992) (court set aside an order to seal where defendant's interests in due process outweighed potential harm to the government's case).

12 *See United States v. Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982).

pretense of securing the premises, agents may attempt to confine personnel to certain areas, to limit use of the telephone, and to pat down individuals and search their personal effects. Asking agents whether individuals are under arrest will usually prompt them to desist from unreasonable attempts to restrict movement or use of the telephone.

- Advise employees of their rights. It is common for agents to attempt to question employees, including meeting with them individually in a commandeered office. It is important, therefore, that all employees understand their rights. Be very careful not to give any advice to employees that could be construed as an instruction not to cooperate with the agents. Such actions can lead to charges of criminal obstruction.[13] It is generally permissible, however, to advise employees that (1) they are not required by law to answer agents' questions and whether to do so is entirely up to them; (2) if they do so they (a) must tell the truth and could be subject to criminal prosecution for any false statements, and (b) can set any conditions they choose, such as having company counsel present for any questioning. You should not suggest that a decision to speak with agents will be viewed unfavorably by the company.[14]
- Do not remove or destroy documents to prevent their seizure. This may seem obvious, but it is advisable to remind employees that removing, destroying or deleting documents is strictly prohibited and could lead to criminal prosecution. Similarly, if you know that a search warrant has been issued, or is likely to be issued, it is a crime to notify anyone for the purpose of preventing an effective search and seizure.[15]
- Consider sending employees home. Because the search is likely to substantially disrupt work, it may be best to send non-essential personnel in affected areas of the facility home for the day. This will also minimize the agents' ability to interview employees.
- Do not consent or otherwise give your permission to search any area or seize any property. In the event of any question concerning the warrant's coverage, or if the agents believe that a broader search is necessary, they may seek your permission. Don't give it. Be very clear that you will not consent to a warrantless search. After you refuse permission, the agents may seek advice from an Assistant United States Attorney or an oral expansion of the warrant from the issuing magistrate.
- Do not volunteer substantive information. A search warrant does not require making any statements or giving any substantive information to the agents. You are not required to show them the location of documents or other property, describe property, or otherwise assist in the search.

13 *See* 18 U.S.C. § 1512(b).

14 If the agents are particularly aggressive in seeking to question employees, it may be necessary to undertake individual representation of particular employees for the limited purpose of questioning during the search. However, the rules of professional conduct generally require a careful explanation to the employee of possible future conflicts between the interests of the employee and the company before undertaking such a representation. *See* Model Rules of Prof'l Conduct R. 1.7 (2003). Once such a representation is established, it is permissible to advise the employee whether or not speaking with the agents is in their individual best interests.

15 *See* 18 U.S.C. § 2232.

However, good judgment suggests that assistance be provided when the answer is obvious (e.g., "Is this Mr. Doe's office?" – where it is and there is a sign on the door identifying it as such) or to prevent unnecessary disruption by the agents in reaching their objective (e.g., directing them to Ms. Roe's office when there are ten offices with no nameplates).

- Object to seizure of privileged documents. If the agents insist on seizing legally privileged documents despite your objections, immediately contact the responsible Assistant United States Attorney. If the seizure goes forward, propose that you gather the documents under the agents' supervision and seal them so that they cannot be opened without breaking the seal.[16] In this manner, you can prevent government review of privileged documents until the matter is litigated or otherwise resolved. Alternatively, if privileged documents are seized by the agents, counsel should prepare the most detailed inventory possible under the circumstances and promptly file a written request with the AUSA and the judicial officer who issued the warrant that those documents be placed under seal.[17]
- Make a record of events as they unfold. It is crucial to make such a record to support a possible challenge to the legality of the search, to aid in negotiation for return of materials, and generally to collect information concerning the scope and nature of the investigation. A pocket-sized tape recorder is often the best means to record extemporaneous notes. (E.g., "It is 9:25 a.m. FBI Special Agent Brute Force has just advised me that he has spoken by phone with AUSA Frank Flunky who agreed with him that the computer room was a proper area to search.") Making a video tape is another option, although this may unnecessarily antagonize some agents. Depending on the number of agents involved, additional attorneys and/or paralegals may be required to properly monitor the agents' activities; a single attorney dealing with a search conducted by a dozen or more agents may quickly become overwhelmed.
- Ask to be present when the agents make an inventory of the property to be seized. You are entitled to be present and to a receipt for the property before the agents leave.[18] Typically, the agents will provide you with a copy of their inventory as the "receipt." If they refuse, you are entitled to obtain a copy of the inventory from the issuing court.[19]
- Make your own inventory of the seized property, including photographs. Agents' "inventories" can be notoriously sparse and unhelpful. The most expeditious method often is to use a pocket-sized tape recorder to dictate your notes.

16 Reasonable prosecutors will usually consent to such arrangements because they do not want their cases tainted by exposure to privileged materials. In addition, the DOJ Manual states that "a search warrant should normally not be used to obtain [attorney-client privileged or attorney work product] materials." *Department of Justice Manual* § 9-19.220 (2000 Supplement).

17 A government-designated "privilege team" (sometimes referred to as a "taint team") consisting of agents and lawyers not involved in the investigation may accompany the agents executing the warrant. The privilege team, which can also be located off-site, may advise the agents during the course of the search in order to avoid any compromise of privileged material, but will not participate in the search. *Department of Justice Manual* § 9-13.420(E) (2000 Supplement).

18 "An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. . . . [and] must . . . give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken . . . ." Fed. R. Crim. P. 41(f)(2) & (f)(3).

19 "The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken . . . ." Fed. R. Crim. P. 41(f)(4).

- Ask for copies of seized computer files. Computer searches are generally executed in one of four ways: (1) printing hard copies of files on-site; (2) making electronic copies of files on-site; (3) creating "a duplicate electronic copy of the entire storage device on-site, and then later recreat[ing] a working copy of the storage device off-site for review;"[20] or (4) seizing the computer hardware and reviewing it off-site.[21] The method utilized will usually depend upon the role of the hardware in the alleged offense. There is no requirement that agents provide you with electronic copies of seized computer files, but it generally doesn't hurt to ask.
- Ask for split samples when agents seize samples, such as in environmental investigations. If a split sample is refused, take your own parallel sample.
- Advise the lead agent of any classified documents that are seized. Classified documents are not exempt from search and seizure, but the agent in charge of the search should be advised of the status of such documents if the company has an obligation to protect classified information.[22] If classified documents are seized, the agency with jurisdiction over the information should be notified immediately.
- Interview individuals whose offices were searched or who interacted with the agents as soon as possible in order to prepare a precise and complete record of what transpired. It is particularly important to determine the questions asked by the agents and the answers given, and to identify any documents shown to employees in the course of questioning.
- Be prepared for publicity. Unlike a grand jury subpoena, the issuance of a search warrant is public. It is not unusual for agents to provide the news media with advance notice of the execution of a warrant. Indeed, the news media, including television remote units, may arrive before the agents. Consider preparing a brief press statement and designating a press contact.
- Commence an internal investigation as soon as possible. A search warrant almost always means that the company itself is the target of an investigation and that the government has probable cause to believe that it will find evidence of a crime on the premises. Counsel should expeditiously commence an investigation to determine what conduct is at issue and assess the company's potential exposure.

20 Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (July 2002) (available at http://www.cybercrime.gov/searchmanual.htm).

21 Searches of seized computer hardware often takes months, although some courts are mandating shorter and more reasonable search periods. *Id.*

22 *See* Department of Defense, *National Industrial Security Program Operating Manual* ¶ 5-510 (as amended in 2001) ("Contractors shall not disclose classified information to federal or state courts, or to attorneys hired solely to represent the contractor in a criminal or civil case, except in accordance with the special instructions of the agency that has jurisdiction over the information.").

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Warrantless Searches

In limited circumstances, a search may be conducted without a warrant. Examples include searches:

- Incidental to a lawful custodial arrest;[23]
- With the consent of the occupant of the premises;[24]
- At international borders;[25]
- In exigent circumstances, such as where necessary to prevent the destruction of relevant evidence.[26]

Moreover, evidence may be seized without a warrant when in plain view of agents who are lawfully on the premises.[27]

Precautions

No law-abiding company expects to be the subject of an unannounced search by armed federal agents. Nonetheless, any company that may come under federal investigation, particularly those in heavily-regulated industries, should be prepared for the worst. Advisable steps include:

- Clearly marking privileged documents and maintaining them separately from non-privileged material;
- Maintaining copies of essential business records (including records stored on personal computers) off premises;
- Ensuring that at least one lawyer at each facility has been trained in proper response to a search warrant. Management at facilities where there is no lawyer should know whom to call in the event of a search;
- Identifying outside counsel experienced in criminal law, preferably within a reasonable distance from company facilities; and
- Developing a plan for closing the facility in case of such an emergency.

Post-Search Remedies

Motion for Return. Seized property will be held in the custody of the investigating agency and ordinarily will not be returned until the government has no further use for it. However, Rule 41 provides that "[a] person aggrieved by an unlawful search and seizure of property *or* by the deprivation of property may move for the property's return."[28] The motion for return "must be filed in the district where the property was seized."[29] Such efforts rarely succeed when the search was lawful. However, the threat of a motion for return may prompt a prosecutor to accommodate counsel's request for access to or copies of certain materials, particularly where they are necessary for the continued day-to-day operation of the business.

23 *New York v. Belton*, 435 U.S. 454, 457 (1981) (lawful custodial arrest "justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area").

24 18 U.S.C. § 2236. Consent must be voluntary and can be garnered from a third party "who possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Jenkins*, 46 F.3d 447, 451, 454 (5th Cir. 1995). Courts have validated searches performed through consent of employees, in which case the relevant issue is whether the employee has joint access to or control over the property to be searched. *See Jenkins*, 46 F. 3d at 455; *United States v. Murphy*, 506 F.2d 529, 530 (9th Cir. 1974); *United States v. Longo*, 70 F. Supp.2d 225, 256 (W.D.N.Y. 1999); *United States v. Buitrago Pelaez*, 961 F. Supp. 64, 68 (S.D.N.Y. 1997).

25 *United States v. Roberts*, 274 F.3d 1007, 1011 (5th Cir. 2001).

26 *United States v. Alfonso*, 759 F.2d 728, 742 (9th Cir. 1985).

27 *See Horton v. California*, 496 U.S. 128, 136-137 (1990) (warrantless seizure justified where seizing officer "d[oes] not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed," "the incriminating character" of item is "immediately apparent," and officer "h[as] a lawful right of access to the object itself") (internal citations omitted).

28 Fed. R. Crim. P. 41(g) (emphasis added).

29 *Id.*

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Motion to Suppress. Consider these questions in determining whether evidence was collected via an illegal search and seizure and, therefore, must be suppressed (or returned, if the motion is made pre-indictment):

- Was there probable cause to believe that an offense had been committed?
- Was there probable cause to believe that evidence related to that offense would be found on the premises searched?
- Were all the areas searched and the items seized described with particularity in the warrant?
- Was the information supporting the showing of probable cause sufficiently current to justify a belief that the materials would be found on the premises at the time the search was performed?
- Is there any basis for asserting that the affiant supporting the warrant deliberately provided false information or exhibited a reckless disregard for the truth?
- Did the agents exceed the scope of their authority, e.g., did they conduct a general search by rummaging at large through materials on the premises?

The contents of this newsletter are not intended to serve as legal advice in individual situations. Counsel should be consulted for legal advice and planning.

Emergency Checklist

The items in this checklist are explained in more detail above.

Do's

- ☐ Identify and meet with the lead agent.
- ☐ Ask for a copy of the warrant and review it carefully.
- ☐ Determine whether agents are detaining employees.
- ☐ Advise employees of their rights.
- ☐ Consider sending employees home.
- ☐ Object to the seizure of privileged documents.
- ☐ Make a record of events as they unfold.
- ☐ Ask to be present when agents make an inventory of seized materials.
- ☐ Make your own inventory of seized materials.
- ☐ Ask for copies of seized computer files.
- ☐ Ask for split samples.
- ☐ Advise the lead agent of any classified documents that are seized.
- ☐ Interview individuals whose offices were searched or whom agents interviewed.
- ☐ Be prepared for publicity.
- ☐ Commence an internal investigation.

Don't's

- ☐ Do not interfere with the search.
- ☐ Do not allow anyone to hide or destroy documents.
- ☐ Do not consent to the search of any area or seizure of any materials.
- ☐ Do not volunteer information.

UNDERTAKING OF [NAME]

I, [NAME], declare that I have retained the law firm of [FIRM NAME] as counsel to represent me in connection with the [MATTER NAME] and any related proceedings or litigations. I understand that [COMPANY NAME] has agreed to advance the expenses (including attorneys' fees) actually and reasonably incurred by me in connection with the [MATTER] and any related proceedings or litigations, provided that I deliver to [COMPANY NAME] an undertaking to repay all amounts so advanced if it shall be determined that, in connection with the matters being [INVESTIGATED/REVIEWED/LITIGATED], I did not [INSERT APPLICABLE STANDARD FROM CORPORATE DOCUMENT (SUCH AS BYLAWS) OR FROM EMPLOYMENT AGREEMENT]. Accordingly, I hereby undertake to repay to [COMPANY NAME] all amounts advanced by [COMPANY NAME] in payment of the expenses (including attorneys fees) incurred by me in connection with the referenced [INVESTIGATION/REVIEW/LITIGATION] and any related proceedings or litigations, if it shall be determined that, in connection with the matters being [INVESTIGATED/REVIEWED/LITIGATED], I did not [INSERT APPLICABLE STANDARD FROM CORPORATE DOCUMENT (SUCH AS BYLAWS) OR FROM EMPLOYMENT AGREEMENT] .

Executed this ____ day of _____, _____.

By: _____
[NAME]

Session 304
Avoiding Horizontal Stripes: Keeping Your Company's Officers and Yourself Out of Jail

John DeGroote
Deputy General Counsel
BearingPoint, Inc.

Tom Hanusik
Partner
Crowell & Moring LLP

Seth Rodner
Vice President and Chief Compliance Officer
Medicis Pharmaceutical Corp

…. and a problem arises with potential criminal implications

From any source:

- A Rumor
- An Ethics Hotline Call
- A "Voluntary" Solicitation from the Gov't
- A Subpoena
- A Search Warrant

WHAT NEXT?

Guiding Principles

- First, Do No Harm
  - -- Preserve the Status Quo
  - -- Avoid any Claim of Bias
- Assume:
  - -- There Is No Privilege
  - -- You Will Be Cooperating with the Government
- Never Forget Who Your Client Is
  - -- And Who Isn't
  - -- ABA Model Rules 1.7, 1.13, 4.3

Guiding Principles

-
  - Objectives:
    - -- Independence
    - -- Candor
    - -- Speed

The First Hour -- Critical Decisions

- Can Forever Preclude:
  - -- Credibility
  - -- Perception of Independence
- How You Secure Documents
- Who You Involve
- How You Conduct Your Investigation
- What You Say

The First Hour – Document Preservation

- Memo
  - -- To Executives
  - -- To Employees Known to Be Involved
  - -- Broader Is Better
  - -- Reminder that "Documents" Include Various Media
    - + Company Email
    - + Personal Email, Flash Drives, IMs, Cell Phones

The First Hour – Document Preservation

18 USC 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy. Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

The First Hour -- Who Do You Involve First?

- Avoid any Appearance of Bias
- CEO and/or Board Members Clearly Not Involved
- Report Exact Allegations and Proposed Next Steps:
  - -- A Credible Investigation
  - -- An Independent Review if Merited
- Remember, there May Be No Privilege

The First Hour -- The Investigation

- Who Conducts?
  - -- Independent Investigations Come from Independent Counsel
- Who Is Involved?
- Who Controls?
- What Is the Scope?
- What Are the Boundaries?
- What Are the Rules?

The First Hour -- More Important Issues

- Should We Cooperate?
  - -- Expected
- Discussions with Prosecutors
  - -- Articulate Interests
  - -- Define Expectations
  - -- Write it Down
- Whistleblower Protection

The Second Hour -- Maintain Credibility from Every Angle

- Auditor Discussions
- Disclosure?
  - -- "Anything you say can and will . . .."
  - -- Any impact on guidance
- Reserve?
- Notice to Carriers

The Second Hour -- Maintain Credibility from Every Angle (cont'd)

- Pay Attention to Extraordinary Payments to Those Involved:
  - -- CEO/CFO Bonuses
  - -- Stock Trading
  - -- Severance Payments
  - -- Other Payments
- Employment Actions
- Additional Document Retention Notices?
- Counsel for D's, O's, and E's

So You Want to Cooperate? It's All or Nothing

What Does Cooperation Look Like?

- The End Product:
  - -- Candid Discussion plus
  - -- Annotated Binders
    - + What Happened?
    - + Why Did It Happen?
    - + How Did It Happen?
    - + Who Did It?
    - + Evidence to Support All of the Above

So You Want to Cooperate? It's All or Nothing (cont'd)

- Cooperating along the Way
  - -- Regular Updates
    - + Frank Discussions on Merits
    - + Frequent, Candid Discussions of Process
      - ++ Progress to Date
      - ++ Indemnification/Fee Advancement
      - ++ Joint Defense

Who Wants a Lawyer?
Who Needs a Lawyer?
Who Gets a Lawyer?

-- an Ethics Minefield

Who Wants a Lawyer?
Who Needs a Lawyer?
Who gets a Lawyer?

Miscellaneous Thoughts

- Undertakings
  - -- Impact on Credibility
  - -- May Be Required
- "Reasonable and Necessary"
  - -- What are the Limits?
  - -- Does this Impact Choice of Counsel?
  - -- Are Advance Restrictions OK?

Who Wants a Lawyer?
Who Needs a Lawyer?
Who gets a Lawyer?

Selecting Counsel

- One Lawyer/Many Clients?
- Conflicts
  - -- ABA Model Rule 1.7
- Sharing
  - -- Documents/MOIs/ Internal Investigation Report
- Who Would You Hire This Afternoon?
  - -- Think About This Before the Subpoena Arrives
  - -- Not For Your Everyday Litigator

Self-reporting – What Is It?

- Conduct You find
- Considerations:
  - -- Seriousness of Problem
  - -- Pervasiveness
  - -- Weight of Evidence
  - -- Inevitability/Risk
  - -- Victims

The Privilege – Is It Really Gone?

- DOJ's McNulty Memo
- Confidentiality Agreements
- Limited/Selective Waiver
- Disclosure to Third Parties
  - -- Auditors
  - -- Bankers/Investors

Parallel Proceedings

- Pressures Created by Civil Investigations
  - -- Adverse Inferences
  - -- Regulatory Obligations
  - -- Coordination by Civil/Criminal Authorities

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ATTORNEY WORK PRODUCT

SAMPLE DOCUMENT PRESERVATION MEMO

To: Attached List

From: CEO

Re: Document Preservation

Date: ASAP

THIS MEMO CONTAINS IMPORTANT INFORMATION REGARDING THE PRESERVATION OF CERTAIN DOCUMENTS. PLEASE READ IT CAREFULLY IN ITS ENTIRETY. IT DOES NOT AT THIS TIME REQUIRE YOU TO PROVIDE ANY DOCUMENTS, BUT YOU MUST BE CERTAIN THAT THEY ARE PRESERVED AND MAINTAINED.

As you may know, the Company [is conducting an internal investigation; has received an informal document request from an authority; has been subpoenaed; is involved in litigation]. We must avoid any appearance that anyone associated with the Company has destroyed or altered any documents that may be relevant to this matter – even as part of routine document retention policies. It is therefore essential that we preserve all paper and electronic documents that fall within the categories listed below until further notice. The term "documents" is defined very broadly; please see Attachment A to this memorandum for the definition.

Effective immediately, you and your staff must maintain and preserve all documents and files, including all electronic data, currently existing or created from this point forward, concerning the following matters. The fact that an individual or department or company is mentioned below does not imply that the person or entity named is suspected of wrongdoing, but simply that that person or entity may have information regarding relevant events. Please keep this request confidential at all times.

These documents and files must be maintained and preserved until further written notice from the legal department.

DOCUMENTS TO BE MAINTAINED:

A. [descriptions of all categories of documents that may be relevant to the matter]

Please ensure that no electronic or hard copies of documents related to the aforementioned matters – whether they are located in an office, on electronic media, in a private residence, at a remote storage facility, or anywhere else, and whether they are drafts, notes or final documents – are discarded, altered or destroyed. In addition, all scheduled file destruction or deletion procedures for these documents must be suspended until further notice.

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If you have any potentially relevant documents, files, or materials within your possession or control, it is important that you ensure that they are maintained and preserved (without alteration) until further notice from the legal department. Additionally, to the extent that any potentially relevant documents are created from this point forward, they, too, should be preserved (without alteration) until further notice from the legal department.

If you have any questions concerning this matter, please contact xxxxxxxxxxxx, Associate General Counsel XXX-XXX-XXXX.

Please keep this request confidential at all times.

Thank you for your prompt attention to this matter.

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Attachment A

GENERAL INSTRUCTIONS

When identifying documents, the term "document" must be interpreted broadly. It includes all documents in your possession or within your control. Anything that is written or recorded in any form is considered a "document," even if it is only a handwritten note, diary entry, draft or e-mail. **Electronic documents and files must be preserved and should not be altered, deleted, or erased. If you must work with an electronic file that should be preserved, you must make a new version before making any changes.**

All versions of a responsive document must be retained, including all drafts and not just the most recent, or final, version. Multiple identical copies of the same document in your possession – for example, if you have multiple copies of an agreement in your office – need not be preserved. If a second copy of a document contains handwritten notations, however, it is not considered identical and both copies must be preserved. If you only have one copy of a document but believe that others have identical copies, you must still preserve it. As noted above, the term "document" includes materials and data that are stored in computer files, including electronic mail and metadata.

It is crucial that you carefully retain and preserve these documents whether in hard copy or electronic format. No documents relating to this request should be deleted, destroyed, or discarded.

In addition, you must keep the documents in the order and format in which you keep them in the ordinary course of business without altering them in any way. Do not organize them in a different manner or put them in binders. Also, be sure not to make any new notations on the documents, even if you think the notations will be helpful.

Please also collect and preserve any relevant documents over which you have control that may not be located in your office. For example, you must retain documents from central office files, off-site storage, files that your assistant maintains for you, and any relevant documents that you have in a home office or anywhere else outside the office.

Please also identify whether there are relevant electronic documents, voice mails and e-mails stored on company servers, company systems, company hard drives, floppy disks, CD-ROMs, flash or jump drives, and other portable media, in your current email files and in any archived email files you may have, as well as any business documents, voice mails or e-mails stored on home or other off-site computers or other electronic equipment.

As a final note, if you have any doubt about whether a document is relevant or falls within these guidelines, the document should be preserved.