211:The Care & Feeding of the Board & Board Committees After S-OX

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Faculty Biographies

Katherine K. Combs

Katherine K. Combs is vice president, corporate secretary, and deputy general counsel of Exelon Corporation, which was formed by the merger of PECO Energy Company of Philadelphia and Unicom Corporation. Before the merger, Ms. Combs was deputy general counsel and corporate secretary of PECO Energy Company.

She has also served as in-house regulatory counsel for Bell Telephone Company of Pennsylvania (now Bell Atlantic), and as an associate with the law firm of Pepper, Hamilton & Scheetz in Philadelphia.

Ms. Combs serves as chair of the corporate practices committee of the American Society of Corporate Secretaries and is an ex officio member of its board of directors. She also serves on its Enron task force. She is a former member of the board of directors of the Delaware Valley Corporate Counsel Association ("DELVACCA"), the former chair of the public utility law section of the Pennsylvania Bar Association ("PBA"), a former member of the PBA house of delegates, and of the PBA in-house counsel committee.

Ms. Combs received a BA from Northwestern University and a JD from the West Virginia University College of Law.

Mark D. Michael

Mark D. Michael currently serves as the senior vice president, general counsel and secretary of 3Com Corporation in Santa Clara, California, which he joined in 1984. He leads a group responsible for the worldwide legal affairs of 3Com, together with intellectual property strategies, and corporate safety, environmental, health and security. Mr. Michael also serves as a director of Nollenberger Capital Partners, a financial services firm in San Francisco.

Prior to joining 3Com, Mr. Michael practiced law with firms in Honolulu, Hawaii and San Francisco, California.

His affiliations include membership and service as a past director and member of the Corporate Practices Committee of the American Society of Corporate Secretaries, and past co-chair of the Silicon Valley Association of General Counsel.

Mr. Michael received a BA from Stanford University and a JD from the University of California at Los Angeles School of Law.

Roderick A. Palmore

Roderick A. Palmore is senior vice president, general counsel, and secretary of Sara Lee Corporation. He joined Sara Lee as deputy general counsel and shortly thereafter was made a vice president.

Mr. Palmore previously was a partner with Sonnenschein, Nath & Rosenthal in Chicago. Prior to that position, he was a partner with Wildman, Harrold, Allen & Dixon. His prior experience includes work as an assistant United States attorney in the Northern District of Illinois.

Mr. Palmore was recently elected to the board of directors of Nuveen Investments, Inc. He also is a member of the board of directors of the Chicago Board Options Exchange, for which he is a member of the audit committee. He serves on the boards of ACCA and the Boys and Girls Clubs of Chicago. He is a member of the visiting committee of the University of Chicago Law School. He has served on the board of directors of the Chicago Bar Foundation, the Legal Assistance Foundation of Chicago, the Public Interest Law Initiative, and Centers for New Horizons. He has also served on the Chicago Bar Association's board of managers and nominating committee. Mr. Palmore is chair of the Public Arts Advisory Commission of Oak Park, Illinois, and former chair of the Plan Commission in Oak Park.

Mr. Palmore attended Yale University, where he received a BA. At Yale, he received the following honors: National Achievement Scholar, Kenneth MacLeish Scholar, and Yale Alumni Association of Pittsburgh Scholar. He received a JD from the University of Chicago Law School.

Margaret Maxwell Zagel

Margaret Maxwell Zagel is president of Fortune Industries, a legal and business consulting company. She had recently joined Altheimer & Gray as leader of the corporate governance, risk, and crisis management group. She specializes in advising executives and boards on governance issues, business, financial, legal, and regulatory risk, regulatory investigations, complex litigation, and ADR. She has special expertise in financial, accounting, and auditing matters.

Ms. Zagel was previously a partner in a Chicago law firm, leaving private practice to become one of the first women general counsel for a major American company at Grant Thornton, LLP, an international accounting firm. She then joined Tellabs Inc. as general counsel. Subsequently, she joined Organic, Inc., an internet company in San Francisco, as chief legal and administrative officer, to lead the company's IPO and subsequent successful sale.

Among many activities, she has served as an advisory committee member and faculty for the Corporate Counsel Institute and the Garrett Securities Institute for Northwestern University Law School. She is a member of the ABA, the National Association of Corporate Directors, and the Economic Club of Chicago. She is a former member of ACCA and active in ADR, having served as an AAA arbitrator and a neutral for the CPR Institute for Dispute Resolution. Currently, she sits on the board of directors, audit, and governance committees of Atrion Corp., a publicly traded medical device manufacturer. She is a frequent speaker on legal and business issues.

Ms. Zagel received her BA from Tulane University and her law degree from the University of Illinois College of Law.

Audit Committee Roles after Sarbanes

Margaret Maxwell Zagel
Fortune Industries, Inc

Best Practices for Audit Committee Meetings

The chairperson should preside over all meetings of the audit committee and all members should actively participate in the committee's deliberations. The members of the audit committee should be afforded the protection of the business judgment rule absent conflict of interest or lack of due care. Process is important in maintaining that protection. Appropriate care and diligence is critical. Members should not permit themselves to be rushed or forced to act without all information reasonably available. Ultimately the member's primary responsibility is to make decisions in good faith and in the best interests of the corporation.

The Committee Should Act as a Committee

- The committee should adhere to procedures established for the committee specifically and for the board more generally.
- The audit committee should comply with the requirements of the committee charter.
- The committee should establish its own agendas and agendas should be established and circulated at a date reasonably in advance of each meeting.
- Members should avoid individual commitments to executives, internal auditors and external auditors.
- All members of the committee should share information with the other members of and advisors to the committee.

Members Should be Fully Informed

- Members should carefully read all materials submitted to the board and the committee.
- Members should satisfy themselves that they have been fully informed
- Members should insist upon being provided materials well in advance of scheduled meetings.
- Members should read company reports, brochures and other literature.
- Members should obtain and read information about the industry in which the corporation conducts its business.
- Members should attend appropriate continuing education programs.
- Members should periodically visit company operations.

Members Should Exercise a Healthy Skepticism

- Members should ask questions and follow-up questions, before and during meetings and should not be overly concerned with embarrassing employees or "putting them on the spot."
- Members should insist on illustrations and examples to illuminate the matters presented to them.
- The committee should review alternatives to accounting decisions.
- The committee should review critical assumptions and matters of judgment with respect to financial statements and reporting.
- The committee should seek opinions from external auditors where relevant, such as with respect to compliance with generally accepted accounting principles, the quality of the corporation's financial records and the external auditors' views as to the quality, accuracy and completeness of the corporation's disclosures.
- The audit committee should seek the advice of independent advisors when appropriate.

Conduct of Meetings

- Meetings in person are generally preferable to telephonic meetings.
- Appropriate time should be allocated for meetings and matters should not be resolved primarily on the basis of time limits.
- Action should be taken through the adoption of formal resolutions.
- Rationales for decisions should be clear.
- Accurate and timely minutes of meetings should be prepared.
- The minutes should:
  - Identify materials presented to the committee
  - Identify participants in the meeting
  - Describe the qualification of experts
- Minutes should be timely circulated for review prior to and approved at the next succeeding meeting.
- Notes and minutes are discoverable in litigation, so legal counsel should be involved in the preparation of the minutes.

Evaluation of External Auditors

The audit committee should evaluate the performance, independence and integrity of the corporation's external auditors on a continuous basis in addition to when making retention and compensation decisions or decisions with respect to engagement to provide non-audit services. The audit committee should be promptly informed of any proposed changes in the relationship between the corporation and its external auditor. Topics to be considered in this evaluation include the following, which do not set forth detail as to specific issues or questions that will be relevant in a given situation:

General

- Depth and strength of the local office and engagement team
- Strength and extent of the SEC practice of the local office and engagement team
- Strength of the national office review team
- Industry expertise
- Credibility and reputation
- Errors and omissions insurance coverage
- Work paper retention policies
- Audit partner rotation and second partner review policies
- Scope of audit
- Fee arrangements
- Staffing in comparison to competitors

Specific

- Accessibility
- Quality of advice and reports
- Ability to provide clear and concise advice and reports
- Timeliness of advice, service and reports
- Quality of management letters and internal control reports
- Sufficiency and consistency of staffing
- Adherence to budgets
- Timely identification of non-audit services
- After organization of the Public Company Accounting Oversight Board the committee should:
    - Confirm that the external auditor is registered with the oversight board
    - Review the external auditor's registration statement
    - Consider the quality controls policies, disciplinary matters and nature and extent of reported disagreements with other clients as available in filings with the oversight board
- The committee should evaluate the external auditor's independence representation letter.

- Relationships with the Corporation and its Personnel
- Personal
- Family
- Business
- Investing
- Prior employment of officers, particularly financial and accounting officers

Prohibited Non-Audit Services

- Under Section 10A of the Exchange Act, as amended by the Sarbanes-Oxley Act, the Public Company Accounting Oversight Board is to establish rules prohibiting registered accounting firms from providing the following services:
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- bookkeeping and other services related to accounting records or financial statements
- financial information systems design and implementation
- appraisal or valuation services, fairness opinion, or contribution-in-kind reports
- actuarial services
- internal audit outsourcing services
- management functions or human resources
- broker or dealer, investment advisor, or investment banking services
- legal services and expert services unrelated to the audit
- regulatory prohibited services

While some of these services are already prohibited under existing independence rules, we recommend that other sources be found for all such services currently.

Non-audit Services which are permitted to be Provided by External Auditors subject to Pre-approval by the Audit Committee

Under revised Section 10A all other non-audit services, including the following, may only be provided by a registered accounting firm with the pre-approval of the audit committee.

- preparation of tax returns
- structuring of transactions
- merger and acquisition advice or counseling
- risk management advice
- commercial banking assistance
- personal services to management, for example, estate planning and tax return preparation
- consulting services—business systems other than financial information services, computer systems, business development

- insurance planning
- outplacement services

Meetings with External Auditors and Management

Meetings with external auditors and management should inform the committee as to how the corporation conducts its business, with whom the corporation does business, what assets the corporation uses to conduct its business and the results of the corporation's conduct of its business. The committee should be obtaining information about decision making with respect to financial matters and accounting through these meetings. The committee should insist on in-depth reports and encourage participation by all of the persons attending the meetings. Matters to be addressed at these meetings should include:

Analysis of Liquidity and Capital Resources, including:

- earnings trends
- cash flow trends
- guarantees
- commitments
- lease arrangements
- loan arrangements
- synthetic lease transactions
- securitization transactions
- special purpose entities
- strategic alliances and corporate partnerships
- letters of credit
- credit rating trends
- stock price trends
- business purpose of transactions
- The basis for "off balance sheet" treatment of any such transactions

Evaluation of Risk Management

The committee should evaluate the nature of risks and business purposes with respect to both new and repetitive risk management activities including those related to energy, weather, commodities and interest rate hedging or lack thereof. In evaluating these activities, the committee should also evaluate:

- transaction counterparties, originators and intermediaries
- pro forma and actual results
- anticipated and actual benefits of the activities

The committee should also monitor mark to market actions with respect to these activities and related agreements.

Review of Internal Controls

The audit committee should discuss and review internal controls with external auditors, internal auditors and management. In conducting this review:

- The committee should ask management and internal auditors to confirm the existence of procedures to collect, process and dispense the information required in periodic and current reports to be filed with the SEC.
- The committee should confirm that management has conducted the required quarterly review and evaluation of information gathering procedures.
- The audit committee should confirm that no attorney has reported any violations of securities laws or breaches of fiduciary duty, or, if any were reported, the nature, extent and disposition of matters reported.
- To the extent appropriate, the committee should review employee complaints regarding accounting, internal accounting controls and auditing matters.
- The committee should discuss with management its review and recommendations.
- The committee should discuss with the external auditor its review and recommendations.
- The committee should determine the need for and oversee the implementation of changes.
- The committee should confirm the integrity and effectiveness of internal controls and identify any deficiencies.
- The committee should analyze costs and benefits of existing controls and potential changes.
- The committee should evaluate the risk of failure of the corporation's internal controls.

Critical Accounting Policies and Estimates

- The Audit Committee should identify all significant accounting principles used by the corporation.
- The committee should identify which of those policies are the most significant (for example, the five most significant policies).
- The committee should identify significant accounting estimates by management.
- The committee should require management to provide reasons for the selection of principles and determination of estimates.
- The committee should require information concerning alternatives and sensitivity analysis sufficient to objectively evaluate the choices of principles and the reasonableness of estimates.
- The committee should evaluate in general terms the application, including consistency of application, and reasonableness of the principles and estimates.

- The Committee should monitor the application of critical accounting policies and estimates.
- The Committee should review written communications between external auditor and management, including management letters and schedules of unadjusted differences.
- The Committee should review the disclosure and explanation of critical accounting policies and estimates in Management's Discussion and Analysis sections of SEC periodic reports.
- The Committee should review the disclosure and explanation of critical accounting policies and estimates in financial statements.
- Members of the committee should be familiar with and understand accounting pronouncements and developments.
- The committee should understand what tests have been made with respect to recoverability of assets.
- The committee should compare accounting principles used by the corporation and their application to use and application of such principles by other participants in the corporation's industry.

Financial Fraud

- The committee should ask management, and internal and external auditors about the existence of warning signs of fraud such as:
  - unusual and unexpected relationships
  - journal entries above an appropriate threshold amount
  - journal entries made to rarely used accounts
  - period end transactions and transactions after closing of accounts for the period
  - journal entries made at period end or after closing of accounts for the period
  - missing account numbers
  - repeat round numbers
  - violation of internal approval thresholds
- The committee should ask to be informed of the business purpose for significant and unusual transactions.
- The committee should evaluate the bias in the comparison between actual results and accounting estimates.
- The committee should ask to be informed as to changes in cost recovery practices and procedures including practices and procedures with respect to depreciation, amortization and depletion, and ask to be advised of decisions made in this area.
- The committee should ask to be advised of changes in practices as to classification as expense versus capital cost and procedures and decisions instituted and made in this area.
- Significant product returns and allowances should be explained to the committee.
- Significant changes from period to period in line items should be explained and evaluated.

Management Accountability and Certifications

- The CEO and CFO should be prepared to individually certify that the most recent periodic reports are materially truthful and complete, comply with the requirements of the Securities Exchange Act, present fairly in all material respects the financial condition and results of operations of the corporation, and have been reviewed with the audit committee.
- Any exceptions to the certifications to be included with such filings should be identified and explained to the committee.
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Related Party Transactions

Transactions with related parties should be reviewed with particular care. The audit committee should insist that management provide complete and accurate information identifying:

- parties
- the relationships of all parties to management
- identification of new transactions, renewals and repetition of such transactions and modification of items of related party transactions.
- terms of the transactions, including:
  - duration
  - comparable terms for arms-length transactions
- the corporation's business purpose and the business purposes of other parties
- the impact of each transaction on the corporation's financial statements
- credit risk to the corporation
- timeliness of payments
- the dates of the agreement to enter into each transaction, completion of the transaction and receipt of payments
- contingency risks to which the corporation is exposed

Meetings with Management

The audit committee should meet alone with management and internal auditors to obtain candid input about the professionalism and quality of the outside auditors. The committee should be well informed about business trends, internal and external, and monitor the impact of those trends on the corporation.

Matters to be discussed with management would be expected to include:

Trends and Business Conditions

- product changes
- new customers, lost customers and changes in customer relationships

- new markets, exits from markets and changes in markets served
- competitive conditions
- derivatives and hedging transactions
- contingent liabilities
- customer complaints
- quality control and product test results
- protection of intellectual property
- changes in aging of accounts receivable
- changes in aging of accounts payable
- inventory turnover
- labor relations
- property, plant and equipment needs
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External Communications

- Financial analyst reports
- Credit agency reports
- Stock exchange or Nasdaq inquiries
- SEC comment letters and inquiries

Financings

- Bankruptcy notices received from suppliers or customers
- Compliance with loan covenants

Personnel

- Changes in accounting staff, department heads and internal auditors should be brought to the attention of the committee.

Internal Controls

- The committee should ask management and internal auditors to confirm the existence of procedures to collect, process and dispense the information required in periodic and current reports to be filed with the SEC.
- The committee should confirm that management has conducted the required quarterly review and evaluation of information gathering procedures.
- The audit committee should confirm that no attorney has reported any violations of securities laws or breaches of fiduciary duty, or, if any were reported, the nature, extent and disposition of matters reported.
- To the extent appropriate, the committee should review employee complaints regarding accounting, internal accounting controls and auditing matters.

Matters Impacting International Operations

Audit committees of corporations which conduct international operations should discuss with management and internal auditors factors affecting those businesses, including:

- Relevant political climates
- Relevant economic climates
- Currency valuations
- Strategic alliances
- Taxes

External Auditors

The committee should obtain management's and internal auditor's views with respect to the external auditors including staffing, independence, timeliness, cost and accessibility

Press Releases

Press releases covering financing information, earnings or pro forma financial information should be provided to the audit committee at least two days prior to the release date. The committee should be provided information as to all matters covered by or reflected in the releases sufficient to and in a manner sufficiently timely to permit it to conduct a meaningful review and discussion and provide meaningful input.

Earnings Releases

- Releases should compare actual results with comparable prior-year results and present results under generally accepted accounting principles and on a pro forma basis, if applicable.
- The releases should highlight important factors contributing to results for the quarter.
- The releases should identify business trends and factors which are significant to comparing the results of the comparable periods.
- A consistent format should be used for periodic releases.

Pro Forma Information

- The committee should be satisfied that pro forma information is necessary and appropriate.
- Assumptions made to produce the pro forma information should be reasonable and should be clearly disclosed.
- Pro forma information should be informative and focused.

- Releases should always contain a balanced presentation of important operating information.
- Pro forma information should not contain any untrue statement of material fact or omit to state any material fact needed to make the pro forma information not misleading.
- Pro forma information should be reconciled to GAAP financial information.

Timely Information

The committee should receive from management the following information on a "real time" basis:

- Material changes in the corporation's financial condition
- Material changes in the corporation's operations
- Development of material trends

Qualitative information presented in plain English

Sample quarterly Audit Committee agendas

As discussed above, the need to review earnings release, SEC filings, internal and disclosure controls and other responsibilities will likely require more than 4 meetings. Set forth below are typical agendas for quarterly meetings

	1	2	3	4
Executive session with external auditor	x	x	x	x
Executive session with management	x	x	x	x
Review financial statements, MD&A and balance of applicable SEC reports, discuss critical accounting policies and estimates	x	x	x	x
Review risks	x	x	x	x
Evaluate internal controls	x	x	x	x
Engagement of external auditor and determination of compensation and terms of the engagement	x			
Review CEO and CFO certifications	x	x	x	x
Evaluate external auditor's independence	x		x	
Evaluate external auditor performance	x			
Evaluate management and internal auditors		x		x
Review audit plan				x
Review results of external audit	x			
Consider major changes in and choices regarding accounting principles and procedures	x			x
Review committee charter and propose any resulting changes to the Board		x		
Review D&O Insurance coverage			x	
Prepare report for proxy statement	x			
Evaluate the committee's performance		x		

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 20, 2003

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Larry D. Thompson
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

As the Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud. While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself.

Attached to this memorandum are a revised set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization. These revisions draw heavily on the combined efforts of the Corporate Fraud Task Force and the Attorney General's Advisory Committee to put the results of more than three years of experience with the principles into practice.

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

Further experience with these principles may lead to additional adjustments. I look forward to hearing comments about their operation in practice. Please forward any comments to Christopher Wray, the Principal Associate Deputy Attorney General, or to Andrew Hruska, my Senior Counsel.

Federal Prosecution of Business Organizations[1]

I. Charging a Corporation: General

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 offers of corporate guilty pleas.

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. In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the court affirmed the 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." Similarly, in *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982), the court held, "criminal liability may be imposed on the corporation only where the agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated -- at least in part -- by an intent to benefit the corporation." Applying this test, the court upheld the 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. As the court concluded, "Mystic--not the individual defendants--was making money by selling oil that it had not paid for."

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 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)).

II. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors should 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 should 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 should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

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

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

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

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection (*see* section VI, *infra*);

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

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

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

B. Comment: As with the factors relevant to charging natural persons, the foregoing factors are intended to provide guidance rather than to mandate a particular result. 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. The nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. 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.

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."

III. 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 should consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

IV. 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.

USSG §8C2.5, comment. (n. 4).

V. 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 yet 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).

VI. Charging a Corporation: Cooperation and Voluntary Disclosure

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.

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.

In some circumstances, therefore, 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 SEC and the EPA, 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.[2] 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.

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.[3] The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

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, either through the advancing of attorneys fees,[4] 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. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes 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; 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.

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.

VII. 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 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. 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 reasonable 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.

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.

VIII. 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.[7] 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.

IX. 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*.

X. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Although non-criminal alternatives to prosecution often exist, 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.

XI. 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.

XII. 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 VII, *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 VIII, *supra.*

Footnotes:

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.

2. In addition, the Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5)g).

3. This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.

4. Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.

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 United States Sentencing Commission, GUIDELINES MANUAL, §8A1.2, comment. (n.3(k)) (Nov. 1997). *See* also USSG §8C2.5(f)

7. For example, the Antitrust Division's amnesty policy requires that "[w]here possible, the corporation [make] restitution to injured parties...."

FEDERAL SENTENCING GUIDELINE GUIDANCE- COMPLIANCE PROGRAMS; DOJ GUIDANCE ON CRIMINAL CHARGES AGAINST CORPORATIONS; SEC STATEMENT ON RELATIONSHIP OF COOPERATION TO ENFORCEMENT DETERMINATIONS

CORPORATE COUNSEL ARE ACCUSTOMED TO DESIGNING COMPLIANCE PROGRAMS TO COMPORT WITH THE REQUIREMENTS OF THE FEDERAL SENTENCING GUIDELINES. THOSE GUIDELINES FOR COMPLIANCE PRGRAMS ARE BELOW. IN ADDITION, THE DEPARTMENT OF JUSTICE HAS UPDATED THE CRITERIA ITS PERSONNEL WILL EXAMINE IN DETERMINING WHETHER TO CHARGE A CORPORATION CRIMINALLY. THESE GUIDELINES WERE UPDATED IN 2003 AND PUBLISHED DOJ CRIMINAL RESOURCE MANUAL. THOSE REQUIREMENTS ARE OUTLINED BELOW, AND A FULL COPY IS ATTACHED. THE SEC ALSO RELEASED GUIDELINES 2001 WHICH OUTLINES THE RELATIONSHIP OF COOPERATION IN AN SEC INVESTIGATION AND THE DECISION OF THE SEC IN ENFORCEMENT MATTERS. (SEE BELOW). BOARDS SHOULD BE AWARE OF HOW THEIR DECISIONS AND THE ACTIVITIES OF COMPANY PERSONNEL CAN AFFECT THESE POTENTIALLY CRUCIAL DECISIONS.

A. Federal Sentencing Guidelines - Seven Criteria for Effective Corporate Compliance Program.

1. Compliance standards and procedures: Established prior to the act, followed by its employees and agents and reasonably capable of reducing potential criminal conduct

2. High level individual(s) in organization must have overall oversight responsibility

3. Due Diligence: No delegation of discretionary authority to individual if knew or should have known through due diligence of propensity to engage in criminal activity

4. Effective communication and training: For all employees and agents, disseminating practical explanations of what is required, or participation in training programs

5. Auditing or Monitoring: Company must take reasonable steps to achieve compliance, take steps to detect criminal conduct, publicizing reporting system for violations, reporting system set up to avoid fear of retribution

6. Discipline: Appropriate disciplinary mechanisms consistently enforce, appropriate discipline of individuals who failed to detect offense

7. Response: Reasonable steps to respond to offense, steps to prevent further offenses, and possible modifications to compliance program

[From Federal Sentencing Guidelines Manual, Ch. 8, Nov. 1, 2002]

B. Charging a Corporation - DOJ Criminal Resource Manual (updated in 2003; based on 1999 memo).

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

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;

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

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;

5. the existence and adequacy of the corporation's compliance program;

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

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.

C. SEC Statement on Relationship of Cooperation to Enforcement Decision Factors. (Oct. 23, 2001)

The SEC generally identifies four broad measures of a company's cooperation in determining whether and how to charge for violation of the federal securities law.

- *Self-policing* prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;

- *Self-reporting* of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the

misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulators, and to self-regulators;

- *Remediation*, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and

- *Cooperation with law enforcement authorities*, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.

From SEC News Release No. 2001 – 117 (Oct. 23, 2001). The precise guidelines followed by the SEC are as follows:

1. What is the nature of the misconduct involved? Inadvertence, honest mistake, simple negligence, reckless or deliberate indifference to indicia of wrongful conduct, willful misconduct or unadorned venality.

    - Were the company's auditors misled?

2. How did the misconduct arise?

- Is it the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company?

- What compliance procedures were in place to prevent the misconduct now uncovered?

- Why did those procedures fail to stop or inhibit the wrongful conduct?

3. Where in the organization did the misconduct occur?

- How high up in the chain of command was knowledge of, or participation in, the misconduct?

- Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct?

- How systemic was the behavior?

- Is it symptomatic of the way the entity does business, or was it isolated?

4. How long did the misconduct last?

- Was it a one-quarter, or one-time, event, or did it last several years?

- In the case of a public company, did the misconduct occur before the company went public?

- Did it facilitate the company's ability to go public?

5. How much harm has the misconduct inflicted upon investors and other corporate constituencies?

- Did the share price of the company's stock drop significantly upon its discovery and disclosure?

6. How was the misconduct detected and who uncovered it?

7. How long after discovery of the misconduct did it take to implement an effective response?

8. What steps did the company take upon learning of the misconduct?

- Did the company immediately stop the misconduct?
- Are persons responsible for any misconduct still with the company?
- If so, are they still in the same positions?
- Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators?
- Did the company cooperate completely with appropriate regulatory and law enforcement bodies?
- Did the company identify what additional related misconduct is likely to have occurred?
- Did the company take steps to identify the extent of damage to investors and other constituencies?
- Did the company appropriately recompense those adversely affected by the conduct?

9. What processes did the company follow to resolve many of these issues and ferret out necessary information?

- Were the Audit Committee and the Board of Directors fully informed?
- If so, when?

10. Did the company commit to learn the truth, fully and expeditiously?

- Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior?
- Did management, the Board or committees consisting solely of outside directors oversee the review?
- Did company employees or outside persons perform the review?

- If outside persons, had they done other work for the company?
- Where the review was conducted by outside counsel, had management previously engaged such counsel?
- Were scope limitations placed on the review?
- If so, what were they?

11. Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation?

- Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law?
- Did the company produce a thorough and probing written report detailing the findings of its review?
- Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered?
- Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?

12. What assurances are there that the conduct is unlikely to recur?

- Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?
- Did the company provide our staff with sufficient information for it to evaluate the company's measures to correct the situation and ensure that the conduct does not recur?

13. Is the company the same company in which the misconduct occurred, or has it changed through a merger or bankruptcy reorganization?

[From Exchange Act Release No. 44969]

The Care and Feeding of Board and Board Committees after Sarbanes

- Margaret Maxwell Zagel
  President, Fortune Industries
  Former SVP and General Counsel, Grant Thornton LLP, Tellabs, Inc, and Organic Inc
  Director, Atrion Corp
- Katherine Combs
  VP, Corporate Secretary, Deputy General Counsel, Secretary, Exelon Corp.
- Roderick Palmore
  SVP, General Counsel, Sara Lee Corp.
  Director, Nuveen Investments, Inc
- Mark Michael
  Former SVP, General Counsel, 3Com Corp.
  Director, Nollenberg Capital Partners

Presented at ACCA Annual Meeting,
San Francisco Oct 2003

Key factors impacting Board oversight functions after Sarbanes: The changed landscape

- Sarbanes provisions and SEC regulations affecting Board performance
- Board expectations concerning responsibilities, information and interaction with management
- Changed management roles and responsibilities in interacting with Boards
- External expectations and regulatory power affecting Boardroom activity

Key provisions of Sarbanes-Oxley Act (SOX)

- Dramatic and sweeping changes in securities laws:
  - 15 separate rulemaking projects to implement provisions mandated by SOX
- Testimony by Chairman Donaldson on September 9, 2003 focused on key areas of SEC focus:
  - Restoring confidence in the accounting profession
  - Strengthening enforcement of the Federal securities laws
  - Improving the "Tone at the Top" and "Executive Responsibility"
  - Improving disclosure and financial reporting
  - Improving the performance of "Gatekeepers"

Key Board Expectations

- Access to Information
- Access to Management
- Access to External Advisors
- Boardroom Dynamics
- Special Committees: Audit, Nominating, Governance and Compensation

Changes in Management Roles and Responsibilities Interactions With Directors

CEO/CFO

- More accountable for financials due to certification requirements
  - Potential loss of bonus if restatement required
  - Financial Code of Conduct for senior officers
  - Attestation of internal controls' effectiveness
- Less control of director nominations
  - Independent governance/nominating committee
- Less control of CEO compensation/succession
  - Non-management directors must decide/review

Changes in Management Roles and Responsibilities Interactions With Directors

CEO/CFO, continued

- **Less control of information flow to directors**
  - Mandatory executive sessions without CEO
    - Must disclose "presiding director"
  - Interested parties may communicate directly and confidentially with directors
  - Committees may hire independent consultants
  - Audit committee must oversee process for investigation of complaints alleging improper accounting, internal control weaknesses

Changes in Management Roles and Responsibilities Interactions with Directors

CEO/CFO, continued

- **Less control of auditor selection, scope of work**
  - Audit committee must hire, approve all fees
    - Auditor prohibited from performing certain management-related services
    - Close scrutiny of need for services not "audit-related"
  - Auditor must report to Audit Committee
  - Mandatory executive sessions with auditors
  - New crimes for attempting to improperly influence auditor, destruction of work papers

Changes in Management Roles and Responsibilities Interactions with Directors

- **CLO/Corporate Secretary/Governance Officer**
  - **Expanded role in governance**
    - Corporate Governance expert
      - Advising board/management on new requirements
    - Implementing reforms
    - Managing new processes
      - Audit committee complaint process
      - "Up the Ladder" reporting process
      - Accelerated insider trading reports
      - Certification process/Disclosure committee
      - Internal controls attestation
    - Interfacing with governance rating agencies
    - Developing governance web sites

External expectations of Board performance has changed the playing field

- Increased Judicial skepticism of corporate activity and Board oversight increases pressure on Boards
- Delaware courts increased the level of scrutiny of Board oversight in determining whether Board acted in good faith (Disney)
- Increased skepticism in Federal courts of good faith claims by Boards. Dismissal or summary judgment more (7th Cir decision, In re Abbot Laboratories)

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Increased scrutiny of Board actions by SEC with substantial new enforcement powers

- SEC staff does not believe that Corporate America has fully understood or embraced the changes mandated by Sarbanes
- SEC investigations increased 41% in the last 3 years and will continue to grow as the SEC adds more accountants and enforcement lawyers
- SEC has new enforcement tools and is using those tools at an earlier stage in investigations
  - D&O bars, extraordinary payment freezes, bonus/profit forfeiture
  - SEC mandate to review companies every 3 years

SEC enforcement policies affects actions of Company and Board

- 2001,SEC adopted enforcement policy that rewards companies for self-policing, self-reporting, remediation and cooperation with law enforcement officials
- 2003, SEC announces that its prior policy to settle on the basis of "neither admits nor denies" will no longer allow a settling defendant to contest the facts of a settlement in a future SEC enforcement proceeding
- SEC is actively working with the DOJ, sharing data bases and targeting both individuals and corporations

Increased threat of corporate and individual criminal investigations and prosecutions

- Broader obstruction of justice charges for hampering investigations and high penalty for alteration or destruction of documents (EY auditor-NextCard)
- Potential criminal and civil charges for false officer certifications
- New securities fraud crime making it illegal to participate in a scheme to defraud persons in connection with a public company
- Improper retaliation against a whistleblower
- Improperly influencing an auditor.

"Crime in the suites will be treated the same or more severely than crime in the street" Judge Castillo

- Boards understand that there is a public mandate to find and "stop" corporate fraud
- Federal Sentencing Guidelines set out the seven criteria for an effective compliance program. Boards want to know they are met
- Department of Justice guidance on charging corporations with criminal wrongdoing gives prosecutors substantial bargaining power and affirmatively encourages charging corporations where charging individuals is insufficient (Holder memo)

Education of Board

- Formal continuing education for directors can be a positive factor in governance ratings
  - e.g., ISS CGQ gives credit for attendance at accredited programs
- D & O insurance premiums may reflect credit for participation in director training
- Many companies provide internal training, including:
  - Orientation of new directors
  - Preparation and maintenance of a Board Manual
- Legal updates on changing regulatory requirements and emerging best practices

Board Composition

- Director Qualifications
- The right mix of skills, backgrounds & experiences
- The right mix of personalities
- Philosophies of the role of the Board as they affect Board composition
- Independence and effectiveness

Establishing Corporate Governance Principles

- **Content is discretionary, so long as required topics are covered:**
  - Director qualifications,responsibilities,expectations
    - Independence: standard materiality criteria
  - Director access to management, independent advisors
  - Responsibilities of key board committees
  - Directors compensation
  - Orientation and continuing education
  - Management succession
  - Annual performance evaluation
    - Board, committees and individual directors

Establishing Corporate Governance Principles

- **Other topics to consider including**:
  - Diversity of membership
  - Director tenure, mandatory retirement
  - Stock ownership requirements
  - Committee assignments/rotation policy
  - Committee chair selection process
  - Lead or presiding director
  - Insider trading clearance and reporting
  - Prohibition on loans to directors
  - Limits on service on other boards
  - Expectations for information flow

Committee Charters

- **Required for Audit, Compensation and Governance Committees**
- **Composition and certain functions prescribed**
  - Solely independent directors
  - Authority to engage independent advisors
  - Some flexibility to shift functions to other committee

Assessment of Board, Committee and Individual Director Performance

- **Annually required for Board and committees**
  - Scheduling issues
  - Small, but growing evaluation of individual directors
- **Review both functions and admin. processes**
  - Did we do all that charter requires, and how well?
  - Discretion in method used – qualitative is better
  - Challenges posed by individual evaluations
    - Reluctance to criticize or confront
    - How/who to communicate results
    - Some use consultants to minimize discomfort
  - Relevance of third party governance ratings?

What do the Board and Board Committees expect from management to perform its duties

First-Do I want to serve as a member of your Board?

- I will do a background check on company, its financial status, personnel and prospects. I will talk to internal counsel and financial personnel but will ask that the company pay for my own attorney and accountant to review the background material.
- Key questions I will ask
  - Are my assets protected? What is the state of the D&O policy, corporate indemnification and how does that work under applicable state law to protect me
  - What regulatory, administrative or other investigatory matters are under way or reasonably anticipated? I define investigation broadly because once an entity is under the microscope-all sorts of little bugs appear.

The "Third Degree" by Board member candidates

- What pending lawsuits are there that will cost the company or me money? And what do the allegations of those suits tell me about the company?
- What is the personal integrity of management and the other Board members? I am not interested in positions that will harm my reputation
- What is the company's position on good governance? Is the company paying lip service to governance or does it utilize governance processes to improve oversight of corporate performance

Financial questions

- Is this a potential headline making corporate failure? I want to read the financial statements, footnotes, see the management letters from the auditor, understand related party transactions and ask about important transactions that may not have been disclosed.
- What was the willingness and openness of those personnel answering my questions?
- How does the board actually interact and how does it perform its oversight functions? Is this a Board that is empowered and contributes appropriately in its oversight function?

Board Effectiveness

- Split Chair/CEO roles?
- Lead/Presiding Directors
- Board Philosophy & dynamics
- Board Education
- Orientation Issues
- Continuing Education requirements
- Continuous evaluation of effectiveness

Legal Matters, Compliance and Ethics Codes

- The Board oversees business conduct, ethics, legal compliance and controls
- A senior executive officer may be designated with compliance responsibilities, reporting to the Board
- Setting "tone" and "standards" may include publishing Code of Conduct on company website
- Under SOX and SEC rules, companies must disclose adoption of code of ethics for senior financial officers
- Any waiver of code of ethics in favor of CEO, CFO, etc., will require disclosure within 5 business days

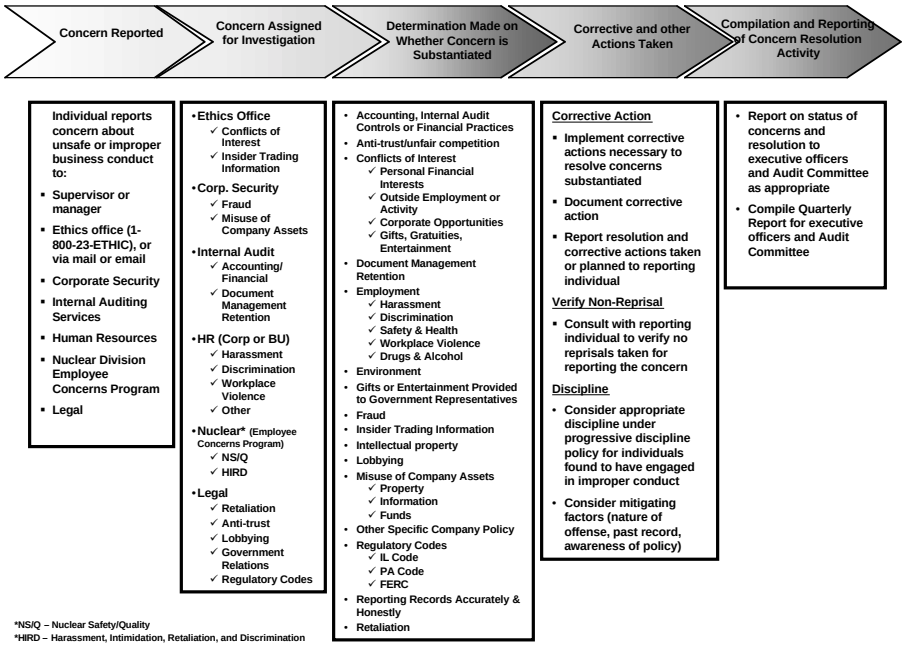
Method for Allowing Communication with Non-Management Directors

- **Must identify "presiding director" and method of communicating with same**
- **Must enable anonymous and confidential reporting of concerns**
  - Options include mail, email, intranet and third party providers
- **Management (except CEO) can initially review and summarize, or "filter", if method disclosed**
  - Minimizes number of insignificant and commercial messages directors will receive
  - Clarify directors' preferences

Method for Receipt, Investigation of Accounting-Related ("Whistleblower") Concerns

- **Audit committee must approve, oversee process**
- **Process must cover receipt, investigation, resolution, retention of complaints**:
  - Improper accounting
  - Internal control weaknesses
  - Fraud
  - Violations of Code of Conduct
- **Expand existing ethics process or adopt stand-alone process**

PROCESS FOR REPORTING AND RESOLVING CONCERNS



The Audit Committee post-Sarbanes, new power and responsibility

- All Audit Committee members must be independent
- No Audit Committee member may receive fees other than fees as Board or Committee member
- One member must be a Financial Expert and must be disclosed as such
- Each listing agency has specific additional requirements
- Audit Committee must be generally responsible for oversight of the company's financial position, external and internal audit function and risk assessment and control

Audit Committee Responsibilities

- Auditor reports to the Audit Committee and must meet in executive session with Committee
- Committee hires and fires auditor
- Committee approves all engagement fees and terms and pays from fund established by company
- Committee must approve all proposed non-audit fees
- Committee resolves all disagreements between auditor and management
- Committee may hire external advisors, legal, financial or others as they choose to be paid by company
- Committee is responsible for whistleblower procedures

Specific Auditor reports to Audit Committee

- Critical Accounting policies
- All material written communications between auditor and management, Management letter, passed adjustments
- Alternative financial treatments of the company's financial information, the ramifications and the auditor's preferred treatment
- Quarterly reviews and annual audit
- 10A reports from auditor or management on potential illegal conduct

Qualified Litigation Compliance Committee

- The SEC encourages companies to form a qualified legal compliance committee (QLCC) to coordinate and oversee reports of potential internal investigations
- Reports can only be referred to a pre-existing QLCC
- QLCC may be established by adopting charter, or charter of existing committee may be amended to constitute itself as a QLCC without further board action
- Final rules to implement Section 307 of SOX, and Rule 205 regarding Implementation of Standards of Professional Conduct for Attorneys, may require attorney to report "material violation" up-the-ladder

Board Perspective on Certifications

- Is the Framework in place?
- Is there a rigorous system in place to assure that issues are caught?
- Have there been material philosophical or policy changes?
- Have there been exceptions made?
- Any significant individual issues?

Support for Committees

- **Audit Committee**
  - "Financial literacy" training
  - Possible consultant with financial expertise
- **Corporate Governance Committee**
  - Director search firm
  - Director compensation consultant
- **Compensation Committee**
  - Executive compensation consultant
  - Employee benefit plan design consultant

Assessing Board Compliance with Governance Requirements

- Add SOX to compliance risk areas and establish compliance program
- Include compliance in annual Board evaluation process
- Annual certification of compliance with Listing Standards
- Third-party assessments of governance practices
  - ISS
  - GMI
  - Corporate Library
  - Moodys

SUCCESSION PLANNING

- The role of the Board
- The CEO'S Role
- Planning for emergencies
- Talent development

Post-Sarbanes Board will be more involved in in risk assessments and corporate crisis

- Board accountability will require more details, earlier assessments, alternative scenarios and more rapid communication with Board members on developing risks and crisis
- Business and legal risk identification and assessment should be an ongoing process with Board
- Board should know of and be integrated into a company crisis plan
- Governance processes and active Board oversight may lessen the incidence of or severity of some types of crises

Thank you

Questions?