HOW CORPORATIONS CAN AVOID OR MINIMIZE FEDERAL CRIMINAL LIABILITY FOR THE ILLEGAL ACTS OF EMPLOYEES

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Introduction

The potential for corporate criminal liability for the illegal conduct of employees is on the rise. Foremost among the reasons proffered for this upward spiral is the desire to deter corporate misconduct and fashion more responsible corporate behavior, i.e., increased monitoring, by imputing employees’ illegal acts to the corporation. A more practical reason proffered for this trend is that a finding of corporate culpability provides a reason to disgorge the corporation of any benefit it may have received as a result of an employee’s wrongdoing. Moreover, some commentators warn that the specter of corporate criminal indictment will only grow larger as the government’s use of criminal penalties against corporations expands in

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* The views expressed in this article are the authors’ own; the article does not necessarily reflect the views of any client of Kirkpatrick & Lockhart LLP, or the firm.

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1 See Kevin B. Huff, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 Colum. L. Rev. 1252, 1252 (1996) (noting the significant expansion of regulatory requirements applicable to corporations); Dan K. Webb et al., Understanding and Avoiding Corporate and Executive Criminal Liability, 49 Bus. Law. 617, 617 & n. 1 (1994) (citing statistics from a nationwide survey of over 200 general counsel conducted by Coopers & Lybrand and The Chicago Lawyer); see also Harvey L. Pitt & Karl A. Groskaufmanis, Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct, 71 B.U. L. Rev. 447, 448 (1991) (finding that Congress has promoted this trend by increasing organizational fine levels and “heightening institutional liability for money laundering, fraud and insider trading by employees”).

2 See Pitt & Groskaufmanis, supra note 1, at 449-50 & nn. 20-21 (noting that deterrence of corporate misconduct is the fundamental aim of corporate criminal liability). But see Daniel R. Fischel & Alan O. Sykes, Corporate Crime, 25 J. Legal Stud. 319, 319-20 (1996) (arguing that corporate criminal liability has developed without any theoretical justification, that there is no need for corporate criminal liability in a legal system with adequate civil remedies, and that corporate criminal liability results in “serious problems of overdeterrence”). Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. Legal Stud. 833, 836 (1994) (arguing that the trend toward increased corporate criminal liability may actually decrease corporate monitoring because such monitoring increases the probability of government detection that may not otherwise occur, thereby causing the corporation to incur both monitoring and penalty costs).

3 See Kathleen F. Brickey, Corporate Criminal Liability § 1:04, at 10 (2d ed. 1991) (basing this rationale on the theory that a corporation can only act through its agents; thus, the corporation should not be able to benefit while disclaiming any responsibility).
response to a “public mood that is increasingly hostile toward business interests.” The fact is that corporations offer deep pockets to Federal investigators and prosecutors whose budgets may swell with increased forfeitures and penalties. This is troubling news for boardrooms across the United States -- especially for the large, decentralized corporation, where it is unlikely that the upper levels of management are intimately aware of employee conduct or misconduct.

In all probability, you will be unaware of any investigation until the government reveals that your corporation has been the target of an ongoing grand jury investigation. This is the norm; the FBI, as well as other law enforcement agencies, typically exhausts all covert investigative tactics before advising the target corporation that an investigation is underway. Consequently, this startling revelation usually manifests itself in the form of a grand jury subpoena to produce witnesses or evidence, or worse, with Federal agents, armed with a search warrant, storming your records center to commence a search and interview your employees.

Now, what do you do? Perhaps the better questions are: What can you do to prevent the criminal investigation and indictment of your corporation? Or, how can you minimize the adverse effects of criminal indictment?

In this article, we suggest procedures and a course of conduct that corporations and their counsel can consider when dealing with Federal agents and attorneys, which are designed to avoid a criminal indictment or alternatively to minimize the penalties associated with an indictment. The suggested procedures for your consideration include:

- Implementing an effective compliance program;
- Reporting offenses to the appropriate government authority in a timely manner;
- Cooperating, when appropriate, with federal agents and attorneys;

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4 Pitt & Groskaufmanis, supra note 1, at 448; see also, e.g., Fischel & Sykes, supra note 2, at 333 (noting that corporate criminal liability is a growing area of the law); Webb et al., supra note 1, at 617 (noting expanding theories of liability and increasing penalties under the United States Sentencing Guidelines).
Accepting responsibility for any corporate wrongdoing;

Conducting internal corporate investigations; and

Proactive pre-indictment contact and negotiation with government prosecutors.

Before you can take steps to avoid or minimize the consequences of an indictment, you must understand what is meant by “corporate criminal liability.” Thus, part I of this article discusses the standard used by courts to determine corporate criminal liability for the illegal acts of employees. Furthermore, Part I identifies those corporate agents whose illegal conduct may give rise to corporate criminal liability. Then, in part II we offer our proactive and prophylactic procedures that a corporation can implement and use to avoid or minimize criminal liability for the illegal acts of employees.

**Part I: Corporate Criminal Liability**

**A. The Standard**

Generally, a corporation may be held criminally responsible for the illegal conduct of its employees if: (1) the illegal act was committed while the employee was acting within the scope of employment, and (2) the employee’s conduct was undertaken, at least in part, for the benefit of the corporation.⁶

1. **Conduct Within the Scope of Employment**

A Corporation is a fictitious entity that acts through its various agents; therefore, to hold a corporation criminally responsible for the illegal conduct of an employee, the illegal

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⁶ This article will not address the ground swell of private whistle-blower civil actions designed to increase the government’s coffers and provide attractive bounties to lawyers and disgruntled employees.

⁶ See United States v. Sun-Diamond Growers of Cal., 138 F. 3d 961, 970-71 (D.C. Cir. 1998) (gratuity statute violation); United States v. Automated Med. Lab. Inc., 770 F. 2d 399, 406 (4th Cir. 1985) (false documents to a federal agency); United States v. Basic Constr. Co., 711 F. 2d 570, 573 (4th Cir. 1983) (Sherman Anti-Trust Act violation); United States v. Koppers Co., Inc., 652 F. 2d 290, 298 (2d Cir. 1981) (Sherman Anti-Trust Act violation); Webb et al., supra note 1, at 620; see also Huff, supra note 1, at 1256 (outlining the test in three parts: (1) employee commits a crime (2) while acting within the scope of his authority (3) with the intent to benefit the corporation); Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 Minn. L. Rev. 1095, 1102 (1991) (same).
conduct must have occurred within the scope of employment. Federal Courts have broadly interpreted this purported limitation. For purposes of determining corporate criminal liability, an employee acts within the scope of employment if the employee acts with either actual or apparent authority. Moreover, if the two elements listed above are present, a corporation can be held liable even where the employee’s conduct contravened corporate policy or violated express instructions. Some courts have been willing to go even further, extending liability to situations when an employee acted beyond the scope of either actual or apparent authority and such actions went unchecked by officers or directors, giving the appearance of official approval. The practical result is that the government needs only to prove that an employee’s illegal conduct occurred while performing work-related activities to attach criminal liability to the corporation. Such an expansive interpretation of an element designed to limit corporate liability for the illegal acts of employees has prompted at least one commentator to label this limitation as “almost meaningless.”

2. For the Benefit of the Corporation

The government also must show that the employee’s illegal conduct furthered the corporation’s business, i.e., benefited the corporation, in order to equate the employee’s action

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7 See generally New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909). This is the seminal case on corporate criminal liability.

8 See Brickey, supra note 3, § 3:07 and cases cited therein, at 105-07.

9 See, e.g., Basic Constr. Co., 711 F. 2d at 573 (corporation may be held criminally liable for acts committed by employees acting with actual or apparent authority); Hilton Hotels, 467 F. 2d at 1004 (liability may attach without proof that employee acted with actual authority); see also Brickey, supra note 3, § 3:07, at 106-07 (finding that corporate liability for employee acts committed within the scope of either apparent or actual authority is well-established).


11 See Brickey, supra note 3, § 3:07, at 107 (discussing Continental Baking Co. v. United States, 281 F. 2d 137 (6th Cir. 1960)).

12 See Huff, supra note 1, at 1258; Webb et al., supra note 1, at 620.

13 Bucy, supra note 6, at 1102.
with that of the corporation. At first blush, it would appear that a requirement that the corporation somehow benefit from an employee’s misdeeds -- which misdeeds will likely result in a federal criminal investigation of the corporation -- would all but swallow the rule. However, that is untrue, because this requirement, like its counterpart, has been emasculated through broad judicial interpretation.

Courts have held that the corporation need not actually benefit to satisfy this requirement. Rather, the employee must have only intended to benefit the corporation, although, criminal liability may attach to the corporation even where an employee’s illegal conduct is motivated primarily by self-benefit, when the employee intends, “at least in part,” to confer a benefit on the corporation. And, at least one court has taken this proposition to its furthest extreme -- holding that a jury would be entitled to conclude that even incidental (and perhaps unintended) benefit to a corporation may suffice to impute the employee’s actions to the corporation. Somewhat ironically, the court noted: “Where there is adequate evidence for imputation, . . . the only thing that keeps deceived corporations from being indicted for the acts

14 See Standard Oil Co. of Tex. v. United States, 307 F. 2d 120, 128 (5th Cir. 1962). This is the seminal intent-to-benefit case.
15 See Bucy, supra note 6, at 1102.
16 See, e.g., Automated Med., 770 F. 2d at 407; Beusch, 596 F.2d at 877; United States v. Cadillac Overall Supply Co., 568 F. 2d 1078, 1090 (5th Cir. 1978); United States v. Carter, 311 F. 2d 934, 942 (6th Cir. 1963); Standard Oil, 307 F. 2d at 128; Old Monastery Co. v. United States, 147 F. 2d 905, 908 (4th Cir. 1945).
17 See Beusch, 596 F.2d at 877; Standard Oil, 307 F. 2d at 128; see also Huff, supra note 1, at 1261; Webb et al., supra note 1, at 621; see generally Brickey, supra note 3, § 4:02, at 131-37.
18 Automated Med., 770 F. 2d at 407; United States v. Gold, 743 F. 2d 800, 823 (11th Cir. 1984); United States v. Cincotta, 689 F. 2d 238, 242 (1st Cir. 1982); see also Huff, supra note 1, at 1262; Webb et al., supra note 1, at 621; Brickey, supra note 3, § 4:02, at 136.
19 See Sun-Diamond, 138 F. 3d at 970. In this case, the United States District Court for District of Columbia Circuit upheld the conviction of Sun-Diamond, a large agricultural cooperative, for making illegal campaign contributions to the failed congressional campaign of Henry Espy, brother of then-Secretary of Agriculture Mike Espy, in violation of the Federal Election Campaign Act. Id. at 971. The scheme was devised by Richard Douglas, Sun-Diamond’s Vice President for Corporate Affairs, whose actions were attributed to Sun-Diamond notwithstanding that Douglas “hid the illegal contribution scheme from others at the company and used company funds to accomplish it . . . .” Id. at 970. The court reasoned that Douglas may have been acting out of pure friendship (Douglas and Mike Espy had been friends since college) or cultivating Sun-Diamond’s relationship with Secretary Espy to further the cooperative’s interests -- it did not matter, because “the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer.” Id. Furthermore, it was irrelevant that the “scheme came at some cost to Sun-Diamond [because] it also promised some benefit.” Id.
of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.”20

Therefore, the intent-to-benefit limitation is very narrow and subject to the broad discretion of government prosecutors. Ultimately, a corporation will likely only be insulated “from criminal liability for actions of its agents which [are] 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.”21 Corporations, however, remain subject to the broad discretion of government prosecutors and the whims of judicial interpretation.

In sum, the standard for determining corporate criminal liability for the illegal acts of employees casts a wide net to snare employers -- often in situations where the imposition of criminal liability seems counterintuitive and unjust.

B. Whose Conduct May Give Rise to Corporate Criminal Liability?

Knowing that your corporation can easily become the target of a federal criminal investigation due to employee misdeeds is only part of the battle, the next question becomes: whose misconduct can be imputed to the corporation? There are three general categories of corporate agents whose conduct can be imputed to the corporation and a fourth related category that may come into play in all three: (1) individuals directly associated with your corporation; (2) subsidiaries or divisions; (3) independent contractors; 22 and related to the preceding (4) the application of the collective knowledge doctrine, which provides the basis for imputing the collective conduct of numerous individuals to the corporation. These categories are discussed below.

20 See id., 138 F. 3d at 970.

21 Automated Med., 770 F. 2d at 407; see also United State v. Demauro, 581 F. 2d 50, 53 & n. 2 (2d Cir. 1978) (discussing bribery of bank officials to launder money).

22 See Webb et al., supra note 1, at 622; Brickey, supra note 3, §§ 3:02-06, at 91-105.
1. **Individuals**

As a whole, this group is probably the most obvious. It consists of individuals with whom you probably work on a regular basis and everyone else that receives a company paycheck.

At the top of this list, are the corporation’s Directors and Officers. These individuals create and implement company policy. Directors and Officers are responsible for guiding corporate affairs, so it is only natural for courts to treat them as an extension of the legal entity. Consequently, courts have little trouble imputing the acts and intent of such high-level executives to the corporation when such acts and intent stem from the executive’s role as a policy-maker.

Courts have also been willing to include the illegal acts of managers and other supervisory-level personnel among the acts which can give rise to corporate criminal liability. The reasoning behind this extension is similar to that which justifies a finding of criminal liability for the illegal acts of Directors and Officers -- the corporation has delegated a certain amount of authority or power to these individuals, which creates the opportunity “to engage the corporation in a criminal transaction.” Therefore, when determining corporate liability, the court’s focus is on “the function delegated to the corporate officer or agent,” not the agent’s title.

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23 See Brickey, supra note 3, § 3:01, at 90 (stating that Directors and Officers comprise the corporation’s alter ego).

24 See, e.g., Sun-Diamond, 138 F. 3d at 970 (Vice-president’s illegal campaign contributions); Cincotta, 689 F. 2d at 240 (Treasurer billing for oil never delivered); Beusch, 596 F.2d at 877 (Vice-president’s failure to report foreign currency); Carter, 311 F. 2d at 942 (Individual who was President, CEO and a member of the Board of Directors made an illegal payment to union official); United States v. Empire Packing Co., 174 F. 2d 16, 20 (7th Cir. 1949) (President’s knowledge of false claims is the knowledge of the corporation); see generally Brickey, supra note 3, § 3:02, at 91-95.

25 See, e.g., Automated Med., 770 F. 2d at 401, 407 (managers instructing employees to falsify records); Koppers Co., Inc., 652 F. 2d at 292, 298 (district manager’s price-fixing in violation of Sherman Anti-Trust Act); C.I.T. Corp. v. United States, 150 F. 2d 85, 89 (9th Cir. 1945) (branch manager caused false statements to be made to FHA); see generally Brickey, supra note 3, § 3.03, at 95-100.

26 C.I.T. Corp., 150 F. 2d at 89.

27 Id.; see also Webb et al., supra note 1, at 622.
Finally, and perhaps more troubling, courts have gone down this slippery slope to the bottom of the corporate ladder to find corporate criminal liability even for the illegal acts of low-level employees. This is a logical extension of a rule intended to foster greater self-monitoring, because it recognizes that subordinate employees are the ones most likely to perform regulated activities. The rationale behind such a finding is that a corporation can only act through its agents, therefore, those with the power to delegate “must carefully select and supervise those who are authorized to carry on” the business of the corporation. And, although it may seem unfair to expect large decentralized corporations to monitor the daily machinations of each and every employee, “the blunt judicial response . . . has been that ‘checking and elimination of . . . obviously illegal practices is not shown to [be] any more difficult than other details of a nation-wide industry.’” Thus, a corporation “may be held accountable for criminal acts of . . . salesmen, clerical workers, truck drivers, and manual laborers,” when such acts are committed within the scope of employment.

2. Subsidiaries and Divisions

In addition to the individuals employed by the company, the company’s subsidiaries and divisions are agents of the parent company. Therefore, pursuant to the same reasoning that supports holding a corporation criminally liable for the illegal acts of individuals, the illegal conduct of subsidiaries and divisions can be imputed to the parent for purposes of determining corporate criminal liability. Moreover, at least one court has held that a parent

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28 See, e.g., Basic Constr. Co., 711 F. 2d at 572-73 (bid rigging by two relatively minor officials); Standard Oil, 307 F. 2d at 127 (“oil-swapping” by pump operators, although no intent to benefit the corporation was found); generally Brickey, supra note 3, § 3:04, at 100-04 (citing cases).

29 Brickey, supra note 3, § 3:04, at 101 (citing cases).

30 Id. at 103 (quoting United States v. Armour & Co., 168 F. 2d 342, 343 (3d Cir. 1948)) (alteration in original).

31 Id. at 100-01 (citing cases).


33 See, e.g., United States v. Wilshire Oil Co. of Tex., 427 F. 2d 969 (10th Cir. 1970); Johns-Manville Corp., 231 F. Supp. 690; see also Brickey, supra note 3, § 3:06, at 105.
company may be found criminally liable for illegal acts committed by a subsidiary or division even when the illegal acts were committed before the parent’s acquisition of the subsidiary or division.\textsuperscript{34} The court reasoned that when an acquiring company has adequate time to scrutinize the operations of the target company prior to assuming control, it is reasonable to impute the subsidiary’s or division’s illegal conduct to the parent company for purposes of determining criminal liability of the latter.\textsuperscript{35} The court’s holding, however, limited the parent company’s liability to the period of time during which it actually operated the subsidiary.\textsuperscript{36} As a practical matter, a holding of this nature imposes an obligation on companies contemplating a merger or takeover to conduct a thorough investigation into any possible criminal conduct of the target’s employees to prevent the assumption of criminal liability along with assets.

3. **Independent Contractors**

Of the three groups, Independent Contractors would seem the least likely to give corporations cause for concern. They are not employees, nor do they fall under the watchful eye of the parent corporation. They are, by definition, independent; however, notwithstanding this critical distinction, the illegal acts of an independent contractor may give rise to criminal liability for the corporation with which the former contracted to perform certain tasks.\textsuperscript{37} Furthermore, a corporation cannot avoid criminal liability by asserting it lacked knowledge of the illegal conduct, nor can a corporation avoid liability by ordering a cessation of the illegal conduct once it learns of the malfeasance.\textsuperscript{38} Rather than focusing on the difference between agents, e.g.,

\begin{itemize}
  \item \textsuperscript{34} See Wilshire Oil, 427 F. 2d at 973-74 (price-fixing occurred from 1959 to 1965, but Wilshire did not acquire the subsidiary until 1960).
  \item \textsuperscript{35} Id. at 974 (totality of the circumstances test reveals that Wilshire had ample opportunity to detect and reject subsidiary’s illegal practices).
  \item \textsuperscript{36} Id. at 973-74 (the scheme lasted from 1959 to 1965, but the indictment named Wilshire only for the years it operated the subsidiary, 1960 to 1963).
  \item \textsuperscript{37} See, e.g., United States v. Parfait Powder Puff Co., 163 F. 2d 1008 (7th Cir. 1947) (holding that cosmetics company was liable for violations of the Federal Food, Drug, and Cosmetic Act committed by independent contractor/manufacturer which substituted an unapproved ingredient for an approved ingredient).
  \item \textsuperscript{38} See id. at 1009.
\end{itemize}
employees, and independent contractors, the court reached its conclusion by focusing on the fact
that the corporation delegated certain responsibilities to the independent contractor.\textsuperscript{39}
Consequently, a corporation’s criminal liability for the acts of independent contractors is
premised on the former empowering the latter to act, not because the corporation “consciously
participated in the wrongful act.”\textsuperscript{40} Therefore, the acts of independent contractors may be
imputed to the corporation because the relationship creates the opportunity for independent
contractors to commit illegal acts while furthering the business of the corporation.\textsuperscript{41} This is
similar to the reasoning employed by courts to hold corporations criminally liable for the illegal
conduct of managers.\textsuperscript{42}

4. The Collective Knowledge Doctrine

Courts have also developed a corollary to the rules outlined above -- the
Collective Knowledge Doctrine, which is designed to prevent corporations from being able to
disavow criminal knowledge or intent simply by compartmentalizing knowledge and subdividing
duties into smaller components.\textsuperscript{43} Under this judicial construction, “the aggregate of those
components constitutes the corporation’s knowledge of a particular operation.”\textsuperscript{44} Moreover, “[i]t
is irrelevant whether employees administering one component of the operation know the specific
activities of employees administering another aspect of the operation.”\textsuperscript{45} Consequently, “a
corporation cannot plead innocence by asserting that the information obtained by several
employees was not acquired by any one individual who then would have comprehended its full

\textsuperscript{39} See id.

\textsuperscript{40} Id.

\textsuperscript{41} See id.

\textsuperscript{42} See supra text accompanying notes 25-27.

\textsuperscript{43} See United States v. Bank of New England, N.A., 821 F. 2d 844, 856 (1st Cir. 1987). But see Webb et al., supra note 1, at 626-27
(stating that courts usually will not apply the collective knowledge doctrine to specific intent crimes).

\textsuperscript{44} Bank of New England, 821 F. 2d at 856.

\textsuperscript{45} Id.
import." Thus, “[u]nder the collective knowledge doctrine, a corporation may be held to knowingly violate the law even though no single agent intended to commit the offense or even knew of the existence of the operative facts that led to the violation.”

**Part II: How to Avoid or Minimize Corporate Criminal Liability**

So, now you know that the government may attempt to impute to your corporation the illegal conduct of virtually any party with even a tangential relationship to your corporation. Naturally you ask: how can I prevent this from happening to me and my corporation? Don’t panic -- there are steps that you can take to protect the corporation. In this section we discuss the following: (A) the United States Sentencing Guidelines as they apply to Organizations, which provide the basis for sentencing corporations and provide clues to the types of corporate behavior that will be rewarded both to avoid indictment and after indictment, including effective compliance programs, self-reporting, cooperation and acceptance of responsibility; (B) how to conduct an internal corporate investigation; and (C) proactive pre-indictment contact and negotiations between the corporation and the government to avoid indictment or lessen the severity of a criminal prosecution.

A. **The United States Sentencing Guidelines for Organizations**

You do not want to learn first hand how the United States Sentencing Guidelines for Organizations (“Guidelines”) are applied to corporations, because if you find yourself in that position, it is already game, set, match -- United States. You do, however, want to learn *prior* to confronting an issue of criminal liability what is contained in the Guidelines, because they provide valuable clues to the types of corporate behavior that the federal government rewards

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47 Brickey, supra note 3, § 4:05, at 140-41 (citing cases).
and punishes. The Guidelines, of course, also provide the basis used by courts when sentencing corporations. Thus, although the Guidelines generally appear at the end of the game, they are a critical starting point when positioning your company to avoid or minimize the consequences of an indictment for the illegal acts of an employee. The Guidelines are, however, extremely complex and should be discussed with counsel, so what follows below is merely a survey of their more salient points.

The Guidelines, which became effective on November 1, 1991, is the federal law for sentencing corporations and individuals. The Guidelines is mandatory. They have been the subject of a long and continuous debate because they remove a great deal of the discretion that federal judges traditionally exercised during sentencing. The following four principles are reflected in the Guidelines:

(1) Courts, whenever practicable, must fashion a remedy that makes the organization’s victim(s) whole;

(2) If the organization operated primarily for a criminal purpose, a fine should be set sufficiently high to divest the organization of all of its assets;

(3) If the organization was not operated primarily for a criminal purpose, the fine should be based on the seriousness of the offense and the culpability of the organization; and

(4) Probation is an appropriate sentence for an organization under certain circumstances.48

The Guidelines are designed to impose sanctions upon organizations and their agents that “will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.”49

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49 Id.
Moreover, the Guidelines seek, among other things, “uniformity in sentencing . . . .”\(^{50}\) At their simplest level, the way the Guidelines are used is that a “court determines [a] corporation’s fine by first calculating the ‘base fine,’ and then adjusting the fine up or down based on the corporation’s ‘culpability score.’”\(^{51}\) Essentially a corporation’s culpability score reflects the corporation’s complicity in the employee’s wrongdoing.

On their face, the Guidelines present a simple plan with noble policies and purposes; but, you ask, why are the Guidelines important to me if I have not been indicted? The Guidelines are important to you and your corporation for two reasons: (i) the principles and mitigating factors therein are not only considered at sentencing, they are, more importantly, considered by prosecutors when deciding whether a criminal indictment should be sought and (ii) they provide valuable insight on how to avoid or minimize criminal liability. Thus, to position your corporation favorably to avoid a criminal indictment or minimize the consequences of a criminal prosecution, your corporation, along with counsel, should consider the following:

- Implementing an effective compliance program;
- Timely reporting of the illegal acts of employees to the appropriate government agency;
- Cooperating, when appropriate, with federal agents and attorneys; and
- Accepting responsibility for the corporation’s wrongdoing.

Each recommendation is distinct, reaping its own rewards, and should be discussed with counsel; however, there is an interrelationship among all four, whereby the last three flow naturally from an effective compliance program. Moreover, the reporting requirements contained in the Guidelines account for internal corporate investigations, which are discussed in part II.B.

1. **Effective Compliance Programs**

\[^{50}\text{Id. ch. 1, pt. A intro. cmt.}\]

\[^{51}\text{Huff, supra note 1, at 1267 (citing Sentencing Guidelines, supra note 48, §§ 8C2.4-2.8).}\]
The ultimate benefit that a corporation can receive from implementing an effective compliance program is that the existence of such a program may persuade the U.S. Attorney not to seek an indictment against the corporation. This is not provided for in the Guidelines; rather, this is a function of the U.S. Attorney exercising prosecutorial discretion. It has been our experience that most U.S. Attorneys give great weight to whether a target corporation has an effective corporate program in place when deciding whether a corporate criminal prosecution is warranted for the act(s) of an employee. The Guidelines’ analysis of whether a compliance program is effective follows below.

Only effective compliance programs qualify for a reduction in a corporation’s culpability score. An effective compliance program “must be specifically targeted at detecting and helping prevent criminal conduct by employees of the corporation.” Failure, however, to prevent or detect employee misconduct, by itself, does not make a program ineffective. Organizational due diligence in seeking to prevent and detect criminal conduct by employees is the hallmark of an effective compliance program. To assess a corporation’s due diligence, the Guidelines list the following seven factors that courts, and corporations, should consider when determining whether a compliance program is sufficiently effective:

1. The compliance program must be reasonably capable of reducing the prospect of criminal conduct;
2. High-level personnel must be assigned overall responsibility to oversee the compliance program;

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52 See also Webb et al., supra note 1, at 658.
53 See id. at 657 (citing Sentencing Guidelines, supra note 48, § 8A1.2 application note 3(k)).
54 Huff, supra note 1, at 1268 (citing Sentencing Guidelines, supra note 48, § 8A1.2 application note 3(k)). “An ‘effective program to prevent and detect violations of law’ means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct.” Sentencing Guidelines, supra note 48, § 8A1.2 application note 3(k).
56 See id.
(3) The corporation must use due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known, had a propensity to engage in illegal activities;

(4) The corporation must effectively communicate its compliance program to all employees and other agents;

(5) The corporation must take reasonable steps to achieve compliance with its program, by utilizing monitoring, auditing and reporting systems;

(6) The compliance program must be consistently enforced through appropriate disciplinary mechanisms;

(7) After an offense has been detected, the organization must take all reasonable steps to respond appropriately to the offense and to prevent further similar offenses.57

If the corporation stands any chance to completely avoid a criminal indictment because of an effective compliance program, the corporation must take heed all of seven factors. Other factors that courts may take into account to determine a compliance program’s effectiveness are: the corporation’s size; the nature of the corporation’s business; and the corporation’s prior history.58 Moreover, an effective compliance program must “incorporate and follow applicable industry practice [and] the standards called for by any applicable governmental regulation . . . .”59 Under the Guidelines, the benefit that the corporation will derive from implementing an effective compliance program is that the corporation’s criminal liability will be minimized, i.e., the corporation’s fine will be reduced. The process of fine reduction is discussed below.

At the outset, corporations being sentenced pursuant to the Guidelines are assessed a culpability score of five, which is in the middle of the fine range.60 However, if employee misconduct occurs despite an effective program to prevent and detect violations of the

57 See id. § 8A1.2 application notes 3(k)(1)-(7); Huff, supra note 1, at 1268 & n. 76.


59 Id.

60 See id. §§ 8C2.5(a), 2.6, 2.7.
law, a court will reduce a corporation’s culpability score by three points. A reduction of a corporation’s culpability score results in a commensurate reduction in the fine that will be assessed. The practical effect of such a reduction, from five to two, is that the corporation’s fine is lowered by sixty percent. Consequently, a corporation with an effective compliance program ends up paying a substantially lower fine than a corporation without such a program for the identical offense. Of course, there are certain qualifications and exclusions.

A corporation will not qualify for a reduction of its culpability score, notwithstanding an effective compliance program, if “high-level personnel . . . or an individual responsible for the administration or enforcement of [the compliance] program . . . participated in, condoned, or was willfully ignorant of the offense.” Furthermore, a corporation will not qualify for a reduction of it’s culpability score “if, after becoming aware of an offense, the [corporation] unreasonably delayed reporting the offense to appropriate governmental authorities.” A reasonable delay in reporting is, however, expected because the Guidelines contemplate that a corporation will conduct an internal investigation into an offense. No reporting is required if a corporation reasonably concludes, based on information available to it at the time of its investigation, that no offense was committed.

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61 See id. § 8C2.5(f).
62 See id. § 8C2.6-2.7.
63 A reduction in the corporation’s fine is intended to give the corporation the incentive “to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” Huff, supra note 1, at 1268-69 (citing Sentencing Guidelines, supra note 48, ch. 8 intro. cmt.).
64 Sentencing Guidelines, supra note 48, § 8C2.5(f).
65 Id. This has prompted some commentators to suggest that “the incentive to adopt compliance programs provided by the Guidelines may be tempered by the countervailing requirement to report violations within a reasonable time.” Huff, supra note 1, at 1269; see also Arlen, supra note 2, at 836 (costs of compliance and expected increase in criminal liability, may exceed the benefits of compliance, i.e., reduction in the number of crimes); Richard S. Gruner, Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform, 36 Ariz. L. Rev. 407, 458 (1994) (“If a company’s law compliance program fails to reduce corporate crime levels while permitting public officials to successfully prosecute three or more times as many corporate offenses as would otherwise be the case, the firm operating the program will suffer rather than benefit from its preventive efforts”).
66 See Sentencing Guidelines, supra note 48, § 8C2.5 application note 10. Internal corporate investigations are discussed in Part II.B.
67 See id.
Implementing an effective compliance program is highly suggested; however, as these exclusions demonstrate, it is not a guarantee that a corporation will avoid a criminal indictment or that a corporation’s fine will be reduced.

In addition to fine reduction, there are other benefits to implementing an effective compliance program, not readily apparent in the Guidelines, of which you should be aware.

First, an effective compliance program, “[d]esigned thoughtfully, disseminated widely, and enforced strictly . . . can have a substantial deterrent effect” on employees and executives.\(^68\) The attendant benefit is the prevention of crime and the preclusion of a highly publicized investigation and indictment, which can have devastating consequences even if the corporation is never found criminally liable.\(^69\) Second, compliance programs create greater opportunity for self-reporting through detection.\(^70\) In addition to a culpability score reduction, discussed below, self-reporting preempts the opportunity for a whistleblower to bring a qui tam suit against the corporation.\(^71\) Third, a corporation of greater than fifty employees will avoid mandatory probation if it has an effective compliance program.\(^72\) Avoiding mandatory probation is a substantial benefit because mandatory probation would likely entail having the government constantly looking over your shoulder, which could cause disruption of your business operations.

In sum, while no compliance program will fully deter employee crime, it may prevent some employee crime, and the implementation of an effective compliance program can, notwithstanding any failure to detect or prevent a crime, reduce or avoid the costs of a criminal indictment and conviction.

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\(^{68}\) Webb et al., supra note 1, at 657.

\(^{69}\) See id.

\(^{70}\) See id.

\(^{71}\) See id. at 658. A qui tam action is a civil action where the informer-plaintiff sues on behalf of himself and the government. The ability to bring such a suit depends upon a statutory delegation of this right.

\(^{72}\) See Sentencing Guidelines, supra note 48, § 8D1.1(a)(3).
2. **Self-Reporting, Cooperation, and Acceptance of Responsibility**

A corporation’s ability to self-report, cooperate and accept responsibility flow naturally from and depend upon, at least in part, the existence of an effective compliance program. Similarly, it has also been our experience that exhibiting this type of behavior will go a long way to persuading the U.S. Attorney not to seek an indictment against the corporation. As with the existence of an effective compliance program, this is a function of the U.S. Attorney exercising prosecutorial discretion.

Under the Guidelines, the benefit of self-reporting, cooperating and accepting responsibility for the corporation’s wrongdoing is that the corporation’s criminal liability will be minimized, i.e., the corporation’s fine will be reduced. The differing benefits attending these behaviors is discussed below.

Five points will be deducted from a corporation’s culpability score if, prior to an imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the offense, it:

- reported the offense to appropriate governmental authorities;
- fully cooperated in the investigation; and
- clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.\(^73\)

There are smaller deductions for corporate behavior that embodies fewer than all three of the criteria listed above. If a corporation does not self-report, but fully cooperates in the investigation and accepts responsibility for its criminal conduct, two points will be deducted.

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\(^73\) See Sentencing Guidelines, supra note 48, § 8C2.5(g)(1).
from its culpability score. A corporation that merely accepts responsibility for its criminal conduct will have one point deducted from its culpability score.

Remember, a corporation is assessed a culpability score of five at the outset of the sentencing process. Therefore, a five point deduction, for self-reporting, cooperation, and acceptance of responsibility, would significantly reduce a corporation’s fine, in some cases up to ninety-five percent. Counsel can advise the corporation as to the best course of action for your particular situation.

As you probably expected, a corporation’s ability to reap the benefits of these behaviors is subject to certain qualifications and exclusions. Corporations only qualify for a reduction if cooperation is both timely and thorough. Cooperation is timely if it begins “essentially at the same time as the organization is officially notified of a criminal investigation.” Thorough cooperation requires “the disclosure of all pertinent information known by the organization,” which means “sufficient [information] for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.” Cooperation is measured on an organizational, not individual, level.

To qualify for a reduction based on the corporation’s affirmative acceptance of its role in the criminal conduct, the corporation should enter “a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct . . . .” To prevent the admissibility of a guilty plea that is later withdrawn, such

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74 See id. § 8C2.5(g)(2).
75 See id. § 8C2.5(g)(3).
76 See id. § 8C2.6 (using the minimum multiplier).
77 See id. § 8C2.5 application note 12.
78 Id.
79 Sentencing Guidelines, supra note 48, § 8C2.5 application note 12.
80 See id.
81 Id. § 8C2.5 application note 13.
a plea should be made in connection with plea discussions before the U.S. Attorney.\textsuperscript{82} In some instances, the government may require “the chief executive officer or highest ranking employee of an organization [to] appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.”\textsuperscript{83} However, if the corporation’s past conduct is inconsistent with its acceptance of responsibility, then it will not qualify for this reduction.\textsuperscript{84} Moreover, this reduction is inapplicable to a corporation that decides to go to trial, is convicted, and only then accepts responsibility for its role in the misconduct.\textsuperscript{85}

Ultimately, these are a few simple steps for a corporation to consider taking -- after the discovery of an employee’s wrongdoing, either by the corporation or the government -- to minimize the costs of criminal liability. This list is not exclusive and there may be other creative solutions that counsel can suggest based upon your particular situation.

B. Internal Corporate Investigations

Conducting a proper internal corporate investigation is a critical component in the process of understanding the allegations made against the corporation and ultimately positioning the corporation to avoid or minimize the consequences of indictment for the illegal acts of an employee. Without such an inquiry, the corporation is left with only the government’s findings when dealing with federal prosecutors. The purpose of an internal corporate investigation is twofold: (1) discover facts and assess the law applicable to the government’s allegation(s), which (2) will lay the foundation for counsel to render legal advice to the corporation upon which a proactive strategy for dealing with the government can be built. There are, of course, other

\textsuperscript{82} See Fed. R. Crim. P. 11(e)(6).

\textsuperscript{83} Sentencing Guidelines, supra note 48, § 8C2.5 application note 14.

\textsuperscript{84} See id., § 8C2.5 application note 13.

\textsuperscript{85} See id. There are rare situations, e.g., where an organization goes to trial to assert and preserve issues that do not relate to factual guilt, that are exceptions to this rule. See id.
advantages and some disadvantages to conducting an internal investigation, which should be considered; however, conducting an internal corporate investigation is generally recommended.

1. **Initiate the Investigation**

   Once you learn that your corporation is under investigation by the federal government, or you learn of alleged employee misconduct, you should consult with counsel about initiating an internal corporate investigation of the alleged wrongdoing.footnote[86] To determine how to initiate the investigation, the first question you should ask is: Who should control the investigation?footnote[87] The investigation can be initiated and controlled by a myriad of players -- the Board of Directors, a Standing Committee of the Board, a Special Committee of the Board, or by Management.footnote[88]

   The choice is yours, however, it is both general practice and recommended that the investigation be “conducted by [outside] counsel hired by an independent committee composed of outside directors.”footnote[89] Underlying this recommendation is a twofold purpose: (1) handing over control of the investigation to a committee of outside directors and independent counsel “lends the investigation a measure of objectivity and credibility which will be essential in dealing with the government and third parties,”footnote[90] and (2) the decisions of independent

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86 See Alec Koch, Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government, 34 Am. Crim. L. Rev. 347, 347 (Winter 1997) (noting that such investigations have become commonplace in this era of expanding corporate criminal liability). Of course, if the corporation becomes aware of malfeasance without government notification or involvement, it may choose to initiate an internal investigation. See id.


88 Id. (listing advantages and disadvantages of each).

89 Anton R. Valukas & Robert R. Stauffer, Internal Corporate Investigations: The Law, Practice and Strategies of Corporate Self-Policing, The Lawyer’s Brief, at 2 (Apr. 30, 1992) (emphasis added) [hereinafter Valukas & Stauffer, Corporate Investigations]; see Anton R. Valukas & Robert R. Stauffer, Internal Investigations of Corporate Misconduct, 2 Insit. 17, 17 (Feb. 1992) [hereinafter Valukas & Stauffer, Corporate Misconduct]; see also Mark A. Rush & Michael Agresti How to Protect Your Internal Corporate Investigations from Discovery, Kirkpatrick & Lockhart LLP (May 1998) (recommending that corporations request and obtain formal authorization of the Board of Directors to conduct an internal investigation, further safeguarded by obtaining formal authorization from management). But see Valukas & Stauffer, Corporate Misconduct, supra at 18 (stating that relatively minor misconduct or the misconduct of only lower-level employees can be investigated by in-house counsel).

90 Valukas & Stauffer, Corporate Misconduct, supra note 89, at 18.
directors who are free from conflicts of interest are more likely to benefit from the protection of the business judgment rule. Nevertheless, when making your final decision, it is important to remember that whoever controls the investigation will likely be instrumental in choosing:

- counsel to act as an investigator;
- the scope of the investigation and the techniques that will be employed;
- the type of investigative report that will be prepared; and
- the dissemination of information learned from the investigation.  

2. Select an Investigator

At the outset, the corporation must determine whether the investigation will be conducted by in-house counsel or outside counsel. There are advantages and disadvantages inherent in each choice; however, regardless of whomever is selected, “such counsel should be experienced in gathering and analyzing information, especially from recalcitrant persons, and in addressing the legal issues relating to matters relevant to the investigation.”

Although employing in-house counsel to conduct an investigation is not the preferred method, it is perhaps the simplest, least disruptive and most inexpensive way to get the job done. Moreover, in-house counsel’s familiarity with the business and its personnel will likely translate into greater cooperation from employees. And, in some cases, in-house counsel may be able to put an immediate stop to any employee criminal misconduct, as well as take

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91 See Yodowitz & Meyers, supra note 87, at 144. The business judgment rule is discussed briefly in Part II.B.4.

92 See id. at 142.

93 See id. at 145; see also Veronica Blake-Greenway, The Do’s and Don’ts of Internal Investigations, 547 PLI/Lit 545, 549 (1996) (stating that the investigator should be selected early in the process).

94 Yodowitz & Meyers, supra note 87, at 145.

95 See id.

96 See id.; see also Blake-Greenway, supra note 93 at 549 (noting in-house counsel’s familiarity with the business and its employees as an advantage).
necessary disciplinary measures against employees that have violated company policy and/or the law.97

However, as noted above, there may be significant drawbacks to using in-house counsel to conduct your internal investigation: In-house counsel lacks sufficient autonomy, which creates credibility problems in the eyes of federal prosecutors -- the very people with whom the corporation must negotiate to minimize the consequences of or avoid indictment;98 and use of in-house counsel may not afford you the same attorney-client privilege and work product doctrine protection. It is for these reasons that the corporation should engage outside counsel to conduct the investigation.

Consequently, outside counsel may be the best choice because such counsel is generally free from inherent conflicts of interest. Moreover, outside counsel is the best choice because objectivity or the appearance of objectivity in conducting the investigation are of paramount concern.99 Naturally, the corporation will have less control over the investigation, but it is that very independence that lends credibility to the investigation.100 Moreover, when retaining outside counsel the corporation can select “counsel with expertise in conducting investigations and, in particular, in the subject matter of the investigation.”101

In the final analysis, corporations should select counsel that suits their needs, but always keep in mind the importance of objectivity and credibility to a successful internal corporate investigation.

3. Mechanics of the Investigation

97 See Blake-Greenway, supra note 93 at 549.

98 See id.; see also Yodowitz & Meyers, supra note 87, at 146 (noting that government investigators tend to be more suspicious when investigations are conducted by in-house counsel).


100 See id.

101 Id. at 149.
Once the corporation selects an investigator, the scope of the investigation should be determined. This should be set forth in a memorandum that also contains the procedures to be followed by the investigator, including procedures for the identification and interviewing of witnesses, the identification and reviewing of relevant documents, and maintaining confidentiality. The memorandum “should emphasize the need for thoroughness, making clear that the investigation is intended to compile and analyze all relevant information for the purpose of formulating advice to the corporation and preparing for anticipated litigation.”

Laying the proper foundation at the beginning of the investigation heightens the likelihood of a prompt, thorough and accurate investigation -- all of which are important goals for enhancing the investigation’s credibility and minimizing potential adverse publicity.

Once the investigation’s scope and procedures are determined, it is time for the factual component of the investigation to get underway. Factual information is usually gathered via: (1) document collection and review, and (2) employee interviews. These processes must be thorough and anticipate potential issues that will be raised by the government’s investigation.

Initially, the investigator should collect all relevant documents. This serves not only the purposes of the investigation, but may also serve as a response to a possible government subpoena. To effect collection of the relevant documents, the investigator should circulate a memorandum identifying the “types of documents which may even remotely relate to the

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102 See Valukas & Stauffer, Corporate Misconduct, supra note 89, at 18.
103 See id.
104 Id.
105 See id.
106 See id.; Koch, supra note 86, at 349.
107 See Koch, supra note 86, at 349.
108 See Valukas & Stauffer, Corporate Misconduct, supra note 89, at 18 (stating that document collection should always be done with the consideration of the possibility of a government subpoena).
investigation and instructing employees not to destroy any such documents pending the conclusion of the investigation and related proceedings.\footnote{109} In a similar vein, the corporation should suspend all document destruction procedures, even if done in the normal course of business, because the destruction of a document during the pendency of an investigation could have devastating consequences.\footnote{110} Once a relevant document is collected, the document’s source should be catalogued for ease in identifying witnesses and to prevent duplication of efforts.\footnote{111}

After all of the relevant documents have been collected, the investigator should begin the process of interviewing all “individuals who may have knowledge of the relevant facts.”\footnote{112} Interviewing will likely be a multi-step process, moving from the general to the specific, including re-interviews after the investigator has had a chance to garner information from document review and other witness interviews.\footnote{113} It is important to note that when the investigator interviews employees of the corporation, the investigator should make clear the he represents the corporation, not the employee.\footnote{114}

Finally, the information gathered by the investigator will be presented to the committee that initiated the investigation in an investigative report.\footnote{115} The report should be labeled “Privileged and Confidential: Attorney Work Product” and contain: (1) a summary of the circumstances that led to the investigation; (2) the investigative steps taken; (3) a summary of the facts revealed by the investigation; (4) the corporation’s policies, procedures or practices that led to the events investigated; (5) an analysis of the applicable law; (6) arguments for and against
corporate criminal liability; (7) suggested preventative measures; and (8) a recommendation of appropriate remedial action.116

Remember, this is your tool for dealing with the government’s inquires and allegations. Conducting an internal investigation will allow you to take a proactive stance in your negotiations with the government and make well-informed decisions because of the knowledge attained from the investigation. How much you decide to reveal, if anything, is up to you -- disclosure, however, may constitute a waiver of any privileges that attached to the information generated during the course of the investigation. In the final analysis, whether you decide to share information with the government or not, the key is to conduct a prompt, accurate and thorough investigation that will allow you to know exactly where you stand with respect to potential corporate criminal liability.

4. Other Advantages of an Internal Investigation

Of course, in addition to its important information-gathering function and the attendant benefits discussed above, conducting an internal corporate investigation has other advantages. First, conducting an internal investigation in the manner suggested and outlined above can help ensure that the decisions made by the committee controlling the investigation will be protected under the business judgment rule.117 Consequently, courts will not second guess actions taken by the committee in implementing and executing the internal corporate investigation.118 And, second, conducting an internal investigation, coupled with appropriate remedial action and sufficient disclosure -- remember, however, the potential for waiver -- to the

116  See id.

117  See Yodowitz & Meyers, supra note 87, at 138; see also Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The business judgment rule is a judicial acknowledgment that directors manage the business and affairs of corporations, which presumes that they do so on an informed basis, in good faith and in the honest belief that the actions they take are in the best interests of the corporation. See Aronson, 473 A.2d at 812.

118  See Aronson, 473 A.2d at 812; Yodowitz & Meyers, supra note 87, at 138.
government may preempt a government investigation. The attendant benefits of avoiding a government investigation include:

- less disruption of your business;
- more control over the public dissemination of information;
- more control over the scope of the investigation;
- lower potential for adverse publicity; and
- a less adversarial engagement with the government.

Thus, the potential upside of conducting an internal corporate investigation is great. That does not mean, however, that there is no downside.

5. Disadvantages of an Internal Investigation

There are two significant drawbacks to conducting an internal corporate investigation: (1) the expense involved; and (2) the risk of discovering and being compelled to disclose inculpatory information.

The cost of conducting an internal investigation can be high, including costs associated with disruption of your business operations. Moreover, an internal investigation requires considerable executive time commitments. Nevertheless, financial concerns should only weigh against conducting an internal investigation if the costs associated with being found criminally liable for the conduct of an employee will be less than the costs of conducting the investigation -- an unlikely proposition.

In addition to the costs associated with an internal investigation, you might not like what you find during the course of the investigation, and in conducting the investigation you

119 See Yodowitz & Meyers, supra note 87, at 139.
120 See id. at 141.
121 See id.
may have inadvertently built a case against your corporation.\textsuperscript{122} Of course, this does not mean that the government was not already in the process of doing or could not have done the same thing. Simply, it means that you will have the same information that the government has in its possession. A related issue, however, is that there is always the chance that you may disclose certain privileged information, thereby waiving any privilege that may have attached to the information procured.\textsuperscript{123} Fortunately, there are steps that the corporation and investigator can take to avoid disclosure of confidential and privileged information.

6. Protecting the Investigation from Discovery

Counsel selected to conduct the investigation should be given a retention letter.\textsuperscript{124} This is different from the memorandum that sets forth the scope and procedures of the internal investigation.\textsuperscript{125} The retention letter should state “that the purpose of the investigation is to provide legal advice and prepare for possible litigation . . . .”\textsuperscript{126} Furthermore, it should be made clear in the retention letter “that the investigation is not intended to further any continuing or future misconduct or to conceal any misconduct, but rather to gather the facts and determine possible liabilities and defenses.”\textsuperscript{127} Including these terms in the retention letter places the internal investigation and the work product derived therefrom within the rubric of the attorney-client privilege.

In addition to obtaining a retention agreement with counsel hired to conduct the investigation and following the procedures for conducting an internal investigation discussed

\textsuperscript{122} See id. at 140-41.
\textsuperscript{123} See id.
\textsuperscript{124} See Valukas & Stauffer, Corporate Misconduct, supra note 89, at 19.
\textsuperscript{125} See supra text accompanying notes 102-05.
\textsuperscript{126} Valukas & Stauffer, Corporate Misconduct, supra note 89, at 19.
\textsuperscript{127} Id.
above, the following eleven recommendations should be considered when deciding how to implement and conduct your internal corporate investigation.\textsuperscript{128}

1) Request and obtain formal authorization to conduct an internal investigation from the Board of Directors;

2) Request and obtain formal authorization to conduct an internal investigation from corporate management;

3) Appoint an attorney to coordinate and supervise the investigation;

4) Documents generated during the course of the investigation should be marked “Privileged and Confidential: Attorney Work Product”;

5) Maintain a separate file for the internal investigation, so that only those directly involved in the investigation have access;

6) Instruct employees to cooperate in the investigation;

7) Notes from witness interviews should be marked “Opinion Work Product”;

8) Reports of the investigation’s findings should contain legal advice, opinions and analysis;

9) Consultants should be retained by counsel conducting the investigation rather than the corporation;

10) Avoid voluntary disclosure, especially of information gathered during the course of the internal investigation; and

11) Advise employees that counsel conducting the investigation represents the corporation, not employees of the corporation.

This outline is simply a checklist for corporations on how to structure an internal investigation in a way that will afford the work generated during the course of the investigation the greatest protection from discovery. These steps, however, are not a foolproof guide to

\textsuperscript{128} For a more thorough discussion of this issue, see Rush & Agresti, supra note 89.
maintaining or creating privileged documents. You should consult with counsel and know the
law of your jurisdiction. One thing is sure: It is vital that personnel involved in the
investigation become intimately familiar with the attorney-client privilege and the work product
doctrine in the corporate context.129

C. Proactive Pre-Indictment Contact and Negotiations with Government Prosecutors

A criminal indictment can be as devastating to a corporation as a conviction. For
that reason, “[i]t is imperative that defense counsel for corporations under criminal investigation
respond promptly and creatively by offering proposals that permit federal prosecutors to further
the public interest in law enforcement” without criminally indicting the corporation.130 From the
outset, “[t]he defense lawyer’s job is to interject doubt in the prosecutor’s mind,” that a
conviction is: (i) obtainable and (ii) in the interests of justice.131 These two factors are of the
utmost importance to a prosecutor considering whether to seek an indictment.132 In many
instances, the latter factor is the most important and provides the basis for defense counsel’s
most compelling arguments.

Although discretionary, most prosecutors will grant defense counsel’s written
request to meet and discuss the corporation’s position before seeking an indictment. We
recommend that defense counsel take every opportunity to dissuade government prosecutors
from indicting the corporation. Timing is of great importance. Counsel must consider an early
approach to the government to attempt to avoid the government spending a lot of time and
resources on an investigation, because that may provide a compelling reason for a criminal

129 See id., at 3-12 (discussing the attorney-client privilege and the work product doctrine in the corporate context).


131 Steven F. Molo, How to Successfully Persuade the Prosecutor not to Indict, 4 No. 4 Bus. Crimes Bull. 1, 1 (May 1997).

132 See id. at 1.
disposition. Be aware, however, that the government will want to perform some independent investigation of the facts prior to having any meaningful discussions of a non-criminal prosecution. Of course, the last opportunity is the opportunity presented at the preindictment meeting. Understandably, counsel -- fearing that the government has already decided to indict and will use this meeting for the sole purpose of learning the defense’s strategy -- may be reluctant to put all of his/her cards on the table at the preindictment meeting. This is a decision that counsel and the corporation must make. Defense counsel should only lay out its best case -- of not only the facts, but why the interests of justice would not be served by an indictment of the corporation -- if counsel reasonably believes that the government can be dissuaded from indicting, or, in the alternative, reducing the charges. Otherwise, counsel should still request the meeting, but only to hear what the government has to say about its case, the evidence and its position on a plea.

If, however, you decided to go into the preindictment meeting, use all of your best ammunition to dissuade the prosecutor from indicting, because there is no point in making only a partial presentation and keeping your fingers crossed that it was enough. We suggest that defense counsel consider the following arguments when making the preindictment presentation:

- The government’s evidence will not prove the corporation’s guilt beyond a reasonable doubt;

- Any violation of the law was technical, not substantive;

- Rogue employees, who are not representative of the corporation’s policies and practices, are responsible for the misconduct;

- The corporation had taken remedial measures to remedy the harm and insure that the misconduct does not reoccur, including restitution to victims, termination or discipline of employees, and modification to existing compliance program; and
• Civil and/or administrative penalties are available and more appropriate means of resolving the matter.  

It is important for defense counsel to convince government prosecutors “that there is a basis for distinguishing the treatment of the corporation from the criminally culpable individual employees or officers.” Of course, because the corporation’s criminal liability is derivative, i.e., the corporation’s guilt arises from the illegal conduct of its agents, it is difficult to persuade government prosecutors that there is no basis for prosecuting the corporation, while there is a basis for prosecuting the individuals involved.  

The key is to convince prosecutors that their goals of deterrence, restitution, and punishment will be served by alternatives to criminal indictment of the corporation. Consequently, defense counsel should focus on the government’s ability to achieve its goals via civil remedies, including securing repayment to the victims, the payment of fines to the government, and the implementation of monitoring, training and reporting requirements upon the corporation. Moreover, it is important for defense counsel to point out that there will be numerous collateral victims, such as innocent employees and shareholders, as a result of a criminal indictment and conviction of the corporation; and, that this result is “not in the public interest for [a] generally law-abiding corporation[...].”

**Conclusion**

Courts have been willing to interpret the standard for corporate criminal liability broadly -- such that there are virtually no limitations on the types of illegal employee conduct

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133 See id. at 2.

134 Savage & Martz, supra note 130, at 11.

135 See id.

136 See id. at 13.
that can be imputed to a corporation. Furthermore, corporations can be found criminally liable for the illegal conduct of a wide variety of agents. These two factors increase the likelihood that your corporation could come under the government’s investigative eye, if it hasn’t already. What will you do to prevent that investigation from culminating in a criminal indictment and likely conviction of your corporation -- sounding a potential death knell for the corporation? Hopefully, you have thought ahead, perhaps having implemented a compliance program. Is it effective under the United States Sentencing Guidelines? This should be evaluated to determine whether the corporation will obtain the desired result of its efforts. Remember, even an effective program may fail to prevent all employee criminal activity, so you need to be prepared to consider the following questions: should you: (i) report the illegal activity, (ii) cooperate with the government’s investigation, and (iii) accept responsibility if the corporation determines that there was any wrongdoing?

The mechanism for facilitating these steps is the internal corporate investigation. When beginning an internal investigation, the corporation must be very careful in selecting who will control the investigation and counsel to conduct the investigation. Furthermore, the investigation must be conducted meticulously, according to well thought-out plan, both to garner the information needed and to protect that information from discovery. Moreover, an internal investigation will provide you with the information you need to dissuade government prosecutors from indicting the corporation. Proactive preindictment discussions and negotiations with federal prosecutors are a corporation’s best chance to take advantage of prosecutorial discretion and avoid an indictment in the eleventh hour.

No course of action is guaranteed to avoid or minimize the consequences of an indictment; however, if the government thinks, or is convinced, that it can achieve its goals without going through the expense of an indictment and criminal trial, then corporations and corporate defense counsel should take every possible step to make that happen.