Debarment (i.e., exclusion) from competing for government contracts is ordinarily effective for a period of up to three years, although the provision is made for a longer period.

Suspension or debarment orders exclude contractors, either directly or indirectly through their affiliates, from receiving government contracts, from acting as individual sureties, and from non-procurement transactions including: "grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements." Suspension or debarment by one agency precludes a contractor from being eligible to enter into procurement or non-procurement transactions with all other Executive Branch agencies. In determining the scope of the debarment, improper conduct of an individual associated with the contractor, including the actions of directors, officers, and employees, may be attributed to the organization. In like fashion, the misconduct of the organization

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469 Id. § 9.406-4(a)(1).
470 For example, the FAR provides that the period of debarment for violation of the Drug-Free Workplace Act, 41 U.S.C. §§ 701(b)(3) (1994), may be for a period of up to five years. 48 C.F.R. § 9.406-4(a)(1)(i). The FAR also provides that debarment may be extended for an unspecified "additional period" if necessary "to protect the Government's interest." Id. § 9.406-4(b). Such an extended suspension, however, cannot be predicated "solely on the basis of the facts and circumstances upon which the initial debarment action was based." Id. Some agency procedures allow debarment for longer than five years where the contractor willfully violated agency regulations or a prior debarment settlement agreement. CIBINIC & NASH, supra note 437, at 276; see also Shannon, supra note 447, at 415-17 (stating that the FAR does allow longer debarments "depending on the severity of the actions").
471 As used in the FAR, a "contractor" is an individual or entity that "[d]irectly or indirectly (e.g., through an affiliate), submits offers for or is awarded . . . a Government contract." In this connection, "[b]usiness concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both." 48 C.F.R. § 9.403.
472 Id. § 9.405(a).
473 Id. § 9.405(c).
475 See 48 C.F.R. §§ 9.405(a)-(b); 9.407-1(d).
476 Section 9.406-5(a) provides that: [t]he fraudulent, criminal, or other seriously improper conduct of an officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.
477 Id. § 9.406-5(1). Additionally, 10 U.S.C. § 2408 provides for substantial criminal fines to be imposed against defense contractors that employ persons in positions of responsibility who have been convicted of defense contract-related felonies. See Michael J. Davidson, 10 U.S.C. § 2408:
may be attributed to associated individuals and to joint venture partners. The same considerations apply to the scope of suspension.

The existence of one or more of the specified causes of suspension or debarment, however, does not require that the contractor be suspended or debarred. Instead, the FAR suggests that the debarring official should consider a variety of mitigating factors among which are "effective standards of conduct and internal control" employed by the contractor.

Thus, effective compliance programs may not only help the corporation avoid criminal liability in the first instance, but may also help in the instance when misconduct occurs despite the company's efforts to prevent it. Furthermore, if the misconduct constitutes cause for debarment, the corporation may avoid debarment by virtue of having previously implemented an effective compliance program and a system of internal controls. Indeed, this appears to have been the case in Caremark.

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477 Section 9.406-5(b) provides: The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.


478 Section 9.406-5(c) provides: The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Id. § 9.406-5(c).

479 See id. § 9.407-5.


481 See id. § 9.406-1(a).


483 See Steven M. Kowal, Corporate Compliance Programs: A Shield Against Criminal Liability, 53 FOOD & DRUG L.J. 517, 521 (1998) (stating that "[i]n the existence of a compliance program . . . can demonstrate the company's current responsibility and integrity and provide a basis to avoid or limit debarment from government contracts").

484 Section 9.406-1(a)(1) provides that [b]efore arriving at any debarment decision, the debarring official should consider . . . [w]hether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

485 C.F.R. § 9.406-1(a)(1). As Chancellor Allen noted in Caremark, the company had taken a number of actions to centralize supervision of its branch operations and to ensure compliance in response to the government's investigation. Caremark terminated payments of management fees to physicians. A revised version of the company's Guide to Contractual Relationships was issued
In addition to the sanctions under the Federal Sentencing Guidelines and the statutory and administrative authority to exclude companies from doing business with the government or from participating in government benefit programs, a variety of federal statutes establish punitive civil liability for violative conduct.

3. Civil Penalties

As the Caremark case amply demonstrates, corporate misconduct giving rise to criminal liability may also engender substantial civil liability.\(^{435}\)

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clarifying the requirements of Medicare/Medicaid and new contract approval procedures were instituted. Additionally, Caremark's internal audit plan included compliance with business and ethics policies and an independent audit firm was engaged to report on the adequacy of Caremark's control structure. The board ordered a review of compliance policies and received reports from management concerning employee compliance training. The board also approved the issuance of a new ethics manual that expressly prohibited payments in exchange for Medicare/Medicaid referrals. \(\text{In re Caremark Intl, Inc, Derivative Litig., 698 A.2d 959, 962-63 (Del. Ch. 1996).}\)

\(^{435}\)The distinction between liability under the civil law and punishment under the criminal law is not a bright line. As Professor Richard J. Lazarus has observed:

At some level of abstraction there may be "no distinction better known, than the distinction between civil and criminal law," but in practice the precise dividing line between the two has become increasingly blurred. Civil sanctions seem more and more like criminal sanctions in their severity and harshness. Moreover, at the federal level, Congress has virtually criminalized civil law by making criminal sanctions available for violations of otherwise civil federal regulatory programs. An estimated 300,000 federal regulations are now subject to criminal enforcement.

Richard J. Lazarus, *Meeting the Demands of Integration Criminal in the Evolution of Environmental Law: Reforming Environmental Law*, 83 GEO. L.J. 2407, 2441 (1995). In this same vein, Professor Abraham S. Goldstein commented that the federal government's commitment of its full regulatory power against white collar crime has risked eliminating the traditional distinction between civil and criminal actions:

The conduct ordinarily described as white-collar crime is under attack in all the ways available to the regulatory state—through criminal, civil, and administrative law. The objective seems to be to achieve the state's regulatory purpose unimpeded by the "technical" limits imposed by criminal law or criminal procedure. This results in the erosion of formal distinctions between "criminal" and "civil" actions. The erosion, by collapsing traditional categories, has created a serious risk that the central role of criminal law in a system of sanctions may be compromised or even lost.

Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1895 (1992). See also Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal - Civil Procedural Divide*, 85 GEO. L.J. 775 (1997) (commenting that the blurring of traditional distinctions between civil and criminal actions is due to "shifts in the conceptual or intellectual foundations of the criminal-civil distinction" that functionally has increased the number of "hybrid" legal institutions). One commentator has noted the problem, in light of Halper, of locating the point at which civil sanctions become punitive. See Lauren Orchard Clapp, Note, United States v. Halper: Remedial Justice and Double Jeopardy, 68 N.C.L. REV. 979, 992-93 (1990) ("Although the Halper court's holding is constitutionally sound, it presents problems in application, the most obvious of which is the difficulty in identifying the point beyond which a civil forfeiture stops serving remedial purposes and begins serving punitive ends."). This has led Professor Mary M. Cheh to suggest that
In *Caremark*, a total of $228.4 million was paid to settle civil claims of various government entities and private insurers.\(^{466}\) Corporations risk significant punitive damages in most tort actions.\(^{467}\) But additionally, a variety of federal statutory schemes provide for civil liability coincident with criminal fines that may involve a doubling or trebling of civil damages.\(^{468}\) Thus, like license forfeiture and disqualification from transactions with the government, collateral civil liability as a consequence of criminal misconduct cannot be ignored.\(^{469}\)

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such proceedings, even though denominated "civil," should be treated as criminal proceedings:

It is clear that certain proceedings, even though statutorily or judicially labeled "civil," in reality exact punishments at least as severe as those authorized by the criminal law. Arguably, such proceedings should be treated as criminal proceedings for the purposes of constitutional safeguards since, in the end, the punishment inflicted on the defendant, is the functional equivalent of a criminal sanction. This idea is appealingly straightforward and, sometimes, equally compelling. If a contractor who has filed false claims against the government can be assessed thousands of dollars in civil fines, why should the proceeding be any different from a criminal prosecution for the same misdeeds that carries the same monetary penalty.


\(^{466}\) See *Caremark*, 698 A.2d at 965-66.

\(^{467}\) As Professor James D. Cox has commented, "No country so empowers its citizens to redress the social harms committed by others as does the United States. Compensating the injured and deterring future violations are frequently seen as complementary objectives of private suits."


\(^{468}\) Professor G. Robert Blakey has noted that [t]he idea that certain kinds of conduct should be vindicated by an award of multiple damages runs deep. Biblical law embodied the idea for theft and trespass. Greek law, too, provided for double damages if stolen property was recovered and for tenfold damages otherwise. Nevertheless, the rationale behind the various sanctions found in the law of the ancient world did not clearly differentiate what is commonplace to us: "tort" and "crime."


The criminal penalty is the visible tip of the liability iceberg facing the organizational defendant, which also confronts a broad range of administrative sanctions and civil damages. According to statistics of federal prosecutions gathered in one study, from 1984 to 1990 convicted corporate defendants paid criminal fines totalling approximately $215 million, but were assessed collateral sanctions (including restitution and forfeiture) totalling four times that amount, or $986 million.

\(^{469}\) As the ABA report also observed:

Civil sanctions against organizations are an important part of the government's enforcement arsenal. In fact, according to a recent study by a former staff member of the United States Sentencing Commission, the average collateral monetary sanction imposed on an organization far exceeds the average criminal fine, and the
For example, under the False Claims Act[^405], a corporation that makes a claim against the government (i.e., "a demand for money or for some transfer of public property"),[^401] knowing that the claim is false or fraudulent, is subject to a civil penalty of between $5,000 and $10,000 for each false claim.[^402] Each voucher or bill submitted to the government for payment can constitute an individual claim subject to the penalty.[^403]

In addition to these statutory penalties, the False Claims Act provides for the award of treble damages.[^404] Damages may be reduced to twice the amount of the damages sustained by the government, if the false claim was voluntarily disclosed.[^405] Under the *qui tam* provisions, civil actions under

[^400]: Professor Kenneth Mann has challenged the analytical distinction between punitive (i.e., more than compensatory) civil damages and deterrent (i.e., remedial) civil damages. It is difficult to view a $500,000 civil penalty on the bank director as anything other than punishment. One way to characterize this sanction as remedial is to argue that the monetary penalty will deter bank officers from engaging in similar wrongful conduct in the future. This is not a defensible position, however, for, in the case of monetary sanctions, deterrence is achieved through punishment. It is the pain of having to pay a large fine that deters similar actions in the future. This merging of the ends of deterrence and punishment distinguishes monetary from nonmonetary sanctions. Barring the bank officer from future management positions can be seen as producing solely a remedial effect. The immediate end of the sanction is not punishment, even if the bank officer personally experiences it as punitive. The distinction between punishment and deterrence with regard to more-than-compensatory money sanctions is therefore flawed, for the deterrent effect of monetary sanctions is dependent on their being punitive as well.


[^405]: Id. § 3729(a). Before the multiplier is reduced from treble damages to double damages, the court must find:

(A) The person committing the violation... furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within thirty days after the date on which the defendant first obtained the information;

(B) Such person fully cooperated with any Government investigation of such violation; and

(C) At the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation...
the False Claims Act can be brought by private individuals, in the name of the United States who may share in the award of damages recovered by the
government.496

Treble damages are also provided under the Clayton Act,497 the Insider Trading Sanctions Act of 1984,498 and the Racketeering Influenced and Corrupt Organization Act (RICO).499 The RICO statute also authorizes the forfeiture of assets or property acquired with income derived from a "pattern of racketeering activity."500 Under the money laundering statute, a defendant who either transports a monetary instrument or conducts a transaction using the proceeds derived from specified unlawful actions501 may be subjected to a fine of up to "twice the amount of the criminally derived property involved in the transaction."502

The False Claims Act, RICO, the antitrust laws, and the money laundering statute have been employed by government and private litigants

496Id. § 3730(a)-(b).


49918 U.S.C. § 1964(e) (1994). Professor Blakey, an author of the RICO statute, has argued that since the predicate offenses for a RICO claim are all fault-based, and not simply regulatory, the availability of multiple damages through private enforcement actions is in the public interest: [where] a multiple damage claim is appended to certain kinds of antisocial conduct, as, for example, in RICO, which deals with systemic patterns of violence, the provision of illegal goods and services, and intentional fraud, that conduct is the kind of conduct that should be unconditionally deterred, that is, the category of conduct prohibited by RICO does not contain, even at the margins, socially desirable conduct. RICO is not, like some aspects of antitrust, a "regulatory offense." It does not include strict liability, as RICO and its predicate offenses are all fault-based. Society has a general stake in seeing that this sort of illicit conduct is sanctioned. From an economic point of view, that it is sanctioned in private civil litigation rather than criminal prosecutions is a detail. Accordingly, private litigation, like RICO, that is vindicated through a multiple damage mechanism plays an important public law function. The private enforcement system that so many commentators so vociferously decry is, therefore, enforcement in the public interest. Blakey, supra note 488, at 119-21.

50018 U.S.C. § 1962(a) (1998). See also id. § 1961(1) (enumerating the offenses classified as racketeering as: mail and wire fraud, financial institution fraud, money laundering, and fraud in the sale of securities). See also Cheh, supra note 485, at 1326 n.4 (explaining that "over 100 federal forfeiture statutes are currently in effect, covering the seizure of goods and property and encompassing a wide range of activities").


502Id. § 1957(b)(2).
in a variety of settings. These include health care fraud actions involving Medicare and Medicaid; fraud in the purchase and sale of securities and commodities; and shareholder derivative actions. Because a corporation can only be penalized financially for crimes, the parallel civil liability deriving from a corporation's criminal act may equal or exceed the corporation's criminal sentence. Thus, the collateral consequences of criminal conviction provide their own "powerful incentives" for a corporation to act diligently to prevent and to detect criminality.

V. AN EFFECTIVE PROGRAM TO PREVENT AND DETECT VIOLATIONS OF LAW

The primary purposes of a corporate compliance program are to prevent violations of law and corporate policy and to allow detection of any such violations. So that the corporation can take timely remedial action

503 Professor Mann has commented:
In addition to passing legislation to augment the powers of the Department of Justice and administrative agencies to impose penalties, Congress has also increased the resources of the private sector to being punitive cases. The courts have read this legislation very broadly. The expansion of private punitive civil sanctions has helped to create a receptive atmosphere for punitive civil sanctions generally. The RICO statute, which predated some of the most important new state-involved punitive sanctions, is the quintessential example. There Congress converted entire sections of the federal criminal code into civil wrongs as a way to enforce existing substantive law. Under RICO, civil and criminal offenses are identical in every way except procedurally.
Mann, supra note 490, at 1848.

504 Id. at 1850-51.

505 In his remarks before the Investment Counsel Association, Paul F. Roye, director of the SEC Division of Investment Management, observed that a strong compliance program is vital to the success of the firm (in this instance, investment advisers):
No matter how you look at it, the price of compliance is minimal compared to the potential costs of non-compliance. As the saying goes, "pay now, or pay a lot more later." Devoting resources to compliance is simply the right business decision. If a firm does not have a strong compliance ethic, if it places the interests of the firm before its clients, it is only a matter of time before it loses the confidence of its clients. A compliance failure can lead to bad publicity and embarrassment, which can permanently damage a firm's reputation and ultimately lead to an erosion of its client base. The end result will be lower profitability and private lawsuits. In short, a weak and ineffective compliance system can spell disaster for an advisor.

506 See id.
507 See Caremark, 698 A.2d at 958.
and can act to protect its rights. As a result of the loss of confidence in the way corporations do business, as well as the powerful incentives discussed previously, ethics and business conduct have enjoyed a renaissance of interest among corporate governance practitioners and academics.

The United States Sentencing Commission has identified the characteristics of "an effective program to prevent and detect violations of law." Federal agencies have also used the prospect of enforcement actions (threatening debarment or disqualification) as motivation to impose what the agency considers to be necessary and appropriate compliance measures.

While these various government pronouncements are instructive (and highly relevant to those corporations facing sentencing or discipline), a formalistic laundry list of compliance program elements derived therefrom is not the answer to corporate compliance. Instead, corporate compliance programs should not only foster a culture of compliance within the corporation, but also instill employee awareness of standards of conduct. Furthermore, corporations must be vigilant to ferret out possible violations prior to their occurrence and to respond to the violations that occurred despite the company’s best preventative efforts.

508 See id.

509 Harvey Pitt and Karl Groskaufmanis attribute the interest in developing internal compliance programs to the investigation of price fixing, bid-rigging and market sharing in the heavy electrical equipment industry during the early 1960s. The prosecution resulted in fines against the leading U.S. companies in the electrical equipment industry and 31 sentences (24 of which were suspended) against individuals. In sentencing the General Electric Company, Judge J. Cullen Ganey stated the conspiracy was "a shocking indictment of a vast section of our economy under which this country has grown great, the free-enterprise system." According to Pitt and Groskaufmanis, "[T]he drama of this sentencing spurred businesses to develop effective compliance programs. The demand for antitrust compliance programs fueled the explosive growth of the antitrust bar. Encouraged by trade regulators, these programs became commonplace." Pitt & Groskaufmanis, supra note 120, at 1578-81. Pitt and Groskaufmanis also note that a public opinion survey cited in the 1986 Report of the Blue Ribbon Commission on Defense Management (the Packard Commission) found that "Americans believed that almost half of the United States defense budget was lost to waste and fraud." Pitt & Groskaufmanis, supra note 120, at 1593-94. See also Walsh & Pyrich, supra note 426, at 650 (stating that "high profile antitrust prosecutions in the late 1950s and early 1960s precipitated the first widespread adoption of corporate compliance programs in the United States").

510 See Pitt & Groskaufmanis, supra note 120, at 1598-600.


512 See Calkins, supra note 497, at 130, 144.
A. The Elements of an Effective Compliance Program
Under the Federal Sentencing Guidelines

The principal purpose of the sentencing guidelines for corporate offenders is to "provide . . . incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct." The Sentencing Commission has explained that the "fine range should be based not only on the seriousness of the offense but on the culpability of the organization." The culpability of the organization is determined by the steps taken "by the organization prior to the offense to prevent and detect criminal conduct, the level and the extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed.

The sentencing guidelines define an "effective" compliance program as one "that has been reasonably designed, implemented and enforced so that it generally will be effective in preventing and detecting criminal conduct." The "hallmark" of an effective program is due diligence on the part of the organization "in seeking to prevent and detect criminal conduct by its employees and agents."

According to the guidelines:

Due diligence requires at a minimum that the organization must have taken the following types of steps.

1. The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.

2. Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.

3. The organization must have used due care not to delegate substantial discretionary authority to

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517 U.S.S.G., supra note 76, cmt. (Introductory Commentary to ch. 8).
516 Id.
515 Id.
514 Id. § 8A1.2, Application Note 3(k).
individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.

4. The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical matter what is required.

5. The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.

6. The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

7. After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses — including any necessary modifications to its programs to prevent and detect violations of law.518

The guidelines recognize, however, that there is no single formula for an effective compliance program applicable to all corporations.519 Nevertheless, the guidelines identify three general factors that the sentencing

518 Id. See also id. § 8A1.2 Application Note 3(b) (defining "high-level" personnel of an organization); id. § 8A1.2 Application Note 3(c) (defining "substantial authority personnel" of an organization).

519 Id. Application Note 3(k) (stating precise actions necessary for an effective program to prevent and detect violation of law).
court is to consider in evaluating the effectiveness of a corporation's compliance program.\textsuperscript{520}

The first factor is the size of the corporation. The guidelines suggest that the degree of formality required will vary according to the size of the corporation. The larger the corporation is, the more formal its compliance program must be. According to the guidelines, "a larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents."\textsuperscript{521}

Although the application note in the guidelines does not describe or define a "larger organization," the guidelines as a whole are not silent on the issue. The section of the guidelines that details the calculation of a culpability score helps quantify what constitutes a "larger organization."\textsuperscript{522} When calculating a culpability score, the guidelines seem to consider a company with five thousand employees or more a "larger organization."\textsuperscript{523}

The second factor is an assessment by management of the compliance risk associated with the corporation's business.\textsuperscript{524} If by virtue of the corporation's business there is a greater than ordinary risk that certain offenses may occur, management must take specific action to prevent those offenses from being committed.\textsuperscript{525} The guidelines cite as examples: corporations that handle toxic substances; corporations whose employees have the capability of fixing prices of goods and services; and corporations whose employees have the "flexibility to represent the material characteristics of a product."\textsuperscript{526}

The third factor the sentencing court will consider is whether the prior compliance history of the corporation reveals areas of risk that should have been addressed by the compliance program.\textsuperscript{527} The guidelines state that "[r]ecurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct."\textsuperscript{528}

The guidelines also note that standard industry practice and the requirements of government regulations are relevant to assessing the

\textsuperscript{520}See id.

\textsuperscript{521}U.S.S.G., supra note 76, § 8A1.2 Application Note 3(k)(i).

\textsuperscript{522}Id. § 8A1.5.

\textsuperscript{523}Id. § 8C2.5(b).

\textsuperscript{524}Id. § 8A1.2 Application Note 3(k)(ii).

\textsuperscript{525}See U.S.S.G., supra note 76, § 8A1.2 Application Note 3(k)(ii).

\textsuperscript{526}Id.

\textsuperscript{527}Id. § 8A1.2 Application Note 3(k)(iii).

\textsuperscript{528}Id.
effectiveness of a corporation's compliance program. The guidelines consider that "an organization's failure to incorporate and follow applicable industry practice or the standards called for by an applicable government regulation weighs against a finding of an effective program to prevent and detect violations of law."  

The guidelines govern only the sentencing of corporations convicted in a judicial proceeding. Executive Branch agencies have imposed compliance structures and obligations on corporations either in administrative settlement agreements or in the form of guidance from the agency's Inspector General. Not surprisingly, these administrative statements parallel the principles enunciated in the Federal Sentencing Guidelines.

B. Administrative Agency Requirements for Compliance Programs

Federal agencies have used the specter of suspension and debarment to influence the adoption and structuring of compliance programs. Federal agencies often incorporate compliance requirements in administrative settlement agreements with companies facing debarment. Indeed, it has been suggested that avoidance of agency enforcement action has been the catalyst for the wide-spread adoption of compliance programs.

There are few reported cases that illuminate the government's view of an effective compliance program. Judicial orders involving compliance

529 U.S.S.G., supra note 76, § 8A1.2 Application Note 3(k)(ii) (commentary paragraph immediately following 3(k)(iii)).
530 Id.
531 See Kowal, supra note 483, at 517.
532 See id. at 519-20 (noting that in addition to the enormous fines imposed on companies such as C.R. Bard, National Medical Enterprises, and Louisiana-Pacific, the plea agreements also included requirements for the implementation of corporate compliance programs including the retention of experts to monitor adherence to government requirements and reports to government agencies concerning compliance).
533 Commenting on the adoption of compliance programs in the health care industry, it has been observed that:

[The real catalysts for the wide spread adoption of health care compliance programs, however, have been the [Department of Justice] and the [Office of the Inspector General of the Department of Health and Human Services]. These agencies have recently required all organizations settling health care fraud charges to adopt government-supervised corporate integrity programs as part of the defendants' settlement agreements. These government-imposed compliance programs usually require corporations to commit substantial assets to compliance and involve significant government and private oversight.

programs are primarily consent decrees, entered into to settle civil litigation. Consent decrees generally provide mechanisms for compliance with the terms of the order. Some include the appointment of a "compliance officer" who is responsible for the implementation of the order. Others leave oversight and audit of compliance to the government.534

534 Thus, for example, consent orders of injunction under the antitrust laws usually required the appointment of an Antitrust Compliance Officer who has "responsibility for implementing the antitrust compliance program and of achieving compliance with the Consent Judgment." United States v. Rochester Gas & Elec. Corp., 1998-1 Trade Cases (CCH) ¶ 72,200 (W.D.N.Y. 1998). The Antitrust Compliance Officer is to "supervise the review of the current and proposed activities of the defendant to ensure that they comply with [the] Consent Judgment." Id. To that end, the orders typically require the Antitrust Compliance Officer to:

(1) distribute within 60 days of the entry of this Consent Judgment, a copy of
this Consent Judgment to all officers and employees with responsibility
for activities covered by the order;

(2) distribute in a timely manner a copy of this Consent Judgment to any
officer or employee who succeeds to a position [with responsibility for
activities covered by the order];

(3) brief annually in writing or orally those persons designated [above] on the
meaning and requirements of this Consent Judgment and the antitrust
laws and advise them that the defendant's legal advisors are available to
confer with them regarding compliance with the Consent Judgment and
the antitrust laws;

(4) obtain from each officer or employee designated [above] a written
certification that he or she (a) has read, understands, and agrees to abide
by the terms of this Consent Judgment; and (b) has been advised and
understands that his or her failure to comply with this Consent Judgment
may constitute contempt of court; and

(5) maintain a record of recipients to whom the Consent Judgment has been
distributed and from whom the certification . . . has been obtained.

1. Administrative Settlement Agreements

Administrative settlement agreements, similarly, arise in the context of violations of law and regulations administered by executive branch administrative agencies. Sanctions available to administrative agencies are monetary penalties, suspension, and debarment from contracting with the federal government or from participating in federally funded programs. In order to avoid suspension or debarment, corporations often will enter into settlement agreements that address past violations and that put in place measures preventing repetition of the violative conduct. Review of these agreements suggests elements of a compliance program that the various administrative agencies consider to be effective.335

335 The author has considered 22 settlement agreements with the following agencies: Defense Logistics Agency — In re Caspian, Inc. (Sept. 29, 1992); In re Cordis Corp. (July 8, 1992); In re Allfast Fastening Sys., Inc. (June 26, 1992); In re General Aviation Indus. (Feb. 19, 1992); In re Richardson Elec. Ltd.—Nat'l Elec. Division, (Feb. 3, 1992); In re Sundstrand Corp. (Jan. 26, 1989); Department of the Air Force — In re Lockheed Martin Corp. (June 30, 1995); In re Northrop Corp. (July 1, 1991); In re Grumman Corp. (May 31, 1990); Department of the Army — In re Tura Mach. Co. (Nov. 19, 1992); Department of Navy — In re Grumman Corp.(Feb. 8, 1994); U.S. Department of State — In re Boeing Co. (Sept. 29, 1998); In re Delft Instruments, N.V. (Aug. 21, 1997); In re Fuchs Elec., Pty. Ltd. (Jan. 24, 1997); In re Teledyne Indus., Inc. (Jan. 25, 1995); In re Armour of Am. (Dec. 23, 1993); In re Japan Aviation Elec. Indus., Ltd. (Mar. 6, 1992); In re Robert Manina (Nov. 16, 1983); In re Smith & Wesson Co. (Mar. 20, 1979); U.S. Environmental Protection Agency — In re [Name Withheld] (Undated); National Aeronautics and Space Administration — In re Grumman Corp. (July 1, 1994); In re [Name Withheld] (Undated); In re [Name Withheld] (Aug. 3, 1990) (all of these administrative settlement agreements are on file with author). In addition, Kirk S. Jordan and Joseph E. Murphy have reported their findings based on a review of 36 settlement agreements (of which the only duplication was the 1994 Grumman settlement). Kirk S. Jordan & Joseph E. Murphy, Compliance Programs: What The Government Really Wants, ACCA Docket, 10 (July/Aug. 1996). F. Joseph Warin and Jason C. Schwartz have also published their analysis of five administrative settlement agreements. F. Joseph Warin & Jason C. Schwartz, Corporate Compliance Programs as a Component of Plea Agreements and Civil and Administrative Settlements, 24 J. Corp. L. 71 (1998).
Responsibility for Compliance

Administrative agreements ordinarily specify who within the corporation will have responsibility for seeing that the compliance program is implemented and enforced. An example can be seen in the recent settlement agreement between the Boeing Company and the State Department Office of Defense Trade Controls, that concerned violations of the International Traffic in Arms Regulations. The responsibility for implementating the compliance program was placed on Boeing's General Counsel and Executive Council, composed of "Boeing's Chairman and Chief Executive Officer, the President and Chief Operating Officer, the Chief Financial Officer, the General Counsel, the Chief Administrative Officer, the Presidents of the Operating Groups and the Vice President of the People Organization." Other administrative agreements have required that the chief executive officer, the chief operating officer, the vice president for audit, the vice president for contracts, and the vice president for ethics, be responsible for compliance. Involvement of a council composed of senior executives, similar to that required in the Boeing settlement agreement, has also been required.

536See Jordan & Murphy, supra note 535, ACCA Docket at 14-16.
537International Traffic in Arms Regulations, 22 C.F.R. pt. 120.
537In re In re Caspian, Inc., supra note 535, at 4; In re Cordis Corp., supra note 535, at 5; In re General Aviation Indus., supra note 535, at 3; In re Sundstrand Corp., supra note 535, at 7.
538The administrative agreements entered into by Grumman Corporation and its subsidiary, Grumman Data Systems Corporation, placed responsibility for the compliance programs on the vice president for audit, who became the vice president for audit and ethics. In re Grumman Corp. (Department of Navy), supra note 535, at 3; In re Grumman Corp., supra note 535, at 5; see also In re Grumman Corp. (Dept. of Air Force), supra note 535, at 7-8.
540In re Sundstrand Corp., supra note 535, at 6.
540In re Delft Instruments, N.V., supra note 535, at 2. Grumman Corporation also instituted a Business Ethics Committee composed of the vice president and general counsel, and the vice president for Audit and Ethics, as permanent members, and other senior executives as appointed by the board of directors. In re Grumman Corp. (Dept. of Air Force), supra note 535, at 8; In re Grumman Corp. (Dept. of Navy), supra note 535, at 4; In re Grumman Corp., supra note 535, at 5. See also Warin & Schwartz, supra note 535, at 77.
b. Monitoring Implementation and Compliance with the Agreement

Administrative agreements also impose stringent requirements for oversight of implementation. Corporations are often required to engage independent third parties, approved by the agency, to oversee compliance activities.

In some cases, independent auditors have been retained,\(^445\) in other cases, the administrative agreement has required the appointment of an independent "ombudsman" to oversee implementation of the mandated compliance program and to investigate reported violations.\(^446\) In addition, virtually all of the administrative agreements require the corporation's books and records be available for inspection by agency representatives during the effective period of the agreement, usually three to five years.\(^447\) Corporations

\(^{445}\)In this regard, the Boeing administrative agreement provides that: [i]o monitor implementation of the [compliance] measures and related measures specified in the Consent Agreement, Boeing will retain a recognized auditing firm acceptable to the Department to initiate an audit and provide Boeing's Office of General Counsel, its Executive Council and the Department with a report no later than 150 days after the signing of the Order referred to in the Consent Agreement. The report will review Boeing's record of implementation of these measures and, as appropriate, contain recommendations for correcting any weaknesses identified in the course of the audit, which Boeing will implement after consideration by the Department.

\(^{446}\)In re Boeing Co., supra note 535, Annex ¶ 4. In like fashion, the Office of Defense Trade Controls required Delft Instruments, N.V. to engage "an appropriate internationally recognized auditing firm acceptable to the Department" to report on implementation of the compliance procedures under the agreement and to make recommendations concerning remedial measures. In re Delft Instrument, N.V., supra note 535, Annex, at 2. A similar provision was also included in a NASA settlement agreement. In re [Name Withheld], supra note 535, ¶ 6. NASA has also required the engagement of consultants to review compliance. In re [Name Withheld], supra note 535, at 12-13. The Department of the Air Force required Grumman Corporation to have its Internal Audit organization conduct a similar review, In re Grumman Corp. (Dept. of Air Force), supra note 535, at 9, as it did in the settlement with Lockheed Martin Corporation, In re Lockheed Martin Corp., supra note 535, at 8-9. The Department of the Navy also required an internal audit into compliance. In re Grumman Corp. (Dept. of Navy), supra note 535, at 6. See also Jordan & Murphy, supra note 535, ACCA Docket at 28.

\(^{447}\)In re Fuchs Elec., Pty. Ltd., supra note 535, ¶ 6(e); In re Tura Mach. Co., supra note 535, at 3; In re Cordis Corp., supra note 535, at 6-7; In re [Name Withheld] (NASA), supra note 535, at 7-8.

\(^{448}\)Thus, for example, the administrative agreement in the Boeing Company case provides that "Boeing agrees to arrange and facilitate, with minimum advance notice, on-site audits of its Sea Launch facilities, wherever situated, by the Department during a five-year period commencing on the signing of the Order." In re Boeing Co., supra note 535, at 3. See also In re Delft Instruments, N.V., supra note 535, Annex, ¶ 1j (stating that "Delft also agrees to an on-site visit by Department representatives at appropriate facilities within the first 18 months after the signing of the relevant Order, and such periodic visits thereafter as the Department may request from time to time to monitor compliance"); In re Teledyne Indus., Inc., supra note 535, at 4-5 (stating that "TWCA agrees to on site audits by the Department at the facilities wherever situated, during the period of
have also been required to make their employees available for interviews conducted by agency representatives, without the right to have company counsel present.\textsuperscript{548}

Further, periodic reporting obligations have been imposed. Under these provisions, the ombudsman or another responsible corporate officer, has been required to meet with the agency's procurement integrity official to discuss implementation of the agreement.\textsuperscript{549} Written reports have been

statutory debarment . . . for compliance with the provisions of the Act and Regulations\textsuperscript{a}); \textit{In re} Japan Aviation Elec., Ltd., \textit{supra} note 535, at 3 (stating that "JAE agrees to on-site audits by the Department at JAE facilities in Japan and the United States, during the period of statutory debarment"). The Air Force agreement with Lockheed Martin similarly provided that:

[i]n addition to any other right the Air Force may have by statute, regulation or contract, the Air Force or its duly authorized representative may examine Lockheed Martin's books, records, and other company documents and supporting materials for the purpose of verifying and evaluating: (a) Lockheed Martin's compliance with the terms of this Agreement; (b) Lockheed Martin's business conduct in its dealings with all of its customers, including the Government; (c) Lockheed Martin's compliance with Federal laws, regulations, and procurement policies and with accepted business practices; and (d) Lockheed Martin's compliance with the requirements of Government contracts or subcontracts. The materials described above shall be made available by Lockheed Martin at all reasonable times for inspection, audit, or reproduction.

\textit{In re} Lockheed Martin Corp., \textit{supra} note 535, at 11. Warin and Schwartz also found that the agreements they studied all provided for agency audit and inspection rights. \textit{See} Warin & Schwartz, \textit{supra} note 535, at 78-79.

\textsuperscript{548}For example, the Lockheed Martin agreement with the Department of the Air Force provided that for purposes of verifying Lockheed Martin's compliance with the agreement, the Air Force or its authorized representative may interview any Lockheed Martin employee who consents to be interviewed at the employee's place of business during normal business hours or at such other place and time as may be mutually agreed between the employee and the Air Force. Employees may elect to be interviewed with or without a representative of Lockheed Martin present.

\textit{In re} Lockheed Martin Corp., \textit{supra} note 535, at 11. \textit{See also} \textit{In re} Grumman Corp., \textit{supra} note 535, at 7; \textit{In re} Caspian, Inc., \textit{supra} note 535, at 3; \textit{In re} Tura Mach. Co., \textit{supra} note 535, at 7; \textit{In re} Cordis Corp., \textit{supra} note 535, at 5; \textit{In re} Allfast Fastening Sys., Inc., \textit{supra} note 540, at 2; \textit{In re} General Aviation Indus., \textit{supra} note 535, at 3; \textit{In re} Richardson Elec., Ltd., \textit{supra} note 535, at 5; \textit{In re} Northrop Corp., \textit{supra} note 535, at 15; \textit{In re} [Name Withheld] (NASA), \textit{supra} note 535, ¶ 7-8; \textit{In re} Grumman Corp. (Dept. of Air Force), \textit{supra} note 535, at 15; \textit{In re} Sundstrand Corp., \textit{supra} note 535, at 9.

\textsuperscript{549}Several administrative agreements required the filing of affidavits certifying that the provisions of the agreement had been implemented. Under the Boeing agreement, a member of Boeing's Executive Council was required to submit an affidavit to the State Department, within 45 days of signing the agreement, attesting to the implementation of the compliance and remedial measures. \textit{In re} Boeing Co., \textit{supra} note 535, Annex ¶ 5. The State Department also required the Executive Boards of the restructured Delft companies to submit affidavits certifying that the restructuring had been accomplished. \textit{In re} Delft Instruments, N.V., \textit{supra} note 535, Annex ¶ g. The agreement with Sundstrand Corporation required the Vice President of Contracts and Compliance to furnish a statement every six months that Sundstrand was in compliance with the agreement. \textit{In re} Sundstrand Corp., \textit{supra} note 535, at 7. Other agreements required that senior executives of the subject corporations meet with the agency's procurement integrity official to report
required addressing the status of the compliance program; the number of reports of misconduct or noncompliance and the disposition of those reports; and the number of employees who received training in the program.\textsuperscript{550}

\textsuperscript{550}Some of the agreements required periodic reports on compliance generally. See \textit{In re} Fuchs, Pty. Ltd., \textit{supra} note 535, ¶ 6(c) (ordering ombudsman to submit evaluation of implementation of the compliance program every six months); \textit{In re} Tura Mach. Co., \textit{supra} note 535, at 4 (ordering Ombudsman to submit quarterly reports regarding implementation of the agreement and the status of investigations of suspected wrong doing); \textit{In re} Richardson Elec., Ltd., \textit{supra} note 535, at 8 (ordering the board of directors to submit a report every 6 months "describing the measures taken by REL to implement the compliance program and to ensure compliance with this agreement"); \textit{In re} Grumman Corp. (Dept. of Air Force), \textit{supra} note 535, at 14-15 (ordering corporation to report on compliance with the agreement every six months). Other agreements specified the content of the required reports. For example, the reports required by the Lockheed Martin agreement were to include:

A. A description of Ethics Training conducted on the Standards of Conduct and Ethics, subject matter covered, and the number of persons who attended, including a statement of the percentage of total employees trained year to date as of the date of the report. The first report for each calendar year will report total numbers and percentages for each preceding year. The ethics training program will be audited by Internal Audit and the results of the audit will be provided on an annual basis in accordance with Article 9.

B. A description of the Compliance Training conducted, including subject matter covered and target job functions for each subject matter. The compliance training program will be audited by Internal Audit and the results of the audit will be provided on an annual basis in accordance with Article 9.

C. Informal notifications or initiatives relating to the Business Ethics Program.

D. The status of any (a) ongoing criminal investigation or proceedings involving Lockheed Martin; (b) ongoing civil or administrative investigations or proceedings involving allegations of fraud, false statements, corruption, or conflict of interest, involving Lockheed Martin and the U.S. Government; or (c) other matters involving Lockheed Martin that the Vice President of Ethics and Business Conduct determines may bear on the present responsibility of Lockheed Martin for Government contracting.

E. Statistical reports on calls to Lockheed Martin confidential ethics helplines and on other reports of suspected misconduct. The statistics shall be reported for Lockheed Martin as a whole, for LMAS, and for the nine other largest business units; statistics shall also be reported separately for LMAS in accordance with the provisions of Article 6. The reports shall provide the following information:
The reports submitted are subject to criminal penalties for false statement.\(^5\)\(^5\)

c. **Substantive Requirements for Compliance Programs**

In addition to establishing oversight responsibility and ensuring adequate monitoring, administrative agreements also impose substantive requirements. Although there is no "model" compliance program,\(^5\)\(^5\) various

1) the total number of calls or contacts made or referred to any Lockheed Martin Ethics Officer (on confidential ethics helplines or through any other channel) and logged into the Ethics Tracking and Reporting System; and

2) as to these calls and contacts
   (a) the number that were reports of alleged misconduct; and
   (b) the number that were requests for information, comments, inquiries, or expressions of concern; and

3) as to the alleged misconduct reported and logged into the Ethics Tracking & Reporting System;
   (a) the means (e.g., helpline call, letter, drop-in visit, etc.) by which the alleged misconduct was reported,
   (b) the category (e.g. procurement irregularity, mischarging, etc.) of the alleged misconduct,
   (c) whether the misconduct was substantiated (in whole or in part),
   (d) whether disciplinary action was imposed, and
   (e) whether corrective action other than discipline was taken.

*In re Lockheed Martin Corp.*, supra note 535, at 3-4. A similar report was also required to be filed on a quarterly basis by a subsidiary, Lockheed Martin Aeronautical Systems Company. *Id.* at 5-7.

Agreements have required disclosure of "hotline calls," employee disciplinary actions as well as government investigations and civil litigation (i.e., *qui tam* suits). See *In re Grumman Corp.*, supra note 535, at 6.

(1) all instances of disciplinary action imposed on the recommendation of the Business Ethics Committee for violation of the Code of Business Conduct; (2) all known, ongoing criminal investigations; (3) all known *qui tam* suits; (4) all known defective pricing cases; (5) all hotline calls considered by the Business Ethics Committee, including a description of the complaint, any remedial action taken or planned, and whether the Audit Committee [of the board of directors] has been or will be advised of the matter; and (6) any other matter which might affect Grumman's present responsibility status, including, but not limited to, actual or potential suspension and/or debarment actions by other Government and quasi-governmental agencies.

*In re Grumman Corp.* (Dept. of Navy), *supra* note 535, at 8. Other agreements required detailed information concerning training, changes in management personnel, voluntary disclosures of misconduct, and changes in compliance-related procedures, as well as information concerning employee misconduct and investigations. See *In re Caspian, Inc.*, *supra* note 535, at 7; *In re Cordis Corp.*, *supra* note 535, at 10; *In re Allfast Fastening Sys., Inc.*, *supra* note 535, at 6. See Warin & Schwartz, *supra* note 535, at 79-80.


\(^5\)\(^5\)Although there does not appear to be a model compliance program endorsed by the various federal agencies, many of the compliance measures imposed by administrative agreements have followed the formula for an effective compliance program set forth in the Federal Sentencing
administrative agreements provide insight into what measures the agencies deem necessary to ensure that the corporation will be a responsible contractor or federal program participant. Among these substantive requirements are the following.

1. Written Policies and Procedures

Administrative agreements, generally, require the corporation to establish and maintain written policies and procedures governing the way the corporation conducts its business. Corporations often are required to adopt policies and procedures that specifically address the conduct that gave rise to the agreements.\footnote{See, e.g., \textit{In re Fuchs Elec., Pty. Ltd.}, supra note 535, ¶ 6. Fuchs was required to establish and implement a compliance program within 180 days of the effective date of the agreement. The compliance program was to include, "adoption of a compliance manual that addresses the handling of United States-origin defense articles, services or technical data, and that requires all employees of Fuchs to follow such compliance procedures." \textit{Id.}} Similarly, NASA required one of its contractors to "prepare and issue to its employees, within sixty days from the execution of this agreement, a revised Manual of Timekeeping Procedures." \textit{In re [Name Withheld] (NASA), supra note 535, at 7.}

\footnote{\textit{In re Boeing Co.}, supra note 535, Annex ¶ 2.}

\footnote{\textit{Id.} ¶ 3.}
including conspiracy to defraud the United States, conspiracy to defraud the United States "by underbidding for design and development contracts and charging the cost overruns or anticipated cost overruns to overhead accounts," in violation of 18 U.S.C. § 371 ([1994]). The changes included (Count 1); conspiracy to defraud the United States "by giving things of value to public officials of DOD" (Count II); conspiracy to defraud the United States in the ascertainment of federal taxes by mischaracterizing purported losses from the sale of inventory (Count III); and making false statements for contract progress payments, in violation of 18 U.S.C. § 287 (1994) (Count IV). In re Sundstrand Corp., supra note 535, at 2-3.

557 To settle the charges arising from the government's investigation of Sundstrand's Advanced Technology Group, Sundstrand agreed to pay fines and civil sanctions totaling $115 million. In re Sundstrand Corp., supra note 535, at 1. In settlement of the charges arising from the investigation of Sundstrand Data Control, Inc., Sundstrand agreed to pay $1,020,000 covering criminal and civil liability and $11,571,532 covering administrative liability. Id. at 2. Finally, to resolve various contract claims arising from Sundstrand's accounting and contract pricing practices, Sundstrand agreed to pay the DLA $62.3 million and grant an additional $9 million in cost reductions on existing contracts. Id. at 3-4.

558 Sundstrand agreed to implement "core company policies and procedures directed at contracting with the government," including those recommended by counsel in regard to: labor charging, material charging, contract pricing, standards of conduct, accounting for indirect costs, product conformance, subcontracting and intersegment transfers, export and import of data and products, industrial security and rights in technical data and computer software. Id. at Enclosure 5, at 2-3. See also In re Tura Mach. Co., supra note 535, at 5; In re Grumman Corp. (Dept. of Navy), supra note 535, at 5; In re [Name Withheld] (EPA), supra note 535, at 5.
any) and reports to the government. The code of ethics is to be distributed to all employees and should be reviewed by the employees at least annually. Corporations have also been required to subscribe to industry-wide ethics initiatives, such as the Defense Industry Initiative on Ethics and Business Conduct.

3. Training

The Administrative agreements, however, call for more than simply the adoption and distribution of a code of ethics. Corporations have been required to implement training programs so that employees are aware of their legal obligations and the standards to which their conduct will be held.

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560 See In re Caspian, Inc., supra note 535, at 4; In re Cordis Corp., supra note 535, at 6; In re Allfast Fastening Sys., Inc., supra note 535, at 3-4; In re General Aviation Indus., supra note 535, at 4-5; In re Richardson Elec., Ltd., supra note 535, at 6; In re [Name Withheld] (NASA), supra note 535, at 7. Several agreements contain the further requirement that the corporation institute an annual certification procedure under which:

[A]ll managers at every level in the company will attest that they personally have
(a) discussed with each employee under their supervision the content and application of the Company's Compliance Program; (b) informed each such employee that strict compliance with the Program is a condition of employment; and (c) informed each such employee that [the company] will take disciplinary action, including termination, for violation of the principles and practices set forth in the Program, applicable laws or regulations, or basic tenets of business honesty and integrity.


561 See In re Grumman Corp. (Dept. of Navy), supra note 535, at 6; In re Grumman Corp. (Dept. of Air Force), supra note 535, at 10; In re Sundstrand Corp., supra note 535, Enclosure 5, at 1.

562 See In re Lockheed Martin Corp., supra note 5350, at 3; In re Grumman Corp., supra note 535, at 7; In re Lockheed Martin Corp. (Dept. of Navy), supra note 535, at 7; In re Tura Mach. Co., supra note 535, at 5; In re Caspian, Inc., supra note 535, at 5; In re Cordis Corp., supra note 535, at 7; In re Allfast Fastening Sys., Inc., supra note 535, at 4; In re General Aviation Institutes, supra note 535, at 6; In re Richardson Elec., Ltd., supra note 535, at 7; In re [Name Withheld] (NASA), supra note 535, at 7; In re Grumman Corp. (Dept. of Air Force), supra note 535, at 9; In re [Name Withheld] (EPA), supra note 535, at 5. See also Warin & Schwartz, supra note 535, at 82-83.
Record keeping requirements with respect to training have also been imposed.\textsuperscript{563}

4. Mechanisms for Reporting Misconduct

Under the codes of ethics mandated by administrative agreements, employees are required to report instances of conduct that may constitute violations of law or corporate policy.\textsuperscript{564} It is commonly required that the corporation establish a mechanism by which employees can report incidents of misconduct without fear of retaliation.\textsuperscript{565} This is usually accomplished through the institution of a telephone number that employees may call, toll-free, to speak with the ombudsman or other persons authorized to receive employee reports.\textsuperscript{566} Corporations are further required to advertise the government "hotline" telephone numbers.\textsuperscript{567}

5. Record Keeping

Administrative agreements imposed a variety of record keeping requirements. Several agreements have incorporated significant revisions to the corporation's records systems. For example, the Boeing agreement included the implementation of a comprehensive computerized document control system that would trace both the status of the corporation's export licenses and requests for licenses. This system would be accessible by regulatory authorities at both the Departments of State and Defense.\textsuperscript{568}


\textsuperscript{564}See In re Boeing Co., supra note 535, 2 & Annex.

\textsuperscript{565}See Jordan & Murphy, supra note 535, ACCA Docket at 27-28.

\textsuperscript{566}See In re Tura Mach. Co., supra note 535, at 4; In re Caspian, Inc., supra note 535, at 5; In re Cordis Corp., supra note 535, at 7; In re Allfast Fastening Sys., Inc., supra note 535, at 4; In re General Aviation Indus., supra note 535, at 5; In re Sundstrand Corp., supra note 535, at 9. See also In re Lockheed Martin Corp., supra note 535, at 3. At least one company has used a locked mail box for employee reports of misconduct. See In re General Aviation Indus., supra note 535, at 6.

\textsuperscript{567}See In re Grumman Corp., supra note 535, at 6; In re Cordis Corp., supra note 535, at 7; In re Allfast Fastening Sys., Inc., supra note 535, at 4; In re General Aviation Indus., supra note 535, at 5; In re Richardson Elec., Ltd., supra note 535, at 7; In re [Name Withheld] (NASA), supra note 535, at 8.

\textsuperscript{568}See In re Boeing Co., supra note 535, Annex ¶ 2. Several other agreements imposed record keeping requirements that addressed the underlying violations. Thus, corporations were required to:

[M]aintain complete records, including original documents of all purchases, sales,
Similarly, the agreement with Lockheed Martin Corporation imposed record keeping and reporting requirements based on the corporation's development of an ethics tracking and reporting system.\textsuperscript{569}

Under the Lockheed Martin agreement, the corporation was to maintain a record of calls to the company's ethics reporting "help line" as well as other contacts with the ethics organization.\textsuperscript{570} These records were to reflect the number of calls and contacts; the type of alleged misconduct (e.g., cost mischarging, quality issues, or product substitution); a summary of the alleged misconduct; whether the allegations were substantiated; and whether disciplinary action was taken.\textsuperscript{571}

Lockheed Martin was also required to keep detailed records concerning ethics and compliance training. These required records included the subject-matter of each training offering; the number of persons who attended and the job classifications of the attendees.\textsuperscript{572} These records were to be subject to review by the corporation's internal audit organization.\textsuperscript{573}

6. Voluntary Disclosure and Self-Reporting of Misconduct

Several corporations had adopted policies of making voluntary disclosures of wrongdoing as part of their self-governance programs. Under these policies, corporations were committed to reporting suspected

receipts, shipments, or testing of any material or product in any way related to government contracts or subcontracts. These records shall be sufficient to provide complete evidence of all transactions related to items furnished directly or indirectly by [the company] to the government upon any government procurement.

\textit{In re Caspian, Inc., supra} note 535, at 3; \textit{In re Cordis Corp., supra} note 535, at 4-5 (alteration in original).

\textit{In re Lockheed Martin Corp., supra} note 535, at 3-5. Some of the most onerous provisions of the administrative agreements were those imposing reporting requirements. Corporations were required to make quarterly or semi-annual reports concerning ongoing criminal, civil, and administrative proceedings. Corporations were also required to disclose the findings of internal investigations of misconduct and of internal audits. In addition, corporations were put under an ongoing obligation to report the initiation of criminal or civil investigations as well as the receipt of subpoenas, civil investigation demands, and the execution of search warrants usually within a few days. \textit{See In re Lockheed Martin Corp., supra} note 535, at 4-5; \textit{In re Grumman Corp. (Dept. of Navy), supra} note 535, at 5; \textit{In re Tura Mach. Co., supra} note 535, at 4; \textit{In re Caspian, Inc., supra} note 535, at 5-7; \textit{In re Cordis Corp., supra} note 5350, at 10-11; \textit{In re Allfast Fastening Sys., Inc., supra} note 535, at 4-5; \textit{In re General Aviation Indus., supra} note 535, at 7-8; \textit{In re Richardson Elec., Ltd., supra} note 535, at 7-8; \textit{In re Northrop Corp., supra} note 535, at 14; \textit{In re Grumman Corp. (Dept. of Air Force), supra} note 535, at 14-15; \textit{In re Sundstrand Corp., supra} note 535, at 7, 9.

\textit{In re Lockheed Martin Corp., supra} note 535, at 7-8.

\textsuperscript{571}\textit{See} \textit{id. See also In re Tura Mach. Co., supra} note 535, at 4 (stating that the ombudsman was to maintain similar records under the agreement).

\textit{In re Lockheed Martin Corp., supra} note 535, at 3. \textit{See also In re Cordis Corp., supra} note 535, at 10; and \textit{In re Grumman Corp. (Dept. of Air Force), supra} note 535, at 10.

\textsuperscript{573}\textit{See In re Lockheed Martin Corp., supra} note 535, at 8-9.
misconduct to the Inspector General of the Department of Defense within fifteen days of discovery. Corporations were further committed to investigating reports of misconduct and to making prompt restitution, if warranted.574 Other agreements imposed a more stringent requirement that companies report even suspected misconduct to the government.575 Cooperation with ongoing investigations was also required.576

7. Personnel Practices

Administrative agreements specified personnel practices that were to be adopted and implemented.577 As part of the settlement, corporations represented that employees who had been involved in the wrongdoing had either been terminated or separated from regulated activity.578 Other corporations represented that if employees were criminally charged in the

574 The administrative agreements incorporated these policies and provided that: as part of [the company's] program of self-governance, [the company] has a policy of voluntarily disclosing suspected misconduct involving or affecting [the company's] Government operations to an appropriate Government official within fifteen days after such misconduct is discovered by, known to, or disclosed to any management official of the Company. The misconduct to be reported includes misconduct by any person, including, but not limited to, those associated with [the Company] or with the Government and shall include misconduct disclosed to [the Company] management from any source. [The Company's] program provides that [the Company] will immediately investigate any reported misconduct that comes to its attention and will notify the Government of any potential or actual impact on any aspect of [the Company's] Government business and will take corrective action, including prompt restitution of any harm to the Government. In re Cordis Corp., supra note 535, at 11 (alteration in original); In re General Aviation Indus., supra note 535, at 8-9; In re Richardson Elec., Ltd., supra note 535, at 8. See also In re Lockheed Martin Corp., supra note 535, at 9.


577 See Jordan & Murphy, supra note 535, ACCA Docket at 28-31.

future, they would also be terminated. In like fashion, corporations agreed that persons subject to suspension or debarment orders would not be considered for employment in the future. Additionally, administrative agreements directed corporations to institute policies that support corporate compliance programs with an element of performance evaluation.

8. Corporate Governance

Finally, administrative agreements established the role of the board of directors as overseers of compliance. The administrative agreements with Richardson Electronics, Ltd. and the Grumman Corporation specified that the boards of directors acting through committees were principally responsible for the corporation's compliance programs. The Richardson agreement further provided that the Executive Oversight Committee of the Board, comprised of independent directors, was responsible for maintaining and updating the code of conduct adopted by the full board and for auditing the corporation's compliance with the agreement. Both the Richardson and Grumman agreements provided that the oversight committee was to receive regular reports from both the corporation's internal audit organization and from the general counsel. Other agreements also required regular

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579 See In re Grumman Corp., supra note 535, at 4; In re Grumman Corp. (Dept. of Navy), supra note 535, at 10; In re Cordis Corp., supra note 535, at 12; In re Caspian, Inc., supra note 535, at 8; In re Allfast Fastening Sys., Inc, supra note 535, at 7; In re Grumman Corp. (Dept. of Air Force), supra note 535, at 11; In re Sundstrand Corp., supra note 535.


582 See Warin & Schwartz, supra note 535, at 75-76; Jordan & Murphy, supra note 535, ACCA Docket at 16.

583 See In re Richardson Elec., Ltd., supra note 535, at 5; In re Grumman Corp. (Dept. of Navy), supra note 535, at 3; In re Grumman Corp. (Dept. of Air Force), supra note 535, at 7.

584 See In re Richardson Elec., Ltd., supra note 535, at 7.

585 Thus, the Richardson agreement provided:
The [Executive Oversight] Committee shall oversee all of [Richardson's] business ethics and compliance programs, consult with whatever advisors it deems appropriate in matters relating to those programs, receive regular reports from the Director of Internal Audit and from the General Counsel concerning [Richardson's] compliance with the programs, and take or recommend to the full
reports to the board from the ombudsman or officer responsible for the ethics and compliance programs.\textsuperscript{566}

2. Inspector General Guidelines for Compliance Programs

The Inspector General of the United States Department of Health and Human Services has offered extensive guidance for compliance programs in hospitals,\textsuperscript{587} clinical laboratories,\textsuperscript{588} and home health agencies\textsuperscript{589} that participate in the Medicare/Medicaid programs. In those documents, the Inspector General articulated what the department views as the

\begin{quote}
Board whatever actions are appropriate and necessary to ensure that [Richardson] conducts its activities in compliance with the requirements of the law and sound business ethics.

\textit{In re} Richardson Elec., Ltd., \textit{supra} note 535, at 7-8. The agreement between Grumman Corporation and the Department of the Air Force similarly provided that:

the Audit Committee of the Board of Directors shall continue to be composed of independent, outside Directors and shall continue to have responsibility for the oversight of corporate self-governance policies and procedures relating to business ethics and compliance. The Vice President-Audit shall continue to report to the Board of Directors through the Audit Committee on all ... investigations initiated by any agency or instrumentality of the United States and relating to Grumman's contracts with the Government.

\textit{In re} Grumman Corp. (Dept. of Air Force), \textit{supra} note 535, at 7-8.

\textsuperscript{566}The Lockheed Martin agreement provided in this regard:

The Vice President of Ethics and Business Conduct or her designee shall report to the Audit and Ethics Committee of the Board of Directors (Audit Committee) of Lockheed Martin in person and in writing not less than quarterly concerning Lockheed Martin's Ethics Program and compliance with this Agreement. The Audit Committee shall direct the Vice President of Ethics and Business Conduct to take whatever actions are appropriate and necessary to ensure that Lockheed Martin conducts its activities in compliance with the requirements of the law and sound business ethics.

\textit{In re} Lockheed Martin Corp., \textit{supra} note 535, at 2. \textit{See also In re} Tura Mach. Co., \textit{supra} note 535, at 4 ("The Ombudsman shall attend any Board of Directors meeting as either the Ombudsman or the Board may deem necessary and advise the Board of Directors on any matters or questions concerning compliance with Tura's [Integrity Assurance Program] or the terms of this agreement.").


characteristics and elements of an effective compliance program, against which participant compliance programs will be evaluated.596

In the Inspector General's view, the purpose of a corporation's compliance effort is to "establish a culture ... that promotes prevention, detection and resolution of instances of conduct that do not conform to [legal requirements]."591 Therefore, compliance programs should articulate and demonstrate the organization's commitment to the process.592 In this regard, the Inspector General emphasized that "[i]t is incumbent upon ... corporate officers and managers to provide ethical leadership to the organization and to assure that adequate systems are in place to facilitate ethical and legal conduct."593

The Inspector General enumerated seven elements that "at a minimum" should be included in a comprehensive compliance program. Based on the Federal Sentencing Guidelines,594 these elements are:

(1) the development and distribution of written standards of conduct, as well as written policies and procedures that promote the [corporation's] commitment to compliance (e.g., by including adherence to compliance as an element in evaluating managers and employees) and that address specific areas of potential fraud, such as claims development and submission processes, cost gaming, and financial relationships with physicians and other health care professionals;

2) the designation of a chief compliance officer and other appropriate bodies, for example, a corporate compliance committee, charged with the responsibility of operating and monitoring the compliance program, and who report directly to the CEO and the governing body;


591 Hospital Guidance, supra note 587, at 1; Health Agency Guidance, supra note 588, at 2; Laboratory Guidance, supra note 589, at 1.

592 See generally id.

593 Hospital Guidance, supra note 587, at 2; Health Agency Guidance, supra note 588, at 2; Laboratory Guidance, supra note 589, at 2.

594 Hospital Guidance, supra note 587, at 7; Health Agency Guidance, supra note 588, at 7; Laboratory Guidance, supra note 589, at 6.
(3) the development and implementation of regular, effective education and training programs for all affected employees;

(4) the maintenance of a process, such as a hotline or, to receive complaints, and the adoption of procedures to protect the anonymity of complainants and to protect whistleblowers from retaliation;

(5) the development of a system to respond to allegations of improper/illegal activities and the enforcement of appropriate disciplinary action against employees who have violated internal compliance policies, applicable statutes, regulations or federal health care program requirements;

(6) the use of audits and/or other evaluation techniques to monitor compliance and assist in the reduction of identified problems areas; and

(7) the investigation and remediation of identified systemic problems and the development of policies addressing the non-employment or retention of sanctioned individuals.595

The Inspector General of the United States Department of Housing and Urban Development has also published guidelines to prevent fraud in public housing.596 Although less detailed than the guidelines published by the Department of Health and Human Services, the elements necessary for an effective compliance program are in agreement.597

595Hospital Guidance, supra note 587, at 7-8. See also Health Agency Guidance, supra note 588, at 8-9; Laboratory Guidance, supra note 589, at 6-7 (noting that these guidelines were an outgrowth of the earlier OIG Model Compliance Plan for Clinical Laboratories, 62 Fed. Reg. 9435 (Mar. 3, 1997)).

596Guidelines for Public Housing Authorities to Prevent, Detect and Report Fraud, U.S. Department of Housing and Urban Development, pg. 3 of printout [hereinafter HUD Fraud Guidelines].

597The HUD Fraud Guidelines state that a comprehensive antifraud policy should contain the following components:

Policy Statement
The policy should provide that management is responsible for preventing, detecting and reporting fraud, and each member of the management team should be familiar with the types of signals suggesting possible fraud within his or her scope of responsibilities. The policy statement also states who is in charge of investigating suspected irregularities.
C. Establishing a Culture of Compliance

The Federal Sentencing Guidelines describe the elements of a compliance program that are incorporated into various administrative settlement agreements and guidance documents. These elements are instructive of the criteria the government will consider in evaluating the efficacy of a company's compliance efforts. To be effective, however, a

Scope of Policy
This area of the Fraud Policy sets forth what constitutes fraudulent activities and the fact that the policy covers everyone from management to employees.

Actions Constituting Fraud and Related Criminal Activities
The segment sets forth examples of the most serious of these activities:
- Bribery or kickbacks
- False claims or bid-rigging
- Theft, embezzlement, or other misapplication of funds or assets
- Forgery or alteration of documents
- Impropriety with respect to reporting financial transactions
- Profiting on insider knowledge
- Destruction or concealment of records or assets

Reporting Suspected Fraud
Where fraud or related criminal activity such as described above is suspected, the policy should state that it should be reported to the HUD OIG Office of Investigation in the District that has jurisdiction in your state and to other appropriate federal, state and local law enforcement authorities.

Other Irregularities
This section covers allegations of personal improprieties or other irregularities not constituting fraud or criminal activity and should state that these matters should be resolved by management.

Confidentiality
This section provides that any investigation, resulting from suspected irregularities, will not be disclosed to outsiders, except to the appropriate law enforcement authorities. It also provides that management will not retaliate against employees who report either fraudulent or non-fraudulent irregularities.

Authorization for Investigation
This section should advise that whoever is in charge of the PHA's internal investigation has the authority to take control of and examine records.

Reporting Procedures
This section states that employees suspecting fraud should report it and not attempt an investigation. It also states that management and others should refrain from discussing the allegations with anyone other than those with a legitimate need to know.

Termination
This section states that any recommendations to terminate employees should be reviewed by counsel and management.
compliance program should not be the product of a formulaic check list. Instead, a compliance program should be part of an overall culture of compliance. Employees must understand that conformity with legal requirements is an integral part of a company's business performance and that deviations from those requirements will not be tolerated.\textsuperscript{598}

Each element of a compliance program should foster, in one way or another, a culture of compliance. Although the issue of whether compliance should be rule-based or value-based has been a topic of debate,\textsuperscript{599} there must be formal policies that clearly articulate both the company's commitment to

\textsuperscript{598}As a former Deputy Attorney General of the United States, Jamie S. Gorelick, observed:

There are essentially two kinds of corporations where business ethics are involved. The first has a corporate culture, created by corporate leadership, that embraces business ethics. In such a corporation, systems are designed to identify ethical (or criminal) lapses and to ensure that information about these lapses is communicated to the appropriate level in the chain of command; employees are trained to resist cutting corners and to hold their colleagues to the same standards; good corporate citizenship is rewarded in promotions; and when it comes time to decide whether and how much information should be revealed to the government and others outside the company, those decisions are made with due regard for ethical considerations.

The other type of corporation is not usually actively corrupt. Rather, it lives—and dies—by the age old mistaken belief that what you don't know, won't hurt you. These companies have no working systems to identify and report malfeasance. Employees regularly cross ethical lines in the name of the bottom line. And, when trouble is discovered either within the corporation or without, surprise gives way to an instinct for stonewalling that often overtakes reason. . . . The second sort of corporation is far more likely to run into trouble than the first, and, when trouble comes, it tends to be severe.


In truth, the risk [of criminal prosecution] to both executive and company never can be eliminated entirely. The risk can be reduced substantially, however, by a corporate culture that not only requires and rewards compliance with laws and regulations, but one that also encourages employees to be aware of potential problem areas.

Writing of compliance in the securities industry, John H. Walsh suggests that "compliance should be viewed as part of the built-in value of the product, not as an after-the-fact response to problems." John H. Walsh, \textit{Right the First Time: Regulation, Quality, and Preventive Compliance in the Securities Industry}, 1997 COLUM. BUS. L. REV. 165, 236 (1997).

compliance and the standards to which the conduct of employees will be held. Procedures must be established for employees to follow in order to ensure compliance with those standards. Employees must also be made aware of the standards of conduct and the company's implementing procedures. Finally, the company must be vigilant in preventing possible violations and in responding to violations that occur by taking appropriate remedial measures and disciplinary action.

1. The Corporate Compliance Program

There are many approaches to establishing an effective compliance program. Each company, however, must develop its own structure and mechanisms for implementing the values and standards that are consistent with its corporate culture.600

A corporation should begin with an assessment of legal compliance risks associated with its business activities.601 A compliance program should be grounded on legal and regulatory requirements that are applicable602 and specifically, the requirements that govern the particular business activities of the corporation.603

600Thus, for example, Professor Marc I. Steinberg observes that: [t]he Program's scope should reflect the nature of the enterprise's business and the legal issues such enterprise realistically may face. Given the economic practicalities involved and with the proviso that the law must be obeyed, an objective cost/benefit analysis normally is appropriate. Certainly, an enterprise engaged in several different businesses with operations abroad should be expected to develop a more extensive program than one with purely local operations specializing in a particular product market.

601For example, Webb and Molo suggest assembling a team comprised of representatives of the Law Department, Human Resources and Operations areas such as Environmental Compliance, Health and Safety and Quality Assurance. They recommend that the team review past problems as well as current and prospective business activities. Webb & Molo, supra note 347, at 385-87. They also recommend that legal counsel prepare legal memoranda analyzing the law and regulations applicable to the company's business activities upon which the company can base its policies and procedures. See, e.g., Bartrum & Bryant, supra note 533, at 63-64; Kowel, supra note 483, at 524; Pitt & Groskaufinanis, supra note 120, at 1637-38.

602Cf. Pitt & Groskaufinanis, supra note 120, at 1640 (stating that a compliance program should address; federal antitrust, employment, environmental protection, occupational safety and health, and securities laws).

The corporation should also examine the compliance programs of other companies in its industry.\(^{504}\) Consistency with industry practice is a measure of effectiveness under the Federal Sentencing Guidelines.\(^{505}\) Although many companies consider their policies and procedures as proprietary, and are therefore reluctant to share them with others, relevant information concerning business practices can be obtained from industry groups like the Defense Industry Initiative (DII) on Business Ethics and Conduct.\(^{505}\)

Having surveyed the corporate compliance programs within its industry, the corporation should then establish and implement the basic structure of its compliance program.

a. **Corporate Policies and Procedures**

The corporation should clearly and unequivocally state that it is the policy of the company to comply with all applicable laws and regulations. It has been suggested that the company's code should state the company's "intention to exceed the minimum requirements of the law."\(^{507}\) The company

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\(^{504}\)Pitt and Groskaufmanis caution against simply adopting another company's code: "because every corporate culture is different and changes over time, code drafters should attempt to tailor a code to their particular company, rather than simply copying the codes of other companies. This is not only desirable, but necessary because courts are most likely to give effect to a corporate code that has been tailored to the circumstances confronting the particular company. Courts may dismiss the mere adoption of another company's code as "empty formalism." Moreover, by tailoring the code, counsel will ensure that the compliance program fits the company's needs.

Pitt & Groskaufmanis, *supra* note 120, at 1639-40.


\(^{506}\)For example, the DII maintains a library of ethics and compliance resource materials prepared by members and sponsors an annual Ethics Directors' Workshop and Best Practices Forum for sharing compliance practices.

\(^{507}\)Pitt & Groskaufmanis, *supra* note 120, at 1641. Pitt and Groskaufmanis recommend that the company's policies state that the company intends to exceed the requirements of applicable law. *See id.* Additionally, the corporation's policies and procedures should define a "safe" course of compliance. As Justice Brandeis recounts with regard to his counseling in private practice:

I have been asked many times as regard to particular practices or agreements as to whether they were legal or illegal under the Sherman Law. One [group of] gentlemen said to me, "we do not know where we can go." To which I replied, "I think your lawyers or anyone else can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, you may slip and go over; but anybody can tell you where you can walk perfectly safe within convenient distance of that precipice." The difficulty which men have felt generally in regard to the Sherman Law has been that they have wanted to go the limit rather than that they have wanted to go safely.

Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the*
should also make clear its intention to enforce its policies through appropriate discipline, including termination.\textsuperscript{608}

The corporation's policies should establish the standards against which an employee's conduct will be judged.\textsuperscript{609} The policies should provide basic guidelines concerning compliance with applicable laws, pertaining to the corporation's business practices and should direct employees to the corporation's more detailed procedures.\textsuperscript{610} Consideration should also be

\textit{Good Citizen Corporation, 21 IOWA J. CORP. L. 731, 754 n.135 (1996)} (citations omitted).

\textsuperscript{608}Pitt and Groskaufmanis also recommend that the company code define the scope of employment as a predicate to a defense against vicarious liability:

To maximize the corporate code's utility against vicarious or secondary corporate liability for the acts of corporate employees, the preamble to the code should also include a statement by the company that an important purpose of the code is to define the scope of employment for the company's employees. More precisely, the code should make it clear that conduct contrary to the company's policy statement is outside the scope of a covered employee's employment. This statement must be coupled with an unambiguous warning to employees that the code's purpose is to establish a regime that will be enforced to the detriment of errant employees. These steps may foster judicial deference to the code of conduct.

Pitt & Groskaufmanis, supra note 120, at 1641-42. Webb & Molo agree with this view. See also Webb & Molo, supra note 347, at 390 (stating that organizations should include statements in the preamble indicating the scope of an employee's authority).

\textsuperscript{609}As former SEC Chairman Harold M. Williams remarked, the "key to an adequate control environment" is an approach on the part of the board and top management which makes clear what is expected, and that conformity to these expectations will be rewarded while breaches will be punished." \textit{Remarks Before the American Institute of Certified Public Accountants, supra note 128, at 11,547.} Pitt and Groskaufmanis are also of this view.

Directors can ensure that the company fosters a tone of corporate respect for legal obligations from the top of the corporation down. The most efficacious way to avoid problems is to instill in all corporate citizens an understanding that unlawful conduct is not encouraged, will not be condoned or ignored, and will lead to serious adverse consequences.

Pitt et al., supra note 71, at 6. Walsh and Pyrich similarly note:

As a threshold matter, a corporate compliance policy should clearly delineate particular standards of behavior for the conduct of the corporation's business. These standards should be appropriate to the particular corporation's culture as well as existing industry standards. The standards should also focus on those areas most likely to present potential legal problems. To be most effective, corporate standards of conduct should include both proscriptions against unacceptable behavior and prescriptions as to desirable behavior.

Walsh & Pyrich, supra note 426, at 646.

\textsuperscript{610}The company's policy and procedures should provide employees with an understanding of their legal obligations and an understanding of the compliance risks associated with their actions. \textit{See Richard S. Gruner, General Counsel in an Era of Compliance Programs and Corporate Self-Policing, 46 EMORY L.J. 1113, 1156 (1997).} By sensitizing employees to the statutory and regulatory requirements of their actions, the corporation can reduce the likelihood of inadvertent, as well as willful, violations. As Bartrum and Bryant note:

[B]y providing meaningful guidance to employees, corporations reduce the likelihood that an employee will inadvertently violate existing laws and regulations. Further, a corporation that clearly sends a message to all employees
given to the adoption of "standard operating procedures" at the operational level that provide more specific and detailed guidance concerning compliance.61

Finally, corporate policies and procedures should be reflective of the manner in which the company actually conducts business. Otherwise, there is the risk that the policies will be regarded as an attempt to impose an alien framework on the business operations, and therefore, will be ignored.

In any event, the establishment of policies and procedures is only the starting point for building a culture of compliance. In order to be effective, the policies and procedures must be conveyed to the employees with the endorsement and sponsorship of the company's management.

b. Sponsorship of the Policies and Procedures by Corporate Management

Standing alone, the adoption of comprehensive corporate policies and procedures is not sufficient to establish the necessary culture of compliance. Instead, they must be endorsed and sponsored by the company's management at all levels.612

that violations of law will not be tolerated reduces the likelihood that an employee will intentionally violate the law in an attempt at career advancement. Such an environment also encourages employees to take their complaints and concerns to management instead of going directly to the government or the media, which may reduce the risk of qui tam or whistle-blower suits.

Bartram & Bryant, supra note 533, at 56.

612Thus, Webb and Molo observe:
Since the enactment of the Guidelines, much of the discussion on policies and procedures has focused on corporate codes of conduct. Little mention has been made of the necessity for more detailed policies and procedures relating to areas most likely to pose the greatest problems for the organization. The general code of conduct, while useful in disseminating a positive corporate ethos and setting forth basic rules for employees, is not "reasonably capable of reducing the prospect of criminal conduct" in matters which are necessarily complex given the governing law and the company's business activities. For example, the complexity of antitrust, environmental, or anti-boycott regulations may require detailed explanations. Yet, such areas may not be relevant for the entire work force. The hourly worker operating a punch press need not concern himself with the nuances of the Robinson-Patman Act. Accordingly, the organization must develop supplemental written policies and procedures, targeted at specific groups of employees, to ensure specific, yet understandable guidance in more complex technical matters.

Webb & Molo, supra note 347, at 392; see also Richard S. Gruner, General Counsel in an Era of Compliance Programs and Corporate Self-Policing, 46 EMORY L.J. 1113, 1156 (1997).

612In his report on behalf of the special review committee of the board of directors of Gulf Oil Corporation, a report which became the model for the corporate voluntary disclosures of questionable payments, John J. McCloy states that "[T]he Committee wishes to emphasize ... that it is not in the institution of rules and procedures to preclude political illegalities that the future
Policies and procedures should be approved at the highest levels of the corporation.\textsuperscript{613} They should first be adopted and issued by the board of directors.\textsuperscript{614} The policies and procedures should then be promulgated throughout the company by the chief executive officer and the chief operating officer as befits a directive from the board of directors.\textsuperscript{615}

\textsuperscript{613}As John H. Walsh observes, "[T]he compliance of a securities firm cannot be better than the compliance determined at the top." Walsh, \textit{supra} note 598, at 235. Richard S. Gruner and Louis M. Brown similarly note that "at a basic level, the success of agency processes to ensure corporate law compliance in a large organization depends on a strong statement of interest in law compliance by top executives who are in a position to state corporate policy." Gruner & Brown, \textit{supra} note 607, at 750.

\textsuperscript{614}Thus, Pitt and Groskaufmanis suggest:

The company must pay attention to the process by which a code is adopted. If the company adopts a code of conduct to establish a true tone at the top and to encourage regulators, prosecutors, and judges to defer to the code, it follows that management should develop and recommend the major policy statements, which the company's full board of directors should approve. The board should delegate responsibility for overseeing the implementation, maintenance, and enforcement of the compliance program to appropriate committees comprised primarily, if not exclusively, of outside directors.

Pitt & Groskaufmanis, \textit{supra} note 120, at 1642. \textit{See also} Bartrum & Bryant, \textit{supra} note 533, at 67 (stating that "board approval serves two purposes: 1) it sends a message that the compliance program is supported at the highest levels of the organization, and 2) it facilitates accountability by requiring periodic updates to the board").

\textsuperscript{615}In this regard, Webb and Molo note that:

[To succeed, a compliance program must be truly a company effort. While the impetus for creating a compliance program may emanate from the general counsel's office, it must have complete support at the highest levels of the organization. Senior management and the board of directors must be involved, in part, based on their duty of care. Moreover, for employees to appreciate the importance of the compliance effort, it is essential that the program carry the imprimatur of the board of directors and senior management - specifically, the CEO. Thus, from the outset, the board and senior management must support the program visibly.

Webb & Molo, \textit{supra} note 347, at 384. \textit{See also} Kowal, \textit{supra} note 483, at 524 (stating that "[t]here must be visible support from top management to establish that compliance with internal standards is important, and that deviations will be met with appropriate remedial action, including disciplinary proceedings"); Bartrum & Bryant, \textit{supra} note 533, at 62 (stating that top management must support the compliance program).

Such high-level commitment is necessary to create a corporate culture where employees feel obligated both to act within the bounds of the law and to report those who do not. One vocal dissident in upper management could send employees the message that the organization is just abiding by another set of regulations imposed by the legal department.

\textit{Id. at} 62.
Equally important, the corporation's policies and procedures must be supported by mid-level and line management. Unless those who actually supervise the company's employees sponsor the company's policies, it is likely that the employees will regard the policies as meaningless and will consequently ignore them. Worse, if the employees regard the policies and procedures as impediments to doing business, imposed by an out-of-touch management, the rules will be circumvented in order to "get the job done."

Thus, management at all levels of the corporations must consistently reinforce the importance of compliance with the policies and procedures. Otherwise, policies and procedures will be viewed, at best, as trivialities, or at worst, as obstacles to circumvent.

c. Compliance as a Criterion of Performance

Compliance with legal and regulatory requirements as well as with corporate policies and procedures should be a criterion of performance for management at all levels. Tying compliance to promotions and compensation stresses the importance placed on compliance by the company. It makes it clear that compliance is viewed as being as important as sales or production goals. It also stresses that the company will not tolerate compliance lapses. A compliance criterion should be written to reinforce a manager's positive compliance initiatives. A compliance failure should reflect negatively on a manger's performance and should result in a corresponding loss of compensation or adverse personnel action.

Other performance criteria (i.e., sales or production) must be consistent with compliance. Sales or production goals must not be such that they cannot be attained without sacrificing compliance. In this connection, commentaries have noted the examples of a pizza company that requires pizza delivery persons to obey all traffic laws while at the same time establishing delivery-time requirements that cannot be met without exceeding the speed limit.616

616Deborah A. DeMott cites this example based on an award of $79 million against Domino's Pizza. As Professor DeMott explains:
A pizza business markets its home delivery service as especially rapid, telling prospective customers, "Delivery within 30 minutes of your order or the pizza is yours for free." Delivery people are told "Never exceed the speed limit. Never run red lights." If they are also told "You pay for any free pizzas," the drive-legally instruction competes with the agent's financial self-interest, and some agents may either determine to ignore the driving instructions or they may, less directly, tend to over-estimate their skill to drive illegally but still inflict no injuries on others. Indeed, this example does not presuppose that the management of the pizza business intends for its agents to disregard the driving instructions. The example thus does not involve the phenomenon of instructions that the agent reasonably understands the principal intends or
d. Creating Awareness of the Requirements

Established standards of conduct that are endorsed by senior management, supported by management at all levels of the corporate structure, and integrated into performance criteria are the foundation of a company's compliance culture. It is essential, however, that the corporation's standards of conduct are communicated effectively to all of its employees. The company's written policies and procedures should be widely distributed throughout the corporation and should be accessible to all employees via the company's intranet. Employees whose work implicates the corporation's policies and procedures directly should be given copies.  

An introduction to the company's policies and procedures should be part of the orientation provided to all new employees. New employees should certify that they have been informed and received copies of the company's policies and procedures. Line managers and supervisory personnel should reinforce the employee's orientation by periodically reviewing the corporate policies and procedures.

The corporation should also establish a training program concerning various areas of legal risk. A significant component of this training should

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means to be ignored. The organization's incentive structure has consequences for agents' conduct separate from management's intentions. 
DeMott, supra note 336, at 45-46. Other commentators note that unrealistic goals or goals that are inconsistent with compliance can lead to corporate criminality notwithstanding management's efforts to prevent it. Thus, Pamela H. Bucy notes that:

[w]hen considering the corporate goals, the factfinder should examine whether the goals set for the relevant division, subsidiary, or employee promote lawful behavior or implicitly encourage illegal behavior. As the American Law Institute noted in devising the Model Penal Code's standard of corporate criminal liability, "the economic pressures within the corporate body may be sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain.

Bucy, supra note 354, at 347. Similarly, Emmett H. Miller observes:

[The decentralized, multi-divisional structure of many modern public corporations creates perverse incentives for lower level management to break the law. In such organizations, top management performs strategic planning, setting production and profit quotas for the various operational divisions, while lower and middle management retain almost complete control over operations. This situation presents the possibility that top management, isolated from the realities of operations, will make unreasonable demands on lower and middle management that can be met only by breaking the law. Furthermore, top management may prefer to remain ignorant of lower level crime, thus reaping its benefits without incurring personal liability. This phenomenon may help explain why most corporate crimes are committed by lower and middle level management rather than top management.


617See Pitt & Groskaufmanis, supra note 120, at 1644.
be directed to ethical conduct and decision making. Training modules addressing specific areas of legal risk should be developed for targeted segments of the employee population. For example, with regard to training in export controls and the FCPA, employees involved solely in domestic manufacturing would require only orientation-level training. In contrast, employees engaged in international marketing activities would require much more focused, substantive training. Specialized guidance materials, supplementing the policies and procedures, should be provided to these employees as well.

Finally, refresher training should be provided on an on-going basis. This training should remind employees of the company's policies and procedures and inform them of any changes in relevant laws and regulations. All training programs should be documented as to content and attendance.

e. Maintaining Vigilance to Prevent and Detect Violations

After establishing written standards of conduct and instituting a program of training appropriate to an employee's duties and responsibilities, the corporation must then take steps to assure that there is compliance with the policies and procedures. A company that is not vigilant in enforcing its code of conduct may be in a worse position if violations occur than a company with no code at all. This vigilance requires rigorous audits, maintenance of the internal reporting mechanisms (i.e., employee "hot lines"), and through investigation of reports and indications of misconduct.

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618 As Webb and Molo note, "Rarely will a single training program suffice for an organization's entire work force. Rather, a corporation should train different groups of employees in different manners based upon job duties, educational backgrounds, and the impact of the compliance program on them." Webb & Molo, supra note 347, at 394.

619 See Bartrum & Bryant, supra note 533, at 69 ("Employee training should be an ongoing process. In addition to the initial training sessions explaining the compliance program, the organization must provide periodic refresher courses and sessions for new employees as well as employees whose responsibilities change.").

620 See id. See also Webb & Molo, supra note 347, at 394-95 (stating that "[t]he organization should make compliance program training an ongoing process").

621 See Stephen J. Weiss, Foreign Corrupt Practices Act of 1977: The Antibribery Provisions 82 (Institute of Security Regulation 1979). Prosecutors may view violation of a company's policies and procedures as evidence of willfulness and intent. Additionally, as Webb and Molo point out, a sentencing court may view the failure to enforce the corporation's policies and procedures as evidence that the compliance program was not "effective," and accordingly, deny mitigation credit under the Federal Sentencing Guidelines. Webb & Molo, supra note 347, at 379 ("Once an organization establishes a compliance program, the company must abide by it. A sentencing court will deem a program 'non-effective' - based on lack of enforcement - if the company fails to follow its compliance program.").
1. Auditing for Compliance

Regular, periodic audits by the corporation's internal audit organization should be conducted to assure that the corporation's policies and procedures are being followed. The corporation's independent auditors should be directed to confirm the reports of the company's internal auditors on a spot-basis as well as to conduct a thorough review of the company's response to indications of serious misconduct.

Development of the compliance audit program should be guided by the size and complexity of the organization and the company's compliance history. Particular attention should be paid to areas of heightened legal risk in which there is a likelihood of current or future questionable practices.

The audit should focus on the degree of compliance with the corporation's policies and procedures within a particular business element as well as monitoring the effectiveness of the administration of the compliance program. For example, the auditor's review should include general awareness of the policies and procedures, the comprehensiveness of training, availability of individual assistance with respect to ethical or compliance issues, and the employees' awareness and utilization of internal reporting mechanisms. Thus, a compliance audit should include verification that:

- Corporate policies and standards of conduct are available to all employees, including newly hired employees. Verification should include review of the documentation reflecting dissemination of the policies and standards.

- Employees receive training in the policies, procedures and standards of conduct as well as appropriately detailed compliance training in relevant substantive legal requirements.

- Policies and standards are communicated to employees by means of company publications.

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62 Professor Gruner also suggests conducting "legal audits" of significant compliance areas under the direction of the general counsel to test the adequacy of the company's compliance program. Gruner, supra note 610, at 1167-68.

63 See Bartrum & Bryant, supra note 533, at 71-72.
Employees are aware of individuals and other resources within the company for consultation regarding specific issues of compliance with ethical or legal standards.

Employees are familiar with the internal mechanisms for reporting suspected misconduct and for raising other compliance issues.

Reports of suspected misconduct are investigated promptly and culpable employees, including managers, are disciplined consistently.

Such an audit may involve interviews with employees as well as review of documentation.

In addition to the records maintained by the corporation, other sources of information should be considered. These sources include:

- employee surveys;
- internal reports of questionable conduct;
- complaints by customers or suppliers;
- exit interviews with departing employees;
- exit interviews with government auditors and inspectors;
- allegations in law suits;
- press reports and inquiries;
- informal communications with employees.

Audit findings should be reported to the chief executive officer, the chief operating officer and the board of directors (or a committee of the board). The audit findings should also be provided to the general counsel and the administrator of the company's compliance program. Any indication of a serious violation of law or regulatory requirement should be referred to company counsel for investigation.
2. Internal Mechanisms for Reporting Questionable Conduct

A corporation should provide a mechanism for its employees to report potential violations of law or company policy. Many companies maintain toll free telephone lines that employees can use to report questionable conduct. Reports may be made anonymously and employees must be able to make reports without fear of retaliation.\textsuperscript{624}

Records of calls should be maintained reflecting the date on which the call was received and the subject matter of the call. Calls raising substantial issues of noncompliance with law or company policy must be investigated. Allegations of misconduct exposing the company to criminal or civil liability should be referred immediately to the company's legal counsel. The company's records should reflect the company element to which the referral was made.

Once a call has been followed up, the company's record should be annotated to reflect the outcome of the investigation and the remedial action, if any, that was taken. The employee making the initial report (if identified) should be informed of the outcome of the company's review and the record of the report, as annotated, should be available for inspection and review by the company's auditors.

3. Investigation of Reported Misconduct

When a serious violation of law or regulatory requirement is suspected, such that the corporation may be exposed to criminal or civil liability, the matter should be referred to the corporation's legal counsel for review, investigation, and legal analysis. This will provide a basis for asserting the protection against disclosure to third parties afforded by the attorney-client privilege and the attorney work product doctrine. Similar protections against discovery of the results of an internal investigation may not be available if the matter is handled by auditors or others.\textsuperscript{625}

\textsuperscript{624}See Pitt & Groskaufmanis, supra note 120, at 1645.

The company should also create a mechanism through which anonymous employee questions and disclosures may be channeled. Many compliance issues may be in gray areas in which the law itself, much less its application, remains undefined. Employees should have a "safe harbor" to call counsel or some other individual to discuss issues of concern or to report possible violations. Companies that have established hotlines often find that the bulk of the calls seek clarification of the policy's application.

\textit{See also} Gruner, \textit{supra} note 610, at 1160.

\textsuperscript{625}See, e.g., United States v. John Doe #1, 979 F.2d 939, 943-45 (2d Cir. 1992) (holding that the attorney-client privilege protects the communication from discovery but does not protect the underlying facts disclosed). It has also been suggested that there is a privilege for "self-critical
Under most circumstances the results of the investigation should be memorialized in a written report to management with recommendations communicated to appropriate members of management consistent with the preservation of the confidentiality of attorney-client communications. If the investigation was undertaken in response to a hotline call, the company's records should be annotated to reflect the conclusion of the investigation. Any remedial actions taken as a result of the investigation should be documented as well.

f. **Enforcement Through Consistent Discipline**

When reports of misconduct have been substantiated and responsibility has been determined, discipline must be imposed. Discipline must be consistently applied, without regard to the individual's position in the organization. Additionally, as the Federal Sentencing Guidelines make

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See Bartram & Bryant, supra note 533, at 73.
clear, persons responsible for the violation, or for the failure to detect the violation, should be disciplined along with the primary actor.627

g. Annual Certification of Compliance

It is advisable for the corporation to require officers, managers and employees operating in high risk areas to certify compliance with applicable laws and corporate policies. The certifications should include representations concerning past and future conduct of the individual,628 as well as a representation concerning the individual's knowledge of questionable or improper conduct by others. The report of any misconduct should be investigated thoroughly and remedied promptly. The certification should be maintained as part of the individual's permanent employment record and any material misrepresentation in the certification should be the basis for substantial discipline.

h. Periodic Compliance Reviews

Finally, in addition to the regular audits of the company's compliance, the corporation should conduct periodic reviews of the compliance program.629 These reviews may be in response to incidents of misconduct that have suggested weaknesses in the compliance program. In those circumstances, the review should result in remedial measures ensuring that the weaknesses are corrected and that the misconduct will not be repeated.

Compliance program reviews should also be undertaken with a view toward identifying enhancements that will make the program more effective.630 The review should be based on an assessment of the areas of significant risk in the company's activities and an evaluation of the capability of the compliance program to respond to those areas of risk.

627 U.S.S.G., supra note 76, § 8A1.2, Application Note 3(k)(6) ("The standards must [be] consistently enforced through appropriate disciplinary mechanism, including as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement . . . .'').

628 See Pitt & Groskaufmanis, supra note 120, at 1644 ("Constant reminders of the company's policies should never be far from the sight, or minds, of those employees expected to comply. On a regular basis, employees should be required to certify their actual past compliance and intended future compliance with the code's provisions.").

629 Webb & Molo, supra note 347, at 395.

630 Id. at 395-96.
V. Conclusion

The Caremark decision has sharpened the attention of corporate directors on their compliance oversight responsibilities as part of the duty of care they owe to the corporation's shareholders. The chancellor's reasoning in Caremark is in harmony with the main themes of corporate governance thinking over the past twenty-five years, as reflected in the principles enunciated by the American Bar Association, American Law Institute, the Securities and Exchange Commission, and the writings of scholars. The chancellor's suggestion that directors have an affirmative duty to see that the corporation has an effective compliance program in place (and that directors may be personally liable if they breach that duty) is a direct challenge to the very restrictive view of the director's responsibility to oversee employee conduct expressed in the Graham case — a challenge that must await resolution by the Delaware Supreme Court.

Nevertheless, in light of the "powerful incentives" under the Federal Sentencing Guidelines for corporations to implement compliance programs, coupled with equally significant collateral consequences to the corporation resulting from criminal prosecution, it has become imperative that corporate directors ensure that an efficacious program of legal and regulatory compliance is implemented. Indeed, in view of what is, in essence, strict corporate liability for crimes committed by employees while acting within the scope of employment, corporate directors must take the initiative in implementing policies, procedures, and mechanisms to minimize the risk of liability and to mitigate the consequences of employee misconduct.

The structuring of the corporation's compliance program is a matter of sound business judgment as is designation of the person or persons who will exercise operating authority over the program in the first instance. Even if, in the exercise of their business judgment, the directors delegate the responsibility for compliance to one or more senior managers, the directors remain obligated, as fiduciaries, to assure themselves that appropriate steps have been taken and that the corporation's compliance efforts are adequate in areas at legal risk.

There is a growing body of guidance concerning the elements of an effective compliance program that the Federal Sentencing Guidelines have strongly influenced. The guidelines, agency agreements, model programs proposed by agency inspectors general, and the resources of industry groups like the DII, provide valuable assistance in developing and evaluating compliance programs.

In the end, however, each corporation must find its own way. Legal compliance must be seamlessly integrated into the corporate culture and must become an integral part of the product and not a post hoc response to a problem. It is only when the directors, managers, and employees create a
culture of compliance that there can be any reasonable assurance that the law will be obeyed and that corporate liability, civil and criminal, will be avoided.