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Reasons to Have a Company Legal Compliance Plan

Protection from creditors and devastating liabilities is generally a goal of many organizations and of their owners or officials; achieving this goal may involve insuring certain risks and the use of trusts, limited liability companies, corporations, and similar structures as part of an end-game strategy. However, avoiding liability in the first place is a major leg on which any solid protection plan stands. The best planning thus involves planning to assure compliance with various rules the violation of which could create devastating liability, either criminal or civil. Organizations dealing with government contracts or government funded benefits need to be particularly careful because governmental agencies often have very potent remedies, including criminal sanctions, more readily available to them, often with significant budgets for obtaining the remedies. Sometimes clients, particularly those of modest size, are reluctant to do such planning; however, big risks can fall on small operations. Here are some solid reasons why such planning is worthwhile and some ideas to make such planning more likely to succeed.

1. The Risk Is So Great, Why Would You Not Want to Have One?

(a) Criminal enforcement activity has increased dramatically on business matters.

(i) New definitions of crimes and the increased number of criminal provisions continue to expand the scope of prohibited activity.

(ii) Several crimes do not require actual intent. Some are based on "knowingly and willfully" but others only require "reckless disregard" or "knew or should have known," negligence, or similar non-intent standards.

(iii) There is increased funding for Department of Justice, Federal Bureau of Investigation, Office of Inspector General (OIG), Internal Revenue Service, and other federal agencies for audits, investigations, and prosecutions in a number of areas. Enforcement efforts generally pay for themselves and then some.

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(iv) State enforcement activity continues to increase, as well. See *People v. Guiamelon*, 205 Cal. App. 4^{th} 383 (2012) (physician's conviction under state health care anti-kickback law upheld).

(v) Respondeat Superior doctrine can create corporate criminal and civil liability for acts of agents. See *New York Central & Hudson River Railroad Company v. U.S.*, 212 US 481 (1909) (where employee's act is for company in scope of employment, the act is attributable to the company even if criminal and not authorized). A plan can prevent such conduct for which the company may be responsible, but if the plan fails to prevent the conduct, the existence of the plan does not relieve the company of its responsibility. Making the plan as effective as possible is very important.

(vi) The agents acting for an organization may also be personally criminally or civilly liable for their own personal conduct. See *US v. Reis*, 366 F. App'x 781 (9^{th} Cir. 2010) (corporation and its CEO may be criminally liable for actions on behalf of corporation violating environmental law); *Prive v. Vermont Asbestos Group and Howard Manosh*, 992 A.2d 1035 (Vt. 2010) (similarly, both corporation and officer may be civilly liable for asbestos discharges). With respect to the health care industry the U.S. Dept. of Justice has announced a greater focus on prosecuting criminally, and pursuing civilly, individuals, such as physicians and providers, for violations. "Yates Memo " of 9/9/15, www.justice.gov/dag/file/769036/download.

(vii) High officials of organizations sometimes may also be criminally liable without evidence that they had any knowledge of or participation in the core criminal activity, under the responsible corporate officer doctrine. See, *e.g.*, *US v. Undetermined Quantity of Articles of Drug*, 145 F. Supp. 2d 692, 705 (SD Md. 2001) (Food Drug and Cosmetic Act). Affirmative wrong doing by the individual is not needed in many cases, particularly those involving public welfare statutes; rather, merely being in a position to prevent corporate wrongdoing alone may be sufficient in those cases. *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975) (both cases were under the federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301 *et seq.* which contains a strict liability provision for misdemeanor misbranding and adulteration violations. Various state and federal statutes, such as under the Sherman Antitrust Act, the federal or state securities laws, state or federal environmental laws, the federal Stark law (prohibiting self-referrals by physicians), or other laws, may be found to be appropriate vehicles for such prosecutions. 7 Blue Sky § 9:117.5 (SEC BLUE § 9:117.5); Berman and Donath, *When No Knowledge Can Still Be a Dangerous Thing: The Potential Criminal Liability of Officers and Directors of Healthcare Companies for the Acts of Their Subordinates*, American Health Lawyers Association Business Law and Governance Practice Group, Business Law and Governance, Vol. 1, Issue 1, Dec. 2008.

(viii) In addition to more typical civil and criminal liability, many federal and state laws contain forfeiture provisions to remedy unlawful conduct or punish wrongdoers and criminal organizations. See, *e.g.*, these federal provisions dealing with the enforcement of forfeitures: 18 USC § 982 (asset forfeitures for money laundering); 18 USC § 983 (administrative forfeiture); 18 USC § 983, Fed. R. Civ. P., Supp. Rule G (civil forfeiture; 18 USC § 983(d) is the innocent owner provision); 21 USC § 853, Fed. R. Crim. P. 32.2 (criminal forfeiture; 21 USC § 853(c), (n) are the innocent owner provisions); 28 CFR Part 9 (remission or mitigation of civil and criminal forfeitures).

(ix) Federal sentencing guidelines can be harsh, but the guidelines substantially reduce penalties if the organization has an effective compliance program. See *United States Sentencing Guidelines*, Chapter 8 (1991).

(x) Prosecutorial discretion is affected by use of compliance plans. See "Principles of Federal Prosecution of Business Organizations," *U.S. Dept. Justice, U.S. Attorneys' Manual*, § 9.28.000 *et seq.* (2008); see particularly §§ 9.28.300 and 9.28.800. Also, the use of deferred prosecution agreements to obtain internal reforms bears watching. Brandon L. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. 853 (2007).

(xi) Taking the Fifth Amendment privilege against self-incrimination in a civil matter may give rise to adverse inferences in the case. *Baxter v. Palmigiano*, 425 U.S. 308, 318–19; *S.E.C. v. Thomas*, 116 F.R.D. 230, 234 (D. Utah 1987) (drawing an adverse inference even from a party's legitimate assertions of the privilege against self-incrimination in a civil case does not render assertion of the privilege unconstitutionally costly). The privilege against self-incrimination will not be effective to prevent corporate or other organizational records from being disclosed because organizations do not enjoy the privilege. Even a records custodian claiming the privilege personally who is also the corporation's sole shareholder, officer, and employee, can be compelled to produce the records. *Amato v. United States*, 450 F.3d 46 (1st Cir. 2006) (one person incorporated chiropractic practice).

(b) There is increased tax, environmental, securities, and antitrust scrutiny of business.

(i) Civil claims may arise from the government or, especially as to environmental and antitrust matters, from other businesses or competitors or interest groups, and as to securities, from investors.

(ii) Criminal provisions exist with respect to all such subject areas. For example, criminal tax fraud in the not for profit tax exempt sector is a more significant concern of the Treasury. See Treasury Inspector General for Tax Administration, *A Corporate Approach is Needed to Provide for a More Effective Tax Exempt Fraud Program*, (7/6/2009).

(iii) State and local civil or criminal rules may well apply, too.

(c) Civil enforcement by governmental agencies has increased.

(i) Huge monetary recoveries and penalties payable to governmental agencies have occurred in a number of industries. False Claims Act (see 31 USC § 3729), Civil Monetary Penalties (see 42 USC § 1320a-7a), and other statutory civil remedies are available relating to a number of industries, and remedies such as those for civil fraud, or damages based on equitable disgorgement, unjust enrichment, payment by mistake, and overpayment are also available to governmental agencies. An implied certification theory has been upheld by the courts with respect to various violations. Under this theory there can be an implied misrepresentation of compliance in order to induce payment of a claim. Where a person "makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Universal Health Servs., Inc. v. United States, ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016). The court used what it called a "demanding" materiality standard and did not draw a bright line test, resulting in inconsistency and uncertainty.

(ii) Exclusion from government contracting alone can be a major career ending sanction, but it can also give rise to additional liabilities. For example, with respect to the health care industry, see OIG, Guidance for Implementing Permissive Exclusion Authority Under Section 1128(b)(15) of the Social Security Act (October 20, 2010) available at http://www.oig.hhs.gov/fraud/exclusions/asp. Exclusion may apply to whole organizations or to the responsible individuals such as "officers" or "managing employees." OIG (Office of Inspector General) will apply a presumption in favor of exclusion of an individual where there is evidence that the officer or managing employee knew "or should have known" of the conduct that formed the basis for a corporate sanction, such as the conduct of others of which the excluded person may not have been fully aware, and sometimes without evidence that the individual knew or should have known. See 42 USC § 1320a-7(b)(15); 42 USC § 1320a-7a(b)(15)(A)(ii) (exclusion by the OIG); *Friedman v. Sibelius*, 686 F.3d 813 (DC Cir. 2012) (responsible corporate officer conviction sufficient for exclusion by OIG). Failing to qualify under the Medicare enrollment rules can halt participation in the program and a failure to maintain or obtain qualification can also create false claim liability. For example, if a medical practice hires a physician with unpaid prior medical debt to the program (perhaps after a bankruptcy or dissolution of the physician's earlier practice), the practice the physician joins may be disqualified from the program (42 CFR § 424.530(a)(6)) and bills submitted while disqualified could be false claims. Exclusion as a government contractor or grant recipient may occur, for example, for failure to make mandatory disclosure of certain violations or credible evidence of them, or, in some cases (*e.g.*, contract value over $5 Million, performance of at least 120 days, but not small business concerns or "commercial items") failure to have a business ethics compliance program. See, 48 CFR §§ 9.406-2, 9.407-2, and 52.203-13.

(iii) License revocations by state licensing officials may follow a fraud or abuse case or a criminal case.

(iv) Executives of companies may face large compensation disgorgement liabilities where the companies are covered by the Sarbanes-Oxley Act (P.L. 107-204, at § 304, which section is applicable to the CEO or CFO putting a year's funds at risk without a causation factor), or by the Dodd-Frank Act (The Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, July 21, 2010, 124 Stat. 1376, at § 954, which section is applicable to any executive and putting a year's funds at risk, but with a causation factor) if the financial statements of their companies need to be restated, even if the executive affected is innocent of any wrongdoing. Failure of a company to seek disgorgement under the Dodd-Frank Act can result in a devastating delisting of the company from stock exchanges.

(v) Funding of reimbursements or payments to a company from governmental agencies, such as Medicaid and Medicare, may be suspended in cases of credible allegations of fraud. See 42 CFR §§ 455.2 and 455.23; 42 CFR §§ 405.370, 405.372, and 405.471. Such suspension of Medicaid or Medicare payments is mandatory, absent good cause not to suspend the payments.

(vi) Injunctions against violations and asset freezes may be sought by the government prior to indictment and the restraining order may be granted without bond. See 18 USC § 1345 (injunctions against fraud against the United States and to restrain disposition of property; aimed at banking and health care violations). The standard may not be as high as in other cases to obtain the order. See *U. S. v. Fang*, 937 F. Supp. 1186, 1197 (D. Md. 1996) (finding that "reasonable probability" standard of conventional preliminary injunction analysis equates with "probable cause" and that it applies in this health care fraud case). See also other fraud injunction provisions: 18 USC §§ 1341 to 1360; 18 USC § 287; 18 USC § 371; 18 USC § 1001. *U.S. v. Quadro Corp*., 916 F.Supp. 613 (E.D.Tex.1996) (court has authority in mail or wire fraud case to issue asset freeze, but declines to do so). If granted, any such order can produce a significant and harsh impact on a company or individual. An effective compliance plan may be argued as a factor for a court not to grant the order, or the plan may prevent the government from seeking such an order in the first place.

(vii) Criminal fines or civil penalties imposed to enforce the law (as compared to those for other purposes, such as to obtain prompt compliance or provide a remedy for third party expense) are not tax deductible. 26 USC § 162(f); 26 CFR § 1.162-21; *Com'r v. Heininger*, 320 US 467 (1943); *Southern Pacific Transp. Co. v. Com'r*, 75 TC 497 (1980). For example, only one-third of an antitrust treble-damage judgment is deductible. 26 USC § 162(g).

(d) Private enforcement of fraud and other rules is strongly encouraged.

(i) *Qui tam* lawsuits under the federal civil False Claims Act (see 31 USC § 3730) (15%-30% of overpayments recovered may be collectable by the whistle blower; and attorneys' fees may be collected under 31 USC § 3730(d)(1)-(2)) is available in industries dealing with government contracts or government payments. Many states also have false claims acts. See UCA § 26-20-1 *et seq*. (Utah False Claims Act). Some states even extend their false claims acts to the collection of state taxes. See, *e.g.,* N.Y. State Fin. Law §189.4(a) (2012) (extends to taxes on income or sales over $1 Million). *Qui tam* cases to enforce state escheat and unclaimed property laws have been brought in some states; whether such cases will succeed and how far this trend to extend these rules will go, remains to be seen.

(ii) The Racketeering Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961, *et seq*.) applies to patterns of illegal conduct. It provides a private as well as governmental cause of action. The remedies under RICO are quite broad, providing for fines, imprisonment, asset forfeitures, and asset freezes. There are state racketeering acts, too. See UCA §§ 76-10-1601 *et seq*.

(iii) State court invalidation of private contracts is possible on public policy or illegal contract basis. See *Polk County, Tex. v. Peters*, 800 F.Supp. 1451 (E.D.Tex.1992).

(iv) State court enforced duties of the Board of Directors (and apparently of officers, too) to assure compliance with law and financial propriety can lead to large damage awards, injunctions, and other remedies; these duties may be asserted by shareholders, trustees in bankruptcy, etc., as well as by government officials. See, *e.g.*, *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). Class actions may be possible. Similar duties apply to managers of limited liability companies and top officials of other forms of organization.

(v) Rewards for whistle blowers (which do not require the time and financial commitment necessary to pursue *qui tam* actions) will increase whistle blowing. For example, the Dodd-Frank Act (The Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, July 21, 2010, 124 Stat 1376) provides rewards for whistleblowers in securities matters (see Act§§ 748 (commodities) and 922 ff. (securities)). There also is authority for the Utah Division of Securities to grant whistleblower awards, and retaliation against whistleblowers is prohibited. UCA §§ 61-1-101 to 106. Tax misconduct may be reported by persons knowing of it, who may be encouraged by the whistleblower reward program under Internal Revenue Code § 7623(b).

(vi) Employment relationships or disputes are affected where employees threaten whistle blowing or claim retaliatory firing, etc. Many *qui tam* claims arise from employment disputes.

(vii) Health insurance companies and federal health regulators can share information, and the government is able to require insurers to pursue anti-fraud programs against insured companies on pain of penalties against the insurers.

(viii) A number of statutes, both federal and state, allow for treble damages. See, *e.g.*, § 4(a) of the Clayton Act, 15 USC § 15(a) (Appendix A2) (treble damages and attorney's fees are mandatory); UCA § 76-10-919. Other forms of exemplary or punitive damages may be available.

(e) Avoiding trouble through a plan helps protect the attorney client and attorney work product protection for certain information and communications, not only against regulatory officials, but third parties as well, and in both civil and criminal matters. Disclosure requirements in heavily regulated or tax favored industries may effectively destroy the attorney-client privilege and attorney work product doctrine in many situations. See DOJ guidelines McNulty Memo http://www.usdoj-gov/dag/speeches/2006/mcnulty_memo.pdf, and the aftermath of the McNulty Memo leading to the Filip Memo http://www.usdoj-gov/dag/readingroom/dag-memo-08282008.pdf regarding waiver of attorney-client privilege. The crime-fraud exception may eliminate the privilege where an attorney's advice is sought to enable or conceal conduct the client should know is unlawful. A privilege lost in one arena could mean disclosure of potentially damaging information to others in other arenas, with consequent increased risks of civil or criminal liability or other adverse impacts.

(f) The Sarbanes-Oxley law (P.L. 107-204, known as SOX; see particularly 15 USC § 7241(a)(4) and 18 USC §§ 1350, 1512, 1519 (2002)) imposes civil and criminal liability for failures to insure effective corporate compliance plans. Some provisions of the Act are for public companies, but many provisions apply to privately held organizations or not for profit organizations, such as the obstruction of justice provisions (18 USC §§ 1512 and 1519) which apply even before an investigation starts.

(g) Liability of a corporation for fraud against the government may well not be dischargeable after a bankruptcy Chapter 11 plan is confirmed, and this includes False Claims Act liabilities to relators bringing *qui tam* actions under that Act. Bankruptcy Code 11 USC §§ 1141(d)(6)(A); 523(a)(2)(A) and (B). Nondischargeability may apply to settlements of such claims as well. See *U.S. v. Spicer*, 155 BR 795 (Bnkr. DDC 1993), *aff'd* 57 F.3d 1152 (DC Cir.1994). Fraud, fiduciary defalcation, and certain other kinds of misconduct liabilities are not dischargeable by individuals in bankruptcy. Also, taxes under fraudulent or nonfiled returns, trust fund taxes, and certain other taxes and tax related liabilities are not dischargeable. Bankruptcy Code 11 USC § 523.

(h) Officers and directors may well not be fully covered by indemnity agreements or insurance against all areas of exposure. There are limits on such things as what sorts of claims or conduct is covered, when the coverage starts to pay, and when the coverage can be ended. Taking the Fifth Amendment privilege against self-incrimination could eliminate significant indemnity coverages. There is no indemnity allowed for reckless, willful, or criminal conduct (*Globus v. Law Research Serv., Inc*., 418 F.2d 1276, 1288 (2d Cir. 1969)) and counterclaims for indemnification are barred under the False Claims Act (*Mortgages, Inc. v. U.S. District Court for District of Nevada*, 934 F.2d 209 (9th Cir. 1990)). See also corporate and other organizational codes such as 8 Del. C. § 145(a); *Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1094 (Del. Ch. 2012) (Delaware statute prohibits a corporation from indemnifying a corporate official who was not successful in the underlying criminal proceeding and has acted, essentially, in bad faith); UCA § 16-10a-901 *et seq*. (corporations); UCA § 48-2c-1801 *et seq*. (limited liability companies).

(i) Spoliation of evidence can have major adverse consequences in disputes ranging from discovery sanctions (Utah R. Civ. Proc. 37(d)), adverse inferences (*Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622, 631 (D. Utah 1998) ("adverse inference must be predicated on the bad faith of the party destroying the records")), dismissal of claims (*Phillips Elecs. N. Am. Corp. v. BC Tech*., 773 F. Supp. 2d 1149 (D. Utah 2011) (dismissal warranted in case where the deletion of files was prejudicial)), findings of due process violations (see *Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002)), tort actions against the spoliator (see *Hills v. United Parcel Service, Inc.*, 232 P.3d 1049 (Utah 2010), (court might in proper case recognize an independent cause of action for third-party spoliation of evidence)), professional discipline (Ut. Rul. Prof. Conduct 3.3), and criminal prosecution for obstruction of justice or evidence tampering (see UCA § 76-8-510.5). Beyond spoliation, other obstruction of justice laws which generally apply include: 18 USC § 1518 (health care offenses); 18 USC § 1519 (Sarbanes-Oxley (SOX) law); UCA § 76-8-306.

(j) At least some crimes can lead to the deportation of foreign nationals under 8 USC § 1101(a)(43)(M)(i) and 8 USC § 1227(a)(2)(A)(iii). This can be bad for them and bad for the company, too.

2. Benefits of Plans - What's in it for the Company?

(a) Criminal.

(i) Prevention of the crime is more likely.

(ii) There may be reduced penalties for any crime (especially crime by employees, etc.).

(iii) There may be a lower likelihood of prosecution. Plan needs to be effective (not perfect) and if effective, it is much harder to prove "recklessness" or other standards.

(iv) Failure to have a compliance plan suggests "deliberate ignorance;" although having a plan is generally voluntary, not having one, or worse, having one and not letting it be truly effective, looks rather suspicious to regulators and others in many cases.

(v) There may be a greater likelihood of settlement; government settlements often require a compliance plan, and where an effective plan is in place, settlements are more easily negotiated. However, settlements of compliance failures can lead to deferred prosecution agreements or civil corporate integrity agreements which can add burdensome elements; prevention through a company's own more livable plan is better.

(vi) There may be a defense to a responsible corporate officer prosecution under a public welfare no-fault sort of statute. *United States v. Park,* 421 U.S. at 673; *United States v. Wisenfeld Warehouse Co*., 376 U.S. 86 (1964); <u>see</u> also *Goldenheim, et al. v. Inspector General*, Dec. No. 2268 (Departmental App. Bd. Appellate Dir. Aug. 28, 2009) (Final Review of Administrative Law Judge's Decisions) ("[I]f indeed the fraud occurred despite the [defendants] having exercised the 'utmost care' and having taken 'extraordinary measures' to ensure that the company behaved lawfully . . . then at trial they could have mounted the affirmative defense that they were powerless to stop [the fraud].")

(b) Civil.

(i) Prevention of civil claims of various sorts, from False Claims Act to employment disputes, may result. For example, a *qui tam* relator status may be prevented where an employee is obligated under a compliance plan to report suspected violations to management so that the company may investigate and, if appropriate, report to officials or take other corrective action.

(ii) There may be reduced exposure to penalties, damages, license revocations, program exclusions, etc. For example, treble damages under a false claim act action may be reduced and penalties avoided if the conduct is disclosed before being discovered by the government. See 31 USC § 3729(a)(A) to (C). As another example, there may be an affirmative defense to employment discrimination damage actions based on an effective compliance program. See *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6^{th} Cir. 2008).

(iii) At least one Delaware case (*Caremark*, cited above) has made corporate directors personally liable to the corporation and shareholders for large losses in failing to have a compliance plan. A Bankruptcy Court has extended this potential liability to officers as well. This trend will expand, and a compliance plan can help provide protection.

Officers, directors, and other officials in some cases may be personally liable for conduct on behalf of companies, sometimes jointly and severally with others who may misbehave, such as for fiduciary breaches, employment law violations (individuals may be treated as the "employer" under certain statutory provisions), responsible person liability for the 100% penalty under IRC § 6672 relating to employment trust fund taxes, and other violations of law by the company. States also provide for similar 100% penalties which may apply to sales or other taxes as well as employment trust fund taxes. See UCA § 59-1-302. Utah's provision is interpreted similarly to the federal provision. See *Ut. St. Tax Com'n v. Stevenson*, 150 P.3d 521 (Ut. 2006).

(iv) Compliance plans may help protect these persons, and the company benefits where key people are not distracted by the need to mount personal defenses.

(c) Internal Operations and Value Enhancement.

(i) Planning provides a deeper understanding of actual business operations.

(ii) Plans provide for ways to monitor employee behavior, in order to prevent adverse activity and enhance positive activity. This can enhance efficiency and reduce internal conflict by providing clear expectations.

(iii) Plan implementation corrects risky conduct and increases financial security against massive damage (note: shareholder actions may in some cases be available against board of directors or other high officials personally, as well as against the organization). For example, a plan may help prevent the risk of a renegade middle manager causing employment discrimination for which the company may end up responsible. A well implemented plan creates a culture of compliance to reduce non-business (*i.e.*, non-compensated) and often unknown risks.

(iv) A plan enhances the gathering and dissemination information to the organization's personnel on governmental and other legal requirements. Ignorance and misconceptions create unnecessary risks.

(v) Plans provide help in defending against allegations of failure to comply with law, particularly where a mental state (*e.g.*, negligence, intent) is a factor.

(vi) A plan encourages employee reporting to management rather than filing *qui tam* action (employees are the single greatest risk for becoming the source of a *qui tam* action, and all *qui tam* cases must be investigated by the Department of Justice, increasing the odds of a criminal charge).

(vii) A plan facilitates protection of attorney-client privilege, which is under attack, yet may be of critical importance.

(viii) Having a plan helps avoid court or government imposed compliance programs; your voluntary plan is probably more livable than someone else's imposed plan.

(ix) Both the New York Stock Exchange and NASDAQ require compliance plans as conditions for listing. See SR-NYSE-2002-03; SR-NASD-2002-141, 2002-77, 2002-80, 2002-138, 2002-139.

(x) Insurance underwriters assess the effectiveness of compliance plans in making coverage available or in pricing coverage.

(xi) Prevention of compliance problems protects the value of the business. Potential acquirors doing acquisition due diligence investigations review and assess compliance plans. Public markets and acquirors in private transactions respond to a lack of good corporate citizenship with reductions in value. There are successor liability rules which make the acquisition (including asset acquisitions) of a business with compliance problems quite risky. See, *e.g., U.S. ex rel. Fisher v. Network Software Associates*, 180 F.Supp. 2d 192 (D.D.C. 2002) (asset acquiror has False Claim Act liability for acquired business's prior false claims where successor had notice of the false claim and there was a substantial continuation of the operation). Labor issues may give rise to successor liability. See *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974) (race and sex discrimination); *Trujillo v. Longhorn Manufacturing Company*, 694 F.2d 221 (10th Cir. 1982) (sex discrimination case). See also *In re Slodov*, 436 US 238 (1978) (personal liability of principal of acquiror for payroll tax of acquired business may apply if there are withheld funds remaining).

(xii) Risky conduct by officers, directors, or agents may require the company to indemnify them for defense costs or damages and penalties under company indemnification provisions in agreements, bylaws, etc., and a compliance plan may help avoid these costs.

(xiii) Some states require as a condition to participation in government programs a certification that compliance plans exist and meet regulatory requirements in certain industries, such health care where Medicaid claims are involved. New York has been leading the way in the health care industry and other states may follow as to that industry and others, too. See, *e.g.*, 18 NYCRR Sec. 521.1 (annual Medicaid certification as precondition to program participation). In the health care industry, the federal Patient Protection and Affordable Care Act (2010) (see Sections 6102 and 6401) requires compliance plans for providers and suppliers as a condition to enrollment in government health care programs.

(xiv) High quality directors and officers may be reluctant to join an organization without some effective compliance plans and procedures.

(xv) Some sophisticated organizations looking for long term associations are more likely to deal with an organization which demonstrates professionalism and long term thinking, including through compliance programs.

(xvi) Hard earned customer goodwill can be destroyed by publicized failures to comply with the law or acts viewed as abusive or wrongful.

(xvii) Failures of compliance can lead to very complex, expensive, and time consuming litigation on several fronts at once, criminal and civil, private and governmental, sometimes in more than one jurisdiction, and sometimes in a seemingly never ending cascade of litigation over time as settlements or judgments in earlier matters are used as bases for later actions. There is often no easy road to settlement.

3. Negatives of Plans - Is Ignorance Bliss?

(a) Failure to follow a plan looks very bad; consistent enforcement is critical, so the organization should be sure to provide complete follow-up and documentation of all complaints.

(b) Effectiveness of the plan may be compromised if:

(i) The plan is not kept current on changes in law or operations or plan not understandable.

(ii) An offense is by high-level individuals or person in charge of the plan.

(iii) Unreasonable delay in reporting occurs; for example, in health care, quick and accurate disclosure to payors of any billing or coding errors is important.

(iv) Where a plan is not developed from a baseline audit, it is vulnerable (otherwise, no one will know the problems upon which to focus). Note: such audits may be full-blown report card audits or may be (and often are) more limited.

(v) Failure in continuous employee training or where the plan is not provided to all employees, may leave the plan vulnerable.

(c) There are some costs and effort in creating and following a plan.

(i) Dollar costs are heavily outweighed by plan benefits over the longer term, and often rather quickly. Plans need to be tailored, and this makes them more cost-effective.

(ii) Plans need not be excessively complex, but should be tailored to the actual operations of the organization (*e.g.*, in the health care industry, a hospital's plan will likely be much more complex than a physician group's plan) and should focus on the areas of greatest risk.

(iii) An organization may be able to combine with others to obtain a less-costly or more coordinated plan, particularly where parties have similar risks and are dependent on each other.

(d) There may be a need to make refunds of overpayments (*e.g.*, from government payers) and the company may need to report errors.

(i) If errors are found, the company needs to correct them to avoid false claim allegations of concealing the receipt of an overpayment from the government, for example.

(ii) There may or may not be an affirmative duty to disclose; voluntary disclosure may or may not be wise. This should be carefully reviewed case by case.

(iii) Voluntary self-disclosure protocols available in some industries take time, effort, and money but reduce the chance of *qui tam* action, enhance credibility, rebut allegations of intentional wrong doing, and may obtain leniency (no guaranty, however).

(iv) Self-disclosure may trigger further audit by a governmental agency.

(v) Self-disclosure may trigger action by private parties or other federal or state agencies.

(vi) There will be a need to analyze the effect of disclosure on available evidentiary privileges.

(vii) Self audits, on the other hand, also may identify amounts payable to the organization.

4. Basics Required for Plan.

(a) Reasonably Meet Requirements for an Effective Plan.

(i) Plan must be effective but not foolproof.

(ii) Small organization's plan may be much simpler than large organization's plan.

(iii) May combine with other groups for a common plan.

(b) Basic Requirements - The Seven Cardinal Virtues.

(i) A compliance officer with clout and responsibility, and who is accessible, is a key factor. It is best if the compliance officer's compensation or bonus is not profit driven, since a profit tie may create perverse incentives. General counsel and the compliance officer should be separate individuals.

(ii) Clear, written policies and procedures are needed.

(iii) Careful delegation and screening is a must.

(iv) Periodic training and creating a culture of compliance is necessary.

(v) There needs to be monitoring and auditing (neutral reviews, hotlines, etc., may be a part of this), along with annual analytic reviews of performance and improvement.

(vi) Consistent enforcement is crucial.

(vii) Prompt investigation and corrective action are required.

(c) Other Matters.

(i) Seek assistance from government in questionable or ambiguous areas, and document the guidance received.

(ii) Have a plan which is interactive or consistent with plans of key contractors or suppliers where appropriate (they likely need a proper compliance plan, too).

(iii) Consider having compliance achievements as a factor in establishing compensation or bonuses for high level executives. Government agencies like such things as specific personal responsibility and certifications with compensation recoupment for noncompliance.

(iv) Avoid rote "check the box" plans. Plans should be thought through and tailored to the organization. Government agencies are unimpressed by rote plans sitting on shelves.

(v) A resource for the government to use in evaluating a plan has been provided by the Department of Justice, and it is good for the company to ask the same questions: www.jusice.gov/criminal-fraud/page/file/937501/download.

5. **Areas of Coverage**. Legal areas a company should consider covering with a plan and accompanying policies (such as codes of conduct, internal controls, and training), or consider reviewing in connection with a plan, will vary industry by industry and organization by

organization, but will include industry specific matters and will be determined by taking into account the state and federal (or foreign) jurisdictions in which the organization operates and agencies which have or may have jurisdiction over the organization. Legal areas to consider covering may include (where applicable, and not every area is equally applicable to all organizations) such high-risk areas as:

(a) General civil law matters, including tax law (including trust fund tax matters for which responsible individuals may be assessed the 100% penalty under IRC § 6672), nonprofit conflicts of interest and prohibited transactions, retirement plan fiduciary duty and prohibited transactions, consumer credit matters, debt collection law, environmental law, land use rules, business and professional licensing rules and ethics, Federal Trade Commission red flag rules concerning identity theft, data breaches and unauthorized disclosures, intellectual property use, etc.

(b) Antitrust law, both federal and state. See, *e.g*., Sherman Act (15 USC § 1 et seq.), Clayton Act (particularly 15 USC § 13(a) (this section of the Clayton Act is known as the Robinson Patman Act) § 14 and § 18), Federal Trade Commission Act (15 USC § 45(a)(1) *et seq*.); Utah Antitrust Act UCA § 76-10-911 *et seq*.

(c) Securities law, officer and director duties, and financial reporting. See *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996); *Stone v. Ritter*, 911 A.2d 362 (Del. 2006); *In re Citigroup Inc. Shareholder Derivative Litig*., 964 A.2d 106 (Del. Ch. 2009); *In re World Health Alternatives, Inc.*, 385 B.R. 576 (Bankr. D. Del. 2008) (director and officer fiduciary duty cases); Sarbanes Oxley Act Rules 17 CFR § 229.406 (2008). Accounting rules need to be carefully followed and reviewed in light of the larger picture to avoid Enron-style disasters.

(d) Foreign Corrupt Practices Act, 15 USC § 78 dd-1 *et seq.* Any business purpose for providing anything of value to a broadly defined class of foreign officials will create potential trouble. *U.S. v. Kay*, 359 F.3d 738 (5th Cir. 2004). See FCPA Opinion Procedure Release No. 08-02 (Dept. of Just. 6/13/08) at http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html.

(e) Particular industry regulatory issues. For example, in the health industry various fraud and abuse laws and regulations, including areas under Health and Human Services, should be taken into account. See compliance guidance at http://oig.hhs.gov/fraud/complianceguidance.html. Payments for referrals (direct or indirect) and false claims for reimbursement are big issues under several federal and state statutes to protect governmental payers and in some cases insurance or health plan payers. See, *e.g*., Antikickback law (Medicare Fraud and Abuse Amendments of 1977; 42 USC § 1320a-7b(b)), and Stark anti self referral law (Ethics in Patient Referrals Act of 1989; 42 USC §§ 1395nn *et seq*.), Civil Monetary Penalties law 42 USC § 1320a-7a(a), relating to referrals, and False Claims Act, 31 U.S.C. §§ 3729 – 3733, and the Civil Monetary Penalties law, and other fraud rules (such as mail fraud), relating to submitting false claims. Patient privacy under state and federal law should also be covered. See Health Insurance Portability and Accountability Act of 1996, known as

HIPAA, 42 USC § 1320d *et seq*. Medical laboratories have special requirements to meet. Clinical Laboratory Improvement Amendments Act of 1988, 42 USC § 263a; 42 C.F.R. Part 493.

(f) Money laundering. The U.S. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, requires "financial institutions" to establish antimoney laundering programs. This includes travel agencies, investment advisors, jewelry dealers, car dealers, etc. See 31 CFR § 103.11(n) (2008). Other rules apply as well. See, *e.g.*, 18 USC § 1956(a)(1) and (2) (money laundering, conducting financial transactions with proceeds of unlawful activity; 18 USC § 982 provides for asset forfeitures for money laundering).

(g) Government contract issues, including federal and state matters, where such contracts are part of the business. See *e.g.*, Federal Defense Contractor rules for Department of Defense, General Services Administration, NASA, etc. See 48 CFR pts. 2, 3, and 52. Federal contracting rules such as the Anti-Kickback Act of 1986, 41 USC § 51.

(h) General criminal matters, including matters affecting prosecutorial charging decisions. Among other things, company officials can use guidance on how to deal with subpoenas and search warrants.

(i) Employment, employee benefits, and employment discrimination. As to employment discrimination matters, see *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008) (affirmative defense). Employee benefits areas include ERISA plans, COBRA health insurance continuation, HIPAA health information privacy, wage and hour and other labor laws, etc. Immigration and homeland security issues often arise in the employment context.

(j) Document retention and destruction policies; electronic communication and privacy policies.

(k) Financial auditors must inquire about fraud internal to the company. Statement of Auditing Standards No. 99. The plan should contemplate appropriate consultation with auditors where there is such a fraud allegation or issue.

(l) Guidance on performing internal investigations.

(m) Procedures to protect the attorney client privilege and work product doctrine should be considered.