# PART THREE
# ENFORCEMENT
## CHAPTER 6
## CRIMINAL, CIVIL, AND ADMINISTRATIVE ENFORCEMENT AGAINST INDIVIDUALS AND COMPANIES FOR ORGANIZATIONAL MISCONDUCT

**Introductory Note:** The Principles in this Chapter are recommendations for best practices to guide enforcement policies of state and federal prosecutors and civil and regulatory enforcement officials authorized to bring criminal, civil, or administrative enforcement actions against organizations and organizational actors to sanction them for organizational misconduct. Organizational misconduct is misconduct for which an organization can be held criminally, civilly, or administratively liable under applicable law. Forms of covered misconduct include fraud, corruption, environmental offenses, data-privacy violations, antitrust violations, tax fraud, and workplace-safety violations.

These Principles focus on those decisions that fall within the discretion of enforcement officials. In particular, they offer guidance on the use by prosecutors and civil and administrative enforcement authorities of nontrial resolutions, including guilty pleas, deferred prosecution or non-prosecution agreements, and consent decrees. Thus, they do not deal with private litigation, including class actions. Nor do they address topics for which the existing law and any future reform are legislatively determined. Thus, these Principles do not address the substantive laws defining criminal conduct, such as liability for foreign corruption, the law governing when a corporate can be convicted of a crime, or laws governing when and how to award bounties to whistleblowers. They also do not provide a full set of guidelines governing sentencing, a topic governed by the ALI's Model Penal Code: Sentencing.

Enforcement officials applying these Principles should exercise their discretion to adopt enforcement policies and enter into resolutions that differ from those recommended here when the facts and circumstances so require.

These Principles focus on enforcement policy to guide nontrial resolutions involving knowing or intentional misconduct. They also may be applicable to enforcement actions predicated on negligence or strict liability, depending on the circumstances.

Throughout these Principles it is assumed that both criminal and civil corporate liability are governed by the doctrine of respondeat superior, consistent with current federal law, and with the discussion of the doctrine of respondeat superior in the Restatement of the Law Third, Agency. These Principles are nevertheless applicable to enforcement in states that apply a different corporate-liability rule, such as is found in the Model Penal Code.

These Principles focus on enforcement actions against publicly held business organizations, as well as similar large private entities whose beneficial owners are not involved in the day-to-day management of the organization. These Principles nevertheless are intended to apply to all organizations, although, as discussed in more detail below, their application to smaller organizations may result in different enforcement outcomes.

## TOPIC 1
## DEFINITIONS

### § 6.01. Definitions

**The following definitions apply throughout this Chapter, in addition to those contained in Section 1.01:**

**(a) Administrative order: An order that resolves an administrative enforcement proceeding filed with an administrative law judge or administrative agency governing body (e.g., commission).**

**(b) Cease and desist order: An administrative enforcement order that enjoins an organization from future violations of the law.**

**(c) Civil enforcement official: An enforcement official empowered to bring civil or administrative enforcement actions against individuals or organizations for organizational civil misconduct.**

**(d) Civil misconduct: Any violation of a statute or regulation that, if proven, could result in the imposition of civil or administrative penalties by government enforcement authorities. These Principles focus on intentional or knowing civil misconduct.**

**(e) Collateral consequences: Limitations on an organization's business activities and other disadvantages to an organization that are authorized or required by state, federal, or foreign law as a direct result of the organization being convicted of a crime, other than those sanctions impose by a court in sentencing the organization. The term also includes consequences that can result from either a civil or administrative finding that the**

**organization engaged in certain forms of misconduct or was subject to certain sanctions or other forms of relief, such as an injunction. The term also includes disadvantages to an organization, such as exclusion, imposed by a self-regulatory or non-government organization with jurisdiction over the organization as a result of it being subject to a criminal, civil, or administrative enforcement action or to particular forms of sanctions, such as an injunction.**

**(f) Consent decree: A negotiated civil or administrative resolution that resolves a civil or administrative enforcement action, generally without the organization admitting that it engaged in misconduct.**

**(g) Condoned: An employee who is part of an organization's substantial authority personnel (see 6.01(z) below) condones material criminal or civil misconduct if he or she knows that some form of misconduct is occurring (or consciously avoids knowledge of its occurrence) and does not intervene to terminate it or report it to appropriate authorities within the organization.**

**(h) Criminal misconduct: Any violation of a criminal statute or a regulation that, if proven, could result in the imposition of criminal sanctions.**

**(i) Declination: An explicit statement by a prosecutor, or a civil or administrative enforcement official, not to file either criminal charges or a civil or administrative action or to seek to sanction an organization otherwise.**

**(j) Deferred prosecution agreement (DPA): A nontrial resolution under which a prosecutor files criminal charges, or civil or administrative enforcement official files a civil or administrative complaint, against an organization, but suspends criminal prosecution or the civil or administrative action provided that the organization complies with the DPA's provisions.**

**(k) Disgorgement order: An order that requires the defendant to forfeit the benefit it obtained from criminal or civil misconduct.**

**(l) Employee: See § 1.01 (s). For purposes of this Chapter the term also applies to other agents for whom the organization is liable under applicable law.**

**(m) Full corrective action: The steps taken by an organization that self-reports criminal or civil misconduct (§1.01jj) (in accordance with § 6.04), fully cooperates with**

**prosecutors or civil enforcement authorities (in accordance with § 6.05), and engages in timely and full disgorgement, restitution, and remediation (in accordance with § 6.07).**

**(n) Guilty plea: A negotiated criminal resolution pursuant to which a prosecutor files charges against the organization and the organization agrees to plead guilty to the charges in court.**

**(o) High-level personnel: Individuals who have substantial control over an organization or who have a substantial role in making policy within an organization.**

**(p) Knowledge. Substantial certainty about a particular fact or state of affairs. Knowledge can be inferred from the circumstances. Knowledge also can be proven by establishing willful blindness or a conscious avoidance of knowledge.**

**(q) Material criminal or civil misconduct. Misconduct (1.01 jj) is material if a reasonably prudent enforcement official seeking to pursue the public interest would consider the misconduct itself an appropriate subject for an enforcement action, independent of other considerations such as organizational self-reporting or full cooperation.**

**(r) Misconduct: A violation of a criminal statute, civil statute, regulation, or mandatory internal rule, term or standard. These Principles focus on knowing or intentional misconduct.**

**(s) Monitor: An independent third-party who the organization is required to hire as a result of an enforcement action to oversee the organization's compliance function reforms and, potentially, compliance with the law. The compliance monitor reports to the government authorities who imposed the requirement and potentially to others, as specified in the agreement. As used in this title, the term monitor includes persons that some agencies refer to as independent compliance consultants.**

**(t) Neither-admit-nor-deny resolution: A civil or administrative resolution under which an organization resolves an action without admitting to the misconduct but subject to a prohibition on denying that it engaged in misconduct, except as provided in the nontrial resolution.**

**(u) Non-prosecution agreement (NPA): An agreement under which a prosecutor agrees not file criminal charges, or a civil enforcement authority agrees not to bring a civil action, against an organization if it complies with agreement's provisions.**

**(v) Nontrial resolution: A resolution of a criminal, civil, or administrative action that imposes, or is predicated on, sanctions against or undertakings by an organization. The term includes a guilty plea, DPA, NPA, declination with disgorgement, neither-admit-nor-deny resolution, cease and desist order, and a consent decree. It does not include a traditional declination predicated on a finding that the organization did not engage in provable misconduct.**

**(w) Organizational actor: A person who is either an employee or nonemployee agent of an organization.**

**(y) Remedial order: An order to remedy the harm that has already occurred or to reduce or eliminate the threat of future harm.**

**(x) Restitution order: An order requiring the defendant to compensate identifiable victims of an offense.**

**(z) Substantial authority personnel: Individuals who, within the scope of their authority, exercise a substantial measure of discretion in acting on behalf of an organization.**

**(aa) Willful misconduct: A person engages in willful misconduct for purposes of these Principles if they engage in unlawful conduct voluntarily and intentionally and with the specific intent to do something the law forbids. A person must know that their actions are unlawful but need not know the specific law that they are violating.**

**Comment:**

*a. Collateral consequences*. Collateral consequences refers to limitations on an organization's business activities and other disadvantages to the organization that are authorized or required by state, federal, or foreign law as a direct result of the organization being convicted for certain forms of criminal misconduct, other than those consequences imposed by a court in sentencing the organization. These limitations include debarment, delicensing, and exclusion of the organization from doing business with, or obtaining money from, a government agency. The term encompasses the legal disadvantage that results when an organization's conviction for an offense is used to establish that it engaged in the misconduct in an action brought against it by private parties. This definition is consistent with the definition of collateral consequences in the Model Penal Code: Sentencing § 6x.01(1) (Proposed Final Draft, 2017).

The term also applies to similar disadvantages that can be imposed by government authorities as a result of a civil or administrative resolution that determines that the organization engaged in certain forms of civil misconduct. In the case of administrative actions, the collateral consequences may be imposed as part of the court's determination of the sanctions to be imposed on the defendant for the misconduct. The imposition of certain sanctions, such as injunctions, by some regulators, such as the Securities and Exchange Commission, also can trigger collateral consequences.

Collateral consequences imposed by government authorities can take one of two forms: permissive or mandatory. Collateral consequences are permissive when the relevant administrative agency has discretion over whether to impose the collateral consequences following a finding that the organization is criminally or civilly liable for misconduct. Permissive collateral consequences can be presumptive, in that they are imposed automatically unless the agency affirmatively acts to waive their imposition.

Mandatory collateral consequences automatically follow from a conviction or determination that the organization is liable for the misconduct. Statutes providing for mandatory collateral consequences may include a provision enabling the agency to waive imposition of the collateral consequences in a specified, and often narrowly defined, set of circumstances.

The term collateral consequences also applies to disadvantages to an organization, such as exclusion, imposed by a self-regulatory or non-government body with jurisdiction over the organization as a result of its being subject to a criminal, civil, or administrative enforcement action or to particular forms of sanctions, such as an injunction.

The term collateral consequences does not apply to the enhanced risk of liability to private plaintiffs. Nontrial resolutions that include a formal finding of fact that the organization engaged in misconduct, or full admissions to the facts of the misconduct, also may result in the organization facing an enhanced risk of civil liability to private parties in that they can introduce these factual determinations in court to prove that the organization engaged in misconduct. These Principles do not apply the term collateral consequences to this enhanced risk of liability to private parties but instead refer to it directly as an enhanced risk of private litigation liability.

The term collateral consequences focuses on harm to the organization and thus is distinct from the concept of "collateral damage" which refers to harm to others (such as employees) that can result from a nontrial resolution of an action against the organization.

*b. Declinations*. Declinations can take one of the two forms specified below.

*(1) A traditional declination.* In a traditional declination, the enforcement official declines to pursue official action without imposing conditions on the organization as a prerequisite. An enforcement official may decline to pursue an action for a variety of reasons, including that the organization did not engage in misconduct, that there is not enough evidence to pursue an action, or that the misconduct is not material.

*(2) Declination following full disgorgement, restitution, and remediation*. An enforcement official may decline to pursue an action against the organization, even when there is sufficient evidence to charge the organization with a crime that would warrant prosecution, to reward the organization for undertaking actions that promote effective enforcement, such as self-reporting (§6.04), full cooperation (§6.05), and full disgorgement, restitution, and remediation (see § 6.07). Enforcement officials should require the organization to take full corrective actions (see § 6.01(m)), including disgorging the benefit it received from its misconduct, as a prerequisite to receiving this form of declination, in accordance with § 6.18.

*c. Deferred prosecution agreements.* Deferred-prosecution agreements (DPAs) can be used in both criminal and civil actions.

A DPA is used in a criminal case to resolve charges without the organization being convicted. A DPA typically includes a statement of the charges filed, a statement of facts in which the organization admits to the facts alleged, a monetary penalty, disgorgement of the benefit of the misconduct, the organization's agreement to fully cooperate with the government's investigation and any subsequent prosecution of individuals, a discussion of the organization's voluntary reforms, a statement of any additional reforms required by the agreement, and, when required, a provision requiring the organization to hire and pay for a monitor. Although the terms of a DPA (including the penalty amount) are agreed upon by the parties, the agreement is filed in court and must be approved by a judge. Under federal law, the judge has limited grounds for rejecting a DPA.

In civil actions, the enforcement authority files and then suspends enforcement of the action contingent on the organization satisfying the terms of the DPA, which are similar to those set forth above. DPAs in civil actions regularly include the organization's admission that it engaged in civil misconduct.

*d. Employee:* The term employee is defined in § 1.01(s). This definition is consistent with the Restatement of the Law, Employment Law § 1.01, and the Restatement of the Law Third, Agency §§ 1.01 and 7.07, which, respectively, govern the definition of employment for purposes of employment law and the scope of vicarious liability.

For purposes of these Principles, the term "employees" includes members of an organization's board of directors. Throughout these Principles the term "employees" is used to refer to people for whose misconduct the organization can be held liable or who may appropriately be the subject of a disciplinary action or other remediation for violating the law or knowingly condoning a violation. The organization also can be liable for crimes authorized or committed by members of the board of directors in their official capacity.

While the term "employee" is used in these Principles consistent with its traditional understanding, enforcement officials, in enforcing a statute that expands organizational criminal, civil, or regulatory liability to certain non-employee agents, should interpret the term "employee" as applying to those agents.

*e. Guilty plea.* A guilty plea causes the organization to be convicted of the charges. A guilty plea is approved by a judge who has authority to determine the sentence imposed.

*f. High-level personnel*. The term includes a director; an executive officer; the chief compliance officer; an individual in charge of a major business or functional unit of the organization such as sales, administration, or finance; and an individual with a substantial ownership interest. An owner of an organization who exercises de facto control over the organization's management would also count as high-level personnel. The term "high-level personnel" is used consistent with its use in the U.S. Sentencing Commissions, Sentencing Guidelines for Organizations.

*g. Knowledge.* An individual knows a fact—such as the existence of misconduct—if the person has actual knowledge of the fact or is willfully blind or consciously avoided knowledge. A person has actual knowledge of a fact or of the consequence of an action if the fact is substantially certain to exist, or the consequence is substantially certain to follow from the action.

To establish knowledge through willful blindness it must be shown that the person: (1) was aware of a high probability of the disputed fact (e.g., that misconduct was occurring), and (2) consciously and deliberately avoided confirming the fact. In order to establish (2), the person should either have taken deliberate actions or active efforts to avoid learning the fact or failed to take actions that the person ordinarily would take under the circumstances in order to avoid learning of the fact.

*h. Material misconduct.* The term "material misconduct" refers to criminal or civil misconduct (§1.01 jj) that is material. It does not include material violations of an organization's mandatory internal rules, unless those also are violations of laws or regulations.

Misconduct is material if a reasonably prudent enforcement official seeking to pursue the public interest would consider the misconduct itself an appropriate subject for an enforcement action, independent of other considerations such as organizational self-reporting or full cooperation. Factors to be considered by an enforcement official in determining whether misconduct is material include:

(1) the magnitude of the harm caused by the misconduct;

(2) whether the misconduct involved fraud against or a substantial risk of harm to the person or property of parties other than the organization, such as customers, suppliers, employees, or the general public;

(3) whether the misconduct otherwise involved the violation of a law adopted to serve an important public interest, such as protecting the integrity of: personal data; the financial system; the securities, commodities, or derivative markets; or the health-care reimbursement system;

(4) whether the misconduct occurred in different units of the organization, on multiple occasions, or over an extended period of time;

(5) the magnitude of the benefit to the organization from the misconduct;

(6) whether the misconduct in question is a new instance of misconduct by an organization that had entered into a criminal or civil organizational resolution for similar material misconduct within the last five years; and

(7) whether high-level or substantial authority personnel within the organization either knowingly engaged in, condoned, or failed to terminate the misconduct.

*i. Neither-admit-nor-deny resolution.* Under a neither-admit-nor-deny resolution, the organization cannot deny its responsibility for the misconduct in public, but it may do so in a private civil action or other actions. The provisions of a neither-admit-nor-deny resolution can require an organization to: pay a monetary penalty; disgorge the profits attributable to the misconduct; pay restitution; remediate (in accordance with § 6.07); pay other fees, investigate the misconduct and provide full cooperation (in accordance with § 6.05); undertake the internal reforms set forth in the agreement (in accordance with § 6.09); satisfy reporting requirements to regulators; and in some cases, hire and pay for an outside monitor (in accordance with §§ 6.10–6.12).

*j. Non-prosecution agreements:* Non-prosecution agreements (NPAs) can be used in both criminal and civil actions.

An NPA is used in a criminal case to resolve the matter without the filing of criminal charges. It may require the organization to disgorge the benefits of its misconduct, maintain voluntary reforms instituted prior to the agreement, and fully cooperate with the government's investigation and any subsequent prosecution of individuals. NPAs can also include any of the following: a statement of facts in which the organization admits to the misconduct, a monetary penalty, a discussion of the organization's voluntary reforms, a statement of any additional reforms required by the agreement, and, when required, a provision requiring the organization to hire and pay for a monitor. NPAs are often letter agreements between the organization and the prosecutor's office, and are not filed in court.

In civil actions, the enforcement authority agrees not to file a complaint against the organization contingent on the organization satisfying the terms of the NPA. These terms are similar to those set forth above. NPAs in civil actions regularly include the organization's admission that it engaged in civil misconduct.

*k. Organizational actors:* Persons, both natural persons and organizations, who are either employees or nonemployee agents of the organization.

*l. Remedial order*. An order requiring that an organization take corrective action deemed necessary to prevent either future injury from the misconduct or future misconduct.

*m. Substantial authority personnel.* The term includes high-level personnel of the organization, organizational actors who exercise substantial authority (e.g., a plant manager, a sales manager), and any others who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority. The term "substantial authority personnel" is used consistent with its use in the U.S. Sentencing Commissions, Sentencing Guidelines for Organizations.

*n. Willfully*. The term "willfully" is used here to refer to misconduct that is undertaken voluntarily, knowingly, and with intent to do conduct that is somehow unlawful. Actors need not *want* to break the law. Rather, they simply have to know that they are taking actions that are unlawful. Regulators and civil enforcement authorities may employ other definitions of willfulness when determining whether a person has violated a law for which willfulness is a requisite element.

## TOPIC 2

## PRINCIPLES COMMON TO ENFORCEMENT BY PROSECUTORS AND CIVIL AND ADMINISTRATIVE ENFORCEMENT OFFICIALS

### § 6.02. Enforcement Policies for Nontrial Criminal, Civil, or Administrative Resolutions of Organizational Misconduct

**(a) When seeking nontrial resolutions of criminal, civil, and administrative enforcement actions against organizations, enforcement authorities should act in accordance with a written enforcement policy that is publicly available so that organizations may predict, with reasonable accuracy, what actions of theirs will affect the offered nontrial resolution.**

**(b) To achieve the public interest in cases involving material criminal or civil misconduct, the enforcement policy should be structured to:**

**(1) promote proactive pursuit of enforcement actions against the individuals responsible for the misconduct in accordance with § 6.03;**

**(2) provide predictable and substantive incentives to organizations to:**

**(A) detect and self-report material misconduct to enforcement authorities, in accordance with § 6.04;**

**(B) fully cooperate with enforcement authorities' investigations, including by identifying and providing all evidence reasonably available against all of its employees—including all high-level or substantial authority personnel—who participated in committing material misconduct with the requisite mens rea for the offense, in accordance with § 6.05;**

**(C) promptly terminate the misconduct; and**

**(D) reduce the risk of future material misconduct by remediating its underlying causes, in accordance with § 6.07;**

**(3) ensure that individual and organizational wrongdoers disgorge any net benefits from their misconduct, remediate the harm caused, and pay restitution to victims where appropriate, in accordance with § 6.07;**

**(4) impose sanctions on organizations that are appropriate and consistent with § 6.02(b)(2); and**

**(5) provide public disclosure of the relevant facts about material misconduct and the basis for and contents of the resulting nontrial criminal, civil, or administrative resolution.**

**(c) Enforcement policy should promote cooperation and coordination between the different enforcement authorities that are investigating and considering enforcement actions for the same instances or patterns of misconduct.**

**(d) Nontrial resolutions with organizations are inappropriate unless enforcement officials have a good-faith belief, based on the evidence, that there is sufficient evidence to support bringing criminal charges or a civil action against the organization.**

**(e) Organizations should be provided a transparent procedure for presenting to senior enforcement personnel a good-faith and reasonable argument that they did not violate the law or an existing nontrial resolution, without risk of adversely impacting the nontrial resolution.**

**(f) A nontrial resolution with an organization of a criminal case should not name an individual as a perpetrator unless the individual is a party to the agreement, was previously adjudicated to be legally responsible for the misconduct, or otherwise had an opportunity to be heard.**

**Comment:**

*a. Purposes of an enforcement policy.* An enforcement policy governing nontrial resolutions of criminal, civil, or administrative actions brought against organizations should be structured to promote the interests of enforcement: general and specific deterrence, remediation of both the harm caused and of the root causes of the offense, rehabilitation of the organization, disgorgement of unjust gains resulting from the offense, restitution to victims, and the imposition of punishment that is proportionate to the blameworthiness of the organization given the harm done to the victims and the gravity of the offense. These purposes are consistent with those set forth in the American Law Institute's Model Penal Code: Sentencing § 1.02(2) (Proposed Final Draft, 2017).

These Principles employ a broad concept of deterrence to encompass the variety of ways in which enforcement and enforcement policy can reduce the future risk of misconduct. Thus, enforcement policy promotes specific deterrence it if induces an organization to either implement a compliance program that is effective at preventing future misconduct or to adopt policies governing self-reporting, full cooperation, and employee discipline that increase employees' probability of being sanctioned for misconduct and the expected sanction imposed. Enforcement also can deter misconduct to the extent that enforcement actions against organizations or individuals serve the law's expressive aim by helping to establish, and render salient, the view that specific conduct violates a social norm that society considers to be important.

*b. Predictability and consistency.* Enforcement policy can most effectively serve the goals of enforcement when structured to encourage organizations to take proactive measures to prevent, deter, self-report, terminate, and remediate material misconduct, and to fully cooperate with enforcement authorities and undertake full disgorgement, restitution, and internal rehabilitation. To achieve these goals, enforcement policy should be structured to ensure that organizations can predict how self-reporting, full cooperation, effective compliance, and voluntary disgorgement, restitution, and remediation will affect the form of nontrial resolution available to them, the sanctions imposed, and the other terms of the nontrial resolution.

*c. Public disclosure*. Because material misconduct by an organization has consequences outside the organization itself and can impose major costs on society, it is important for enforcement authorities to be publicly transparent about the justifications for and contents of nontrial resolutions of actions alleging material misconduct. This requires enforcement authorities to publicly disclose both the general enforcement policy guiding nontrial resolutions and each resolution reached with an organization in a matter involving material criminal misconduct.

To promote predictability and transparency, enforcement policies governing organizations should require enforcement officials entering into a nontrial resolutions for material misconduct to disclose the following information concerning their nontrial resolutions with organizations, absent a strong justification for not doing so:

(1) a detailed discussion of the facts of the misconduct;

(2) the organization's acceptance of responsibility for the conduct in the case of a guilty plea, DPA, NPA, or settlement of a civil or administrative action other than a consent decree;

(3) a statement of any charges filed and the factual basis for those charges;

(4) a detailed discussion of whether the organization detected the misconduct, and

(A) if not, whether this appears to have been the result of compliance deficiencies, and

(B) if so, whether the organization fully self-reported;

(5) the organization's efforts to remediate any harm caused;

(6) any voluntary reforms undertaken to address the underlying causes of the misconduct and whether these reforms fully remediate the root causes of the misconduct;

(7) whether the organization fully cooperated;

(8) whether the organization had recently been subject to an enforcement action for this or similar material misconduct;

(9) the specific reasons that the enforcement official selected the form of criminal resolution that he or she did;

(10) the specific factors that led the enforcement official to select the sanctions imposed, including any internal reforms mandated by the agreement;

(11) the duration of the agreement; and

(12) the number and positions of the individuals responsible for the misconduct, if known. An organization's interest in protecting its reputation or avoiding civil litigation in the United States would not constitute "strong justification" for not requiring disclosure.

Enforcement officials also can promote the public welfare by disclosing declinations following disgorgement, restitution, and remediation in some circumstances. One benefit of such disclosure is to inform the public about the nature of the misconduct. Another is to demonstrate to other organizations that organizations that take full corrective action in accordance with §§ 6.01(m), 6.04, 6.05, and 6.07 can obtain a declination can expected obtain a declination.

Enforcement officials may reasonably announce a policy of not requiring disclosure of declinations following disgorgement, restitution, or remediation in circumstances in which the threat of disclosure would undermine the primary objective of such nontrial resolutions, which is to incentivize organizations to self-report misconduct, particularly if many of the informational objectives of disclosure can be achieved through pursuit of criminal, civil, or administrative enforcement actions against the individuals responsible for the misconduct. Thus, disclosure may not be warranted if it would lead the organization to incur costs, for example, from private litigation or other enforcement actions, that are sufficiently substantial to dissuade it from self-reporting and cooperating in circumstances in which prompt self-reporting and full cooperation would avert additional material harm and enable the government to punish the individuals responsible for the misconduct. Enforcement officials should be given greater flexibility to not disclose declinations following disgorgement, restitution, or remediation than other forms of nontrial resolutions because: (1) declinations reflect a decision not to bring a criminal, civil, or administrative action and thus traditionally are not disclosed; and (2) enforcement officials and society benefit substantially when organizations self-report material misconduct. Enforcement officials may need to adopt a presumption against disclosing declinations following disgorgement, restitution and remediation in situations where disclosure could subject the organization to substantial liability imposed by other parties in order to induce organizations to self-report and fully cooperate.

*d. Admissions of misconduct.* Criminal enforcement officials negotiating a guilty plea, DPA, or NPA with an organization that engaged in material misconduct should require the organization to admit to the facts of its material misconduct. Such admission occurs automatically with a guilty plea but must be formally included in a DPA or NPA. Admissions serve many goals, including providing the public with valuable information about the nature of the misconduct and the organization's role in it, as well as ensuring that the organization takes public responsibility for its role in the misconduct. A presumption in favor of requiring admissions also can provide an additional indirect incentive for organizations to incur the costs associated with an effective compliance program, as well as other measures designed to prevent misconduct, such as reforming that organization's policies governing compensation and promotion.

Civil and regulatory enforcement officials also should adopt a presumption favoring admissions of intentional or knowing material misconduct, except as provided in § 6.25. Admissions are particularly important in cases involving intentional or knowing material misconduct that causes material harm to third parties or the government, such as fraud, corruption, and some environmental violations.

Civil and regulatory enforcement officials also should adopt a policy governing the decision to offer partial- or no- admission resolutions. These Principles provide such a policy in §

6.25. Section 6.25 generally restricts partial- or no-admission resolutions for intentional or knowing material misconduct to situations in which an organization self-reported or fully cooperated and would incur material additional liability if required to admit to misconduct.

Whether or not an organization is required to admit to the facts, the nontrial resolution of the enforcement action against an organization should include a statement of the facts of the misconduct and the organization's conduct following the detection of the misconduct. To provide the public with full information about the organization's role in the misconduct, the statement of facts should detail whether the organization had an effective compliance program at the time of the misconduct; the approximate number and seniority of the individuals involved in the misconduct, and the units of the organization involved in the misconduct; the harm caused to the organization by the misconduct; any gain by the organization from the misconduct; whether the organization detected the misconduct, self-reported it, and fully cooperated; and the organization's efforts to fully remediate it.

*e. Ensuring disgorgement of an organization's profit from the offense:* Any criminal or civil enforcement policy governing nontrial resolutions with organizations should be structured so that organizations do not benefit from their misconduct. This helps ensure that organizations will be committed to preventing misconduct and will not adopt internal policies that enhance the risks of their engaging in potentially profitable misconduct. For example, organizations that profit from misconduct may be tempted to adopt compensation, promotion, and retention policies that favor corporate profits over all other concerns. Thus, enforcement policy should require organizations to disgorge all net benefits from their misconduct, even in circumstances in which an organization proactively sought to deter the misconduct by adopting an effective compliance program, self-reporting, cooperating, and remediating. Enforcement officials may require disgorgement directly or through restitution and remediation provisions that ensure that the organization does not retain any material benefit from the misconduct (see § 6.07).

*f. Deterrence, rehabilitation, remediation, restitution, disgorgement, and punishment of individuals responsible for the wrongs are enhanced by encouraging full corrective action as defined in § 6.01(m).* Some misconduct produces evidence that is readily observable by enforcement officials. For example, the existence and source of a large oil spill often is self-evident. Similarly, some organizations are required to install equipment—such as effluent meters—that would enable enforcement officials to detect legal violations. By contrast, many forms of misconduct—such as property fraud, securities fraud, health-care fraud, tax fraud, corruption, money laundering, price-fixing, and false claims—are not readily observable because the outcome of the misconduct often resembles otherwise lawful activities. Preventing such misconduct is important because it can impose enormous costs on society in general, as well as on specific victims. Yet prevention is difficult because the benefit to perpetrators of such misconduct is often substantial and the risk that it will be detected and sanctioned is often small. This places the public in harm's way.

Enforcement officials can enhance their ability to prevent and deter material misconduct and appropriately punish wrongdoers by adopting policies that enhance their ability to detect misconduct, identify the individuals who committed it, and obtain the evidence needed to bring successful enforcement actions against them. Individual liability is critical to the effort to prevent, deter, and punish misconduct because corporate misconduct, in the end, is committed by individuals. Information about individual wrongdoers is important because the organization does not commit misconduct such as fraud or corruption unless an individual intentionally decides to undertake an illegal act. Policies that lead individuals to fear that they will be caught and punished if they break the law are likely to reduce the incidence of organizational crime. They also promote appropriate punishment of the people who committed the crime. Enforcement officials often can most effectively detect misconduct and obtain evidence on the individuals responsible for it by encouraging organizations to detect, self-report and cooperate. To do this, they need to adopt enforcement policies that provide organizations with substantial and predictable incentives to detect misconduct, report it to the relevant enforcement officials, and then fully cooperate with the government's investigation by providing information and evidence regarding the scope of the misconduct and the identities and roles of the individuals responsible for it.

Organizational detection, self-reporting, and cooperation are important because organizations often are better able than enforcement officials to monitor for, detect, and investigate misconduct by their organizational actors in a timely way. For example, organizations can enhance detection by adopting and implementing an effective compliance program (§§ 5.05-5.06), implementing an effective internal-reporting system (§ 5.18), and employing data analytics. Organizations also often are better able to investigate detected misconduct than are enforcement officials (see § 5.11 & 5.22-5.28 on investigations). Organizations already know their own operations, have superior access to their own employees and documentary and digital evidence around the world, and may have considerable resources. Organizations can materially enhance the speed and effectiveness of government investigations by conducting their own investigations to identify instances of misconduct, material witnesses, the individuals who committed the misconduct, and the sources of information most likely to produce relevant and actionable evidence needed to bring an effective action, and then by fully cooperating, including by providing such information to enforcement authorities.

Providing organizations with incentives to detect and self-report promotes other goals of criminal and civil enforcement, in addition to deterrence. Organizational detection helps to reduce and remediate misconduct because organizations that detect misconduct can expeditiously terminate it and take steps to remediate it. It also promotes the goal of rehabilitation to the extent that enforcement policy is structured to induce organizations to implement internal reforms and to appropriately discipline or retrain employees with significant responsibility for material misconduct.

Organizations generally will not help enforcement officials to detect and sanction misconduct by self-reporting and fully cooperating unless they can expect to be materially better off if they self-report and fully cooperate. Detecting and investigating misconduct can be expensive. Moreover, self-reporting and cooperation can be risky for organizations because it leaves them vulnerable to being sanctioned for misconduct that otherwise would have remained undetected.

To encourage organizations to detect misconduct, self-report, and cooperate, enforcement policy should be structured so that any organization that self-reports and fully cooperates, and thereby increases the probability that its misconduct is will be detected and sanctioned, can reasonably expect to obtain a nontrial resolution that imposes substantially lower costs than would be imposed on it if it did not self-report or fully cooperate. Enforcement policies can help provide organizations with adequate incentives to self-report and cooperate by substantially reducing the sanctions imposed on those that do—while nevertheless ensuring that organizations disgorge any benefits obtained (see Comment *e* above). Organizations should be better off if they self-report and fully cooperate than if they do neither; they also should be better off if they both self-report and fully cooperate than if they do not self-report but do fully cooperate after the government has detected the misconduct on its own (see §§ 6.17–6.20 , 6.24-6.26).

The incentives for organizations to detect, self-report, and cooperate should be predictable and consistent. Organizations cannot be confident that they will benefit from disclosing misconduct and cooperating unless the government acts in accordance with a public policy setting forth precisely how engaging in both self-reporting and full cooperation, as compared with either only engaging in full cooperation or engaging in neither, affects the material terms of a nontrial resolution. These terms include the form of the resolution, the monetary sanctions, and the likelihood of that the organization will be subject to oversight by a monitor.

The incentives also must be sufficiently substantial to encourage self-reporting and cooperation even when doing so enables enforcement officials to detect and sanction misconduct that likely would have remained undetected or unsanctioned if the organization did not self-report and cooperate.

*g. Structuring enforcement policy to account for collateral consequences.* Adjustments to financial penalties do not suffice to induce self-reporting in situations in which an organization that self-reports and is required to plead guilty or enter into certain forms of civil or administration nontrial resolutions would suffer serious collateral consequences. A guilty plea produces serious collateral consequences when conviction triggers mandatory or presumptive sanctions such as debarment, delicensing, or exclusion by a federal, state, or local government agency, an important contracting partner, or a non-governmental organization such as the World Bank. A guilty plea also can impose other collateral costs on an organization, for example when private parties can use it to establish the organization's liability in a civil action. Civil or administrative nontrial resolutions also can trigger collateral consequences.

Enforcement policies should provide strong incentives for organizations to detect, self-report, and cooperate, by offering forms of nontrial criminal, civil, and administrative resolutions that do not trigger material government-imposed collateral consequences to an organization that engaged in full corrective action in accordance with § 6.01(m), or that fully cooperated and remediated, in accordance with §§ 6.05-6.07. Such forms of nontrial criminal resolutions include DPAs, NPAs, some neither-admit-nor-deny resolutions, and declinations following disgorgement, restitution, and remediation.

Enforcement policies should ensure that organizations know both that they are likely to be offered the most favorable forms of nontrial resolutions (declinations or NPAs) if, but only if, they self-report, fully cooperate, and undertake full disgorgement, restitution, and remediation (see

§§ 6.17-6.20, 6.24-6.36), absent specific countervailing considerations set forth in § 6.17(c). Full cooperation should be a precondition for resolution through a DPA or an equivalent civil resolution, in accordance with §§ 6.17, 6.19, 6.24-6.25, except as provided in §§ 6.17(c), and 6.24(c).

*h. Good-faith basis for the resolution.* An organization can face pressures to agree to a nontrial resolution even when it determines that it did not violate the law and probably could establish this in court. Moreover, individual enforcement officials may mistakenly believe that enforcement is warranted even where it is not, for example, if they have an incorrect interpretation of the law or the facts. With certain forms of nontrial resolutions, such as DPAs and NPAs, judicial review cannot be relied on to preclude legally unfounded enforcement actions because negotiated DPAs and NPAs do not involve judicial scrutiny of the legitimacy of the legal theory or factual basis supporting the claims against the organization.

Enforcement policies can promote fairness by establishing a transparent process for enabling an organization to seek supervisory review when it has a good-faith and reasonable claim that the case against it rest on an invalid legal theory or is not supported by the facts, or when it has a good-faith and reasonable claim that either the form of nontrial resolution being recommended or the sanctions or internal reforms contained therein deviate materially from the resolution the organization would reasonably expect under the enforcement authority's current enforcement policy.

Enforcement authorities should ensure that smaller organizations, as well as large ones, have a clear path to obtaining supervisory review in those rare circumstances where it is warranted.

In the criminal cases, or in civil or regulatory actions by authorities that ordinarily grant considerable discretion to line enforcement officials, the review process should be sure to respect the judgment of line enforcement officials. Thus, senior officials who are designated to undertake a review that is outside of the normal process of determining whether an enforcement office should bring an enforcement action should not intervene unless they determine that the enforcement official who brought the action does not have a good-faith, reasonable basis for concluding that the organization violated the law or is proposing a form of nontrial resolution that is clearly inconsistent with the current enforcement policy. Supervisors exercising supervisory oversight, who are not ordinarily part of the decision making process for bringing an enforcement action, should not intervene if the proposed nontrial resolution has a reasonable basis, even if the supervisor disagrees with it, for example because the supervisor has a different view of the appropriate approach to organizational enforcement or because the organization is politically influential.

Written enforcement policies governing the use of nontrial resolutions should also clarify that nontrial resolutions with an organization are inappropriate unless prosecutors and civil-enforcement officials, respectively, have a good-faith belief, based on the evidence, that a criminal prosecution or a civil action against the organization is appropriate and could reasonably be expected to be proven by legally sufficient and admissible evidence were the matter to proceed to trial.

*i. Application to small, owner managed organizations.* Although these Principles are applicable to all organizations, they are more likely to result in publicly held corporations and other large organizations undertaking the actions needed to obtain a resolution through a DPA or NPA, rather than small, owner managed, closely held firms.

Small, closely held organizations whose owners are directly involved in their day-to-day operations are less likely to self-report detected misconduct, even to obtain favorable treatment. Owner-managers of small, closely held organizations often are responsible for their organizations' misconduct or are sufficiently implicated that self-reporting and full cooperation could put them in legal jeopardy. Consequently, they are more likely to use their managerial authority to ensure that the organizations do not self-report or cooperate. They also may be inclined to implement compliance programs that are not effective.

As a result, closely held organizations may more frequently be required to plead guilty or else go to trial. Such outcomes may operate to prevent future misconduct by potentially triggering presumptive or mandatory collateral consequences designed to reduce the culpable owner-managers' ability to use their organizations to offend in the future. In this context, requiring organizations to plead guilty may also promote the goals of just punishment by imposing costs on those responsible for the crime—the owner-managers—who may escape direct personal sanctions.

*j. Naming individuals.* It is appropriate to name individual wrongdoers in criminal, civil, and administrative resolutions with those individuals. The act of identifying the wrongdoer in a public document can impose an additional sanction on the wrongdoer. This sanction can reduce the risk of future misconduct by allowing others dealing with that individual to take appropriate actions to reduce the risk of harm.

Although enforcement officials also can impose a similar stigma on individuals by naming or otherwise identifying them in the statement of facts contained in a settlement with an organization, nontrial resolutions in criminal actions against organizations, and civil or administrative resolutions for intentional or knowing misconduct, should not identify individuals by name or otherwise as perpetrators of the misconduct unless the individuals were a party to the resolution or have otherwise been found liable. Even when enforcement officials are confident about an individual's complicity in the misconduct, respect for due process and basic principles of fairness dictates against identifying individual wrongdoers in a settlement with an organization for fear of harming individuals who have not yet had the opportunity to defend themselves in court. Enforcement officials can more appropriately proceed against individual wrongdoers by bringing an enforcement action against them. Resolutions of such actions can, and should, publicly identify the culpable individuals.

*k. Relevance of the law governing corporate liability.* Enforcement policies adopted consistent with these Principles should be effective at encouraging organizations to take full corrective action (see § 6.01(m)) when they are liable for misconduct committed by their employees in the scope of their employment, as under respondeat superior. Organizations' liability for civil misconduct is governed by respondeat superior under both federal and state law. Business organizations' criminal liability for misconduct also is governed by respondeat superior under federal law and the laws of some states. Enforcement policies can provide organizations with incentives to self-report and cooperate when their liability is governed by respondeat superior because organizations face a material risk of being held liable should misconduct be detected. Thus, they have incentives to take actions to reduce the threat of liability.

The penal codes of some states take a more circumscribed approach to organizational criminal liability. Some restrict liability for certain crimes to situations in which the board of directors or high-level managers acting on behalf of the organization within the scope of employment committed, authorized, requested, commanded, or recklessly tolerated the crime. Restricting corporate criminal liability to crimes committed by the board or high-level managers is unlikely to materially reduce enforcement officials' ability to pursue successful criminal actions against small, owner managed, closely held business organizations, because owner-managers often are implicated in or tolerated the misconduct. These owner-managers are unlikely to let their organizations self-report or cooperate if it would lead to personal legal peril (see Comment *i*).

By contrast, this narrower corporate-liability rule effectively precludes prosecutors from pursuing successful enforcement actions against—and in turn inducing full corrective action (see § 6.01(m)) by—large organizations for misconduct committed by employees who are not senior executives because organizations recognize they are unlikely to be held liable for such offenses. For example, crimes involving corruption, fraud, or kickbacks often are committed by employees who are not senior executives. Organizations that do not risk criminal liability for their employees' crimes will not be induced to self-report or cooperate by application of these Principles. Nevertheless, these Principles should be effective at inducing full corrective actions in accordance with § 6.01(m) in such states with respect to civil misconduct, crimes for which respondeat superior does apply, and those crimes, such as price fixing, that may involve senior management.

*l. Cooperation among enforcement officials.* Enforcement policy should promote cooperation and coordination between different enforcement authorities, in the United States and overseas, that are investigating and considering enforcement actions based on the same patterns or instances of misconduct. Criminal-, civil-, and regulatory-enforcement officials within state, federal and foreign governments should cooperate with each when investigating misconduct to the extent that they can do so within the bounds of the law. They also should coordinate when determining the total magnitude and the allocation of the penalties to be imposed.

Coordination on penalties does not require any enforcement authority to sacrifice its own view of what penalty is required in the interests of justice. Thus, if a federal criminal-enforcement authority concludes that the total criminal fine against an organization should be a particular amount, and a state criminal-enforcement authority plans to impose a fine of half that amount, the federal authority should ensure that the organization is required to pay the higher amount. Yet in determining the amount of the fine that should be paid to the United States, the federal authority can appropriately deduct the fine amount paid to the state.

Cooperation by enforcement authorities also should involve coordination on enforcement policies governing the use of nontrial resolutions, particularly with respect to the treatment of organizations that undertake full corrective action in accordance with § 6.01(m) or that fully cooperate and remediate in accordance with §§ 6.05- 6.07. No individual enforcement authority can reliably employ these Principles to promote organizational self-reporting and cooperation—and thus prevention, deterrence, remediation, restitution and rehabilitation—in a situation in which an organization that self-reports faces a significant risk of being subjected to an enforcement action that could result in an enforcement authority, in the United States or abroad, imposing significant sanctions or that does not give substantial weight to self-reporting or full cooperation in determining either the form of nontrial resolution or the sanctions imposed.

## REPORTERS' NOTE

*a. Federal policy governing corporate criminal enforcement.* The U.S. Department of Justice's Justice Manual, Principles of Federal Prosecution of Business Organizations, § 9-28.300, the Justice Manual provision governing civil enforcement policy, § 4-3.100, and the U.S. Sentencing Commission's Guidelines Manual, Sentencing of Organizations (Organizational Sentencing Guidelines) each recognize the importance of deterrence. U.S. Dep't of Just., Just. Manual § 9-28.300 (2020); U.S. Dep't of Just., Just. Manual § 4-3.100 (2018). As such, these provisions offer more favorable terms to organizations that self-report or fully cooperate, and then also undertake disgorgement, restitution, and remediation.

*b. Respondeat superior.* Under both state and federal law, organizations are civilly liable for misconduct committed by their employees while acting within the scope of their employment through the doctrine of respondeat superior. Respondeat superior also is the rule applied to determine business organizations' criminal liability under both federal law, see SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016), and the law of many states, either for all crimes or select offenses. See, e.g., W.T. Grant Co. v. Superior Court, 23 Cal. App. 3d 284, 287 (1972); N.J. Rev. Stat. § 2C:2-7(a)(1) (1979); N.Y. Penal Law § 20.20(2) (McKinney 1986).

In 1909, the U.S. Supreme Court held that organizations can be held criminally liable for antitrust violations committed by employees in the scope of employment with some intent to benefit the organization. New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493 (1909). Subsequent cases extended the scope of criminal respondeat-superior liability to all other federal crimes. E.g., United States v. Singh, 518 F.3d 236, 249-250 (4th Cir. 2008); United States v. Potter, 463 F.3d 9, 25 (1st Cir. 2006); United States v. Jorgensen, 144 F.3d 550, 560 (8th Cir. 1998); United States v. Sun Diamond Growers of Cal., 138 F.3d 961 (D.C. Cir. 1998), rev'd on other grounds, 526 U.S. 398 (1999).

The scope of respondeat superior is broad and extends to all employees acting in the scope of their employment, including lower-level employees. E.g., United States v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975); Texas-Oklahoma Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1975); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir. 1946). Employees act in the "scope of employment" when they undertake the tasks that they were hired to perform, even if, in committing the crime, they violated an organization's policies or instructions not to violate the law.

Moreover, an organization can be held liable even if it directed employees to comply with the law and adopted an effective compliance program. E.g., United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983); United States v. Twentieth Century Fox Film Corp., 882 F.2d

656 (2d Cir. 1989); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009); *Potter*, 463 F.3d at 25. Further, self-reporting and cooperation are not a defense to liability. See Department of Justice, U.S. Dep't of Just. Just. Manual, § 9-28.800 (2019).

A company is not criminally liable, however, for actions by employees that were not intended, at least in part, to benefit the organization. See United States v. Automated Medical Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985) (employing a broad interpretation of the benefit requirement). Actions and knowledge of employees who are not acting, at least in part, on behalf of the organization, and thus are violating their duty of loyalty, are not attributable to the organization. Thus, an organization is not liable if an employee misappropriates information from it in order to engage in insider trading for his or her own account. Similarly, the organization is not liable if the employee accepts a corrupt payment in return for making a decision on behalf of the organization in favor of the bribe payer. However, the organization is liable if one of its employees offers to pay a bribe to an employee of another organization in return for obtaining a benefit for the organization. See, e.g., Sun-Diamond Growers of Cal., 138 F.3d 961 (D.C. Cir. 1998), rev'd on other grounds, 526 U.S. 398 (1999).

*c. Criminal liability predicated on senior management misconduct: Model Penal Code, state penal codes, and foreign laws.* The doctrine of respondeat superior governs organizations' civil liability for misconduct under state law. By contrast, states vary in their approach to organizations' criminal liability.

Some states use respondeat superior to determine an organization's criminal liability, either in general or for certain types of offenses. For example, under N.Y. Penal Law § 20.20(2), a corporation is guilty of an offense when:

> (a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
>
> (b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or
>
> (c) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is
>
> (i) a misdemeanor or a violation,
>
> (ii) one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation, or
>
> (iii) any offense set forth in title twenty-seven of article seventy-one of the environmental conservation law."

N.Y. Penal Law § 20.20(2) (McKinney 1986).

The Model Penal Code takes an arguably more restrictive approach. Under the Model Penal Code:

> (1) A corporation may be convicted of the commission of an offense if:
>
> (a) the offense is a violation ... in which a legislative purpose to impose liability on corporations plainly appears ... or
>
> (b) the offense consists of an omission to discharge a specific duty or affirmative performance imposed on corporations by law; or
>
> (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. …
>
> (5) In any prosecution of a corporation ... for the commission of an offense included within the terms of Subsection (1)(a) ... it shall be a defense ... that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent it commission[.]

Model Penal Code § 2.07 (AM. L. INST. 1985).

Predicating liability on the involvement of senior management reduces large organizations' incentives to prevent, detect, self-report, or cooperate with respect to misconduct that is likely to be committed by employees below the requisite level of seniority, as can be expected to be the case with corruption and fraud. Indeed, many foreign countries that traditionally have taken a similar approach to corporate criminal liability have not been effective at pursuing enforcement actions for corruption against large corporations. More recently, and partly in response to international pressure, many have reformed, or are considering reforms to, their laws governing corporate liability for corruption to ensure that corporations can be held liable for corruption by low-level employees that the organization failed to prevent. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT (2016); Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 L. & CONTEMP. PROBS. 193 (2017); see also Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409 (2014).

*d. Deterrence, individual liability, and the importance of organizational self-reporting and cooperation.* Employees control whether organizations commit misconduct. Individual liability thus is important to the effort to deter organizational misconduct. Yet, for many crimes, individual liability—unaccompanied by organizational liability designed to induce self-reporting and cooperation—will not be sufficient because enforcement authorities acting alone are unable to detect most misconduct. As a result, employees committing white-collar crimes often do so without attending to the risk that they will be caught. See Eugene F. Soltes, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL (2016). Organizations can substantially enhance the threat to wrongdoers of being punished for their misconduct because organizations are much more likely to detect their employees' misconduct. See Eugene F. Soltes, *The Frequency of Corporate Misconduct: Public Enforcement versus Private Reality*, 26 J. FIN. CRIME 923 (2019). In the United States, they also tend to be better able to investigate it. Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Liability*, 93 S. CAL. L. REV. 697 (2020) (differences in laws governing investigations by government and organizations give organizations an advantage in investigating misconduct). Such efforts by organizations can operate to deter misconduct by making the employees' risk of being detected and sanctioned salient and material. See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel, eds., 2012).

*e. Why do enforcement officials need the ability to use DPAs, NPAs and declinations, as well as predictable policies?* Organizations have strong incentives not to self-report or fully cooperate if the only potential nontrial resolution involves prosecution or a formal civil enforcement action. Organizations convicted or subject to civil enforcement liability for a wide variety of misconduct—including bribery, health-care fraud, and false claims against the government—face presumptive, and in some cases, mandatory, exclusion, debarment, or delicensing by federal, state, or local authorities, foreign government authorities, contracting parties, or non-governmental organizations such as the World Bank. These collateral consequences can be ruinous. Organizations have strong reasons not to self-report or fully cooperate unless enforcement officials offer them a form of nontrial resolution that allows them to avoid these collateral consequences. Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability*, supra; see Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Samuel Buell, *The Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62 (A. Barkow & R. Barkow eds., 2011).

To achieve their objectives, however, enforcement policies that permit enforcement officials to use these alternative nontrial resolutions must enable organizations to predict the degree to which self-reporting detected misconduct (and fully cooperating) will alter the form and magnitude of the enforcement agreement. E.g., Arlen & Kraakman, *Controlling Corporate Misconduct*, supra; Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020).

*f. Impact of DPAs and NPAs on agencies' ability to impose collateral consequences.* While an enforcement official's decision to resolve a matter through a DPA or NPA does not trigger presumptive or mandatory collateral consequences, it does not eliminate an administrative agency's ability to debar, exclude, or delicense the organization for the misconduct should the agency conclude such action is warranted. Agencies with authority to take such actions generally retain the authority to initiate their own proceeding to determine whether the organization engaged in conduct that justifies debarment, delicensing, and exclusion. Federal agencies with discretion over exclusion tend to view it not as a form of punishment to be employed whenever a corporation committed misconduct, but instead as a mechanism to be used as a last resort when (1) the organization presents a high risk of committing a future offense that will harm the agency's interests, and (1) the agency determines that it cannot appropriately reduce this risk through less costly means, such as mandated reforms imposed through corporate-integrity agreements. Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME & FINANCIAL MISDEALING (Jennifer Arlen ed. 2018). See discussion in § 6.26, Reporters' Notes c-e.

*g. Just punishment and individual liability.* Criminal and civil liability for misconduct is employed to impose just punishment on those who committed and are to blame for the misconduct. This goal is served by targeting liability at the individuals who committed and are substantially responsible for the misconduct, as discussed in § 6.03.

*h. Is retribution an appropriate or achievable goal of criminal liability for publicly held corporations and other organizations whose owners do not control the organization's day-to-day operations:* Criminal liability imposed on publicly held organizations—and other organizations whose owners do not control the day-to-day management of the organization—is not easily justified as a tool for imposing retributive sanctions, if retributive sanctions are defined as (1) the imposition of punishment that imposes suffering on (2) an individual who is morally responsible for a criminal act. This conclusion is particularly apt when corporate liability is governed by respondeat superior. Instead, the retributive aims of criminal liability are most effectively served by using organizational liability to enhance enforcement authorities' ability to punish the individuals responsible for the misconduct.

Publicly held corporations are artificial persons. Thus, they do not have a mind or soul that experiences a criminal sanction as a condemnation, or source of suffering, that is different from a civil sanction that imposes equivalent monetary penalties and collateral consequences. The entity itself also experiences no shame. Samuel Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROB. 25 (2020) (explaining that retribution requires the imposition of suffering and thus is inapplicable to corporations); John C. Coffee, Jr., "*No Soul to Damn: No Body to Kick*": An *Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

Criminal punishment of corporations through the doctrine of respondeat superior also is inconsistent with the requirement that retributive sanctions be imposed only on persons who are morally blameworthy. Under respondeat superior, a corporation can be convicted even if a low-level employee committed the crime in violation of the company's clear instructions to do so, and notwithstanding the organization's implementation of an effective compliance program. Moreover, it can be convicted even if it self-reported promptly, terminated the misconduct, and helped enforcement authorities sanction the individual responsible. Liability on the organization does not appear to fall on persons who are morally blameworthy under standard accounts of moral responsibility.

Corporate criminal sanctions—and their financial penalties—are ultimately borne by shareholders. Noncontrolling shareholders of publicly held corporations are not morally blameworthy for a company's crimes. Moral responsibility requires, at a minimum, that the person played a responsible role in causing the misconduct or was aware that it was happening and failed to intervene to stop it, notwithstanding having an ability to do so. Shareholders of a publicly held company are not directly involved in committing the crime because they generally are not employed by the company. Nor can they prevent it because they do not have the authority to manage the corporation. They can neither supervise employees nor intervene to improve a company's compliance program. E.g., Del. Code. Ann. Tit. 8, § 141(a) (West 2020). Thus, corporate liability imposes costs on shareholders who generally are not to blame for the misconduct. See Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops*, *in* CRIMINALITÀ D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO (Stefano Manacorda and F. Centonze eds., 2018) (defending corporate liability on deterrence, but not retributive, grounds).

A conviction of an organization could serve to indirectly sanction its managers to the extent that they are stigmatized by the organization's conviction. See Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); Vikramaditya Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* 109 HARV. L. REV. 1477 (1996). Yet the stigmatization of managers does not provide a retributive justification for imposing criminal liability on large organizations because the stigma of managing a convicted organization falls equally on managers who may be appropriately blamed for the misconduct and those who were entirely blameless.

Of course, organizations, managers, and shareholders do potentially benefit from crime, directly or indirectly. Yet receipt of such a benefit does not justify moral condemnation when the recipient did not participate in, and was not aware of, the misconduct. Concern for unjust benefits is served by criminal law's goal of seeking disgorgement of unjust benefits. This is one of the goals sought to be served by these Principles. Enforcement policy that is structured to induce self-reporting and full cooperation, followed by disgorgement of the benefit of misconduct, can more effectively ensure that organizations do not retain the benefits of misconduct, than can a policy that seeks to impose retributive sanctions on organizations, thereby reducing disgorgement by discouraging self-reporting and cooperation.

*i. Incentivizing self-reporting and the Fifth Amendment right against compelled incriminating testimony.* Fifth Amendment concerns are not implicated when enforcement officials structure enforcement policy to incentivize, or even pressure, organizations to provide incriminating information for two reasons.

First, U.S. jurisprudence governing pleas, and the waivers of rights that accompany them, has long recognized that enforcement officials can threaten to pursue a legitimate enforcement action against an individual in order to induce that individual to enter into a nontrial resolution that requires the individual to waive a variety of rights. Such nontrial resolutions can, and regularly do, require the individual to cooperate by making incriminating statements. Enforcement officials can offer immunity, but are not required to do so, in order to obtain such voluntary cooperation.

Second, the U.S. Supreme Court has long held that collective entities do not have a Fifth Amendment right against compelled, incriminating testimony. See Hale v. Henkel, 201 U.S. 43 (1906). Thus, organizations can be compelled to produce organizational materials—including books, records, documents, and emails—that could incriminate the organization.

Moreover, employees acting on behalf of the organization cannot assert a Fifth Amendment right against self-incrimination when subpoenaed to produce corporate documentary and electronic evidence for two reasons. First, the Fifth Amendment privilege extends only to "testimony" compelled by the government; it does not extend to the content of materials created outside of any such compulsion. See Fisher v. United States, 425 U.S. 391 (1976). Second, individuals acting in their official capacity on behalf of the firm cannot resist production of corporate documents and electronic evidence on the grounds that the act of production itself is testimonial (about the existence, authenticity or possession of materials) and directly or indirectly incriminating. Id. An organization's employees asked to produce evidence belonging to the organization—in their official capacity and on the organization's behalf—cannot refuse on the grounds that the act of producing the records is a compelled testimonial act that might be personally incriminating because the act of production is treated as an act of the organization, and not the individuals. The evidence may be used against the individual, as may the fact that the organization possessed and produced it. But the fact that the specific implicated individual produced the information may not be used against him. Braswell v. United States, 487 U.S. 99 (1988) (one-man corporation and its officer); see United States v. White, 322 U.S. 694 (1944) (unincorporated labor union); Bellis v. United States, 417 U.S. 85 (1974) (three-person law firm); see *Hale*.

*j. Corporate criminal liability overseas.* Many countries resist imposing criminal liability on organizations given the difficulty of attributing moral blameworthiness to an entity. Indeed, although member countries of the Organisation for Economic Co-operation and Development (OECD) all committed to imposing legal liability on organizations, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999), 11 countries, including Germany, have chosen to do so through administrative sanctions, instead of criminal liability, in order to reserve criminal liability for conduct deserving moral condemnation.

Moreover, those countries that do impose criminal liability on organizations historically have eschewed respondeat superior, largely on the grounds that a company cannot be morally blamed for the criminal acts of a low-level employee. Instead, a higher level of culpability is required. Consistent with this, the United Kingdom (U.K.) and France in effect limit corporate criminal liability for most crimes to cases involving wrongdoing by individuals within the company's highest managerial authority whose acts can, in effect, be "identified" with the organization. These managers (e.g., the chief executive officer) are sufficiently senior that they can be appropriately considered the "directing mind" or "organ or representative" of the organization. See generally OECD, THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT (2016).

This approach has come at a cost, however, because it undermines countries' ability to deter misconduct by large organizations that is likely to be committed by employees outside of senior management. Recognizing the importance of deterring misconduct such as corruption, many countries are revising their corporate criminal liability laws.

In part in response to criticism by the OECD, the U.K. adopted Section 7 of the U.K. Bribery Act which establishes the corporate offense of failure to prevent bribery and then imposes strict liability on certain companies for failure to prevent corruption unless the company can show that it had an effective program for preventing bribery at the time of this misconduct. Section 7 liability, at least as currently implemented, closely resembles respondeat superior liability in its scope—and in its deterrence goal. Bribery Act 2010, c. 23 (UK). By contrast, when France expanded corporate liability to include liability for failure to adopt an effective compliance program designed to prevent corruption, it subjected companies to administrative, but not criminal, liability. Loi 2016-1691 du 9 Décembre 2016 Relative à la Transparence à la Lutte Contre la Corruption et à la Modernisation de la Vie Économique [Law 2016-1691 of December 9, 2016 on Transparency in the Fight Against Corruption and the Modernization of Economic Life], Journal Officiel de la République Française [J.O.] [Official Gazette of the France], Dec. 10, 2016 ("Sapin II"); see also Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020) (discussing corporate criminal liability in the United Kingdom and France).

*k. Why require disgorgement, restitution, and remediation by organizations that self-report and cooperate?* Organizations need to be required to disgorge the benefit of their misconduct and pay for any harm caused for many reasons, including fairness to victims. In addition, imposition of these costs provides an important incentive for them to prevent misconduct by reducing employees' incentives to commit misconduct and creating an ethical culture.

Organizations control the expected benefit to their employees of engaging in misconduct. Employees generally do not directly benefit from misconduct. Instead, they generally are motivated to commit business crimes by the expectations that their actions to increase the organization's profit will benefit them through enhanced job security, promotions, or financial rewards following from increased sales or profits. Employees who face termination for failure to meet their performance goals are more inclined to commit an unlawful act when they have been unable to achieve their goals through lawful means. See Charles Hill et al., *An Empirical Examination of the Causes of Corporate Wrongdoing in the United States*, 45 HUM. REL. 1055 (1992) (finding that Environmental Protection Act and Occupational Safety and Health Act violations are more likely when top managers focus on rate-of-return criteria in evaluating division performance); Max Bazerman & Ann E. Tenbrunsel, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT, Chap. 6 (2012) (providing employees high-powered incentives focused on business outcomes leads to more unethical behavior by directing attention to outcomes and away from concern for unethical means). Given that for-profit organizations face strong market pressures to encourage their employees to pursue profit, organizational liability is needed to provide organizations with a strong financial motivation to prevent misconduct—including through the design of their compensation and promotion policies. See also Jennifer Arlen and Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

Liability also can motivate organizations to take the steps needed to create a culture and norms favoring compliance. To be effective, this culture must reach deep into the organization and affect the behavior of line managers and employees. See Bazerman & Tenbrunsel, BLIND SPOTS, supra*;* see also Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 960 (2009) (compliance programs seek to deter, in part, by "generating social norms that champion law-abiding behavior"); Todd Haugh, *Nudging Corporate Compliance*, 54 AMER. BUS. L.J. 683 (2017); Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, 263, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); see also Bazerman & Tenbrunsel, BLIND SPOTS (discussing how organizations can structure internal systems in ways that increase or decrease the risk of employee misconduct); Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1176 (2010) (discussing "crowding out" problems in compliance); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016). Corporate liability provides an important motivation for organizations to embrace a culture of compliance even when it could reduce corporate profits. See Jennifer Arlen & Lewis Kornhauser, *Battle for Our Souls: A Psychological Justification for Individual and Corporate Liability for Organizational Misconduct* (NYU Law Working Paper, 2021) (discussing the variety of ways, outside of a compliance program, that organizations can structure employees' decisionmaking environment to facilitate or encourage profitable but unlawful conduct).

*l. Enforcement policies and the rule of law.* Enforcement-policy guidelines that allow organizations to predict how self-reporting, cooperation, and remediation will impact the enforcement resolution can help deter misconduct to the extent that the enforcement policy established by the guidelines offers sufficient credit for these actions. In addition, guidelines can enhance faith in the rule of law by helping to ensure that differences in the terms of enforcement resolutions are based on legal principles that are applied, consistently, by prosecutors within the relevant enforcement authority, and are not overly dependent on the identity and personal preferences of the individual enforcement official. Jennifer Arlen*, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016). Guidelines for prosecutors thus serve goals not dissimilar to those that led to the adoption of the U.S. Sentencing Guidelines Governing Organizations—guidelines that were designed to address concerns about excessive disparities in sentencing and also enhance organizations' incentives to adopt effective compliance programs, self-report, and cooperate.

Enforcement guidelines governing prosecutors' use of nontrial corporate resolutions through DPAs and NPAs are particularly important because the legal basis for, and magnitude of, sanctions imposed by these resolutions are not subject to judicial review. NPAs are not filed in court. DPAs are filed in court, but courts have held that judges do not have authority to supervise the form of resolution used or the sanctions imposed. United States v Fokker Services BV, 818 F.3d 733, 740-742 (D.C. Cir. 2016); see also Sec. & Exch. Comm'n v. Citigroup Global Markets Inc., 752 F.3d 285 (2d Cir. 2014) (holding that judges reviewing a consent decree have authority to determine whether the consent decree is fair and reasonable, but this authority does not include the authority to determine whether a proposed Securities and Exchange Commission (SEC) consent decree best serves the public interest).

Courts also have held that prosecutors have discretion to determine whether an organization's conduct constitutes a sufficient breach of a mandate imposed by an NPA to justify a decision to indict. E.g., See Stolt-Nielsen v. United States, 442 F.3d 177 (3d Cir. 2006) (federal courts do not have authority to enjoin a prosecutor from indicting an organization that the prosecutor concludes violated a DPA); United States v. Goldfarb, No. C 11–00099 WHA, 2012 WL 3860756 (N.D. Cal. Sept. 5, 2012) (denying motion to dismiss indictment because of claimed substantial performance with DPA).

Guidelines serve an important role in constraining the discretion of individual prosecutors to provide consistency and a shared conception of the public interest in the absence of the more traditional constraint of judicial review.

*m. Public disclosure of NPAs.* The policy of the U.S. Department of Justice, Criminal Division, provides that prosecutors entering into an NPA should ensure that the case file "contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his/her attorney." U.S. Dep't of Just., Just. Manual § 9-27.650 (2018). The policy explains that the "principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as to the obligations of the parties to the agreement, and that it be signed or initialed by the person with whom the agreement is made and his/her attorney, or at least by one of them." In corporate resolutions, there appears to be a presumption favoring disclosure, particularly in NPAs entered into by the U.S. Department of Justice, Fraud Section.

*n. Public disclosure of civil settlements.* The U.S. Department of Justice, Civil Division, has adopted a policy against confidential settlements. It provides as follows:

> In any civil matter in which the Department is representing the interests of the United States or its agencies, the Department of Justice will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. 28 C.F.R. § 50.23. Exceptions to this policy may be authorized only in rare circumstances, and only by the relevant United States Attorney or Assistant Attorney General or a more senior Department official.

U.S. Dep't of Just., Just. Manual § 4-3.410 (2018).

Similarly, the Environmental Enforcement Section of the Environmental and Natural Resources Division of the Department of Justice has a policy providing for public notice of all negotiated consent decrees. Under this policy, consent decrees should be lodged with the court and made available for public comment for 30 days prior to their entry. U.S. Dep't of Just., Just. Manual § 5-12.620 (2018).

*o. Administrative negotiated settlements.* Recognizing that the public has a strong interest in the resolution of administrative cases in many situations, many agencies have set forth their settlement procedures in their rules of practice. These often include an opportunity for interested members of the public to comment on proposed settlements. The settlement procedures for some types of case are set forth by statute. For example, the settlement of civil antitrust cases brought by the DOJ is governed by 15 U.S.C. § 16 (2004).

*p. Federal anti-piling-on policy.* In May 2018, former Deputy Attorney General of the United States Rod Rosenstein announced a new policy—now incorporated into the Justice Manual—favoring the coordination of corporate resolution penalties in cases involving penalties imposed by more than one regulator or law-enforcement authority. The policy identifies the following factors as relevant to the determination of whether coordination and apportionment of fines, penalties and forfeiture payments between various enforcement authorities serves the interests of justice: egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the DOJ, separate from any such disclosures and cooperation with other relevant enforcement authorities. U.S. Dep't of Just., Just. Manual § 1-12.100 (2018). The policy expressly provides that nothing in the policy prevents U.S. Department of Justice (DOJ) attorneys from "considering additional remedies in appropriate circumstances, such as where those remedies are designed to recover the government's money lost due to the misconduct or to provide restitution to victims." In his speech announcing the policy, Rosenstein made clear that an organization hoping to get the benefit of the policy must cooperate with the DOJ. Rod Rosenstein, Deputy Att'y Gen., U.S. Dept. of Just., Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar. Cooperating with other enforcement authorities, such as a regulatory agency or a foreign government, would not suffice.

*q. Legal violation as a prerequisite for imposition of a negotiated settlement.* Organizations must be confident that they will not be subject to an enforcement action unless misconduct occurred for which they are legally responsible. Thus, negotiated settlements should only be employed against an organization when the enforcement official is confident that a crime occurred for which the organization is legally responsible under existing or reasonable interpretations of the law. Some have raised the concern that the availability of DPAs can lead prosecutors to pursue (and ultimately prevail through settlement on) more aggressive legal theories because organizations may settle cases they would be likely to win at trial when offered a settlement that imposes lower costs than those associated with going to trial (which can be extremely costly even if the organization wins). As a result, enforcement-friendly legal theories may not be tested by the courts. For example, former U.S. Attorney General Alberto R. Gonzalez raised the concern that organizations' comparative willingness to enter into DPAs may have resulted in prosecutors becoming more aggressive in their interpretations of the law and prosecution decisions. JULIE O'SULLIVAN, FEDERAL WHITE COLLAR CRIMES: CASES AND MATERIALS 235 (6th ed. 2016) (quoting former Attorney General Gonzalez).

Concerns also arise about prosecutors' broad discretion to use DPAs and other negotiated settlements to require that companies adopt internal reforms that may not be appropriate. One of the most famous examples is the DPA that then U.S. Attorney Chris Christie's office entered into with Bristol Myers Squibb that required the company to endow an ethics chair at Chris Christie's alma mater, Seton Hall University School of Law. E.g., Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1 (2010); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 CHI. L. REV. 323 (2017).

In other contexts, such as guilty pleas, the concern over potential overreaching by enforcement authorities could be ameliorated by the requirement that the settlement obtain judicial approval. Yet, this check on prosecutorial discretion appears not to apply to DPAs and NPAs. NPAs are not filed in court. DPAs are filed in court but courts have held that judicial review of DPAs generally should focus on whether the government is improperly seeking a waiver of the Speedy Trial Act and does not extend to the appropriateness of using a DPA or to the specific internal reforms required by the criminal resolution. *Fokker Services, B.V.*, 818 F.3d 733; see also United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017) (concluding that federal courts do not have authority to require the parties to report to the court to apprise it of the organization's effort to comply with the DPA).

Enforcement authorities can ameliorate the concern by adopting mechanisms of review and oversight within the enforcement authority itself to help ensure that enforcement actions are predicated on strong legal theories and that statutes are interpreted and applied in a consistent way by prosecutors within the particular enforcement agency. Enforcement authorities also can enhance legitimacy by using appropriate means to ensure that cases raising unresolved issues about the scope of a criminal statute get to court.

*r. Federal policy against naming unindicted co-conspirators.* Consistent with § 6.02(f), § 9-11.130 of the DOJ's Justice Manual (Limitation on Naming Persons as Unindicted Co-Conspirators) states that generally, unindicted co-conspirators (who have not otherwise been charged in a separate indictment) should not be named in an indictment. U.S. Dep't of Just., Just. Manual § 9-11.130 (2018). Federal prosecutors also do not name uncharged individuals in their settlements with organizations.

*s. Impact on individuals in foreign enforcement actions of being identified in an Organizational DPA.* Fairness concerns arise when prosecutors name culpable individuals or identify them (e.g., through job title) in the statement of facts included in a resolution with an organization. The implicated individuals do not have an opportunity to contest these factual findings during the government's negotiation with the organization. Yet some countries, such as Greece, have charged implicated individuals and then introduced the statement of facts contained in the corporate DPA at trial as evidence of the individual's culpability.

*t. Academic literature.* There is an extensive academic literature on corporate criminal-enforcement policy that discusses, among other issues, the importance of policies that promote predictability and transparency as well as the proper approach to organizational criminal enforcement. This literature includes, but is not limited to: Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020); Jennifer Arlen*, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Rachel Barkow, *The Prosecutor as Regulatory Agency, in Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 177 (Anthony S. Barkow and Rachel E. Barkow, eds., NYU Press, 2011); Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1 (2010); Samuel Buell, *Criminal Procedure Within the Organization,* 59 STAN. L. REV. 1613 (2007); SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 109-175 (2016); Lawrence Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigations and Reform*, 66 FLA. L. REV. 1 (2014); KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 154-155 (2019); Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N. C. L. REV. 23 (2010); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015), Brandon L. Garrett, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

The literature on the optimal scope of corporate criminal liability and the question of whether organization's should only be subject to civil liability includes: Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, J. CORP. LAW (forthcoming 2022); Arlen & Kraakman, *supra*; Jennifer Arlen & Lewis Kornhauser, *Battle for Our Souls: A Psychological Justification for Individual and Corporate Liability for Organizational Misconduct* (NYU Law Working Paper, 2021);_Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L. J. 473 (2006); Mihailis E. Diamantis, *The Body Corporate*, 83 L. CONTEMP. PROB. 133 (2020); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?,* 109 HARV. L. REV. 1477 (1996); William Laufer & Alan Strudler, *Corporate Intentionality, Desert and Variants* *of Vicarious Liability*, 37 AMER. CRIM. L. REV. 1285 (2000); Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007); see also Miriam Baer, *Propping up Corporate Crime with Corporate Character*, 103 IOWA L. REV. ONLINE 88 (2018).

Articles discussing the political economy of corporate criminal liability and enforcement include: Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, J. CORP. LAW (forthcoming 2022);_Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. UNIV. L. REV. 95, 105 (2004); Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV.757, 760-783 (1999); Daniel Richman, *Corporate Head Hunting*, 8 HARV. L. & POLICY REV. 265, 275-76 (2014); Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L. J. 2087, 2100 (2009); see also Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420 (2008).

**§ 6.03. Accountability of Individual Wrongdoers for Organizational Misconduct**

**(a) Enforcement officials investigating material organizational misconduct (§ 6.01q) should:**

**(1) seek to identify, as early as reasonably possible in the investigation, the individuals who are substantially responsible for any material misconduct, including any high-level personnel or substantial authority personnel;**

**(2) focus on obtaining evidence against them as early as reasonably possible in the investigation; and**

**(3) communicate and coordinate with other enforcement authorities in the investigation of individuals responsible for material misconduct to the extent reasonably practical.**

**(b) In seeking to resolve cases involving material misconduct by an organization, enforcement officials should:**

**(1) pursue appropriate enforcement actions against culpable individuals who committed and are substantially responsible for material misconduct;**

**(2) ensure that they are subject to appropriate sanctions and do not retain any benefit resulting from their misconduct;**

**(3) communicate and coordinate with other enforcement officials about the proposed resolution of an action against an individual to help ensure that appropriate sanctions are imposed; and**

**(4) predicate their assessment of an organization's remedial undertaking on whether the organization has taken appropriate actions to hold accountable those organizational actors who committed, condoned, or knowingly failed to terminate the misconduct, or who were substantially responsible for material deficiencies in the organization's efforts to detect it, investigate it, or appropriately remediate it in accordance with § 6.07.**

**Comment:**

*a. Importance of individual liability*. Organizations commit misconduct when an individual employee, or a group of employees, engages in the act that constitutes the misconduct with the requisite mental state required for the violation. The individuals who commit the misconduct thus are the people who directly control whether it occurs. Accordingly, enforcement officials can most effectively deter material organizational misconduct by targeting liability directly at the individuals who knowingly committed it, with the requisite mental state for liability, and by subjecting them to sufficient sanctions to ensure that misconduct is seen as unduly risky, even when it is unlikely to be detected and sanctioned.

Individuals who engage in, and are substantially responsible for, misconduct should be held responsible, even when the organization has already punished them by firing them, for three reasons.

First, individual criminal liability conveys and affirms the message that it is morally wrong to knowingly violate the law without a valid justification or excuse. Employees are terminated from employment for a host of reasons. Criminal liability and civil enforcement actions communicate society's view that an offender has transgressed important laws and done something wrong. These messages, in turn, help establish and support norms within the workplace favoring legal compliance.

Second, private sanctions alone are particularly ineffective when employees have committed the crime to meet performance targets in order to decrease the risk of being fired. Employees who fear that they will be terminated if they do *not* engage in misconduct are unlikely to be deterred from committing misconduct by the threat of getting fired should the organization detect their misconduct. The threat of termination for committing misconduct is not an effective deterrent when the risk of being terminated for failure to meet certain performance goals exceeds the likelihood that the misconduct will be detected should the employee commit it.

Finally, individual liability sends an important message that enforcement authorities treat misconduct committed inside an organization as seriously as they do similar nonviolent crimes committed outside organizations. Public faith in our legal system is enhanced when the public believes that the law applies—and the threat of punishment applies—equally to the rich and the poor, and to professionals as well as others.

*b. Focusing on individuals early in the investigation.* Enforcement officials should seek to identify and obtain evidence about the individuals responsible for material misconduct from the outset of an investigation. This approach serves two aims.

First, by focusing on individuals from the outset, enforcement officials enhance their ability to identify the full extent of the misconduct. Organizations commit misconduct only through the conduct of individuals. Focusing on the behavior of the relevant individuals can enable enforcement officials to efficiently and effectively reveal the facts and extent of any corporate misconduct, as well as identify those individuals who have material information about the misconduct and may be persuaded to cooperate. It helps ensure that enforcement officials pursue the requisite lines of questioning while these witnesses' recollections are still fresh. It also encourages enforcement officials to obtain and analyze additional documentary and digital evidence needed to establish which individuals were responsible and their levels of culpability.

Second, placing primacy on obtaining the evidence about the individuals responsible for the misconduct from the outset of the investigation helps ensure that enforcement officials have the evidence directly relating to individuals needed to successfully pursue a case against them for engaging in misconduct. This helps deter by increasing the chances that the final resolution of an investigation uncovering the misconduct will include appropriate civil allegations or criminal charges against culpable individuals.

*c. Coordinating civil and criminal investigations and resolutions.* Early and regular communication between civil and criminal enforcement officials conducting investigations can materially enhance the ability of each to effectively investigate. Civil and criminal enforcement is more effective when civil and criminal enforcement officials proactively refer cases to each other as soon as it becomes apparent that the other's agency could bring an action against an individual under investigation. Due consideration should be given to any differences in procedural requirements for the two types of actions, as well as to legal limitations placed on cooperation between criminal and civil enforcement officials, for example by Rule 6(e) of the Federal Rules of

Criminal Procedure. Criminal and civil enforcement officials also should communicate and coordinate to ensure that individuals who committed, attempted to commit, conspired to commit, or aided and abetted the commission of misconduct are subject to sanctions that are neither insufficient nor excessive.

*d. Appropriate enforcement actions and prosecutorial discretion.* Enforcement officials retain discretion not to pursue, or to seek less-severe sanctions against, individuals involved in misconduct. Such discretion is an important safeguard in the system. Many factors are relevant to the exercise of this discretion.

One important consideration favoring bringing an enforcement action is whether the individual is a high-level personnel or substantial authority personnel who was substantially involved in, and knowingly or intentionally committed, a material crime. Such employees took on more responsibility, and were vested with more trust and more benefits, when they assumed their positions. Thus, they presumptively should be held to account when they knowingly or intentionally commit material misconduct.

Another important consideration is whether the individual was aware at the time of the misconduct that her or she was violating the law, as well as whether he or she made any efforts, following the violation, to remediate the misconduct or to proactively report the violation to the organization and to enforcement authorities and to fully cooperate with the investigation.

By contrast, the public shame an individual wrongdoer has suffered as a result of his or her knowing or intentional misconduct does not provide grounds for declining to bring criminal charges or a civil action against the individual. Similarly, the fact that the individual is otherwise a responsible member of society does not excuse intentional misconduct. Indeed, many professionals who engage in misconduct enjoy many advantages and often do not face the economic pressures that may lead people to commit the types of crimes, such as theft, that society regularly punishes. The law has little deterrent effect if people who enjoy social and economic privilege can anticipate that enforcement officials will not hold them responsible for their deliberate misconduct as a result of their social standing. The law also cannot effectively express society's position that such unlawful acts are immoral and contrary to social expectations if the people who engage in, and benefit from, such misconduct are not subject to criminal or civil sanctions.

Notwithstanding § 6.03(a), enforcement officials may appropriately conclude actions brought against organizations for material misconduct without also bringing charges or a civil action against any individuals responsible for the misconduct in a variety of circumstances, including when:

(1) the misconduct is defined as misconduct that only an organization commits;

(2) enforcement officials do not have jurisdiction over the responsible individuals;

(3) the statute of limitations has run on claims against the responsible individuals;

(4) a foreign enforcement authority with a superior claim to jurisdiction over the individuals is pursuing appropriate enforcement actions against the individuals responsible for the misconduct; and

(5) enforcement officials do not have sufficient evidence to establish individual liability notwithstanding their good-faith best efforts to obtain it.

*e. Individual liability and the organization's role.* In determining the appropriate sanction for an individual, a variety of factors should be considered. These include whether the individual was aware that he or she was violating the law, whether the individual was ordered to violate the law and took actions to try to avoid or remediate the violation, whether the individual reported the violation within the organization or to enforcement officials, and whether the individual fully cooperated with enforcement officials.

*f. Ensuring that individuals do not benefit from their misconduct.* Enforcement officials should ensure that individuals who commit, conspire to commit, aid and abet, or knowingly condone misconduct do not retain any benefit from it, whether or not they are subject to criminal charges. Such benefits include any bonuses, the value of stock options, and other compensation that is attributable to positive outcomes that the organization obtained as a result of this misconduct.

Enforcement officials also should ensure that the organization takes appropriate steps to make sure that executive management, employees who committed the misconduct, high-level or substantial authority personnel who were aware of the misconduct and failed to terminate it or who approved the pursuit of particular business transactions after being informed by the organization's compliance officers about the material risk of illegality involved do not retain any compensation that resulted from the increased profits (or other benefits) stemming from the transactions, in accordance with § 6.07, Comments f-*h*.

*g. Imprisonment*. Imprisonment is an important form of punishment that is appropriately imposed for material white-collar crimes. The threat of imprisonment is important deterrence factor, particularly given that the risk of detection for many white-collar offenses is low.

There are multiple justifications to impose imprisonment on high-level personnel and substantial authority personnel who willfully commit material crimes. First, these individuals are particularly culpable, as they often had sufficient authority to find lawful solutions to the concerns that motivated the misconduct. Second, they often have sufficient authority that they often are able to engage in culpable conduct without being detected and sanctioned. Third, wrongdoing by managers is more detrimental to corporate culture because their actions, in effect, sends a message from a person in authority to those employees who are aware of the misconduct that misconduct is a viable response to a problem.

*h. Assessing organizational remediation:* To ensure that all individuals who committed, conspired to commit, aided and abetted the commission of, knowingly condoned, or who learned of the misconduct and failed to act to terminate it or to report it to appropriate authorities within the organization in breach of their duties are held appropriately accountable for their role in the misconduct, enforcement officials should take into account the organization's actions towards these individuals when determining whether the organization engaged in full remediation, in accordance with § 6.07. See also § 6.07, Comments *e*-, *f*, and *h*.

**REPORTERS' NOTES**

*a. Policies of the Criminal Division of the Department of Justice.* Federal enforcement policy, as set forth in the Department of Justice's Justice Manual, provides that prosecutors should structure their investigations to identify the individuals legally responsible for misconduct and should proceed against them even if the organization has already been sanctioned. According to the Justice Manual, "Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Provable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution. In other words, regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals." U.S. Dep't of Just., Just. Manual § 9-28.210 (2018).

In order to reduce the likelihood that criminal investigations will result in a criminal resolution with an organization, but will not lead to any charges filed against the individuals responsible for the misconduct, the Justice Manual provides that prosecutors seeking authorization to enter into corporate criminal resolutions prior to the conclusion of the investigation into the individuals responsible for the misconduct should include in their authorization memo "a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and, when warranted, an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period." In addition, prosecutors who decide not to bring charges or to seek civil claims against individuals after having entered into a criminal resolution with an organization should memorialize the reasons for their decision and the decision must be approved by the relevant U.S. attorney or assistant attorney general whose office handled the investigation. Id.

Finally, the Justice Manual states that: "[a]bsent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, no corporate resolution should provide protection from criminal liability for any individuals. The United States generally should not release individuals from criminal liability based on corporate settlement releases. Any such release of individuals from criminal liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney." Id.

*b. Policy of the Civil Division of the Department of Justice.* The Civil Division of U.S. Department of Justice (DOJ) also places a priority on pursuing civil claims against individuals in cases involving corporate fraud and other misconduct. According to the Justice Manual, "effective pursuit of civil claims protects citizens, the government, and the nation's economy, and because expeditious and vigorous civil enforcement provides a strong deterrent to misconduct. Holding individuals who perpetrate wrongdoing accountable, in addition to corporations or business entities, is one of the most effective ways of combatting corporate misconduct. Doing so deters future illegal activity, incentivizes changes in corporate behavior, holds the proper parties responsible for their actions, and promotes the public's confidence in our justice system." U.S. Dep't of Just., Just. Manual § 4-3.100 (2018). The Justice Manual provisions governing civil enforcement provide that enforcement officials should have a plan to enable the filing of actions against individuals before the statute of limitations expires, should ensure that resolutions with organizations preserve the Department's ability to pursue warranted actions against individuals, and should memorialize and obtain prior approval for any declinations as to culpable individuals. Id.

*c. SEC policy on individual accountability*. The U.S. Securities and Exchange Commission's enforcement manual provides a list of factors that the SEC considers when determining whether it is in society's interest to hold individuals fully accountable for their misconduct notwithstanding their cooperation. These considerations include:

> (1) The severity of the individual's misconduct assessed by the nature of the violations and in the context of the individual's knowledge, education, training, experience, and position of responsibility at the time the violations occurred;

(2) The culpability of the individual, including, but not limited to, whether the individual acted with scienter, both generally and in relation to others who participated in the misconduct;

(3) The individual's past history of lawfulness;

(4) The degree to which the individual tolerated illegal activity including, but not limited to, whether he or she took steps to prevent the violations from occurring or continuing, such as notifying the Commission or other appropriate law enforcement agency of the misconduct or, in the case of a violation involving a business organization, by notifying members of management not involved in the misconduct, the board of directors or the equivalent body not involved in the misconduct, or the auditors of such business organization of the misconduct;

(5) Whether the individual demonstrated an acceptance of responsibility for his or her misconduct;

(6) Whether the individual acted proactively to remediate the harm caused by the violations including, but not limited to, whether he or she paid or agreed to pay disgorgement to injured investors and other victims or assisted these victims and the authorities in the recovery of the fruits and instrumentalities of the violations;

(7) The degree to which the individual will have an opportunity to commit future violations of the securities laws in light of both his or her occupation and any existing or proposed remedial measures, and

(8) The sanctions imposed on the individual by other federal or state authorities and industry organizations for the violations involved in the Investigation.

DIV. OF ENF'T, SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL § 6.1.1(c) (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

*d. Federal policy on focusing on individuals from the outset of an investigation.* Both the Criminal and Civil Divisions of the DOJ exhort enforcement officials to focus on individuals from the outset of a corporate investigation. According to the Civil Division, this approach accomplishes multiple goals. First, focusing on individuals enhances enforcement officials' ability to ferret out the full extent of corporate misconduct. "Because a corporation acts only through individuals, investigating the conduct of individuals efficiently and effectively reveals the facts and extent of any corporate misconduct. Second, a focus on individuals increases the likelihood that those with knowledge of the corporate misconduct will be identified and provide information about the individuals involved, at any level of an organization. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil allegations (or criminal charges) against not just the corporation but against culpable individuals as well." U.S. Dep't of Just., Just. Manual § 4-3.100(1) (2018) (Civil corporate investigations should focus on individuals from the inception of the corporate investigation).

The Justice Manual provisions governing the Criminal Division states that it is important to identify the individuals responsible for the misconduct early in the investigation, and to determine the nature and extent of their misconduct. U.S. Dep't of Just., Justice Manual § 9-28.210.

*e. Scholarly literature on the deterrence value of individual liability.* Scholarly analyses of organizational liability for misconduct have long emphasized the importance of ensuring that the individuals who commit misconduct are sanctioned (see Reporters' Note *j*). In theory, governments could deter misconduct through organizational liability alone, without imposing liability on individuals, if organizations could be relied on to sanction their employees who engaged in misconduct and could impose sanctions equal to either the harm caused by the misconduct or its expected benefit to the employee. Often, however, employees who engage in misconduct do not have sufficient assets to pay damages to the organization equal to the harm caused or benefit received. See Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); A. Mitchell Polinsky & Steven Shavell, *Should Employees be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?* 13 INT'L REV. L. & ECON. 239 (1993). In addition, organizations may not be able to adequately deter an employee through the threat of firing them if the employee committed the misconduct in order to safeguard his or her job. For example, executives of underperforming organizations may make materially misleading statements about the organization's financial health due to a fear of being terminated if the organization's true performance were known. Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992). Thus, direct action against the employee (including the threat of imprisonment) may be needed in order to deter.

Individual liability also can help deter by reinforcing the social norm against illegal behavior. Conviction of individual wrongdoers is an expressive act that affirms society's belief that the misconduct was morally wrongful and unacceptable. The public act of punishment can help strengthen the norms against illegal acts such as fraud. It can deter directly by causing people to feel increased guilt when violating the law. It also may deter by increasing the probability of detection, to the extent that others are more likely to report observed misconduct internally or to authorities when society has a strong, regularly expressed, norm against this form of wrongdoing. Thus, an employee who might otherwise engage in fraud or violate well-accepted regulatory rules may desist from doing so because (1) she fears detection and reporting by her fellow employees, and (2) her conscience restrains her from seriously entertaining or acting upon fleeting thoughts of wrongdoing. See, e.g., Miriam Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 111-112 (2014) (explaining how norms can increase an individual's immediate shame or what one might call the "psychic cost" of committing crime).

*f. Role of individual liability in enhancing compliance program effectiveness.* Individual liability also enhances compliance program effectiveness by re-enforcing the message that corporate misconduct is morally wrongful and violates important laws imposed by society. Society signals that particular laws matter through enforcement. When society only pursues enforcement actions against organizations, while allowing the culpable individuals to commit misconduct without being sanctioned, it sends the message that the individuals who violate the laws are not wrongdoers. This undermines the effectiveness of efforts by organizations to inculcate in employees the idea that misconduct is unethical. See Baer, *Confronting the Two Faces of Corporate Fraud*.

*g. Individual liability as the expression of the retributive purpose of criminal law.* In the case of criminal misconduct, liability serves both deterrence and retributive purposes. Moral blame and punishment are most appropriately targeted at the individuals who decided to commit the crime. Direct action against individual wrongdoers, particularly high-level managers, expresses society's belief that their actions were morally wrongful and unacceptable.

By contrast, the cost of organizational liability falls on many people who are blameless. For example, liability imposed on publicly held organizations is borne by shareholders who did not commit the crime, and, moreover, have no authority to make management decisions aimed at deterring crime. Liability imposed on smaller entities or otherwise vulnerable businesses can threaten the organization, harming innocent employees. Organizational liability often is justified on deterrence grounds (§ 6.01 (p); see § 6.02 (a)). It is more difficult to make a strong retributive argument favoring the imposition of costs on innocent shareholders, employees, and others. See Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*, *in* CRIMINALITÀ D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO (Stefano Manacorda and F. Centonze eds., 2018).

*h. Appropriate sanctions on individuals*. For provisions on appropriate criminal sanctions for individuals, see the Model Penal Code: Sentencing (Proposed Final Draft, AM. L. INST. 2017).

*i. Use of DPAs with individuals.* For a discussion of the use of DPAs with individuals in cases in which "neither justice nor public safety demands that the individuals be stigmatized by formal charge and conviction, with their attendant collateral consequences," see the Model Penal Code: Sentencing, § 6.02A, Comment *d* (Proposed Final Draft, AM. L. INST. 2017).

*j. Academic literature.* Scholarship on individual liability in organizational crime cases has explored a variety of issues including why individual liability is vital to effective deterrence of organizational misconduct (see Reporters' Note *b*, above), challenges faced by efforts to hold senior management liable, and empirical analysis of individual liability in organizational crime cases. These analyses include: Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Sara Beal, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41 ( 2016) (symposium); SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016); Samuel W. Buell, *Criminally Bad Management*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING, 59 (Jennifer Arlen ed., 2018); Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CR. L. REV. 109 (2020);

Brandon L. Garrett, *Individual and Corporate Criminals*, *in* Research Handbook on Corporate Crime and Financial Misdealing, 40 (Jennifer Arlen ed., 2018); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 Va. L. Rev. 1789 (2015), Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations (2014); Jonathan Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. Rev. 315 (1991); Michael Klausner & Jason Hegland, *Corporate and Individual Liability in SEC Enforcement Actions*, *in* Research Handbook on Corporate Crime and Financial Misdealing (Jennifer Arlen ed., 2018); Daniel C. Richman, *Corporate Headhunting*, 8 Harv. L. & Pol. Rev. 265 (2014); see also Kevin E. Davis, Between Impunity and Imperialism: The Regulation of Transnational Bribery 154-155 (2019) (discussing individual liability of both bribers and bribe recipients).

## § 6.04. Voluntary Self-Reporting by Organizations

**(a) To be deemed to have self-reported material organizational misconduct for purposes of these Principles, an organization generally should have:**

**(1) voluntarily disclosed criminal or civil misconduct to criminal and civil enforcement officials, respectively, prior to either:**

**(A) detection of the misconduct (or a known imminent threat that it will be detected) by enforcement officials; or**

**(B) commencement of an investigation by prosecutors, civil enforcement officials, or regulators into whether the organization engaged in the misconduct;**

**(2) disclosed such misconduct within a reasonably prompt time after becoming aware of it;**

**(3) disclosed all of the relevant facts reasonably known to the organization at the time of its self-report about the nature and scope of the misconduct, and the identity and role of any organizational actors involved in, or responsible for, the misconduct, and any material deficiencies related to the organization's response to it; and**

**(4) disclosed all information obtained subsequently during the organization's investigation about the nature and extent of any material misconduct and the identity of those involved in or responsible for it that can be disclosed without waiver of any attorney–client privilege or work-product protections (see § 6.05).**

**(b) An organization that receives information about material organizational misconduct through an internal report may obtain credit for self-reporting pursuant to subsection (a), even if the organization has reason to believe that the source of the internal report may have reported, or is about to report, the misconduct to government authorities, as long as the organization:**

**(1) reports the misconduct within a reasonable time after receiving the information from the employee and prior to being informed that the government has commenced an investigation of the misconduct; and**

**(2) otherwise satisfies the conditions in subsection (a), including investigating and reporting any suspected misconduct beyond the subject of the internal report.**

**Comment:**

*a. To whom must the organization report?*: To get credit from criminal or civil enforcement officials for self-reporting criminal or civil misconduct, an organization must report the misconduct to, respectfully, prosecutors in the office with enforcement jurisdiction over the misconduct or to the enforcement division of the civil enforcement authority with enforcement jurisdiction over the misconduct. Reporting to civil authorities should be made to officials in the division of enforcement.

To obtain credit from both civil and criminal enforcement officials for self-reporting misconduct, the organization presumptively should be required to report to both of them. Self-reporting conduct that is both civil and criminal to both civil and criminal enforcement officials is important to ensure both that the misconduct is properly remediated and to enable enforcement officials to pursue any appropriate civil and criminal actions against individuals.

The organization can get credit from each authority for reporting misconduct it reported to only one of multiple enforcement authorities with jurisdiction over the misconduct in two circumstances. First, the organization had actual and reasonable belief that the enforcement official to whom the organization reported would refer the matter to the other authority, if warranted. Second, the organization reported the misconduct to only one enforcement authority under the good-faith and reasonable belief that it was the only enforcement authority with jurisdiction over the misconduct. These exceptions apply only if the organization reported to any other relevant enforcement officials upon becoming aware that they also would have an interest in investigating the misconduct. For example, an organization that reports misconduct to its regulator under the actual and reasonable belief that the misconduct was only a civil wrong can get credit for timely self-reporting, as long as it, or the civil regulator, reported to prosecutors upon concluding that the misconduct also was criminal in nature.

*b. Timing of self-reporting.* Unless self-reporting is legally required (in which case it does not constitute a "self-report" under these Principles), self-reporting is considered timely if an organization reports within a reasonable time after obtain evidence supporting a reasonable belief that it committed material misconduct. The organization should be treated as having a reasonable belief as of the time that an employee who is in executive management, the compliance office, human resources, the ethics office, the risk-management office, internal audit, or the general counsel's office obtains information that would lead a reasonable prudent person to have such a belief.

To obtain credit for timely self-reporting, an organization is expected to report as soon as it obtains, or reasonably should have obtained, a reasonable belief that material misconduct probably did occur, even if it does not know the full extent of the misconduct and its investigation is not complete. Thus, the organization's self-report is reasonably timely, even if it did not report immediately upon receiving initial notice that it engaged in misconduct, if the organization waited to report in order to conduct an initial investigation to determine whether it probably engaged in misconduct and promptly terminated any misconduct about which it became aware. An organization that is investigating whether it engaged in multiple instances of misconduct should report any misconduct that it has detected prior to completing its full investigation.

*c. Reasonable time.* The determination as to whether an organization reported with sufficient promptness depends on a variety of factors including:

(1) the strength of the evidence that misconduct occurred;

(2) the risk that a delay in reporting could result in additional harm from the misconduct;

(3) the risk that a delay in reporting could result in the loss of evidence, delay in enforcement officials' access to relevant witnesses, or in further harm to victims;

(4) the degree to which individuals within the organization acted proactively to bring the matter to the attention of those individuals within the organization with authority to self-report on the organization's behalf; and

(5) the likelihood that there is ongoing misconduct in the organization related to the subject of investigation.

The organization can reduce the risk of harm from any delay in reporting by acting proactively to terminate all detected misconduct and to preserve all evidence potentially relevant to the misconduct.

*d. Terminating the misconduct.* An organization that detects misconduct should terminate it. An organization's failure to terminate ongoing misconduct is a factor that should be taken into account when determining whether the organization engaged in timely self-reporting. Self-reporting following a delay taken in order to conduct an investigation may be timely if the organization terminated all detected misconduct, whereas a similar delay may not be timely if the organization allowed known material misconduct to continue prior to self-reporting.

*e. If the legal standard is not settled.* If the law governing whether particular actions are illegal is unsettled, the organization should predicate its decision to self-report on whether the detected activities constitute material misconduct under the good-faith interpretations of the law that the organization knows enforcement officials hold, provided that those interpretations have a reasonable basis and have not been rejected by the courts in the jurisdictions in which the enforcement action could appropriately be brought.

*f. Voluntary disclosure of previously unknown material misconduct following initiation of a government investigation.* An organization that did not voluntarily disclose misconduct because it did not detect it prior to the commencement of the government's investigation nevertheless may be eligible for credit for self-reporting if the organization informs the appropriate enforcement officials about additional material criminal or civil misconduct about which the enforcement officials were unaware *if* the enforcement officials would likely not have detected it within a reasonable time during the course of their investigation into the detected misconduct. To get credit for self-reporting in this circumstance, the organization must also fully cooperate and remediate.

For example, if the government is investigating a health-care company for over-billing a U.S. agency and that organization, in the course of its thorough investigation, detects instances of bribery of foreign officials, the organization should receive self-reporting credit for disclosing that misconduct. By contrast, if the government is investigating the company for bribe payments made for foreign officials working for foreign health authorities in one country, and the government's investigation is likely to extend to other countries, the company should be given credit towards cooperation, but not towards self-reporting, if it discloses bribe payments it detected in other countries.

*g. Failure to report detected nonmaterial misconduct.* An organization that detects, terminates, and remediates misconduct should not be deemed to have failed to report detected misconduct if it does not self-report misconduct that it reasonably determined, in good faith, was not material (§ 6.01(q)), absent a legal obligation to disclose.

*h. Materiality.* Misconduct is material if a reasonably prudent enforcement official, seeking to pursue the public interest, would consider the misconduct itself an appropriate subject for an enforcement action. Detected misconduct can be material for purposes of this Chapter despite it not being economically material to the organization under a variety of circumstances. Factors relevant to materiality are provided in the Definitions set forth in Title 1 of this Chapter, and discussed in § 6.01, Comment *h*. For example, misconduct may be material if it has caused or has created a significant risk of material harm to third parties. Misconduct also may be material if it is the type of misconduct, such as fraud, that is appropriately the subject of sanctions. Misconduct also may be material if it causes harm to a public interest that a legislative body or regulatory authorities has identified as being important, such as the integrity of the financial system or cybersecurity.

*i. When self-reporting is required by law.* Although organizations generally are not required to report misconduct, some statutes and regulations require reporting of specific forms of misconduct. In such instances, an organization does not get credit for self-reporting for any disclosures made to the authority to whom it is required to disclose because the disclosure is required by law. Rather, applicable statutes and regulations govern what constitutes timely reporting for purposes of determining whether an organization complied with its mandatory reporting obligations.

Credit for self-reporting of misconduct the organization is required to report may be warranted if the organization discloses misconduct to a criminal or civil enforcement official after providing its required disclosure of that misconduct to a different civil authority if that civil authority traditionally does not refer disclosed material misconduct to the appropriate enforcement authorities. It also may be warranted if the organization disclosed, terminated and remediated material misconduct promptly, thereby reducing harm to victims, in circumstances where government officials would have been unlikely to detect absent the organization's self-disclosure.

*j. Reporting when life and limb are at risk.* In determining whether self-reporting is timely, organizations are appropriately expected to self-report activities that potentially place people in material risk of death or serious permanent injury before determining whether the harm-producing activities violate the law.

**REPORTERS' NOTES**

*a. Organizations' superior ability to detect misconduct.* Organizations have a comparative advantage in detecting misconduct because they have greater access to and familiarity with information about their own operations on an ongoing basis. See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997). Consistent with this observation, an analysis of how government authorities learn about corporate frauds identified corporate actors, and not outside governmental oversight or investigations, as the source of information in most instances in which fraud was detected. Alexander Dyck, Adair Morse, & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010). A recent empirical analysis of internal-reporting systems at several large, publicly held firms found that a single organization detected more misconduct in a year than enforcement authorities had pursued against all the publicly held firms put together. Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement versus Private Reality*, 26 J. FIN. CRIME 923 (2019).

*b. Policy of the Department of Justice Criminal Division and the Organizational Sentencing Guidelines on self-reporting criminal misconduct.* Both the Department of Justice's Federal Corporate Enforcement Principles and the Organizational Sentencing Guidelines provide that self-reporting can impact the form of organizational resolution and the fine imposed. See U.S. Dept. of Just., Just. Manual § 9-28.000; U.S. SENT'G GUIDELINES MANUAL § 8C2.5(g) (U.S. SENT'G COMM'N 2010).

Under the Organizational Sentencing Guidelines, organizations receive mitigation credit for self-reporting only if they report "(A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities." In addition, in order to get credit for self-reporting, the organization must have fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. U.S. SENT'G GUIDELINES MANUAL § 8C2.5(g)(1) (U.S. SENT'G COMM'N 2010). Self-reporting also is important because, under the Organizational Sentencing Guidelines, an organization is not entitled to mitigation credit for having an effective compliance program "if, after becoming aware of the offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities." U.S. SENT'G GUIDELINES MANUAL § 8C2.5(f)(2) (U.S. SENT'G COMM'N 2010).

The Criminal Division of the Department of Justice identifies self-reporting as a factor bearing on whether an organization is eligible for a DPA or NPA. See U.S. Dept. of Just., Just. Manual § 9-28.300 (2020).

In addition, the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy establishes a presumption that an organization should receive a declination if it voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, unless there are aggravating circumstances, such as "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism." U.S. Dept. of Just., Just. Manual § 9-47.120 (2019). In order to receive credit for self-reporting under the policy, the organization:

(1) must have self-reported "prior to an imminent threat of disclosure or government investigation";
(2) "within a reasonably prompt time after becoming aware of the offense" (the organization bears the burden of demonstrating timeliness); and
(3) must disclose all relevant facts known to it at the time of the disclosure, including as to any individuals substantially involved in or responsible for the misconduct at issue.

Id., see CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 51-52 (2020).

In October, 2021, Deputy Attorney General Lisa Monaco announced a revision to the Criminal Division's policy on cooperation. In order to get cooperation credit, corporations must identify all individuals involved in the misconduct, regardless of their position, status or seniority. Corporations cannot restrict their disclosures to those individuals who are "substantially involved" in the misconduct. These Principles are consistent with this broad disclosure duty in requiring companies to disclose both the identity of all those who are culpable for the misconduct as well as all those who, through their involvement, are material witnesses to the misconduct. U.S. Department of Justice, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021) https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

*c. Securities and Exchange Commission policy on self-reporting.* The Securities and Exchange Commission's Division of Enforcement treats self-reporting as a component of cooperation. DIV. OF ENF'T, SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL § 6.1.2 (2017). In discussing self-reporting, the Enforcement Manual states that the Securities and Exchange Commission (SEC) treats the following as evidence of "good corporate citizenship": "self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins, and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations."

In its recently issued Resource Guide to the FCPA, the SEC stated that it places a "high premium, on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters." FCPA RESOURCE GUIDE, supra, at 54.

*d. The Commodity Futures Trading Commission policy on self-reporting.* The Commodity Futures Trading Commission (CFTC) has an enforcement policy intended to encourage both self-reporting and full cooperation. In order for an organization to get credit for voluntary disclosure, the following conditions should be met:

(1) voluntary disclosure must be made prior to an imminent threat of exposure of the misconduct;

(2) the disclosure must be made to the CFTC's Enforcement Division within a reasonably prompt time after the company or individual becomes aware of the misconduct; and

(3) the disclosure must include all relevant facts known to the company or individual at the time of the disclosure, including all relevant facts about the individuals involved in the misconduct.

To address situations in which the organization does not know the full facts at the time of the first voluntary disclosure, the CFTC policy states that the enforcement division will still recommend full credit (assuming the organization met the other requirements) "where the company or individual made best efforts to ascertain the relevant facts at the time of disclosure, fully disclosed the facts known at that time, continued to investigate, and disclosed additional relevant facts as they came to light." Commodity Futures Trading Comm'n, *Enforcement Advisory*: *Updated Advisory on Self-reporting and Full Cooperation*; see DIV. OF ENF'T, COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT MANUAL § 7, https://www.cftc.gov/media/1966/The%20CFTC%20Division%20of%20Enforcement%20-%20Enforcement%20Manual/download; see also James McDonald, Dir., Div. of Enf't, Commodity Futures Trading Comm'n, Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC, Speech at the NYU Program on Corporate Compliance & Enforcement/Institute for Corporate Governance & Finance (Sept. 25, 2017), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517; see Vincent A. McGonagle, Acting Dir., Div. of Enf't, Commodities Futures Trading Comm'n, Memorandum on Recognizing Cooperation, Self-Reporting, and Remediation in Commission Enforcement Orders (Oct. 29, 2020), https://www.cftc.gov/PressRoom/PressReleases/8296-20 (the "Guidance").

*e. Impact of Self-reporting on Risk of Criminal Prosecution for Environmental Offenses:* The policy of the Environment and Natural Resources Division of the Department on the effect of voluntary disclosure on an organization's risk of criminal prosecution for a federal environmental offense was adopted in 1991. Under this policy voluntary disclosure is simply one of the factors that bear on the decision of whether to pursue prosecution, along with others such as cooperation and effective voluntary compliance. Self-reporting does not produce a presumption against prosecution. Dep't of Justice, Environment and Natural Resources Division, *Factors in Decisions on Criminal Prosecution for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991). Three considerations potentially support the division's decision to provide so little incentive to self-report. First, companies are legally-obligated to self-report many environmental violations. Second, organizational wrongdoers tend to be closely-held owner-managed firms with owners may be directly or indirectly responsible for the misconduct and yet evade personal criminal prosecution. Prosecution of the company will impose direct costs on them, however. Finally, many, but by no means all, environmental offenses can be detected by third parties, including victims, potentially reducing the need for self-reporting. The counter-veiling consideration is the current significant under-deterrence problem arising from the confluence of the substantial amount of environmental offenses that remain either undetected or detected but unattributable to a specific firm (such as offenses resulting in oil slicks on the water) and the detected offenses that cannot be adequately investigated and enforced due to insufficient agency resources. Greater incentives for companies to self-report and fully cooperate could reduce this problem, as could adoption of an effective whistleblower bounty program for environmental offenses. See Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020).

*f. Self-reporting in the United Kingdom: implications and requirements.* The United Kingdom (U.K.) allows certain prosecutors to use DPAs with organizations in certain cases. The negotiation, imposition, and oversight of the DPA is subject to judicial oversight. The court has authority to review the DPA to determine whether: (1) offering it is in the interests of justice; and (2) its terms are fair, reasonable, and proportionate. Crimes and Courts Act of 2013, c. 22, § 45, sch. 17 (UK).

Although the U.K. uses an interests-of-justice test to determine whether a DPA is appropriate, the guidelines governing their use treat self-reporting or cooperation, if combined with remediation, as the factors favoring a DPA. CPS, The Code for Crown Prosecutors (Oct. 26, 2018); *see also* CPS, *Corporate Prosecution: Legal Guidance*, https://www.cps.gov.uk/legal-guidance/corporate-prosecutions. DPAs tend to be reserved for organizations that self-reported misconduct about which the prosecutors were unaware. The U.K. judge who originally had jurisdiction over all DPAs treated reporting of previously undetected misconduct as an essential prerequisite for eligibility for a DPA. Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020) (discussing U.K. practice and the Rolls Royce DPA).

In 2018, the Director of the Serious Fraud Office, Lisa Osofsky, has stated that DPAs are appropriate only if the company has either self-reported or cooperated by providing new information to the government. Lisa Osofsky, Director, Serious Fraud Off., Keynote on Future SFO Enforcement, COMPLIANCE & ENFORCEMENT BLOG (Oct. 16, 2018). E.g., Judith Seddon et al., *Self-reporting to the Authorities and Other Disclosure Obligations: The U.K. Perspective*, *in* THE PRACTITIONER'S GUIDES TO GLOBAL INVESTIGATIONS (Judith Seddon, Eleanor Davison, Christopher J. Morvillo, Michael Bowes, Luke Tolani, Anna A. Adams, & Tara McGrath, ed., 4th edition 2020). Samuel Buell, *The Potentially Perverse Effects of Corporate Civil Liability*, in

PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62 (A. Barkow & R. Barkow eds., 2011);

*g. Academic Literature:* Academic literature on self-reporting has analyzed a variety of issues. including how to structure (and the effectiveness of existing efforts to structure) organizational enforcement policy to encourage corporate self-reporting, the importance of self-reporting to the government's ability to deter misconduct by organizations, whether civil regulators can treat voluntary self-reporting as a good signal of effective internal policing, and whether companies required to disclose legal violations are doing so. The literature on these issues includes: Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Jennifer Arlen*, Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*, in CRIMINALITÀ D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO, (Stefano Manacorda and F. Centonze eds., 2018); Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020); SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016); Samuel Buell, *The Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62 (A. Barkow & R. Barkow eds., 2011); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Alexander Dyck, Adair Morse, & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010); Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1176 (2010); Lucinda A. Low & Brittany Prelogar, *Incentives for Self-reporting and Cooperation*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020); Jodi L. Short & Michael W. Toffel, *Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing*, 54 J. LAW & ECON. 609 (2011); Jodi L. Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator,* 24 J. LAW & ECON. 45 (2008); David Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1335 (2013); see also Jennifer Arlen & Samuel Buell, *The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems*, 93 S. CAL. L. REV. 697 (2020) (discussing how the benefit of self-reporting varies across countries as a result of differences in laws governing corporate investigations); Stefano Manacorda and Constantino Grasso, FIGHTING FRAUD AND CORRUPTION AT THE WORLD BANK: A CRITICAL ANALYSIS OF THE SANCTIONS SYSTEM (2018) (discussing the World Bank's approach to voluntary disclosure); Pascale Hélène Dubois, Kathleen M. Peters, and Roberta Berzero, *Settlements within the World Bank Group Sanctions System*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020) (same).

## § 6.05. Full Cooperation by Organizations

**(a) To be deemed to have fully cooperated for purposes of these Principles, an organization must:**

**(1) conduct a thorough investigation into any suspected material misconduct; and**

**(2) provide the following information to the relevant enforcement officials to the extent it can do so consistent with § 6.06:**

**(A) the material facts known to the organization that relate to the misconduct or additional misconduct detected during the investigation;**

**(B) the identity, and nature of the involvement, of all individuals who the organization knows or has reason to know:**

**(i) were substantially involved in, or responsible for, the misconduct, including all high-level or substantial authority personnel who knowingly participated in in the misconduct;**

**(ii) possess information likely to be material to the government's investigation; or**

**(iii) are high-level or substantial authority personnel who bear material responsibility for any deficiencies in the organization's detection, investigation, and remediation of the misconduct, and any deficiencies in the organization's cooperation with enforcement authorities.**

**(3) all material documentary and digital evidence relevant to the misconduct and any other material information known to the organization that is:**

**(A) not subject to attorney–client privilege or work-product protection; and**

**(B) not precluded from production by other applicable laws.**

**(b) To be deemed to have fully cooperated, during the course of and following its investigation, an organization also should:**

**(1) disclose proactively to enforcement officials, and undertake continuing disclosure of:**

**(A) relevant information or evidence about which it becomes aware relating to the scope and nature of any material misconduct;**

**(B) the identity and culpability of those who committed the material misconduct; and**

**(C) the existence and location of material evidence relating to the material misconduct, even if it is not in the organization's possession;**

**(2) act in good faith to ensure the timely preservation of relevant documents and evidence by organizational actors and third parties acting on the organization's behalf who could have material information pertaining to any material misconduct;**

**(3) make employees who possess relevant information available to enforcement officials, subject to any limitations imposed by law;**

**(4) comply with enforcement officials' reasonable and justified requests that the organization not interview particular organizational actors or other witnesses absent a legal obligation to do so or the need to obtain information that is material to identifying and terminating ongoing misconduct likely to cause material harm to the persons or property of others.**

**(c) A determination as to whether an organization fully cooperated in a government investigation should not be adversely affected by the organization's:**

**(1) efforts to assist its employees to safeguard their rights, such as by indemnifying them for their defense costs and advising them of their right to obtain their own legal counsel;**

**(2) unwillingness to enter into a criminal or regulatory settlement on a specific set of charges; or**

**(3) reasonable, good-faith assertion of a right or obligation not to disclose pursuant to its attorney–client privilege or work-product protection (see § 6.06) or other laws.**

**(d) Failure to fully cooperate is not itself evidence of misconduct and thus does not provide an independent basis for enforcement officials to file criminal charges or a civil or administrative enforcement action against an organization, absent a statute or regulation requiring cooperation.**

**Comment:**

*a. Full cooperation is a prerequisite to eligibility for a more favorable form of nontrial resolution.* Organizations should only get credit for full cooperation that makes them eligible for a more favorable form of resolution, in accordance with §§ 6.18–6.19, §§ 6.24–6.25 if they have genuinely and fully cooperated, in accordance with § 6.05. Organizations that provide superficial or partial cooperation generally should not be given credit for full cooperation in the enforcement authorities' determination of the appropriate form of resolution.

Material cooperation that is less than full cooperation is appropriately taken into account in determining the sanctions imposed on an organization, but the mitigation afforded should be substantially less than for organizations that fully cooperate or self-report. Inadequate cooperation also is an appropriate factor to be taken into account in determining whether a monitor is appropriate when it undermines the government's ability to identify and pursue a successful action against individual wrongdoers (see § 6.10, Comment d).

*b. Cooperation versus self-reporting.* Throughout these Principles the terms cooperation and self-reporting refer to distinct activities; self-reporting is not treated as a component of cooperation. Thus, the term self-reporting is use to refer to an organization informing the government that it engaged in misconduct when it believes that the government otherwise is not aware that it engaged in misconduct. The term cooperation is used to refer to actions taken by the organization to provide the government information about misconduct after the government has learned that the organization engaged in misconduct and has commenced, or can be expected to commence, an investigation. As a result, an organization can fully cooperate even if it did not self-report. An organization cannot be deemed to have undertaken full corrective action in accordance with § 6.01(m) if it did not self-report.

For a discussion of when an organization should be treated as having self-reported newly detected misconduct after a government investigation has begun, see § 6.04, Comment *f*.

*c. Delay in cooperation.* An organization that did not fully cooperate until late in an investigation should not receive credit for the "full cooperation" needed either to justify a declination, non-prosecution agreement (NPA), or deferred prosecution agreement (DPA) under §§ 6.18–6.19, or to obtain a more favorable civil or administrative resolution under §§ 6.24–6.25, unless the organization:

(1) provided enforcement officials with material evidence they did not otherwise have about the complicity of all high-level personnel and substantial authority personnel who committed or condoned misconduct;

(2) identified and appropriately disciplined the individuals substantially responsible for the organization's initial delay in or resistance to cooperating;

(3) did not delay its cooperation so long as to undermine enforcement officials' ability to pursue appropriate actions against the individuals responsible for any material misconduct; and

(4) continues to fully cooperate through the time the determination is made.

Thus, an organization facing substantial collateral consequences if convicted or found liable in a civil enforcement action may avoid those consequences, notwithstanding its initial delay in cooperating, if it proactively cooperates before any initial non-cooperation causes material harm to enforcement authorities' ability to pursue appropriate actions, for example against individual wrongdoers.

*d. Providing information and the attorney–client privilege.* As discussed in more detail in § 6.06, an organization, like an individual, can share the facts of the misconduct without waiving the attorney–client privilege, even when the organization's legal counsel or management learned these facts through privileged conversations with employees. By contrast, enforcement officials should be mindful that a request that the organization share recordings or transcripts of its privileged interviews with employees likely would constitute a request that the organization waive attorney–client privilege, which would be inconsistent with § 6.06 unless a valid exception to the privilege applies (e.g., the crime-fraud exception).

*e. Corporate investigations.* Full cooperation depends on whether the organization conducted a sufficiently thorough investigation of suspected material misconduct to enable it to identify all material misconduct that it would, based on available information, have a reasonable basis for thinking might be occurring.

The appropriate scope of the investigation will depend on the facts and circumstances. For example, an organization that identifies misconduct that available information suggests is isolated to a particular department or locality may reasonably target its investigation at that department or locality, even though there is a small possibility that other departments are engaging in other forms of misconduct or that practices under relatively autonomous management in one country are engaged in by similarly autonomous managers in other countries. By contrast, if an organization identifies material misconduct involving a particular set of business practices in a particular department or locality, and there is a reasonable basis for concluding that such business practices are reasonably likely to be occurring elsewhere, the organization should investigate whether other units, divisions, or subsidiaries of the organization are committing the same misconduct. For example, if an organization identified material misconduct that is both profitable to the local unit involved and likely to enhance the career of the employees involved—for example, illegal arrangements than enhance sales—it is likely to have a reasonable basis for investigating to determine whether the unlawful practices are more widespread within the organization, especially if the relevant employees' bonuses or careers are predicated on meeting sales objectives. For a discussion of the internal processes for organizational investigations, see §§ 5.22–5.29; see also §§5.11-5.12.

*f. Facts about the organization.* An organization provides valuable cooperation when it provides information about its business, its compliance risks, and its official and unofficial lines of authority and responsibility, which can aid enforcement officials in identifying where to investigate and what information to obtain. An organization also can provide information about the current location of both responsible individuals and employees who may have been aware of their activities.

*g. Facts about the misconduct.* Organizations seeking credit for full cooperation must provide all the available facts about all material misconduct, including where in the corporate records evidence supporting the facts may be located and the identities of individuals who know of or can corroborate the facts.

*h. Information about culpable individuals and people with material information.* An organization has not provided sufficient cooperation to constitute "full cooperation" for purposes of this Section unless it conducted a sufficiently detailed investigation to enable it to identify all individuals involved in or responsible for any material misconduct at issue, regardless of their position, status, or seniority. The organization also must provide information to the relevant enforcement authorities about the identity, role in the misconduct, and available evidence against all employees substantially involved in the misconduct. An individual is "substantially involved in" the misconduct if the person was involved in, or aided, the commission of the misconduct either knowing that their actions were likely to contribute to an unlawful act or with reckless indifference to whether their actions were contributing to an unlawful act. Providing information about the identity of responsible individuals is a prerequisite to receiving cooperation credit because enforcement authorities do not obtain the primary deterrence benefit of organizational cooperation—which is the ability to enhance deterrence by imposing sanctions on the individuals responsible for the misconduct—unless the organization's cooperation helps them identify, sanction and, in turn, deter.

Organizations also must identify people with material information about any material misconduct and disclose whether they played a role in the misconduct. To do so, organizations will often need to inform enforcement officials about the identity and role in the misconduct of employees who played only a minor part in the misconduct because such employees can be expected to have valuable information about the conduct of the more culpable employees who were responsible for the misconduct. In addition, enforcement authorities may view some of these employees as more culpable than the organization does. Organizations also need to provide information about employees who are not responsible for the misconduct but who are likely have information relevant to the government's investigations, to the extent they can do so without waiving attorney–client privilege.

*i. Information about individuals responsible for inadequate compliance or supervision.* Organizations seeking credit for full cooperation also should provide enforcement officials with information about high-level or substantial authority personnel who acted in an intentional, reckless, or grossly negligent way that either enabled the misconduct to occur, or undermined the organization's ability to detect or investigate the misconduct, regardless of whether these individuals are implicated in the misconduct. Information about such individuals is important for several reasons. First, enforcement authorities may reasonably want to investigate whether supervisors who enabled the misconduct were implicated in it. Second, enforcement authorities need information about the high-level and substantial authority personnel responsible for any oversight deficiencies in order to enable enforcement officials to assess whether an organization has fully remediated the root causes of both the misconduct and any deficiencies in the organization's response to it.

As discussed in § 6.07, the appropriate organizational response to deficient supervision by compliance personnel and other supervisors can take a variety of forms—including no action, additional training, reassignment, and termination—depending in part on the reasons for the deficiencies and whether the individual was acting in good faith to implement an effective compliance program.

*j. Making employees available to enforcement officials.* Organizations should make organizational actors who possess relevant information, wherever located, available for interviews by government officials, subject to any limitations imposed by law. The organization should exercise good faith in making employees available. Thus, it should not relocate culpable employees or those with material information to jurisdictions where enforcement officials cannot readily interview them without first having informed enforcement officials and given them an opportunity to interview the employees.

An organization that makes its employees available to enforcement officials should not be denied credit for full cooperation if its implicated employees assert their right against self-incrimination or right to counsel. An organization also may not be in a position to make available former employees or third parties with material information.

*k. Preservation of evidence by an organization.* To obtain credit for full cooperation an organization must proactively seek to preserve material evidence. In determining whether to provide full credit, enforcement officials should consider the policies and practices the organization implemented prior to it detecting misconduct, as well as its policies, practices, and conduct following the initial notice that misconduct may have occurred, to determine whether the organization acted appropriately to obtain and retain information potentially material to enforcement authorities' ability to detect and investigate material misconduct.

*l. Preservation of evidence by third-party agents.* Organizations also should act proactively to ensure the preservation of and access to information about misconduct that is in the possession of third parties who acted or are acting on their behalf. Enforcement officials evaluating an organization's efforts can reasonably consider whether the organization's contracts with its third-party agents gave the organization a right to obtain and to ensure the preservation of information possessed by the third party that may be relevant to efforts to detect or investigate misconduct.

*m. Uncooperative conduct.* An organization seeking credit for full cooperation should not engage in uncooperative conduct. In deciding whether to provide credit for full cooperation, the overarching consideration is whether the organization proactively and fully aided enforcement authorities in their effort to investigate the misconduct, identified the individuals responsible for it, and assisted in their efforts to remediate the misconduct. An organization that takes steps to impede enforcement authorities' investigation should not be given credit for full cooperation, even if the organization purports to be cooperating, unless the organization remediates its uncooperative conduct prior to causing any material damage to the investigation and remediates the root cause of its uncooperative conduct (including taking appropriate action regarding the individuals responsible for it).

Actions that may be considered uncooperative include:

(1) failing to respond to reasonable requests and subpoenas for documentary information and testimony in a complete and reasonably timely manner;

(2) misrepresenting or minimizing the nature or extent of the organization's misconduct;

(3) claiming that information is not available when it is;

(4) failing to either preserve or produce relevant information under the organization's control;

(5) directing the organization's counsel impede enforcement officials' access to employees;

(6) removing employees who have knowledge of the misconduct from the jurisdiction of enforcement officials;

(7) interfering with enforcement authorities' ability to obtain untainted evidence from employees by, for example:

(a) inappropriately advising or directing employees or their counsel not to cooperate fully or openly with the investigation;

(b) providing employees with suggestive responses to questions, whether through questionnaires or interviews; or

(c) providing employees or former employees access to corporate documents or data beyond what those individuals would have been privy to in the course of their employment; and

(8) failing to properly search computer hard drives for documents, data, and electronic images.

*n. Appropriate treatment of employees during the investigation.* Investigators acting on behalf of an organization are presumptively private actors. Thus, in the United States, employees speaking with internal investigators do not enjoy the same procedural protections that they would have during a custodial interrogation by government investigators (e.g., *Miranda* warnings), or during a criminal trial (e.g., *Brady* disclosures), as long as the organization's investigation is not directed by enforcement authorities. Consequently, organizations should ensure that employees are made explicitly aware that the organization's lawyer represents the organization and does not represent them, and that the attorney–client privilege resides solely with the organization. Employees also should be advised about any right they may have to obtain counsel at the organization's expense. Enforcement officials should not treat any efforts by an organization to ensure that its employees know their rights and are represented by counsel as indications that the organization is not cooperating. Safeguarding employees' rights is not only ethical but it also can promote enforcement officials' interests. When employees are advised by counsel, implicated employees who are less culpable employees may be advised by counsel to cooperate with enforcement officials by providing evidence about the more culpable, and potentially senior, wrongdoers. Internal processes to ensure fairness in investigations are addressed in § 5.27.

*o. Protection of individuals' rights.* Enforcement officials owe duties to the public and should ensure the fair administration of justice. They should make sure that any individuals implicated in government investigations are aware of any right to counsel they may have, any access they have to funding for their legal expenses, and their right against self-incrimination.

*p. Failure to cooperate is not itself evidence of misconduct.* An organization's decision not to cooperate is not itself evidence of misconduct, at least when the refusal to cooperate does not involve separate misconduct (such as obstruction of justice, false statements, perjury, or refusing to comply with lawful discovery requests) or demonstrate consciousness of guilt. An organization's failure to take affirmative actions to help enforcement authorities differs from situations in which an organization takes affirmative actions to impede the government's investigation.

*q. Nondisclosure requests.* In some circumstances, it may be appropriate for the government to predicate credit for cooperation on the organization's agreement not to transmit certain information to others. For example, the government may ask the organization not to disclose that either it or the government is investigating misconduct, particularly when disclosure of such information could undermine the government's ability to uncover the entire scope of the misconduct by, among other things, precipitating the destruction of evidence, flight by particular individuals, or dissipation or concealment of assets.

Enforcement officials should avoid requiring nondisclosure when it is excessively costly to the organization, unjustified, or contrary to the organization's legal obligations in the United States or abroad. For example, an organization may have obligations under the securities laws to disclose that it is being investigated. A requirement that the organization not disclose may be excessively costly if it would preclude the organization from pursing its own investigation into ongoing misconduct that could impose serious harm on innocent parties if unchecked. Requiring an organization not to disclose the existence of an investigation to its employees would not be justified if done primarily to enable the government to surprise an individual in the organization to reduce the likelihood that he or she will have legal representation during the initial interview.

*r. Enforcement authorities' responsibility to conduct an independent investigation.* Cooperation by an organization is effective when it supplements enforcement authorities' independent investigations. Enforcement authorities need to conduct their own investigations for several reasons. First, enforcement authorities are likely to have greater motivation than an organization to detect and investigate misconduct and identify those individuals responsible. Second, a parallel investigation by enforcement authorities can motivate an organization to conduct a full and accurate investigation and provide a full and accurate presentation of its internal findings. Finally, enforcement officials are better able to assess, evaluate, and act upon any information provided by the organization if they first gain a thorough understanding of the organization and the facts of the misconduct based on their own independent investigation.

An independent government investigation is particularly important in situations in which the misconduct was widespread or is ongoing, but the organization's investigation has not identified any senior managers who were in any way responsible for committing it or allowing it to continue. Enforcement authorities can reasonably assume that misconduct would not be widespread within an organization without the involvement, complicity, or acceptance of high-level or substantial authority personnel.

*s. Common-interest arrangements as a potential impediment to full cooperation.* In determining whether an organization acted in good faith to undertake full cooperation, enforcement officials should consider the existence, structure, and implementation of any common-interest arrangement (otherwise known as a joint-defense agreement) between the organizations and individuals with material information relevant to the investigation. Common-interest agreements potentially serve many legitimate goals. Nevertheless, joint-defense agreements can operate to undermine the effectiveness of an organization's investigation or its ability to fully cooperate with enforcement authorities.

An organization should not receive credit for full cooperation if it entered into, or implemented, a common-interest arrangement in a way that either precluded it from providing enforcement officials with evidence that it otherwise could have shared or potentially influenced the course of either the entity's or the government's investigation by providing potentially implicated individuals access to the company's investigation. For example, an organization undermines its ability to cooperate if it enters into a common-interest arrangement with entities or individuals with material information about the misconduct and then interviews those individuals jointly with their own lawyer. This would give the interviewed person the ability to assert the attorney–client privilege with respect to the interview that the company conducted with them. An organization also can undermine its own investigation, and potentially the government's investigation, to the extent that it implements a common-interest arrangement with a potentially implicated party in a way that allows that party or the party's counsel to be present at the organization's interviews of its employees. An organization's employees may be less likely to be fully forthcoming in such circumstances and may receive the strong signal that the organization places a greater priority on protecting the implicated individual than on obtaining the full truth about the misconduct. In addition, the implicated party's ability to ask questions during interviews with potential material witnesses, before the organization has ascertained the facts, potentially enables an implicated party to lead the interviewees in a way that may distort the government's investigation as well. An organization also may undermine its own investigation, and that of the government, by sharing its interviews with its employees, as well as other evidence with implicated parties after the fact. Employees who are aware of the common-interest arrangement may adjust the information they provide to the firm during its investigation in anticipation of the information being shared with the other parties to the arrangement. In addition, providing implicated parties with access to information about potential sources of evidence against them could undermine the investigation if it enables the implicated parties to identify and remove incriminating evidence before the organization or enforcement officials are able to obtain it. Indeed, common-interest agreements typically require that if material covered by the agreement becomes the subject of an application for an administrative or judicial order requiring a party to disclose that material, then that party shall give prompt written notice to all of the other parties.

*t. Impediments to cooperation.* There may be circumstances in which an organization cannot get access to or share material evidence despite its best efforts to conduct a thorough investigation. This can occur if the organization cannot feasibly access the information, for example, because it is in the hands of an individual the organization cannot interview. It also can occur if the organization is precluded by the laws of a foreign country from disclosing the information to enforcement officials. Under such circumstances, the organization seeking to obtain credit for cooperation bears the burden of establishing its inability to obtain the evidence in question. In addition, it is appropriate for enforcement officials to consider the genuineness of the organization's efforts, for example, to obtain consent from foreign authorities, in determining whether the organization has fully cooperated. In making this determination, it is appropriate to consider, among other things, whether other organizations dealing with the same foreign authorities were able to achieve better results. In situations in which a foreign authority precludes an organization from full cooperation with U.S. regulators, and the organization is found not to have maintained an effective compliance program, it may be appropriate to consider imposing a monitor in that country to ensure the organization's compliance with the law.

An organization also may be unable to produce evidence because it was destroyed or removed by an employee. In such a situation, the organization bears responsibility if the employee acted in the scope of employment to benefit the organization. By contrast, if the employee was acting solely for personal benefit, in breach of his or her duty of loyalty, then the employee's acts should not be attributed to—or held against—the organization, unless the organization failed to exercise appropriate diligence to anticipate the problem and preserve its evidence.

*u. Relevance of proactive efforts to anticipate or overcome potential impediments to cooperation.* Many countries have laws, such as data-privacy laws, that restrict the transmission of personal data overseas.

In some cases, an organization can facilitate future investigations by acting, well in advance of any misconduct, to adopt a clear policy to which its employees expressly agree, that specifies that the organization is entitled to access all employees' emails sent or received using the organization's email address that relate, directly or indirectly, to the organization's activities, and also all other documentary or digital information created by the employee during the scope of his or her employment or stored on the organization's servers or in its facilities. The organization often can improve its access to relevant personal data by adopting policies and procedures with respect to existing and new employees, as well as counterparties, designed to give it the ability to collect and transmit any information within its possession (including on its servers and devices) relating to an investigation and to transmit this information to other units within the broader organization, to outside counsel, and ultimately to enforcement authorities for purposes of conducting any internal investigation that may arise.

## REPORTERS' NOTES

*a. Cooperation and deterrence.* Enforcement guidelines can promote deterrence by providing strong, predictable incentives for organizations to fully cooperate, in a timely way—usually before the organization determines whether the government can and will obtain the information it needs to pursue the organization. An enforcement official can undermine these incentives, which operate for the benefit of all enforcement officials, if he or she grants substantial concessions to an organization that resisted cooperating for an unreasonable time or otherwise did not fully cooperate. While such concessions may be tempting in order to enable the enforcement official to resolve the specific matter at hand, they send a signal to other organizations that they may be able to resist cooperation until they are confident that the government is able to pursue them without losing the ability to obtain favorable settlement terms through late-stage decision to cooperate.

Nevertheless, full-cooperation credit may be appropriate when, for example, the organization initially resisted cooperation because it was directed to do so by a member of executive management, but the organization later changed its leadership and proactively cooperated in good faith. An organization should not get credit for late-stage cooperation if its delay undermined enforcement authorities' ability to pursue appropriate actions against individuals, for example, by running out the clock on the statute of limitations.

*b. Federal policy on whether self-reporting and cooperation are distinct.* The U.S. Department of Justice's policies treat self-reporting and cooperation as distinct activities. Principles of Federal Enforcement of Business Organizations (hereinafter Federal Corporate Enforcement Principles) § 9-28.210. U.S. Dept. of Justice, Justice Manual, § 9-28.210 (2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210. These Principles follow the U.S. Department of Justice's approach. A number of federal agencies, such as the Securities and Exchange Commission (SEC), treat self-reporting as a component of full cooperation. See § 6.05, Reporters' Note e.

*c. Department of Justice policy on full cooperation*. The Federal Corporate Enforcement Principles recognize the central import of individual liability to efforts to deter corporate crime. U.S. Dept. of Justice, Justice Manual, § 9-28.210 (2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210 ("Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Provable individual culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of … some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution").

Consistent with this, the Federal Corporate Enforcement Principles provide that a "prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense-level calculation "is whether the information is sufficient … to identify … the individual(s) responsible for the criminal conduct." U.S. Dept. of Justice, Justice Manual, § 9-28.700(A) (2018), citing U.S. SENT'G GUIDELINES MANUAL § 8C2.5(g), cmt. (n. 13) (U.S. SENT'G COMM'N 2010), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700. In 2021, Deputy Attorney General Lisa Monaco issued a memorandum specifying that, in order to get cooperation credit, corporations must identify all individuals involved in the misconduct, regardless of their position, status or seniority. Corporations cannot restrict their disclosures to those individuals who are "substantially involved" in the misconduct. These Principles are consistent with this broad disclosure duty in requiring companies to disclose both the identity of all those who are culpable for the misconduct as well as all those who, through their involvement, are material witnesses to the misconduct. U.S. Department of Justice, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021) https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

The Department of Justice's FCPA Corporate Enforcement Policy provides additional incentives for organizations to cooperate, beyond those in the general principles discussed above. In order to get credit for full cooperation under this policy, the organization must do the following:

- Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney–client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);
- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so. Additionally, where the company is aware of relevant evidence not in the company's possession, it must identify that evidence to the Department;
- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of

> overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages; …
>
> - Where requested and appropriate, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation; and
> - Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

U.S. Dep't of Just., Just. Manual § 9-47.120(3)(b) (2019).

*d. Cooperation in federal civil actions.* The Justice Manual allows organizations to get some credit for cooperation in civil cases, even if they do not fully cooperate and thus are not eligible for cooperation credit. In order to get some cooperation credit in a civil action, the organization must identify all wrongdoing by senior officials, including members of senior management or the board of directors. To obtain maximum credit, the organization must identify every individual who was substantially involved in or responsible for the misconduct. U.S. Dep't of Just., Justice Manual, § 4-3.100(3) (2018), https://www.justice.gov/jm/jm-4-3000-compromising-and-closing.

*e. Cooperation in SEC actions.* In 2010, the Securities and Exchange Commission (SEC) announced a policy of encouraging full cooperation through the use of DPAs, NPAs, and other alternatives to formal enforcement. Sec. & Exch. Comm'n, 2010-6, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, https://www.sec.gov/news/press/2010/2010-6.htm. The SEC's Enforcement Manual identifies four measures of an organization's cooperation: (1) self-policing prior to the organization's discovery of the misconduct; (2) self-reporting after discovering the misconduct; (3) full disgorgement, restitution, and remediation of the misconduct; and (4) cooperation with law enforcement. The Manual identifies a continuum of tools designed to reward cooperation, from proffer and cooperation agreements, to DPAs and NPAs, to criminal immunity requests. DIV. OF ENFORCEMENT, SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL § 6.1.2 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf. Although the agency's initial policy enabled companies to obtain a DPA or NPA without self-reporting, on Nov. 17, 2015, the SEC announced a new policy that requires companies to self-report Foreign Corrupt Practices Act violations in order to be eligible to settle through a DPA or NPA. Andrew Ceresney, Dir., Div. of Enforcement, Sec. & Exch Comm'n, ACI's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

*f. Commodity Futures Trading Commission: requirements for cooperation credit.* In 2017, the Commodity Futures Trading Commission (CFTC) announced a policy of encouraging voluntary disclosure and full cooperation through leniency for organizations that meet certain requirements. The CFTC states that its Enforcement Division requires more than "ordinary cooperation or mere compliance with the requirements of law." Commodity Futures Trading Comm'n, Release No. 7518-17, CFTC's Enforcement Division Issues New Advisories on Cooperation (Jan. 19, 2017) https://www.cftc.gov/PressRoom/PressReleases/7518-17.

The Enforcement Division's guidance states that it considers three broad policy issues in assessing an organization's cooperation:

> (1) the value of the company's cooperation to the Division's investigation(s) and enforcement actions;
> (2) the value of the company's cooperation to the Commission's broader law enforcement interests; and
> (3) the balancing of the level of the company's culpability and history of prior misconduct with the acceptance of responsibility, mitigation and remediation.

Commodity Futures Trading Comm'n, Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies, https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf

The Enforcement Division provides extensive guidance on each of these factors. Considerations relevant to the quality of cooperation include whether:

> (1) the company promptly met with Division staff to review and explain the known facts about the misconduct, including all relevant facts relating to individuals responsible for the misconduct;
> (2) the company willingly used all available means to:
>> (a) preserve relevant information under the company's appropriate control, including documents and electronically stored information ("ESI") as kept in the normal course of business;
>> (b) make employee testimony or other relevant corporate documents, ESI, and data available in a timely manner (and in compliance with the Commission's Data Delivery Standards whenever possible);
>> (c) explain transactions and interpret key information;
>> (d) provide a financial analysis of its gain from the unlawful activities; and
>> (e) enable it to respond quickly to requests and subpoenas for information, including, to the extent necessary, hire or designate adequate staff and resources;
>
> (3) to the extent that the company independently investigated the misconduct, the investigation was conducted meaningfully, in good-faith, and in a manner designed to uncover all relevant facts, such as, for example, by:

(a) using an independent entity where appropriate to investigate and report on the misconduct;
(b) identifying, securing, and reviewing potentially relevant documents and data; and
(c) seeking to identify all responsible individuals;

(4) the company outlined findings and relevant evidence regarding the misconduct, and produced full and complete reports of any internal investigations to the Division, including full disclosure of the:

(a) scope of the wrongdoing;
(b) identities of individual wrongdoers within the organization, including culpable senior executives, where applicable;
(c) identities of known or suspected wrongdoers outside of the organization, where applicable;
(d) all relevant facts about individual wrongdoers, including:
(i) relevant communications involving officers, directors, and employees; and
(ii) documents and data evidencing the misconduct;
(e) steps taken upon learning of the misconduct;
(f) processes followed to ferret out necessary information; and (g) measures taken to address and ameliorate the misconduct.

Id.

The CFTC provides a list of actions that it considers to be uncooperative conduct, including:

(1) failing to respond to requests and subpoenas for documentary information and testimony in a complete and timely manner;
(2) misrepresenting or minimizing the nature or extent of the company's misconduct;
(3) claiming that information is not available when it is; (4) failing to preserve relevant information under the company's appropriate control, including documents and ESI as kept in the normal course of business, and/or to produce such information;
(5) directing company counsel or others to limit Division staff access to employees;
(6) inappropriately advising or directing employees or their counsel not to cooperate fully or openly with the investigation;
(7) engaging in evasive, misleading or obstructive conduct during investigative testimony, interviews, or otherwise interfering in any other part of the investigation(s) or action(s);

(8) providing specious explanations for instances of misconduct that are uncovered;

(9) issuing questionnaires to employees or conducting interviews that offer suggestive responses;

(10) providing employees or former employees access to corporate documents or data beyond what those individuals would have been privy to in the course of their employment;

(11) failing to search computer hard drives properly for documents, data, and electronic images; and

(12) failing to comply with CFTC Data Delivery Standards.

Id.

*g. Organization's investigations and employees' right to counsel.* Organizations can interview their employees without triggering any of the rights that accompany a custodial interrogation by government investigators, provided that the organization's investigators are acting independently, and are not an arm of the state. Courts have ruled that an organization's investigation constituted state action when prosecutors appeared to be directing the organization's investigation and the court concluded that the government was not pursuing its own independent investigation. See United States v. Connolly, Case No. 16-cr-370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

Nevertheless, while the organization is not legally required to inform its employees about the advisability of obtaining counsel, principles of fairness suggest they should do so when interviewing potentially implicated employees. Indeed, in many countries they may be required to do so. See Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Liability*, 93 S. CAL. L. REV. 697 (2020). There is reason to be concerned that the structure of an organizational interview may cause employees to implicate themselves when they would not otherwise do so. First, employees may feel compelled to speak by the threat of termination for failure to do so. Under the twin stresses of employment loss and the threat of criminal prosecution they may not have the composure needed to accurately describe either the facts of the misconduct or their own role (and the roles of superiors) in the misconduct. Second, and perhaps alternatively, employees may fail to take sufficient care to accurately and fully describe their own role in the misconduct in a mistaken belief that their interview will remain confidential. In order to ensure that lawyers acting on behalf of an organization can conduct their internal-investigation interviews under the protection of the attorney−client privilege, organizations and their lawyers should inform employees that the lawyer is acting on the organization's behalf and that any discussions are covered by the organization's attorney−client privilege. See Upjohn v. United States, 449 U.S. 383, 389 (1981). Legally sophisticated employees can be expected to understand that the statement that the lawyer is acting for the organization implies that the lawyer is not also acting for them. They also likely will know that the organization may have a strong incentive to share any information learned with government investigators. Understanding this, sophisticated employees can be expected to seek legal representation when needed. But many employees may not understand that the fact that the interview is conducted under the organization's attorney−client privilege does not imply that any incriminating facts revealed in the interview will not be given to prosecutors. These employees may be lulled into making incriminating statements by a sense that the conversation is confidential. This can help the organization's investigation. Yet, the employee could more appropriately protect his or her rights if informed that he or she can bring a lawyer into the interview if he or she so desires. Should the employee want to cooperate, the employee's counsel would be in a position to determine whether it is in the employee's best interests to cooperate with the organization or, alternatively, consider going directly to enforcement authorities to cooperate in return for receiving personal cooperation credit. E.g., Miriam Baer, *When the Corporation Investigates Itself*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed. 2018).

*h. Federal policy on an organization's provision of legal counsel.* The Federal Corporate Enforcement Principles provides that prosecutors evaluating whether an organization has fully cooperated "should not consider whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action." U.S. Dep't of Just., Justice Manual § 9-28.730 (2008). In United States v. Stein, 541 F.3d 130 (2d Cir. 2008), the court concluded that the government violated the defendant employees' Sixth Amendment rights by pressuring their corporate employer to cut off payment of their legal fees that it otherwise would have paid.

*i. Appropriate organizational investigations and inappropriate requests to stand down.* Organizations can appropriately investigate to determine both the full extent of the misconduct and whether its employees did the acts or had the *mens rea* necessary for the offense. Compare with David Michaels, *Traders Accused of Market Manipulation Allege Misconduct by Prosecutors* WALL ST. J. (Aug. 19, 2020), discussing a letter filed with the U.S. Department of Justice by lawyers for Bank of America claiming that prosecutors warned the bank against conducting its own analysis of potentially manipulative trading out of concern that the finding could contradict the government's investigation.

*j. Cooperation in the United Kingdom.* The U.K. Serious Fraud Office (SFO) can enter into deferred prosecution agreements with companies. Full cooperation is an important prerequisite to obtaining a DPA. On Aug. 6, 2019, the SFO released its *Corporate Cooperation Guidance*. U.K. SERIOUS FRAUD OFF., SFO OPERATIONAL HANDBOOK, CORPORATE CO-OPERATION GUIDANCE (2019), https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/corporate-co-operation-guidance/. The SFO's Corporate Co-operation Guidance states that in order to get cooperation credit the company must provide assistance to the SFO that goes above and beyond legal requirements. It then states that cooperation includes

> identifying suspected wrong-doing and criminal conduct together with the people responsible, regardless of their seniority or position in the organization; reporting this to the SFO within a reasonable time of the suspicions coming to light; and preserving available evidence and providing it promptly in an evidentially sound format. Genuine co-operation is inconsistent with: protecting specific individuals or unjustifiably blaming

others; putting subjects on notice and creating a danger of tampering with evidence or testimony; silence about selected issues; and tactical delay or information overloads.

Serious Fraud Office, *Corporate Co-operation Guidance*, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/#_ftn1. Cooperation does not guarantee a company any particular favorable result. Id.

As in the United States, the SFO expects companies to preserve all relevant materials (digital and hard copy), provide them to government investigators, and identify the materials relevant to determining whether charges should be filed. It also seeks proper chain-of-custody logs. Corporate cooperation with respect to digital materials includes preserving and providing passwords, recovery keys, and the like and providing the SFO with information about relevant digital materials that the organization identified during its investigation but cannot access, such as private e-mail accounts, messaging apps, or social-media accounts. The SFO wants organizations to identify material witnesses, at home and abroad, to make its employees and agents available, and to avoid taking any actions that could taint their recollections.

The SFO is particularly concerned about "deconfliction." The SFO expects companies to consult with the SFO before either interviewing potential witnesses or suspects or taking any disciplinary actions or other overt steps. Finally, the SFO guidance states that companies seeking cooperation credit must waive any legal privilege with respect to interview notes and provides that any organization seeking to assert privilege must get the materials certified as privileged by independent counsel. Id. For an analysis of the U.K. approach to corporate criminal liability and enforcement, see Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020). For a discussion of U.K. law on cooperation and legal privilege, see, e.g., Arlen & Buell, *The Law of Corporate Investigations,* 93 S. CAL. L. REV. 697 (2020). For a discussion of cooperation and investigations in the U.K. see, e.g., Ali Sallaway, et al., *Co-operating with Authorities: the UK Perspective*, in THE PRACTITIONER'S GUIDES TO GLOBAL INVESTIGATIONS (Judith Seddon, et al. eds., 2020); see also James Carlton et al., *Employee Rights: The UK Perspective*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS (Judith Seddon et al. eds., 2020); Caroline Day & Louise Hodges, *Witness Interviews in Internal Investigations: The UK Perspective*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, 91 (Judith Seddon et al. eds., 2020).

*k. Data-privacy laws in the United States and around the world.* Organizations seeking to maximize their future ability to obtain cooperation credit should adopt (and publicize) clear policies explicitly stating that the organization has a right to obtain and share information in employees' offices, hard drives, email accounts, and elsewhere generated (or received) in the scope of employment by its employees and agents. In the United States, organizations can assert even broader rights over employees' e-mails and electronic documents because organizations generally have a property interest in any and all digital information on their servers. Overseas, however, employees often retain privacy rights in digital communication that is of a personal, instead of a business, nature. Thus, organizations cannot process all employee e-mails simply because the e-mails are on the organization's servers. Courts in some countries also tend not to credit employee consent to access obtained after an investigation has commenced. See Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2020).

*l. Academic literature.* Corporate cooperation and the use by enforcement authorities of corporate investigations has been the subject of numerous scholarly articles including: Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*, *in* CRIMINALITÀ D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO, (Stefano Manacorda and F. Centonze eds., 2018); Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel eds., 2012); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Miriam Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903 (2011); Miriam Baer, *When the Corporation Investigates Itself*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); Samuel Buell, *Criminal Procedure Within the Organization,* 59 STAN. L. REV. 1613 (2007); SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 109-175 (2016); Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N. C. L. REV. 23 (2010); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 NYU L. REV. 311 (2007); Ellen Podgor & Bruce A. Green, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. Rev. 73 (2013); Veronica Root, *A Theory of Cooperative Enforcement*, LAW & CONTEMP. PROB. (forthcoming 2020); see also Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249 (2020); Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement,* 93 S. CAL. L. REV. 101 (2020) (discussing laws impacting the relative effectiveness or government and corporate investigations around the globe).

## § 6.06. Cooperation: Waiver of the Attorney–Client Privilege and Work-Product Protection

**(a) Enforcement authorities should not seek waiver of the attorney–client privilege or work-product protection as a condition of giving the organization credit for cooperation.**

**(b) Communications falling within the attorney–client privilege, and thus subject to subsection (a)—absent an exception to the attorney–client privilege or an assertion by the organization of an advice-of-counsel defense—include communications that are:**

**(1) between:**

**(A) an organization and its inside or outside legal counsel; or**

**(B) an organization through its inside or outside legal counsel and the organization's employees during an internal investigation conducted for the purposes of determining whether and to what extent a legal violation has occurred, or for determining the organization's appropriate legal response to it; and**

**(2) made for the purposes of seeking or dispensing legal advice on behalf of the organization about the organization's activities.**

**(c) Enforcement officials can require an organization to disclose information known to it about the facts of its misconduct and its organizational actors' involvement in it because the organization can disclose this information without waiving the attorney–client privilege or work-product protection, even if it obtained that information through privileged interviews of organizational actors.**

**(d) An organization risks waiver or partial waiver of its attorney–client privilege if it reveals:**

**(1) the transcript of a privileged interview between an organizational actor and the organization's legal counsel; or**

**(2) specific statements made by an organizational actor to the organization's legal counsel during a privileged interview.**

**(e) When an organization has asserted an advice-of-counsel defense or otherwise placed attorney–client communication at issue in its response to a government investigation, enforcement authorities may ask for disclosure of the organization's communications with the lawyer that allegedly support this defense, as well as any associated attorney work product.**

**(f) Enforcement authorities should adopt preapproval and oversight procedures to guide individual enforcement officials' requests that an organization waive attorney–client privilege and work-product protections, where such requests are not based upon a legal exception.**

**Comment:**

*a. Presumption against seeking a privilege waiver as requirement for full-cooperation credit.* Organizations can fully cooperate, and get full credit for doing so, without being required to waive either the attorney–client privilege or work-product protection. Safeguarding the privileges enhances deterrence by enabling organizations to seek and obtain legal advice both prior to taking action and during the course of an investigation. This advice can help the organization prevent misconduct from taking place; investigate and respond appropriately to suspected misconduct to assess whether misconduct occurred; terminate and remediate any misconduct that did occur; and deal more effectively with prosecutors, civil-enforcement authorities, and shareholders. Organizations are more likely to obtain valuable advice and conduct full, in-depth investigations if they can do so without concern that the information obtained, including employees' interviews, may end up being publicly disclosed.

*b. Privilege extends to internal investigations conducted by in-house or external counsel for the purpose of providing legal advice, including negotiations with enforcement officials.* Organizations can conduct internal investigations under the protection of the attorney−client privilege when they delegate authority to legal counsel to obtain information about potential misconduct from the organization's employees, in conformity with the standards set forth in Upjohn v. United States, 449 U.S. 383, 389 (1981) (see § 5.25). An investigation is appropriately deemed to be for the purpose of obtaining legal services even if the organization's ultimate goal, and its expectation, is that it will self-report the information obtained, fully cooperate and remediate, and thereby obtain a declination.

*c. Privilege does not extend to information known to the organization about the facts of the misconduct and those responsible*. An organization can disclose information known to it about the facts of the misconduct and its employees' roles in it without waiving the attorney–client privilege or work-product protection even if it obtained that information through privileged interviews of its employees. Under agency law, the organization in theory knows all the information known by employees acting in the scope of employment with some intent to benefit the organization. Whenever an employee's individual knowledge is imputed to the organization for purposes of its legal liability, the organization can be said to possess this knowledge prior to any conversation that provides its lawyers with the knowledge. Thus, in theory, the organization can be deemed to know any information that its employees knew about facts that existed before their confidential conversations with the organization's counsel.

The organization, like any other party with information about its own conduct, can share that information with the government without sharing attorney–client privileged materials, even if the specific organizational representatives sharing the information obtained it directly or indirectly from confidential communications between the organization's legal representatives and its employees that took place as part of its internal investigation.

By contrast, the actual content of, as well as the words used during, confidential interviews between the organization's legal representatives and its employees that took place during the organization's internal investigation are privileged if the organization satisfied the conditions set forth in *Upjohn*, unless an exception to the privilege applies. An organization that shares the specific content of the interviews—in writing or orally—would presumably waive the attorney−client privilege unless the sharing occurs under circumstances that support a selective waiver.

*d. Advice-of-counsel defense.* An organization that asserts an advice-of-counsel defense based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue must tender a legitimate, factual basis to support the defense. When an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

*e. Exceptions.* The organization cannot assert the attorney–client privilege if an exception applies, including the crime/fraud exception, an advice-of-counsel defense, waiver of the privilege in this proceeding, or a prior waiver of the privilege. Organizations also may be required to disclose otherwise privileged information to certain regulators, such as their prudential regulator; such disclosure tends not to waive the privilege.

In addition, enforcement officials can seek court approval to obtain an organization's ordinary work product if they can establish the requisite substantial need and that failure to provide it would cause undue hardship. Restatement of the Law, Third, The Law Governing Lawyers § 88 (AM. L. INST. 2000).

*f. Common-interest and joint-defense agreements.* Section 75 of the Restatement of the Law Third, The Law Governing Lawyers addresses the privilege of co-clients:

> (1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68–72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

> (2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Restatement of the Law Third, The Law Governing Lawyers § 75 (AM. LAW INST. 2000).

Section 76 of the Restatement of the Law Third, The Law Governing Lawyers addresses joint-defense agreements, which are referred to as common-interest arrangements. It provides as follows:

> (1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68–72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.

Restatement of the Law Third, The Law Governing Lawyers § 76 (AM. L. INST. 2000). The common-interest privilege only applies to exchanged communications that were themselves privileged.

*g. Cooperation and common-interest arrangements.* Enforcement authorities should not seek waiver of attorney–client privileged communications between other persons and their own counsel that were obtained by the organization through a common-interest arrangement, which is regularly referred to as a joint-defense arrangement. They also should not seek materials covered by the work-product doctrine that one party to a joint-defense agreement obtained from another party to the agreement pursuant to that agreement.

A common-interest arrangement allows parties to the arrangement to share their otherwise privileged communications without waiving their attorney–client privilege. Common-interest agreements do not confer privilege upon communication or other materials that otherwise would not be privileged. Moreover, in the absence of an agreement to the contrary, any member may waive the privilege with respect to that person's own communication. Consequently, a common-interest arrangement will not preclude the organization from sharing facts it learned during its investigation from its interviews with employees other than those who are a party to the arrangement, because communications with the organization's employees in the presence of the organization's lawyer are covered by the organization's attorney–client privilege, which the organization can waive. Other parties to the common-interest agreement do not have any attorney–client privilege in those interviews (unless the interviewed employees are also employees of the other party, which is unlikely to be the case). By contrast, an employee who is a party to a common-interest arrangement can preclude the employer organization from sharing the organization's interview of that employee if the interview was a joint interview involving that employee's lawyers and thus also constituted a communication by the employee with his or her own lawyer. See Comment *f*.

Similarly, a common-interest agreement would not preclude an organization from providing materials to enforcement officials that were generated by the organization's lawyers, and are thus protected by the organization's work-product protections. The organization would not be free to provide enforcement officials with materials obtained from lawyers for another party to the common-interest agreement that is protected by that party's work-product protection.

While the restriction against seeking waiver of attorney–client privileged communication and work product protections does apply to privileged communications obtained through common-interest arrangements, enforcement officials should consider the existence, structure, and implementation of any common-interest arrangement involving the organizations and individuals with material information relevant to the investigation when determining whether an organization undertook good-faith, full cooperation consistent with § 6.05, as discussed in § 6.05, Comment *s*.

## REPORTERS' NOTES

*a. Scope of the attorney–client privilege:* According to § 68 of the Restatement of the Law Third, The Law Governing Lawyers, the attorney–client privilege may be invoked with respect to (1) a communication, (2) made between privileged persons, (3) in confidence, (4) for the purposes of obtaining or providing legal assistance for the client. The privilege applies to client communications made for the purpose of obtaining legal assistance, whether or not litigation is anticipated. Section 68 provides that the client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke or waive the privilege, either personally or through counsel or an authorized agent. A person invoking the privilege must ordinarily object contemporaneously to an attempt to disclose the communication. The person invoking the privilege ordinarily must demonstrate each element of the privilege set forth in § 68 if the objection is contested. Restatement of the Law Third, The Law Governing Lawyers § 68 (AM. L. INST. 2000).

Section 72 of the Restatement of the Law Third, The Law Governing Lawyers explicates the requirement that the legal assistance be the object of the privileged communication. The client's purpose must should be to obtain legal assistance and not "predominantly for another purpose." A lawyer's assistance is "legal in nature if the lawyer's professional skill and training would have value in the matter." The client need not seek legal assistance in litigation. Restatement of the Law Third, The Law Governing Lawyers § 72, Comments *b* & *c* (AM. L. INST. 2000).

Section 73 of the Restatement of the Law Third, The Law Governing Lawyers discusses the privilege for an organizational client and provides that confidential conversations between the organization's counsel and agents of the organization for the purpose of the organization obtaining legal advice are covered by the privilege. Restatement of the Law Third, The Law Governing Lawyers § 73 (AM. L. INST. 2000).

For a discussion of the attorney–client privilege in internal corporate investigations, see § 5.25 of these Principles.

*b. Work-product protections.* Sections 87–89 of the Restatement of the Law Third, The Law Governing Lawyers discuss the scope of lawyer work-product protection. Section 87 provides that:

> (1) Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.
>
> (2) Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.
>
> (3) Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated in §§ 88 (ordinary work product) and 89 (opinion work product) when the immunity is invoked as described in § 90.

Restatement of the Law Third, The Law Governing Lawyers § 87 (AM. L. INST. 2000).

Section 88 sets forth the scope of protections for ordinary work product. It provides that:

> When work product protection is invoked as described in § 90, ordinary work product (§ 87(2)) is immune from discovery or other compelled disclosure unless either an exception recognized in §§ 91–93 applies or the inquiring party:
>
> (1) has a substantial need for the material in order to prepare for trial; and
>
> (2) is unable without undue hardship to obtain the substantial equivalent of the material by other means.

To establish the requisite need and hardship the inquiring party must show that the material is:

(1) relevant to the party's claim or defense: and

> (2) that the party would likely be prejudiced if unable to obtain the information. This latter condition requires a showing that substantially equivalent material either is not available otherwise or can only be obtains through cost and effort disproportionate to the stake in the litigation and its value to the inquiring party.

Restatement of the Law Third, The Law Governing Lawyers § 88, Comment *b* (AM. L. INST. 2000).

Section 89 sets forth the provisions governing opinion work product and states that:

> When work product protection is involved as described in § 90, opinion work product (§ 87(2)) is immune from discovery or other compelled disclosure unless either the immunity is waived or an exception applies (§§ 91–93) or extraordinary circumstances justify disclosure.

Restatement of the Law Third, The Law Governing Lawyers § 89 (AM. L. INST. 2000).

*c. Work product: Materials prepared because of anticipated litigation.* Internal investigations may not be covered by work product protections, even when prepared by, or at the behest of counsel in anticipation of litigation, if the materials would have been prepared even without anticipated litigation and served business purposes as well. For example, in 2020 the U.S. District Court for the Eastern District of Virginia ruled that Capital One could not assert work-product protection to shield from discovery a report on its data breach that was prepared for its outside counsel by a third-party cybersecurity consultant, Mandiant. The court rejected Capital One's claim that the material was protected because Capital One failed to establish that it would not have had Mandiant prepare the report, in substantially the same form, even without the prospect of litigation. This conclusion was based in part on the fact that, prior to the breach, Capital One contracted with Mandiant and hired it to write a report for Capital One, in event of a breach, covering substantially the same topics as the report that was actually written. In addition, the report was distributed to many nonlegal employees at Capital One. *In re Capital One Customer Data Breach Litig.,* 2020 WL 3470261 (E.D. Va. 2020).

In *Wengui v. Clark Hill, PLC* the law firm, Clark Hill, lost its effort to shield protect its own investigation into its own data breach with either the attorney-client privilege or work product protection. *Wengui v. Clark Hill, PLC*, 2021 U.S. Dist. LEXIS 5395 (D.D.C. Jan. 12, 2021). Clark Hill attempted to meet its burden to show that the investigation would not have been conducted in a substantially similar form even absent anticipated litigation by pursuing a two-track approach. It hired a cybersecurity vendor to investigate and remediate the attack and also hired a law firm, Duff & Phelps, for what the firm claimed was the sole purpose of assisting the firm gather information necessary to render timely legal advice. Clark Hill was unable to gain the protection of its asserted two-track approach because the court concluded that it never proved that it in fact had a two track approach. It did not offer a sworn statement that the cybersecurity firm in fact conducted an independent investigation. Nor was any such report produced. Instead, it appears that Clark Hill hired Duff & Phelps two days after the cyberattack and Duff & Phelps in turn hired the cybersecurity firm. Consistent with this, the firm's responses to the court about the incident were based entirely on the advice of outside counsel and consultants retained by outside counsel. The report also was shared with select members of the firm's leadership team in addition to being shared with in-house and outside counsel.

*d. Federal policy on full disclosure without waiver of the attorney−client privilege.* Under the U.S. Department of Justice's Principles of Federal Prosecution of Business Organizations (Federal Corporate Enforcement Principles), full cooperation requires disclosure of the relevant facts but not waiver of the attorney−client privilege. U.S. Dep't of Just., Just. Manual § 9-28.720 (2018). Tensions arise between those two goals when prosecutors seek disclosure of witness statements, whether in writing or during an "oral download." Id. Sharing actual witness statements is likely to be deemed to be a waiver of privilege. See Sec. & Exch. Comm'n v. Herrera, 324 F.R.D. 258 (S.D. Fla. 2017) (reporting the ruling of a single magistrate judge that the privilege was waived as to some fruits of the internal investigation due to "oral downloads" of the content of employee interviews to Securities and Exchange Commission personnel).

*e. Federal Rule of Evidence 502(a) & (d).* Federal Rule of Evidence 502(a) provides that disclosure of a communication or information protected by the attorney–client privilege or work-product protection in a federal proceeding or to a federal office or agency only waives those protections for purposes of a federal or state proceeding as to the communication or information disclosed, and does not waive the protections for other undisclosed information unless: (1) the waiver is intentional, (2) the disclosed and undisclosed communication or information concern the same subject matter; and (3) they ought in fairness to be considered together.

Rule 502(d) provides that if two parties enter into an agreement concerning the effect of disclosure in a federal proceeding, the agreement is binding only on the parties to the agreement, unless it is incorporated into a court order.

*f. Confidentiality agreements with the government.* Organizations that share work product with the government can seek to retain their work-product protection by entering into a confidentiality agreement and identifying the common interests shared by the organization and the government. These include remediating the misconduct and identifying and punishing the individuals responsible.

*g. Advice of counsel.* Although ignorance or misunderstanding of the law is not a defense to many crimes, federal courts generally hold that the defense of reliance on the advice of counsel does apply to specific-intent crimes. See, e.g., United States v. Condon, 132 F.3d 653 (11th Cir. 1998); United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997); United States v. Walters, 913 F.2d 388 (7th Cir. 1990). The advice-of-counsel defense is generally not used as an affirmative defense, but instead is offered to negate an element of the offense—wrongful intent. See, e.g., Bisno v. United States, 299 F.2d 711, 719 (9th Cir. 1961). Courts generally require a defendant asserting the defense to show that he or she: consulted the lawyer before engaging in the conduct in question; made complete disclosure of relevant facts to the lawyer; consulted the lawyer about the legality of the conduct at issue; received advice as to the specific course of conduct that he or she followed; and relied on the advice in good faith. Courts have held that an organization that seeks to predicate an advice-of-counsel defense on communications with in-house or outside counsel must tender a legitimate, factual basis to support the assertion of the defense. See, e.g., Pitt

v. District of Columbia, 491 F.3d 494, 504-505 (D.C. Cir. 2007); United States v. Wenger, 427 F.3d 840, 853-854 (10th Cir. 2005); United States v. Cheek, 3 F.3d 1057, 1061-1062 (7th Cir. 1993). When an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it. See United States v. Bilzarian, 926 F.2d 1285 (2d Cir. 1991); see also U.S. Dep't of Just., Justice Manual § 9-28.720 (2017), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.720.

*h. Advice-of-counsel defense and corporate officers.* A party asserting the advice-of-counsel defense must provide evidence of the advice offered and thus waive the attorney−client privilege with respect to that advice. In United States v. Wells Fargo Bank, 132 F.Supp.3d 558 (S.D.N.Y. 2015), the court held that a corporate officer could not assert the advice-of-counsel defense in a civil case based on advice provided by corporate counsel if the corporation refused to waive its attorney−client privilege with respect to the conversation. Accord, Ross v. City of Memphis, 423 F.3d 596 (6th Cir. 2005). In the criminal context, the U.S. Supreme Court has refused to employ a balancing test. See Swidler & Berlin v. United States, 529 U.S. 399, 409 (1998) (rejecting application of a balancing test to support the waiver of the attorney–client privilege of a deceased client whose privileged communications were important to a criminal case). Nevertheless, some courts have found that in the criminal context it is appropriate to employ a balancing test to determine whether a corporation should be required to waive the privilege in order to enable an employee to pursue an advice-of-counsel defense. E.g., United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994); United States v. Grace, 423 F. Supp. 2d 1125 (D. Mont. 2006).

*i. Oversight.* The Federal Corporate Enforcement Principles include a provision, § 9-28.750, stating that organizations that believe that prosecutors are violating the DOJ's guidance governing protection of the attorney−client privilege are encouraged to raise their concerns with supervisors, including the appropriate U.S. attorney or assistant attorney general. U.S. Dep't of Just., Just. Manual § 9-28.750 (2015).

*j. Prudential regulators.* Prudential regulators tasked with ensuring the safety and soundness of institutions in a particular industry—such as the Federal Reserve—regularly require regulated institutions to disclose all relevant information, including information that would ordinarily be shielded by the attorney–client privilege. Disclosure is confidential and is structured not to operate as a waiver of the attorney–client privilege.

*k. Restatement provisions on co-clients and joint-defense agreements.* For a discussion of the provision in the Restatement of the Law Third, The Law Governing Lawyers addressing joint-defense agreements, referred thereto as common-interest agreements, see § 6.05, Comments *s* & *t*.

*j. Privilege and cooperation in the United Kingdom.* The U.K. Serious Fraud Office (SFO) can enter into deferred prosecution agreements with companies. Full cooperation is an important prerequisite to obtaining a DPA. In the United Kingdom, companies seeking to obtain cooperation credit may be required to share privileged materials. In 2016, the then-director of the SFO, David Green, stated that cooperating companies must provide the SFO with "first witness accounts." See, e.g., David Green, Dir., Serious Fraud Off., Speech at Cambridge Symposium 2016 (Sept. 5, 2016), www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/ (noting that cooperation means "providing [the SFO] with access to any first witness accounts that may have been taken [… [which] are of crucial importance […] in testing the accuracy and integrity of [the SFO's] evidence."). Current SFO Guidance provides that companies seeking credit for cooperation are expected to provide the SFO with any recordings, notes, and/or transcripts of witness interviews. The SFO has tended to expect companies to waive privilege. Companies asserting privilege are expected to provide certification by independent counsel that the material in question is privileged. Serious Fraud Office, *Corporate Co-operation Guidance*, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/#_ftn1. Sharing privileged information with the SFO does not effect a full waiver of the legal-advice privilege in the United Kingdom because, under U.K. law, companies can share selectively with the SFO without triggering a general waiver of the privilege.

In addition, U.K. law on legal privilege differs materially from, and tends to be narrower than, privilege law in the United States. See generally Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Liability*, 93 S. CAL. L. REV. 697 (2020).

*k. Legal privilege in other countries.* In contrast with the United States, which has a broad attorney–client privilege applicable to both internal and external lawyers, and to interviews of all employees of the organization (if the *Upjohn* requirements are met), many if not most other countries grant a much narrower legal privilege. For example, in most European countries (as well as many countries outside Europe) consultations with in-house counsel do not fall under the attorney–client privilege. In addition, many countries grant a corporation a privilege governing communications with external counsel only in the case of communications made by senior managers or employees with authority to speak for the organization on legal matters. Thus, many of the communications resulting from an in-depth internal investigation are not privileged. See generally, Jennifer Arlen & Samuel Buell, Id.

*l. Academic literature*. Scholarship on the interaction of the attorney–client privilege and the cooperation requirement include: Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work-product Doctrine? A Preliminary "No",* 45 AMER. CR. L. REV. 1237 (2008); Daniel Richman, *Decisions about Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295 (2008); Cindy A. Schipani, *The Future of the Attorney-Client Privilege Corporate Criminal Investigations,* 34 DEL. J. CORP. L. 921 (2009).

## § 6.07. Disgorgement, Restitution, and Remediation by Organizations

**(a) To be deemed to have undertaken full disgorgement, restitution, and remediation, an organization must do the following prior to, or as part of, any resolution for organizational misconduct:**

**(1) terminate the misconduct;**

**(2) make restitution for harm caused to victims;**

**(3) remediate material harm caused by the misconduct to persons or property;**

**(4) disgorge or agree to disgorge any benefit derived from the misconduct that has not been, or will not be, paid as restitution or by way of other remedial measures, either before or shortly after the date of the resolution;**

**(5) conduct an assessment of the underlying material causes of the misconduct and make or initiate any needed reforms to remedy any deficiencies; and**

**(6) take appropriate actions with respect to persons who are employees, non-employee agents, or suppliers of the organization, and who committed the misconduct; knowingly induced, condoned, failed to terminate, or failed to internally report it; or knowingly impeded compliance officers or the investigation.**

**(b) An organization may make restitution for the harm caused by the misconduct through payments made to persons harmed by the misconduct or to enforcement authorities with jurisdiction over the matter.**

**(c) Organizations considering disciplinary actions against organizational actors should give them appropriate opportunity to respond to any claims against them.**

**(d) When an organization is subject to enforcement actions by multiple enforcement authorities, the enforcement authorities should coordinate to ensure that the total amount of the restitution, disgorgement, and remediation required across all of the actions is appropriate.**

**Comment:**

*a. The relationship between disgorgement, restitution, and remediation.* The terms "disgorgement," "restitution," and "remediation" are used in these Principles as they are used in the Federal Corporate Enforcement Principles contained in the U.S. Department of Justice's Justice Manual. The term "disgorgement" refers to the requirement that an organization forfeit the gains from its misconduct. The term "restitution" refers to payments by the defendant that are based on the harm caused to the victim, usually for the purpose of compensation. The term "remediation" refers to two different activities. The first is efforts by the organization to remedy in kind the harm that it caused. For example, an organization that polluted a plot of land could undertake remediation by removing the pollution from the field. The second is efforts by the organization to undertake internal remediation of the root causes of the misconduct within the organization.

These Principles employ consistent terminology across the criminal and civil law sections while recognizing that traditionally, the term restitution has been defined differently in civil law and by the Restatement of the Law, Restitution. In the Restatement, "restitution" refers to liability based on *unjust enrichment*, regardless whether the defendant's conduct has been innocent or wrongful. Liability for unjust enrichment is most easily distinguished from a liability for harms by observing that restitution is measured by benefit to the defendant, not by injury to the plaintiff. Thus, under this definition, the term "restitution" does not refer to victim compensation or other criminal penalty. See Restatement of the Law Third, Restitution and Unjust Enrichment § 1, Comment *e(2)* (AM. L. INST. 2011). During the victims'-rights movement of the 1970s, the term "restitution" was used to refer to compensation paid by wrongdoers to victim. This usage has become pervasive and is standard usage in any context related to criminal penalties. Consistency with the Federal Corporate Enforcement Principles requires that the same usage be adopted here.

Particularly when a defendant's gains have been acquired through conscious wrongdoing, restitution of unjust enrichment is sometimes called "disgorgement," a term that has become especially common in law-enforcement contexts. In determining the appropriate amount of disgorgement or forfeiture, courts in the law-enforcement context generally look to the civil law of restitution and unjust enrichment; while in determining the amount of restitution that should be provided to victims, courts look (if anywhere) to the civil law of damages. These Principles consistently use the term disgorgement to refer to the requirement that the organization forfeit its benefit from the misconduct.

*b. Disgorgement of the net benefit from misconduct.* An organization should be required to disgorge any benefit it obtained from its misconduct. Disgorgement should be based on the net benefit to the organization of the misconduct, exclusive of any costs incurred by the organization as a result of the detection, investigation, and enforcement of the misconduct. Thus, the organization should be required to disgorge the net profit attributable to the underlying wrong, consistent with § 51(4) of the Restatement of the Law Third, Restitution and Unjust Enrichment. The focus on net profit is intended to ensure that disgorgement eliminates the profit from misconduct, while avoiding, so far as possible, the imposition of an additional penalty.

When determining the net profits subject to disgorgement, enforcement officials should treat the legitimate costs of operating the business to produce the benefit that is subject to disgorgement as a deductible expense to be subtracted from that benefit to obtain the net benefit of the misconduct. The organization is not entitled to deduct as an expense the marginal costs of the wrongdoing itself, the costs of detecting or investigating such misconduct, or litigation expenses resulting from the misconduct.

Thus, if an organization obtains a contract to build a bridge, for which it will be paid $100 million, as the result of paying a $10 million bribe to a foreign official, and the bridge will cost it $50 million to build, its restitution payment (if the bribe is detected after the contract is complete) should be the $50 million net benefit it obtained from the project, which is the $100 million it obtained from the corrupt contract minus the legitimate costs of building the bridge. The $10 million bribe—although an expense to the organization—is not deducted from the profit subject to disgorgement.

When enforcement officials are able to pursue the bribe recipient, the bribe recipient should be required to disgorge the $10 million bribe, in addition to any sanctions imposed.

In determining whether the organization should be required to disgorge any benefit that it received from the misconduct, the organization should only be required to disgorge the amount of its benefit that is not both matched by losses to the victim and taken into account in determining the amount it is required to pay in restitution or remediation.

Amounts paid as restitution to victims for the harm caused can be counted towards the organization's obligation to ensure it does not retain any net benefit from this misconduct.

*c. Restitution to specific victims.* When specific victims can be identified, enforcement official should require the organization to pay restitution for the harm caused to the victims, either directly to the victims or to enforcement officials authorized to ensure that restitution is made to the victims. In addition, or alternatively, the organization may be required to undertake specific actions to remediate the harm caused. For example, an organization that has illegally dumped toxic chemicals into a town's water source may appropriately be required to both compensate the townspeople for any harm to their person or property and undertake remedial measures to decontaminate the water source.

*d. Disgorgement, restitution, and remediation in corruption cases.* An organization that makes corrupt payments in order to gain or retain business is unjustly enriched through the business opportunities obtained by corruption. Organizational resolutions should ensure that the organization does not retain the profit it obtained from its corrupt activities.

Such payment also can harm to the government entity impacted by the corruption. Thus, a nontrial resolution with an organization that made corrupt payments also should require the organization to try to remedy the harm caused, to the extent this is practicable. In some cases, enforcement officials may best be able to achieve this goal by requiring the organization to pay restitution to the organization or country that was a victim of the corruption (which would result in a corresponding reduction in the disgorgement award). Whether restitution is appropriate depends on the facts and circumstances. These include whether the victim suffered an identifiable and compensable harm, as would be the case if the corruption caused it to be overcharged or to receive inferior quality goods or services. Restitution is appropriate in circumstances in which enforcement officials are confident that the award would indeed to benefit the entity (e.g., the foreign country) that was the victim. Restitution likely is not appropriate if the victim of the corruption has not itself undertaken reasonable measures to remediate its risk of being a victim of corruption in the future, resulting in a risk that restitution payments could be diverted for private gain. In such a situation, it may be more appropriate to require the organization to undertake measures to directly remediate the harm caused, for example, by remediating any deficiencies in the quality of its goods or services or reducing the amount it charges the victim organization as a remedy for any past overpayments.

*e. Remediating the root cause of the misconduct.* Organizations that are fully committed to remediating the cause of the misconduct should conduct a thorough cause analysis to determine the underlying (or root) causes of the misconduct. Appropriate areas of consideration include, but are not limited to, the tone at the top and in the middle of the organization, the effectiveness of communication with and training of employees; the organization's compensation, promotion, and retention system; effectiveness of the compliance program; effectiveness of supervisors' oversight of employees and their response to suspected or detected material misconduct; the effectiveness of, and employees' utilization of, the organization's internal-reporting system; and the effectiveness of the organization's data analytics.

Organizations should implement the operational, organizational, and personnel steps needed to ensure that employees understand their obligations under the law, are discouraged from (and not rewarded for) engaging in misconduct, and have provided a credible awareness that those who engage in or are responsible for misconduct will be punished. Organizations thus should identify any deficiencies in their training and compliance programs and reform them.

In addition, organizations seeking to remediate the causes of the misconduct should investigate whether their compensation and promotion policies contributed materially to causing the misconduct, and respond appropriately to any evidence that they did. An analysis of such policies should include an assessment of whether employees were asked to meet unrealistic targets, such as sales targets.

Organizations also should: investigate whether there is evidence that non-complicit employees were aware of, or suspected, that misconduct was occurring; determine whether they reported their suspicions internally (and if not, why not); and determine what actions were taken with respect to any reports of potential misconduct that were made internally. They also should remedy any deficiencies identified by such an analysis.

Organizations also should investigate whether high-level personnel, other employees with direct authority over the employees responsible for the misconduct, and employees in the organization's compliance program detected the misconduct. If they did not, the organization should assess why they failed to detect it. If they did detect it, the organization should assess whether they responded appropriately.

Organizations with data-analytics programs also should investigate whether their programs detected the misconduct and, if not, identify how to improve the organization's approach to transmitting information between data analytics, human resources policies and practices, and the internal-reporting system.

*f. Employee discipline and remediation.* Internal discipline is a powerful deterrent against wrongful conduct by an organization's employees. It also is vital to the organization's ability to rehabilitate itself by addressing the underlying causes of the misconduct.

Organizations should remediate the cause of the material misconduct and reduce the risk of future material misconduct by taking appropriate actions with respect to organizational actors and third-party contractors responsible for either the misconduct or for supervisory or compliance deficiencies that led or contributed to the organization's failure to prevent, promptly detect, or appropriately respond to the misconduct.

Disciplinary measures include termination, demotion, loss of unvested bonuses, and clawbacks of any bonus compensation based on favorable financial results attributable in whole or in part to material misconduct. Organizations should presumptively discipline employees who knowingly engaged in criminal or civil material misconduct, absent special circumstances. These special circumstances could include the decision of an individual who was implicated, but not substantially responsible for the misconduct, to report it to the organization or to enforcement authorities.

Remediation also requires an appropriate response by the organization to high-level and substantial authority personnel whose significant failure to exercise appropriate supervision over the employees responsible for the misconduct enabled the misconduct to occur or to continue for longer than it should have. Appropriate remediation will depend on the circumstances, including whether the high-level or substantial authority personnel:

(1) were aware of, and knowingly failed to take appropriate actions to address, a material risk of material misconduct; or

(2) were aware that the misconduct was occurring or was likely occurring and knowingly failed to take action to terminate it or to report it to appropriate authorities within the organization. Additional training and other responses designed to train or otherwise rehabilitate the employee, rather than an adverse employment action, may be appropriate in cases in which an employee who failed to take reasonable care in exercising her oversight duties was acting under a good-faith belief that the information in his or her possession did not indicate that a material crime had occurred.

In evaluating the organization's response to implicated employees, enforcement officials should consider whether the employee has been adjudicated responsible for the misconduct, and, if not, whether the employee had a good-faith basis for concluding that his or her conduct did not violate the law. An organization should also use its internal processes to enable an employee to present his or her side of the story. The appropriate organizational response to an individual who has been found legally responsible for the misconduct differs from the appropriate response to an individual who the organization suspects committed misconduct but may not have done so. Internal discipline is a powerful deterrent against wrongful conduct by an organization's employees. An organization can fully remediate without permanently terminating those employees who were suspected of material misconduct if, in the end, the employees were found not to have been substantially responsible for knowingly committing material misconduct.

*g. Compliance officials.* In situations in which the compliance department did not detect the misconduct, or detected suspected misconduct but apparently did not conduct an appropriate investigation, or identified misconduct but did not terminate it, the appropriate response depends on the reason for the deficiency. For example, in considering the timeliness and resources devoted to an investigation, it is important to consider the information available to the compliance officer at the time of the misconduct and the relative priority of any other matters then being addressed by the compliance officer. Compliance officials should not be treated as responsible for unterminated misconduct if they detected it, reported it, and recommended its termination to appropriate authorities within the organization, but those authorities declined to act. By contrast, compliance officers should be regarded as having neglected their duties if they did not report and recommend termination of detected material misconduct in order to avoid triggering a negative response from powerful senior executives within the organization.

Compliance officers should not be viewed as neglecting their duties if they in good faith sought the resources and information needed to effectively perform their functions but were provided inadequate resources or denied access to information. Remediation in such circumstances is appropriately targeted at any employees who knowingly did not provide the compliance office with the resources or information it needed to perform its functions effectively.

*h. Clawbacks.* Enforcement officials assessing an organization's remediation efforts should determine whether the organization has ensured that high-level or substantial authority personnel who committed, conspired to commit, aided and abetted the commission of, or knowingly condoned misconduct are not permitted to obtain any benefit derived from the organization as a result of it, whether or not they are subject to criminal charges. Such benefits include any bonuses, the value of stock options, and other compensation that is attributable to positive outcomes that the organization obtained as a result of this misconduct.

Enforcement officials assessing an organization's remediation efforts also should determine whether the organization has ensured that:

(1) executive management;

(2) senior managers of any unit of the organization involved in material misconduct; or

(3) high-level or substantial authority personnel, who were aware of the misconduct and failed to terminate it or who approved the pursuit of particular business transactions after being informed by the organization's compliance office that there was a substantial likelihood that the transactions were unlawful, do not retain any compensation that resulted from the increased profits (or other benefits) resulting from the transactions.

Appropriate remediation also may include reform of the organization's policy governing claw backs and its other mechanisms for ensuring that the employees listed above misconduct do not retain any portion of their incentive-based compensation that is attributable to the misconduct.

It is important to claw back any bonuses directly attributable to material misconduct, even when recipients did not directly engage in the misconduct, because such action enhances the organization's message that it is committed to compliance and thus will not allow its management to retain benefits obtained from misconduct. By having such a claw-back policy, an organization may enhance management's commitment to preventing misconduct.

Claw-back policies can create perverse incentives for employees to avoid detecting and self-reporting misconduct in order to avoid losing previously earned bonuses. This is one reason it is generally recommended that individuals in the compliance function (1.01(i)) should not receive bonuses and incentive pay tied to the firm's financial health (see § 5.16(b)), so that personnel in compliance do not risk having any compensation clawed-back should they detect and promote self-reporting of misconduct.

*i. Restitution and remediation when a business opportunity obtained through misconduct remains incomplete.* Organizations that committed detected material misconduct should not be permitted to obtain the benefits of their misconduct, including any contracts or other business opportunities that were obtained, in whole or in part, as a result of misconduct. In some situations, the most appropriate way to achieve this goal may be to invalidate the contract. Yet, there are situations in which terminating the unlawfully obtained arrangement may not be appropriate, for example, if it imposes a material and inappropriate harm on a counterparty or innocent third parties. Consider, for example, an organization that obtained, through bribery, a contract to build a power-generating station that a developing country needs to bring electricity to rural areas. Requiring the organization to terminate the contract could substantially delay, if not thwart, completion of the project and might even increase its costs. In such circumstances, an organization may be appropriately deemed to have fully remediated even if it is allowed to retain and complete the project. Enforcement officials should enter into discussions with the organization to determine how best to ensure that the project is completed in a timely fashion while not allowing the organization to be unjustly enriched by its misconduct.

Enforcement officials need not allow the organization to complete the contract if another entity, which is acceptable to the counterparty, is willing to complete the work at the original contract price, or under terms that the counterparty prefers to the terms of its original contract.

*j. Coordination across enforcement authorities when mandating disgorgement and restitution payments.* Organizations that engage in material misconduct may be subject to enforcement actions by multiple enforcement authorities, each with authority to require the organization to pay restitution. Unless the relevant statute or regulation provides for restitution awards that exceed the harm caused by the organization's misconduct, the total amount of restitution should equal, but not exceed, the total harm to all of the victims. The total amount of disgorgement required should not exceed the net benefit to the organization from the misconduct, calculated without including any expenses incurred in anticipation of or as a result of any enforcement action associated with the misconduct. This may require one or more enforcement authorities to credit restitution payments or disgorgement made to other enforcement authorities.

*k. Remediation alone does not warrant resolution through a deferred prosecution agreement or a non-prosecution agreement.* Disgorgement, restitution, and remediation are important goals of criminal enforcement but do not provide enforcement authorities with independent justification for agreeing not to convict an organization for detected misconduct. To ensure that organizations are appropriately rewarded for self-reporting and full cooperation, enforcement authorities should reserve access to deferred prosecution agreement, non-prosecution agreement, or declination to organizations that undertake full corrective action in accordance with § 6.01(m), or that cooperate in accordance with § 6.05. These forms of nontrial resolution should not be used to reward other forms of good conduct undertaken after misconduct was detected, such as restitution, remediation, and post-crime reforms, because doing so undermines enforcement officials' ability to use these forms of nontrial resolution to induce self-reporting and cooperation.

*l. Voluntary restitution:* When assessing whether the organization acted in accordance with § 6.07, and in determining the sanction to be imposed on the organization, enforcement officials should take into account whether the organization voluntarily provided prompt restitution to victims, especially if the restitution voluntarily provided by the organization exceeded the amount that the enforcement authority could have awarded.

**REPORTERS' NOTES**

*a. Restitution, disgorgement, and remediation.* The general topic of unjust enrichment was renamed "restitution" as the result of a last-minute change by the American Law Institute in 1936. The multiple meanings of the word, and the ambiguity that inevitably resulted, have been a source of difficulty ever since. See Restatement of the Law Third, Restitution and Unjust Enrichment § 1, Comments *c, e,* and *g* (AM. L. INST. 2011). On the place of "disgorgement" within the law of unjust enrichment—and the recurrent problems of measuring "net profit" for this purpose—see § 54 and Comments *e–k.* Restatement of the Law Third, Restitution and Unjust Enrichment § 54, Comments *e–k* (AM. L. INST. 2011).

*b. Supreme Court precedents on restitution and disgorgement and Congress' response.* In Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936 (2020), the U.S. Supreme Court held that the appropriate measure of disgorgement in Securities and Exchange Commission (SEC) enforcement actions is the general measure of restitution (in the private-civil-litigation sense) of wrongful gains that the Court employed in earlier decisions involving litigation between private parties, and as summarized in the Restatement of the Law Third, Restitution and Unjust Enrichment. The Court in *Liu* predicated disgorgement on the net benefit to the defendant of the misconduct. This is consistent with Kokesh v. Sec. & Exch. Comm'n, 137 S. Ct. 1635 (2017), in which the Court looked to the civil law of restitution in holding that a "disgorgement" remedy that exceeded the net benefit to the defendant of the misconduct constituted a penalty and (as the SEC had asserted) as liability for unjust enrichment consistent with common-law restitution.

Subsequently, Congress amended Section 21(d) of the Securities and Exchange Act of 1934; these amendments became law on Jan. 1, 2021. Amended Section 21(d) grants the SEC authority to obtain disgorgement in civil actions of "any unjust enrichment by the person who received such unjust enrichment as a result of such violation." SEC authority to seek disgorgement in a civil action is thus now granted expressly, rather than simply being implied. The statute now provides for a five year statute of limitations for most disgorgement actions, but allows the SEC to seek disgorgement up to 10 years after the latest date of the violation for scienter-based violations, including the antifraud provisions of Section 10(b) of the Exchange Act, Section 17(a)(1) of the Securities Act, and Section 206(1) of the Investment Advisers Act. National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501.

*c. Federal criminal enforcement.* The U.S. Department of Justice's Principles of Federal Prosecution of Business Organizations (Federal Corporate Enforcement Principles) state that an organization's proactive disgorgement, restitution, and remediation are factors prosecutors should consider in determining whether to charge the organization and also what form of settlement resolution to favor. See U.S. Dep't of Just., Just. Manual § 9-28.1100 (2020). The Federal Corporate Enforcement Principles provide that the factors prosecutors should consider in determining whether an organization has fully remediated include: payment of restitution to victims prior to any criminal charges being brought, proactive remediation by the organization of its compliance program, and appropriate discipline of wrongdoers.

*d. Voluntary remediation in the securities context.* An organization may benefit in two ways from taking proactive, full corrective action in accordance with § 6.01(m) to remedy deficiencies in its internal controls that led to a violation that implicates the securities laws. First, the organization may obtain a more favorable resolution for the detected misconduct. Second, the organization reduces the risk of being charged with a knowing or willful failure to establish effective internal controls should issues arise in the future. E.g., 17 C.F.R. § 270.38a-1 and 17 C.F.R. § 275.206(4)-7.

The SEC's enforcement policy provides that voluntary remediation is one of the factors that the SEC will consider in determining the extent to which an organization's cooperation will warrant a reduction in the severity of charges and/or penalties. The SEC also takes proactive remedial measures into account in determining whether to seek a waiver of disqualification following a criminal or regulatory enforcement action that could trigger such a collateral sanction. U.S. Sec. & Exch. Comm'n, Release No. 44969, Report of Investigation Pursuant to § 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (2001), https://www.sec.gov/litigation/investreport/34-44969.htm (Seaboard Report); see also U.S. SEC. & EXCH. COMM'N, SPOTLIGHT ON ENFORCEMENT COOPERATION PROGRAM (last modified Sept. 20, 2016), https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

In determining whether an organization has fully remediated, the SEC appears to focus on three factors. First, whether the organization identified the root causes of the misconduct and took proactive, full corrective action in accordance with § 6.01(m), to prevent its reoccurrence. Such steps often include reform of the organization's compliance program. Second, whether the organization acted proactively to make prompt disclosures to, and pay full and fair restitution to, any third parties injured by the violation. Third, whether the organization appropriately disciplined any personnel who engaged in the misconduct. Id.

*e. Mandatory Victims Restitution Act of 1996:* The Mandatory Victims Restitution Act of 1996 mandates restitution to: (1) victims of violent crimes, as defined in 18 U.S.C. § 16 (2013); (2) victims of offenses against property under Title 18, including any offenses committed by fraud or deceit; and (3) victims of offenses defined in 18 U.S.C. § 1365, relating to tampering with consumer products. See 18 U.S.C. § 3663A(a), (c)(l)(A)-(B).

*f. Restitution payments to victims or others.* Enforcement officials can take measures, such as those associated with SEC Fair Funds, to put restitution payments in a fund that can be used to provide compensation to victims of the paying organization's misconduct. See 15 U.S.C. § 7246(a) (2010), Sarbanes-Oxley Act of 2002 (SOX) ("Fair Fund Provision"). Other agencies that collect funds for distribution to victims include the Commodity Futures Trading Commission, see 7 U.S.C. § 18(a), (d) (2013); 17 C.F.R. pt. 12 (2014); the Federal Trade Commission, see Stipulated Final Judgment & Order for Permanent Injunction & Other Equitable Relief as to Defendants LifeLock & Davis at 9, Fed.Trade Comm'n v. LifeLock, Inc., No. CV 10-530-PHX-NVW (D. Ariz. Mar. 15, 2010); and the Department of Justice (DOJ), see Reporters' Note c, supra.

There are circumstances in which it is not practicable to make restitution payment to victims. In the past, federal prosecutors have authorized payments to third parties, such as those who serve the victims' communities in a way related to the harm or nonprofits that serve to deter the harm. In reaction to alleged abuses of these practices, the DOJ Criminal Division adopted a policy against requiring organizations to make payments to charitable, educational, community, or other organizations or individuals that are neither victims of the criminal activity nor provide services to redress the harm caused by the defendant's criminal conduct. The policy does not apply to:

- an otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment or from official corruption.
- payments for legal or other professional services rendered in connection with the case.
- to payments expressly authorized by statute, including restitution or forfeiture.

U.S. Dep't of Just., Just. Manual § 9-16.325 (2020). This Section does not restrict "community restitution" payments made pursuant to 18 U.S.C. § 3663(c) or those included in resolutions in environmental matters

While payments to third parties should not be used excessively and without oversight, there are circumstances in which payments to a third party, such as a nonprofit or a non-governmental entity, may be the most effective and appropriate way to provide remediation of the harm caused directly to those impacted by it. For example, consider the situation of an organization that bribed senior government officials in a developing country in order to obtain lucrative contracts to provide health services to the populace at an excessive cost, in a context in which the corruption touched the highest levels of the government. Payments to the country itself might not serve to remediate any harm caused to the public if there is reason to be concerned that the payments would not end up in the public fisc. In such circumstances, mandated payments to a nonprofit or non-governmental authority that provides medical care to the area impacted by the corruption may be a more effective way to remediate the harm caused by the misconduct. For example, in an enforcement action against Smith and Ousman Ltd. for bribes paid in Kenya, the U.K. government used restitution payments made by the organization to purchase seven ambulances for Kenya, rather than providing cash payments directly to the Kenyan government. https://baselgovernance.org/news/first-ever-uk-conviction-corporate-foreign-bribery-kenya, https://www.printweek.com/News/article/2m-smith-ouzman-fine-funds-african-development.

*g. Remediation and employees.* Remediation often includes actions by the organization to appropriately discipline, retrain, claw back compensation from, or take other remedial actions with respect to employees who were either responsible for the misconduct or who failed to take appropriate actions to detect, investigate, terminate, or remediate the misconduct.

Remediation is important because, even when prosecutors are committed to pursuing managers who were legally responsible for a crime, managers who were ultimately responsible for inducing the misconduct indirectly or directly are able to escape liability when, as is often the case, there is a sufficient distance between them and the criminal acts that they cannot be treated as primary violators, conspirators or aiders and abettors. SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, 130-132 (2016); Samuel W.

Buell, *Criminally Bad Management*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (J. Arlen ed., 2018); Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL. REV. 265 (2014). Organizations can address this problem, in part, by taking remedial measures with respect to responsible employees, potentially including termination of managers substantially responsible for material misconduct, retraining, claw backs, and other measures. Remediation also enables the organization to undertake appropriate corrective or disciplinary actions with respect to people who were responsible for material deficiencies in the company's efforts to prevent, detect, or investigate and respond to the misconduct. For example, when properly structured, claw-back provisions that enable organizations to take back compensation paid to managers that was predicated on outcomes (such as stock price increases) resulting from misconduct can be an effective tool for imposing some costs of misconduct on managers who were directly or indirectly responsible for it or who benefit from it. E.g., John Armour, Jeffrey Gordon, & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE. J. REG. 1 (2020).

Nevertheless, prosecutors should take care not to seek termination of any employee as a condition of remediating the harm unless the employee has already been found legally responsible for the misconduct or has been found responsible for the misconduct in an internal disciplinary action in which the employee had an opportunity to challenge the evidence against him or her and present their own evidence, or has agreed that he or she would not contest an enforcement action were one brought. An individual may be found not to have engaged in misconduct in situations in which an enforcement official is certain that the individual's actions violated the law.

*h. Special environmental projects.* For many years, settlements of federal actions for environmental violations regularly included a provision that allowed the violator to undertake a project designed to provide a tangible environmental or public-health benefit to the environment or to the community affected by the misconduct. The projects were closely related to the violation being resolved but went beyond what is required under federal, state, or local laws. The U.S. Environmental Protection Agency treated an organization's voluntary agreement to perform a Supplemental Environmental Project (SEP) as a factor to be considered in determining the appropriate settlement penalty and typically reduced the penalty imposed as a result of the SEP.

In 2008, Congress specifically authorized SEPs for diesel emission-reduction projects in settlement of Clean Air Act violations (see 42 U.S.C. §§ 16138–16139).

The Justice Manual currently provides that, notwithstanding the general prohibition on payments to third parties, limited exceptions exist for payments to directly remedy harm to the environment, as set from in Memorandum from the Attorney General, Prohibition on Settlement Payments to Third Parties (June 5, 2017) https://www.justice.gov/opa/press-release/file/971826/download. The Environmental Crimes Section of the Environmental and Natural Resources Division has issued guidance designed to ensure that the payments are narrowly tailors to the facts of the case. The guidance also provides that the entity receiving the funds be legally authorized to do so and the prosecutors cannot have any interest in the entity that could give rise to a conflict. U.S. Dep't of Just., Just. Manual § 9-16.325 & § 5.11.105.

*i. Academic literature.* Among other issues, the academic literature has examined efforts by specific agencies to obtain disgorgement of profits or to provide restitution to victims: E.g., Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors*?, 63 BUS. LAW. 317 (2008); Michael D. Sant'Ambrogio & Adam S, Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV 1992 (2012); Urška Velikonja*, Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distribution*s, 67 Stan. L. Rev. 331 (2015); Urška Velikonja, *Public Enforcement After Kokesh: Evidence from SEC Actions*, 108 GEO. L.J. 389 (2019); Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103 (2008); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 527 (2011); see also David A. Skeel, Jr., *Welcome Back, SEC*?, 18 AM. BANKR. INST. L. REV. 573, 583-584 (2010). For a discussion of victim-versus-victim restitution in the context of Ponzi schemes, see, e.g., Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291 (2014); Andrew Kull, *Common-Law Restitution and the Madoff Liquidation*, 92 B.U. L. REV. 939 (2012).

## § 6.08. Assessing the Effectiveness of an Organization's Compliance Function

**(a) In assessing the effectiveness of an organization's compliance function (§1.01 i), enforcement officials should reference the Principles set forth in Chapters 3 and 5 to assess whether the compliance program was:**

**(1) well-designed;**

**(2) adequately resourced and empowered to function effectively; and**

**(3) effectively implemented.**

**(b) Enforcement officials also should consider facts relating to the nature of an organization's misconduct and the organization's response that are relevant to the effectiveness of its compliance program, including:**

**(1) the underlying material causes of the misconduct;**

**(2) the appropriateness of the organization's response to any detected misconduct and the underlying causes of any deficiencies in the organization's efforts to detect, terminate, investigate, and remediate it;**

**(3) the pervasiveness and duration of any detected misconduct;**

**(4) complicity, if any, of high-level or substantial authority personnel of the organization or a unit thereof in committing, inducing, or condoning the misconduct; and**

**(5) awareness of any misconduct on the part of any employees, and, if so, whether they reported it to their supervisor, the organization's compliance or ethics department, or the organization's internal-reporting system.**

**Comment:**

*a. Relationship to Chapters 3 and 5:* Enforcement authorities are regularly called upon to assess the effectiveness of an organization's compliance function (§1.01i) after material misconduct has been detected. Enforcement officials should evaluate both the formal provisions of the firm's compliance program (§1.01m) and how the program was implemented. In addition, enforcement officials should look beyond the compliance office to ascertain whether other aspects of the organization—such as the incentives provided to employees—were responsible for causing or enabling the misconduct. The Principles set forth in Chapters 3 and 5 can guide them in making these determinations.

*b. Importance of transparency and predictability.* Government agencies that provide credit for compliance programs should be transparent about their expectations. A lack of transparency could cause some organizations not to implement needed measures to deter misconduct because they are unaware that such measures are expected. Other organizations may implement unnecessarily costly or intrusive compliance programs or elect to exit profitable business lines because they misunderstand what the relevant government authorities require.

*c. Assessment of effective compliance by enforcement officials as compared with internal assessment undertaken by organizations themselves in the ordinary course of business.* Enforcement authorities assess an organization's compliance function after material misconduct has been detected and thus have information on, and can assess, whether the compliance program was implemented effectively in the presence of material misconduct.

Enforcement officials are in a position to assess whether the compliance program prevented misconduct or enabled the organization to detect it within a reasonable time. In making this assessment, enforcement authorities should consider that their analysis occurs after the misconduct was detected. This is important because, after misconduct has occurred, a compliance program may appear to be ineffective for not preventing the misconduct, even when it would have been viewed as effective before detection of the misconduct, because the form of misconduct, and the best approaches for detecting it, appear more obvious in retrospect than they would have at the time.

In addition, enforcement officials can determine whether the organization responded appropriately to suspected material misconduct by undertaking a full investigation and promptly terminating the misconduct. Credit for implementation also can include whether the organization self-reported all material misconduct and fully cooperated.

Enforcement officials, like organizations, also need to determine whether, and, if so, how, the compliance program needs to be remediated and, if so, what is the best way to achieve this goal. This assessment includes an evaluation of the underlying causes of all material misconduct; the specific ways in which the compliance program did or did not operate effectively to detect it, investigate it, and appropriately address it; measures that can be taken to address any deficiencies; and an assessment of the degree to which specific high-level or substantial authority personnel were a significant factor in causing any material deficiencies in the organization's efforts to prevent, detect, and appropriately respond to misconduct.

Finally, as compared with organizations, enforcement authorities may have different experience and expertise in assessing compliance programs. Enforcement officials should bear in mind the extent to which they have any direct experience with, or expertise in, the challenges of putting a compliance program into operation, in general or in the industry in question. Enforcement authorities also should consider whether the organization had to design a compliance program to prevent and detect a wide variety of potential violations. Designing a reasonable and effective program may involve tradeoffs in how best to use the organization's compliance resources. An organization can have a reasonable and effective compliance program even if the program does not ensure that no violation of any kind can take place.

*d. Duration and pervasiveness of the misconduct.* Enforcement authorities evaluating an organization's compliance program should consider how long the material misconduct occurred prior to being detected. They also should consider whether the misconduct was widespread, either within a particular office or across multiple units of the organization.

In assessing whether the duration and pervasiveness of the misconduct are indicative of compliance deficiencies, enforcement authorities should consider the difficulty of deterring and detecting misconduct in the relevant business activities and assess whether an organization with an effective compliance program and internal-reporting system could be reasonably expected to have detected the misconduct sooner than the organization at issue did. The experience of other organizations that have dealt with similar material misconduct may be relevant to this analysis.

*e. Authority, access, and resources granted to employees with day-to-day operational authority over an organization's compliance program.* In assessing an organization's compliance program, enforcement officials should consider whether employees with day-to-day operational authority over compliance have the authority, resources, and direct-reporting access to both executive management and the board of directors needed to establish and implement an effective compliance program. The resources needed will depend on many considerations including the size of the organization, the nature of the compliance risks, the potential harms associated with the compliance risks, the location of the organization's operations, the industry in which the organization operates, and the laws and regulations governing the organization (see § 5.05(d), see also § 5.07).

*f. Internal reporting.* Establishment of an effective anonymous internal-reporting system is important to the ability of many organizations to implement an effective compliance program, consistent with § 5.18. In assessing an organization's internal-reporting system, enforcement authorities should consider whether the organization has:

(1) effectively informed employees about its internal-reporting system;

(2) adopted adequate policies and practices to ensure the anonymity of whistleblowers and to protect internal and external whistleblowers from retaliation;

(3) enabled employees to report suspected misconduct in their own language and from a neutral location;

(4) adopted policies and processes that ensure a prompt and thorough follow-up on reports; and

(5) implemented periodic audits of the effectiveness of its internal-reporting system. Enforcement officials also should assess whether employees—across the organization and in the specific unit in question—are utilizing the internal-reporting system and what is the organization's response when they do.

*g. Relevance of an organization's practices relating to compensation, promotion, retention, and discipline when assessing whether the organization implemented an effective compliance program.* An enforcement authority's assessment of an organization's commitment to compliance should include an analysis of its compensation and promotion policy, as well as its approach to employees who violate either the law or the firm's ethical guidelines, as these are material to effective compliance, as discussed in §§ 5.05, 5.16, and 5.17.

Compensation and retention policies and practices are important constituents of an effective compliance program. Employees often are motivated to engage in material misconduct because they expect that doing so will increase their compensation, enhance their ability to get a promotion, or protect them from termination. In addition, employees supervised by managers who focus entirely on whether employees achieved certain metrics of success (not including compliance) in conducting annual reviews are likely both to be motivated to achieve those metrics at all cost and to conclude that the organization's stated commitment to compliance is not genuine (see § 5.16).

Enforcement officials also should evaluate the degree to which the organization has either offered positive rewards for actions that promote ethics or compliance, including whether compliance is a significant metric in determining management bonuses and whether the compliance department is a pathway to career advancement.

*h. Assessment of the role of high-level and substantial authority personnel.* In assessing the effectiveness of the compliance program, enforcement officials should consider whether high-level or substantial authority personnel were complicit in committing, inducing, or condoning the material misconduct. Supervisory personnel condone misconduct when they know that some form of misconduct is occurring (or consciously avoid knowledge of its occurrence) and do not intervene to terminate it or report it to appropriate authorities within the organization. Information that high-level or substantial authority personnel condoned misconduct is relevant to enforcement officials' assessment of whether the organization has successfully implemented a culture of compliance.

The fact that one or two high-level or substantial authority personnel committed, induced, or condoned material misconduct does not automatically imply that organization failed to implement an effective compliance program. The compliance program may be effective if it appropriately responded to both the misconduct and any dereliction of duties by high-level or substantial authority personnel.

*i. Relevance of an organization's disciplinary practices when assessing whether the organization implemented an effective compliance program.* An organization's approach to disciplining or otherwise addressing employees who engage in illegal or unethical behavior is an important facet of its compliance program (see § 5.17). Enforcement officials should consider whether the organization appropriately addressed high-level or substantial authority personnel who were complicit in committing, inducing, or condoning the misconduct.

An organization's proactive efforts to remediate illegal or unethical conduct can be assessed by examining how the organization handles employees who have engaged in illegal or unethical conduct—with particular attention to the organization's approach regarding high performers who are reported to have engaged in illegal or unethical conduct. Unethical conduct includes actions directed towards other employees and customers, which are usually handled by human resources or a unit in charge of customer relations, respectively. Organizations that tolerate unethical conduct—particularly by one employee towards another—risk creating a culture in which employees believe ethics are not valued. Also, employees who violate the organization's ethical rules in one domain are at greater risk of violating them in other areas.

Enforcement officials often consider whether an organization has appropriately disciplined or otherwise addressed high-level or substantial authority personnel who condoned the misconduct—in that they knew about it (or were willfully blind to it) and did not act to terminate it or report it to appropriate authorities. In assessing whether the organization responded appropriately such high-level or substantial authority personnel, enforcement officials should consider the strength of the evidence that a particular substantial authority personnel was aware of material misconduct; the employee's seniority in the organization; whether, and the degree to which, the employee had supervisory authority over those implicated in the misconduct; what steps the employee took in response to knowledge about the misconduct; whether the organization can address the neglect by reducing compensation and/or additional training or oversight; and the degree to which the employee has subsequently assumed responsibility for his or her dereliction of duties, fully cooperated, and otherwise demonstrated that he or she can be relied on to report misconduct in the future.

Enforcement officials also should assess the steps an organization has taken to communicate its commitment to ethics and legal compliance to employees, such as informing them about situations in which the organization implemented its commitment to compliance through disciplinary or other remedial measures with respect to employees. Organizations should be given credit for efforts to appropriately publicize instances in which material misconduct was prevented, as well as anonymized summaries of disciplinary actions taken in order to educate employees and emphasize the organization's commitment to compliance.

*j. Data analytics.* Organizations can improve their compliance programs by using a variety of data sources that can help them to detect new forms of material misconduct as well as to identify employees who are particularly at risk of engaging in misconduct. In designing data-analytics programs, organizations should ensure that these systems are sufficiently integrated with other sources of information about misconduct—such as internal-reporting systems, human-resources databases, compliance deficiencies disclosed in nontrial resolutions with other organizations in the industry, customer complaints, and prior complaints about ethical violations. The organization can most effectively monitor for and prevent misconduct if it ensures that its data analytics program and its compliance program have information on employees who have engaged in unethical conduct, including towards coworkers, even if this conduct fell short of a legal violation.

*k. The organization's approach to and treatment of whistleblowers.* In assessing an organization's commitment to compliance, it is appropriate for enforcement officials to consider its policies and practices relating to employees who "blow the whistle" by reporting detected misconduct to governmental authorities. Absent a legal duty to self-report, the organization can appropriately ask, but not require, employees to report internally and provide the organization with an opportunity to respond before they report to the government. Enforcement officials should assess whether the organization proactively adopted policies and practices designed to ensure that employees do not face impediments to reporting suspected misconduct to appropriate government authorities and do not face retaliation should they do so. They also should consider the organization's commitment to, and the effectiveness of its efforts to, protect from retaliation employees who in good faith blow the whistle, internally or externally.

*l. Detection of isolated misconduct.* Incidents of isolated misconduct do not indicate that a compliance program is ineffective. Indeed, when an organization operates in a context that presents a significant risk of violation, the fact that only isolated incidents of misconduct have occurred may be evidence of an effective compliance program. This evidence is strengthened if the isolated misconduct was detected, properly investigated, self-reported, and remediated.

*m. Expert advice.* Enforcement officials may benefit from consulting a compliance expert who can advise on whether the organization's compliance program was effective and on any reforms enforcement officials propose to recommend. The compliance expert can provide valuable expertise in how a compliance program can operate most effectively within various forms of business organization. Alternatively, enforcement officials can gain valuable insight on the effectiveness of an organization's compliance program by obtaining and assessing any reports prepared by an independent compliance-certification authority, to the extent that authority is credible.

## REPORTERS' NOTES

*a. Policy of the Criminal Division of the Department of Justice on effective compliance.* The Criminal Division of the Department of Justice (DOJ) has a guidance document for prosecutors on evaluating corporate compliance programs. Crim. Div., U.S. Dept. of Justice, *Evaluation of Corporate Compliance Programs* (2020), https://www.justice.gov/criminal-fraud/page/file/937501/download. The guidance directs prosecutors to undertake three broad assessments. First, is the corporation's compliance program well-designed? Second, is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively? Third, does the corporation's compliance program work in practice?

Among other considerations, the guidance states that a well-designed program should be predicated on a risk assessment of the types of misconduct that are most likely to occur in that organization's line of business and regulatory environment. Prosecutors also should attend to whether the organization updates its risk assessment and periodically reviews the adequacy of its program. Another hallmark of a well-designed program is the "existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations" of suspected or actual misconduct, breaches of organization policies, or violations of the organization's code of conduct. Prosecutors also should attend to how effectively an organization handles these reports and communicates with employees about the results.

Factors bearing on whether an organization has implemented an effective compliance program include whether senior and middle management are committed to fostering a culture of compliance. This assessment depends on a consideration of conduct tending to encourage or discourage compliance, including responses to suspected misconduct. The effectiveness of oversight by the board of directors is also important, as are the resources provided to, and autonomy granted to, the compliance program, and the effectiveness of disciplinary measures and structure of incentives.

An assessment of whether an organization's compliance program works in practice involves more than the determination that misconduct occurred. A compliance program can be effective even if misconduct did occur. Relevant factors include: (1) how the misconduct was detected; (2) how the company responded to suspected or identified misconduct; and (3) the resources devoted to the investigation, and the nature and thoroughness of the organization's remedial efforts. An important consideration in determining the effectiveness of the organization's remedial efforts is whether it undertook an appropriate and effective root-cause analysis of the misconduct at issue.

*b. Organizational Sentencing Guidelines provisions on effective compliance.* The U.S. Sentencing Commission's Guidelines Manual, Sentencing of Organizations (Organizational

Sentencing Guidelines) have provisions outlining the features of an effective compliance program. The Organizational Sentencing Guidelines provide that in order to have an effective compliance program an organization must (1) "exercise due diligence to prevent and detect criminal conduct" and (2) "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." U.S. SENT'G GUIDELINES MANUAL § 8B2.1(a) (U.S. SENT'G COMM'N 2013). According to the guidelines, satisfying the first requirement at a minimum requires the following:

> (1) adoption of standards and procedures to prevent and detect criminal conduct;
> (2) reasonable oversight by the board of directors;
> (3) commitment by high-level personnel to ensure that the organization has an effective compliance program;
> (4) designation of specific high-level personnel to have overall responsibility for the compliance and ethics program;
> (5) designation of specific individuals to have day-to-day operational responsibility for the program who must have both appropriate resources and direct access to the board of directors or a committee thereof;
> (6) education and training of employees;
> (7) monitoring and auditing of employees' conduct;
> (8) periodic auditing of the compliance program;
> (9) adoption and publicization of an anonymous internal reporting system to enable employees to seek guidance or report misconduct;
> (10) appropriate incorporation of compliance considerations in promotion, retention, and compensation decisions; and
> (11) ensuring that the organization respond appropriately to detected criminal misconduct.

Id.

*c. Relevance of an organization's practices relating to compensation, promotion, retention when assessing whether the organization implemented an effective compliance program.* Any assessment of an organization's commitment to compliance should include an analysis of its compensation and promotion policies as well as its approach to disciplining or otherwise responding to employees who violate either the law or the firm's ethical guidelines.

Compensation and retention policies and practices are important constituents of an effective compliance program because employees often are motivated to commit crimes by the expectation that doing so will increase their compensation, enhance their ability to get a promotion, or protect them from termination. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); see Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992). Indeed, studies show that employees (including officers) are more likely to commit certain crimes when their firms focus on short-term financial returns in evaluating the performance of a division or individual. E.g., Charles W. L. Hill et al., *An Empirical Examination of the Causes of Corporate Wrongdoing in the United States*, 45 HUM. REL. 1055, 1069-1070 (1992) (finding that EPA and OSHA violations are more likely when top managers focus on rate of return criteria in evaluating division performance); see Mark A. Cohen & Sally S. Simpson, *The Origins of Corporate Criminality: Rational Individual and Organizational Actors*, *in* DEBATING CORPORATE CRIME: AN INTERDISCIPLINARY EXAMINATION OF THE CAUSES AND CONTROL OF CORPORATE MISCONDUCT (William S. Lofquist, Mark A. Cohen, and Gary A. Rabe, eds., 1997). For additional analysis of this issue, see Max Bazerman & Ann E. Tenbrunsel, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT, ch. 6 (2012) (performance metrics and incentive compensation can undermine employees' ethics); N. Craig Smith, et al., *Why Managers Fail to do the Right Thing: An Empirical Study of Unethical and Illegal Conduct*, 17 BUS. ETHICS QUAR. 633 (2007); see also Eugene Soltes, *Why It's So Hard to Train Someone to Make an Ethical Decision*, HARV. BUS. REV. (Jan. 11, 2017), https://hbr.org/2017/01/why-its-so-hard-to-train-someone-to-make-an-ethical-decision.

Beyond this, psychological studies show that organizations that provide strong financial incentives for employees to achieve certain financial results, without appropriate consideration for compliance, or those that simply emphasize profit as the primary goal, undermine their ability to achieve effective compliance because employees provided with a strong financial incentives to achieve certain goals will be more inclined to be "morally blind" to situations in which pursuit of those goals leads them to violate the law. Max Bazerman & Ann E. Tenbrunsel, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2012).

*d. Relevance of an organization's disciplinary practices when assessing whether the organization implemented an effective compliance program.* Enforcement officials assessing the effectiveness of an organization's compliance program also should consider the organization's approach to employees found to have violated the law or ethical norms. See, e.g., CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 61-62 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download (assessment of an organization's incentives and disciplinary measures are material to the evaluation of the effectiveness of an organization's compliance program).

Consideration is appropriately given not only to employees who engaged in the misconduct under investigation but also to the organization's approach to other forms of misconduct, including misconduct violating ethical norms that is known to either human resources or the unit addressing consumer complaints. There is evidence that employees' beliefs about whether they are indeed operating within a culture that places a premium on legal and ethical behavior depends on their lived experience of the organization's approach to compliance and ethics. In particular, employees' understanding of the culture depends on whether they see that employees who violate the law or behave unethically (including towards other employees, as with sexual harassment) are appropriately dealt with or, alternatively, are able to do so with impunity (especially if they are strong performers). Firms that tolerate unethical conduct transmit the message to employees that performance matters more than ethics or compliance, thereby undermining the effort to induce compliance and ethical conduct. See Max Bazerman & Ann E. Tenbrunsel, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT, Chapter 6 (2012); Jennifer Arlen & Lewis Kornhauser, *Battle for Our Souls: A Psychological Justification for Individual and Corporate Liability for Organizational Misconduct* (NYU Law and Economics Working Paper 2021); see also Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354-355, 378-382 (1997) (discussing how the criminal law's ability to establish a moral or ethical norm that impacts behavior depends on whether it is actively enforced); cf. Ernst Fehr & Ivo Schurtenberger, *Normative Foundations of Human Cooperation*, 2 NATURE HUM. BEHAV. 458, 463 (2018) (people are more inclined to acted fairly towards others when unfair behavior is penalized).

*e. Modification of a compliance program is not evidence that the prior program was defective.* Organizations may modify their compliance programs to respond to emerging challenges, nascent legislation, industry reforms, technological advancements, or other considerations. An organization's willingness to modify its compliance program can be an indication of a healthy compliance culture, and it is an effective tool in combatting entrenchment and inflexibility in its compliance program.

A successful compliance program should be adjusted based on periodic assessments of its effectiveness. The Federal Deposit Insurance Corporation emphasizes the value of flexibility: "The compliance program must be dynamic and constantly amended on an ongoing basis to focus resources where they are needed most based upon risks to the institution." FDIC, Compliance Examination Manual II-3.2 (2020) https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/compliance-examination-manual.pdf. The Office of the Comptroller of the Currency encourages assessment and adjustment when an organization's risk profile has been affected by "internal or external factors or the evolution of industry risk management practices." Office of the Comptroller of the Currency, 12 C.F.R., Pts. 30, Appendix D (Sept. 2, 2014).

*f. Rewarding and encouraging effective compliance.* Enforcement officials can help deter corporate misconduct by offering more favorable terms, such as reduced monetary sanctions and non-imposition of certain internal reforms, to organizations that adopt effective compliance programs designed to detect misconduct. Absent credit for effective compliance, organizations may be reluctant to implement measures designed to detect misconduct and bring it to light, as such efforts would only increase the expected risk to the organization of being held liable through respondeat superior. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994). The disincentive to detect misconduct can be countered by offering favorable terms to organizations that actively seek to detect misconduct and enhance enforcement officials' ability to sanction the individuals responsible for it.

The appropriate response for enforcement officials who are dealing with an organization that had an effective compliance program, but did not self-report or fully cooperate is to recommend that the organization receive a reduction in the fine imposed. The amount of fine mitigation should be substantially less than the mitigation afforded to organizations that undertake full corrective action in accordance with § 6.01(m) in order to ensure that organizations have substantial incentives to self-report and fully cooperate. In addition, and as discussed in Topic III, infra, an organization should not be eligible for a resolution through a declination, non-prosecution agreement (NPA), or deferred prosecution agreement (DPA), if it did not self-report or cooperate, even if the organization had an effective compliance program at the time of the misconduct. See §§ 6.17-6.19, 6.24, 6.25. Effective compliance programs can help deter misconduct by facilitating early detection and remediation of misconduct, but to create a salient risk to wrongdoers of being prosecuted, organizations need to self-report detected misconduct and fully cooperate, in accordance with §§ 6.04 and 6.05.

It is worth noting that the Organizational Sentencing Guidelines recognizes the interrelationship between credit for compliance and self-reporting. The Guidelines provide that an organization is not eligible for mitigation of the fine imposed on the organization based on its adoption and maintenance of an effective compliance program if it did not self-report detected misconduct. U.S. SENT'G GUIDELINES MANUAL § 8C2.5(f)(2) (U.S. SENT'G COMM'N 2018).

Similarly, the Foreign Corrupt Practices Act Corporate Enforcement Policy predicates a declination on an organization's decision to self-report and cooperate. The policy targets fine mitigation below the minimum fine set forth in the Organizational Sentencing Guidelines at organizations that either self-reported or cooperated. See U.S. Dep't of Just., Just. Manual § 9-47.120 (2019). Self-reporting and cooperation are the two actions that enhance deterrence by rendering enforcement more effective.

In July 2019, then Assistant U.S. Attorney General Makan Delrahim announced that an effective compliance program should be a consideration in determining whether an organization should obtain a DPA in a criminal or civil action predicated on an antitrust violation. Delrahim emphasized, however, that the DOJ's Principles of Federal Prosecution of Business Organizations "counsel against crediting a compliance programs when the other three hallmarks of good corporate citizenship are absent": specifically, (1) prompt self-reporting, (2) full cooperation with the Antitrust Division's investigation, and (3) remediation. Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Just., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

By contrast, the Principles of Federal Prosecution of Business Organizations treat an organization's adoption and maintenance of an effective compliance program as a consideration weighing in favor of employing a DPA or NPA to settle a case involving criminal misconduct. See U.S. Dep't of Just., Just. Manual § 9-28.010 (2015), § 9-28.210 (2018). Thus, in theory, an organization could obtain a non-final resolution, such as a DPA or NPA, solely based on its adoption of an effective compliance program. An analysis of the factors underlying existing DPAs and NPAs, however, indicates that the companies that actually obtain DPAs and NPAs sometimes self-reported and almost always cooperated prior to the criminal resolution and agreed to cooperate in the future.

*g. Mitigation of sanctions for effective compliance under federal law.* The Organizational Sentencing Guidelines provide that organizations should only get a reduction in their fine for adopting and maintaining an effective compliance program if the organization self-reported detected misconduct reasonably promptly. Unfortunately, the Organizational Sentencing Guidelines provide a much smaller amount of mitigation, as a percentage of the total fine, to large organizations whose managers participated in the misconduct than to smaller organizations, notwithstanding the fact that an effective compliance program is likely to have a greater deterrent effect in a large organization than in a small, closely held, owner-managed organization where owner-managers can readily observe the conduct of their employees. See Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. OF MIAMI L. REV. 321 (2012).

The Commodity Futures Trading Commission penalty guidelines provide that the sanction imposed should be mitigated in situations in which the organization had a preexisting effective compliance program. https:// www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download.

*h. Misleading statements about compliance under the securities laws.* An organization does not violate § 10b of the Securities and Exchange Act of 1934 for statements made in its internal anticorruption policy directed at employees and other internal controls when it states that the organization is committed to not engaging in bribery even if its senior managers were paying bribes at the time those statements were made. A company's code of ethics is aspirational, and a company does not make a materially misleading statement for retaining its code of ethics even if it has reason to believe violations have or are occurring. See, e.g., Retail Wholesale & Dep't Store Union Local 388 Ret. Fund v. Hewlett-Packard Co., 845 F.3d 1268 (9th Cir 2017); In re Cognizant Tech. Solutions Corp. Securities Litig., 2018 WL 3772675 (D. N.J., Aug. 8, 2018); In re Banco Bradesco S.A. Sec. Litig., 277 F. Supp. 3d 600, 658-659 (S.D.N.Y. 2017), Lopez v. CTPartners Exec. Search Inc., 173 F. Supp. 3d 12, 28-29 (S.D.N.Y. 2016).

By contrast, a company may be liable if it affirmatively denies that bribes occurred when it knows that they did occur, while touting its compliance program as a reason to conclude they did not occur. In such cases, liability is not predicated on the statements in the compliance program itself but instead on the statements denying that a bribe occurred. See In re Electrobras Sec. Litig., 245 F. Supp. 3d 450, 463 (S.D.N.Y. 2017). Successful actions also have been predicated on other corporate statements about the organization's compliance program and commitment to legal compliance, when the statements were made to investors, were not mere puffery, and were not genuinely or reasonably believed. See Richman v. Goldman Sachs Grp. Inc., 868 F. Supp. 2d 261, 277 (S.D.N.Y. 2012); In re Moody's Corp. Sec. Litig., 599 F. Supp. 2d 493, 508 (S.D.N.Y. 2009).

*i. Safe harbor under the securities law.* The Securities and Exchange Act of 1934 authorizes the Securities and Exchange Commission (SEC) to impose sanctions on securities brokers or dealers, and their supervisors, for committing violations of the securities laws. Among the actions giving rise to such sanctions is the failure to engage in appropriate supervision of employees who commit legal violations. Section 15(b)(4)(E) of the act, however, contains a safe harbor protecting against supervisory liability if "there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and such person has reasonably discharged the duties and obligations incumbent upon him [sic] by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with." 15 U.S.C. § 78o(b)(4)(E).

*j. Internal-controls provisions of the Foreign Corrupt Practices Act.* The internal-controls provisions of the Foreign Corrupt Practices Act require organizations that are issuers (as defined in the federal securities laws) to devise and maintain a system of internal accounting controls that meet specific requirements. Section 13(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m. Organizations can be held liable not only for deficiencies in their own compliance programs but also for deficiencies in the compliance programs of their subsidiaries. If a corporate parent has 50 percent or more of the voting control of its subsidiary, the parent is liable for deficiencies in its subsidiary's internal controls. If the parent has less than 50 percent of the voting control, it can avoid liability for its subsidiary's deficient internal controls if it acted in good faith to get the subsidiary to adopt an effective compliance program.

*k. Controlling-person liability.* Some statutes impose "controlling person" liability on individuals or organizations. The existence of an effective compliance program often is a defense to liability under these statutes. This defense does not operate to insulate organizations from any liability that can be imposed under the doctrine of respondeat superior, however. For example, under the securities laws, courts generally hold that an organization can be held liable for its employees materially misleading statements through the doctrine of respondeat superior notwithstanding the existence of a statutory section establishing controlling-person liability, which is narrower. E.g., Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1576-1577 (9th Cir. 1990), cert. denied, 111 S. Ct. 1621 (1991); Commerford v. Olson, 794 F.2d 1319 (8th Cir. 1986); In re Atlantic Fin. Mgt., Inc., 784 F.2d 29, 32-35 (1st Cir. 1986); Marbury Mgmt., Inc. v. Kohn, 629 F.2d 705 (2d Cir. 1980), cert. denied, 449 U.S. 1011 (1981); Kerbs v. Fall River Indus., 502 F.2d 731, 740-741 (10th Cir. 1974); Fey v. Walston & Co., 493 F.2d 1036, 1051-1053 (7th Cir. 1974); Lewis v. Walston & Co., 487 F.2d 617, 623-624 (5th Cir. 1973); Armstrong, Jones & Co. v. Sec. & Exch. Comm'n, 421 F.2d 359, 361-362 (6th Cir.), cert. denied, 398 U.S. 958 (1970); Johns Hopkins Univ. v. Hutton, 422 F.2d 1124, 1130 (4th Cir. 1970).

*l. Liability of managers or directors.* An organization's board of directors may have a fiduciary duty to act in good faith to ensure that the organization has established an effective compliance program along with an effective system for ensuring that the board of directors obtains information on the organization's compliance with the laws vital to their exercise of their oversight duties. As a result, even in the absence of a statutory duty to establish and maintain a compliance program, executives and directors who act in bad faith by deliberately failing to either ensure the adoption of or appropriately oversee a compliance program may be liable for any damages incurred by the organization should their bad-faith neglect be the proximate cause of the organization incurring liability for misconduct. E.g., Stone v. Ritter, 911 A.2d 362 (Del. 2006); In re Caremark

Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). The requirement that the plaintiff prove that any deficiencies were the result of sustained and intentional neglect establishes a high, but not insurmountable, bar to directors' liability. E.g., Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor*, Chapter 11 in CORPORATE STORIES (J. Mark Ramseyer ed., 2009); Hillary A. Sale, *Monitoring* Caremark'*s Good Faith*, 32 DEL. J. CORP. L. 719 (2007); Donald C. Langevoort, *Caremark and Compliance: A Twenty Year Lookback*, 90 TEMPLE L. REV. 727 (2018).

Indeed, between 2011 and 2021, the Delaware courts issued a series of opinions finding that the plaintiffs had pleaded facts that could suffice to establish directors' liability for bad faith, thereby enabling the plaintiffs to proceed to the next stage of the litigation. Four aspects of these cases are particularly important. First, in assessing whether directors have satisfied their oversight duties, the Delaware Supreme Court has made clear that it does not simply look at whether the directors established a compliance program. Instead, when a firm is in a highly regulated industry or otherwise has specific legal compliance concerns that are vital to the firm's welfare, courts will inquire into whether directors acted in good faith, both to establish a system designed to provide them directly—and not simply to provide management—with information about those specific risks and to ensure that they actually obtained and evaluated the information. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); In re Clovis Oncology, Inc. Derivative Litig., 2019 WL 4850188 (Del. Ch. Oct. 1, 2019); *In re The Boeing Company Deriv. Litig.*, 2021 WL 4059934, at *1 (Del. Ch. Sept. 7, 2021).

Second, the Delaware courts y affirmed that directors can be found liable for breach of fiduciary duty under *Caremark* for either approving a business plan that they know will lead the firm to violate the law or intentionally turning a blind eye to violations of the law by the company or its controlled subsidiary. Teamsters Local 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020); see In re Massey Energy Co. Derivative & Class Action Litig., 160 A.3d 484 (Del Ch. May 4, 2017). (finding that plaintiffs made a viable *Caremark* claim against the company's directors but lacked standing due to the company's recent merger). By contrast, directors are not liable under *Caremark* for approving conduct that violates the law if the evidence only establishes that they *should have known* that the company was violating the law, and does not establish that they *did know* (or were willfully blind to whether) the company was violating the law. Melbourne Mun. Firefighters' Pension Trust Fund v. Jacobs, 160 A.3d 484 (Del. Ch. 2016). Third, in a 2020 decision, the Delaware Supreme Court concluded that the absence of exculpatory evidence in the books and records provided by the company to plaintiffs in response to their broad request under Delaware General Corp. Law 220 created an inference that such evidence did not exist. Hughes v. Hu, 2020 WL 1987029, at *1 (Del. Ch. Apr. 27, 2020). Finally, recent Delaware cases on shareholders' ability to obtain books and records from a firm have granted shareholders access to e-mails by senior executives and directors relating to the firm's compliance with the law. See *Lebanon County Emp. Ret. Fund. v. AmerisourceBergen Corp.*, 2020 WL 132752 (Del. Ch. Jan. 13, 2020); In re Facebook Inc. Section 220 Litig., 2019 WL 2320842 (Del. Ch. May 31, 2019).

*m. Sexual harassment.* In an action against an organization for sexual harassment predicated on either a claim of hostile work environment or sexual harassment by a supervisor that did not result in a tangible employment action, the organization can avoid being held liable under federal law if it can establish that it exercised reasonable care to prevent and promptly correct any harassment and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The first prong of this defense focuses on whether the employer had an effective compliance program to address this issue: whether the organization established, disseminated, and enforced an anti-harassment policy and complaint procedure and took other reasonable steps to prevent and correct harassment. Thus, in this area, an organization's adoption and maintenance of an effective compliance program relating to sexual harassment can insulate it from federal-law liability if the organization also acted reasonably to correct any harassment. https://www.eeoc.gov/policy/docs/harassment.html; see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); see also Kolstad v. American Dental Ass'n., 527 U.S. 526 (1998). This defense is consistent with a recognition that the liability imposed on the organization for sexual harassment differs from classic respondeat superior liability in that it applies even when the supervisor engaged in quid pro quo harassment purely for personal benefit. Given the damage that harassment causes to employees and the firm's efforts to establish an ethical culture, companies can best protect themselves by seeking to ensure that their compliance program, as well as their investigations of these cases, are genuinely proactive and effective, instead of being designed to simply insulate the firm from liability.

*n. Protecting whistleblowers from "pretaliation" or retaliation.* An organization can help effectuate a culture of compliance and enforcement by avoiding policies or practices that prevent or discourage its employees from acting in good faith to report misconduct to government authorities and by ensuring that employees who do report do not face retaliation. Enforcement officials regularly include an assessment of an organization's internal reporting system and its treatment of whistleblowers when determining the effectiveness of the organization's compliance program. CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 66 (2nd ed. 2020), https://www.justice.gov/criminal-fraud/file/1306671/download. In addition, in many situations, the organization may be under a legal duty imposed by state or federal law not to retaliate against an employee who has reported misconduct to governmental authorities. For example, the qui tam provisions of the False Claims Act contain provisions prohibiting retaliation against whistleblowers. 31 U.S.C. § 3730(h). The Dodd-Frank Act includes anti-retaliation provisions that protect people in the United States who report to government authorities. 15 U.S.C. § 78u-6(h)(1)(C). An individual who reports internally to his or her firm, and then later reports to the SEC, can qualify as a whistleblower if he or she reports within 120 days of reporting to the firm. But in *Digital Realty Trust, Inc. v. Somers*, 583 U.S. (2018), the Supreme Court ruled that Dodd-Frank's anti-retaliation provisions only apply to employees who report to the SEC, and not to those who report internally. As a result, an employee who is terminated after his or her internal report but before he or she reports to the SEC would not have a valid anti-retaliation claim under Dodd-Frank, but might be entitled to a whistleblower award. Employees who report internally are not necessarily without recourse, however. They may be protected by the Sarbanes-Oxley Act of 2002, which prohibits certain companies from retaliating against an employee who "provide[s] information . . . or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain delineated fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A. The protections of Sarbanes-Oxley are weaker than those of Dodd-Frank, however, as the former includes an administrative-exhaustion requirement and limits recovery to back pay with interest, as opposed to two times back pay with interest.

Many states have statutes prohibiting false claims to the government that include protections for those who report fraud to the government. For example, the California False Claims Act states that whistleblowers are entitled to job protection if any "employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employment." CAL. GOV'T CODE § 12653. Under California law, whistleblowers who are retaliated against are entitled to reinstatement with the same seniority status, two times the amount of back pay, as well as interest on the back pay, compensation for any special damages, and, when appropriate, punitive damages. A company that violates the law also must pay the whistleblower's litigation costs and attorneys' fees.

Organizations also should ensure that employees and former employees are not prevented from blowing the whistle by internal policies or contracts. Organizations have valid reasons for requiring employees not to disclose confidential information obtained during the course of employment, and for prohibiting employees or former employees from disparaging the organization. However, organizations should exclude whistleblowing disclosures from the scope of such agreements. Several factors counsel in favor of excluding whistleblowing from the scope of nondisclosure or nondisparagement agreements. Such exclusions reinforce a culture of compliance within the organization. They also help deter misconduct by facilitating whistleblowing, and thereby increasing the likelihood that misconduct will be detected and sanctioned. Failing to exclude communications with the government from confidentiality provisions may be viewed as evidence that the organization wishes to discourage whistleblowing.

In some cases, these "pretaliation" agreements may be prohibited by law. For example, SEC Rule 21F-17, implementing a provision of the Dodd–Frank Act, provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement . . . with respect to such communications." Firms violate the law if they require employees to sign a contract that prevents disclosure of the firm's private information to outsiders unless it makes clear that employees can report misconduct to authorities such as the SEC. A firm can also violate the law if its internal reporting system or investigation requires employees to keep matters confidential, including from the SEC or other government enforcement authorities.

The SEC has filed a variety of enforcement actions against companies found to have included contract language stifling whistleblowing communications. For example, in the 2015 action *In re KBR*, the SEC sanctioned an organization for including the following confidentiality clause in its internal reporting system:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

The SEC sanctioned the company because the clause had a potential chilling effect on employees' willingness to report misconduct, regardless of whether any employee had yet been sanctioned for violating the clause. The SEC required the company to ensure that its confidentiality clause affirmatively informed employees of their right to report:

> Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the SEC, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

In re KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015). https://www.sec.gov/litigation/admin/2015/34-74619.pdf.

In 2017, the SEC sanctioned BlackRock Inc. based on a clause in a separation agreement that stated that the existing employee waived any right to obtain any financial reward for reporting misconduct, including, without limitation, under the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Sarbanes-Oxley Act of 2002, relating to conduct occurring prior to the date of the agreement. Sec. & Exch. Comm'n, Release No. 2017-14, BlackRock Charged With Removing Whistleblower Incentives in Separation Agreements (2017), https://www.sec.gov/news/pressrelease/2017-14.html#:~:text=The%20Securities%20and %20Exchange%20Commission,ability%20to%20obtain%20whistleblower%20awards.

In the same year, the SEC sanctioned HomeStreet Inc. for an indemnification agreement that stated that the firm would pay for the employee's counsel if, but only if, the employee confirmed that he was not a whistleblower. Sec. & Exch. Comm'n, Release No. 2017-24, Financial Company Charged With Improper Accounting and Impeding Whistleblowers, https://www.sec.gov/news/pressrelease/201724.html#:~:text=The%20Securities%20and%20Exchange%20 Commission,steps%20to%20impede%20potential%20whistleblowers.

The firm's post-settlement provisions on indemnification provide:

- the employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with any federal, state or local governmental agency or commission ("Government Agencies");
- the employee further understands that this Agreement does not limit Employee's ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be commenced by any Government Agency including providing documents or other information without notice to the Company; and
- This Agreement does not limit the Employee's right to receive an award for information provided to any Government Agencies.

For additional discussion see infra § 6.27 Rptr. Notes g & h.

*o. Academic literature.* Scholarship on compliance has addressed issues such as the features of an effective compliance program, how organizations or the government can use data to assess a compliance program's effectiveness, and how to structure organizational liability to encourage organizations to adopt an effective compliance program: E.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Jennifer Arlen & Lewis Kornhauser, *Battle for Our Souls: A Psychological Justification for Individual and Corporate Liability for Organizational Misconduct* (NYU Law Working Paper, 2021); John Armour, Brandon Garrett, Jeffrey N. Gordon, & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191 (2020); Amitai Aviram, *In Defense of Ineffective Compliance Programs*, 32 FLA. ST. U. L. REV. 763 (2005); Miriam H. Baer, *Governing Corporate Complianc*e, 50 B.C. L. REV. 949, 960 (2009); Miriam Baer, *Propping Up Corporate Crime with Corporate Character*, 103 IOWA L. REV. ONLINE 88 (2018); Miriam H. Baer, *Compliance Elites*, 88 FORD. L. REV. 1599 (2020); Samuel Buell, *Criminal Procedure Within the Organization,* 59 STAN. L. REV. 1613 (2007); Hui Chen & Eugene Soltes, *Why Compliance Programs Fail and How to Fix Them*, HARV. BUS. REV. Mar.–Apr. 2018, https://hbr.org/2018/03/why-compliance-programs-fail; David A. Dana, *The Perverse Incentives of Environmental Audit Immunity*, 81 IOWA L. REV. 969 (1995); Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment,* 103 IOWA L. REV. 507 (2018); Stavros Gadinis & Amelia Miazzad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135 (2019); Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. CONTEMP. PROB. 47 (2020); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016); John Hasnas, *Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics*, 39 LOY. CHI. L.J. 507 (2008); Todd Haugh, *Nudging Corporate Compliance*, 54 AMER. BUS. L.J. 683 (2017); David Hess: *Chipping Away at Compliance: How Compliance Programs Lose Legitimacy and Its Impact on Unethical Behavior*, 14 BROOK. J. CORP. FIN. & COM. L. 5 (2019); Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252 (1996); Vikramaditya S. Khanna, *Corporate Liability Standards: When Should Corporations be Held*

*Criminally Liable*, 37 AM. CRIM. L. REV. 1245 (2002); Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance,* 81 WASH. U. L. Q. 487 (2003); Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, 263, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2007); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999); William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship,* 52 AM. BUS. L.J. 157 (1996); Veronica Root Martinez, *The Compliance Process*, 94 IND. L.J. 203 (2019); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249 (2020); Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUTGERS U.L. REV. 421 (2017); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Criminal and Civil Responsibility: A Second Look at Corporate Codes of Conduct*, 78 GEO. L. REV. 1559 (1990); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003 (2017); Sharon Oded, CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT 219-259 (2013); Eugene Soltes, *Unsubstantiated Allegations and Organizational Culture*, SEATTLE UNIV. L. REV. 413 (2020); Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J. L. & BUS. 101 (2018); Eugene Soltes, *Why It's So Hard to Train Someone to Make an Ethical Decision*, HARV. BUS. REV. (Jan. 11, 2017), https://hbr.org/2017/01/why-its-so-hard-to-train-someone-to-make-an-ethical-decision.; Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS U. L. REV. 678 (1995); see also Max Bazerman & Ann E. Tenbrunsel, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT, CH. 6 (2012); Matthew Caulfield & William S. Laufer, *The Promise of Corporate Character Theory*, 103 IOWA L. REV. 101 (2018); Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 91 N.C. L. REV. 893 (2020); James Fanto, *Surveillant and Counselor: A Reorientation of Compliance for Broker-Dealers*, 2014 BYU L. REV. 1121; Yuval Feldman, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR (2018); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement,* 20 PSYCH. PUB. POL'Y & L. 78 (2014); F. Walumbwa, et al., *Ethical Leadership and Group Performance: The Mediating Role of Group Conscientiousness and Voice*, 23 LEADERSHIP QUAR. 953 (2012); Huiqui Yan, Benjamin Van Rooij, & Jeroen van der Heijden, *The Enforcement-Compliance Paradox: Implementation of Pesticide Regulation in China*, 30 CHINA INFO. 209 (2016).

Excellent books containing a compendium of chapters on a range of compliance issues by leading academic scholars include: CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij

& Daniel Sokol eds., 2021); CORPORATE COMPLIANCE ON A GLOBAL SCALE: LEGITIMACY AND EFFECTIVENESS (Stefano Manacorda & Francesco Centonze, eds., forthcoming 2022)

*p. Academic literature on internal reporting.* Academic articles on the importance of and methods of ensuring the effectiveness of internal reporting include: Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism and Other Ills*, 29 J. CORP. L. 267 (2004); Elizabeth W. Morrison & K.E. See, *An Approach-inhibition Model of Employee Silence: The Joint Effects of Personal Sense of Power and Target Openness*, 68 PERS. PSYCH. 574 (2015); Elizabeth W. Morrison, *Employee Voice and Silence*, 1 ANN. REV. ORGAN. PSYCH. 173 (2014); Eugene Soltes, *Paper versus Practice: A Field Investigation of Integrity Hotlines*, 58 J. ACC. RES. 429 (2020); Eugene Soltes, *Where is Your Company Most Prone to Lapses in Integrity?,* HARV. BUS. REV. July–Aug. 2019, https://hbr.org/2019/07/where-is-your-company-most-prone-to-lapses-in-integrity?ab=seriesnav-spotlight; see also Jodi Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 UNIV. PITTS. L. REV. 1207 (1999); see also Veronica Root Martinez, *Combatting Silence in the Profession*, 105 VA. L. REV. 806 (2019).

*q. Difficulty of determining whether a compliance program is effective.* See Thomas Baxter, Exec. Vice President & Gen. Couns., Fed. Rsrv. Bank of N.Y, Keynote Address at the Fordham University Corporate Law Center Symposium: Changing Face of Corporate Compliance and Corporate Governance, The Law of Democracy Compliance – Some Thoughts About Reaching the Next Level (Feb. 9, 2015), https://www.bis.org/review/r150210c.pdf.

*r. Tradeoff between regulation and compliance.* On the tradeoff between regulation and compliance, see, e.g., Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); Eva Lachnit, *Compliance Programmes in Competition Law: Improving the Approach of Competition Authorities*, 10 UTRECHT L. REV. 31 (2014). See James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. (2013) (exploring the regulatory origin of the tradeoff between supervision and compliance).

*s. Stories of corporations with systemic problems.* For accounts by investigative journalists of corporations whose single-minded quest for profit, the journalists concluded, both motivated misconduct and undermined the internal institutions that should have thwarted it see, e.g., CONNIE BRUCK, THE PREDATORS' BALL: THE INSIDE STORY OF DREXEL BURNHAM AND THE RISE OF JUNKBOND RAIDERS (1989); BRIAN CULVER, ANATOMY OF GREED: THE UNSHREDDED TRUTH FROM AN ENRON INSIDER (2002); DAVID ENRICH, DARK TOWERS: DEUTSCHE BANK, DONALD TRUMP, AND AN EPIC TRAIL OF DESTRUCTION (2020); DAVID ENRICH, THE SPIDER NETWORK: HOW A MATH GENIUS AND A GANG OF SCHEMING BANKERS PULLED OFF ONE OF THE GREATEST SCAMS IN HISTORY (2017); KURT EICHENWALD, CONSPIRACY OF FOOLS: A TRUE STORY (2005); see also JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP (2018); JAMES STEWART, DEN OF THIEVES (1992).

t. *Compliance functions for government institutions*: Articles discussing effective systems for ensuring ethical conduct by government actors include: Rachel Barkow, *Organizational*

*Guidelines for Prosecutor's Offices,* 31 CARD. L. REV. 2089 (2010); Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NW. L. REV. 953 (2020).

**§ 6.09. Required Internal Reforms to an Organization's Compliance Function**

**(a) Unless contrary to applicable law or regulation, criminal, civil, and administrative resolutions may include provisions that require an organization to undertake or to continue specific reforms, including changes to the organization's compliance program, or the hiring of a compliance monitor (§6.01(s)).**

**(b) A nontrial resolution with an organization may require the organization to maintain any reforms it implemented prior to the resolution for the duration of the agreement.**

**(c) A nontrial resolution with an organization may require the organization to adopt and implement an effective compliance program that meets standards defined under applicable law or regulation, or official guidance or guidelines issued by an enforcement authority or regulator.**

**(d) An enforcement official who is part of a regulator with substantial authority over the organization that extends to ensuring that its compliance program is effective may require the organization to undertake specific reforms beyond those associated with subsections (b), (c), and (e) if consistent with the regulator's authority.**

**(e) Except as provided in subsection (d), enforcement officials presumptively should not require organizations to undertake specific reforms beyond those specified in subsections (b) and (c) unless one of the following circumstances exist:**

**(1) the mandated reform is directly designed to address a cause of material misconduct that has not been fully remediated by the organization's voluntary reforms; or**

**(2) the enforcement official has substantial reasons for concluding that the organization's current executive management or its board of directors cannot be relied upon to adopt and implement an effective compliance program, and the compliance deficiency requiring remediation will not likely be addressed by a regulator with substantial authority over the organization.**

**(f) Enforcement officials who require an organization to undertake specific reforms pursuant to subsection (e)(2) should:**

**(1) target the required reforms at remediating a material cause of the misconduct;**

**(2) disclose in the nontrial resolution the justifications for imposing the required reforms; and**

**(3) include provisions in the nontrial resolution to ensure effective oversight of the organization's compliance with the required reforms by a party independent of executive management and the board of directors.**

**(g) Prosecutors' offices, civil enforcement offices, and regulatory authorities whose enforcement officials have authority to incorporate required reforms in nontrial resolutions should:**

**(1) provide clear guidance to their enforcement officials on when they should and should not use settlement agreements to impose remedial measures on organizations and what those measures should be;**

**(2) provide a way for their enforcement officials to obtain additional guidance or to consult with experts in compliance, in the industry, or in the regulatory requirements applicable to the organization so as to be better able to evaluate whether an organization's compliance program is effective; and**

**(3) periodically undertake a systematic evaluation of both the effectiveness and cost of their recommended remedial measures and the effectiveness of their oversight of the implementation of those measures and modify the measures as appropriate.**

**Comment:**

*a. Requirements that an organization adopt and implement an effective compliance program.* When enforcement officials determine that an organization did not have an effective compliance program at the time of the misconduct, they should include provisions in the nontrial resolution to ensure that the organization adopts and maintains an effective compliance program.

In situations in which the organization conducted a full and effective analysis of the root causes of both the misconduct and any compliance deficiencies, and voluntarily adopted effective reforms that fully remediate these deficiencies, a nontrial resolution should require the organization to maintain these reforms for as long as they are appropriate. There may be no need to require the organization to adopt additional reforms.

By contrast, enforcement officials may need to include provisions in the nontrial resolution that mandate that the organization undertake specific reforms if the organization did not have an effective compliance program at the time of the misconduct, does not currently have an effective compliance program as a result of any voluntary reforms, and enforcement officials reasonably believe that the board of directors and management cannot be relied on to ensure that the organization adopts and implements an effective compliance program.

*b. Reforms predicated on official standards.* When enforcement officials conclude that an organization has not adopted reforms that fully remediate any deficiencies, enforcement officials should include provisions in the nontrial resolution that require the organization to adopt and implement an effective compliance program and set forth standards for the adoption and maintenance of an effective compliance program. Except as provided in subsections (d) and (e), enforcement officials should predicate these standards on applicable laws, regulations, and official guidance or guidelines issued by relevant government authorities. For example, federal prosecutors should reference the provisions on effective compliance in the U.S. Sentencing Commission's Organizational Sentencing Guidelines (§ 8B2.1) or the U.S. Department of Justice's guidance on *Evaluation of Corporate Compliance Programs*, which sets forth factors relevant to determining whether a compliance program is effective. In some situations, enforcement officials can reference laws, regulations, or guidance issued by regulatory authorities regarding effective compliance programs.

Enforcement officials who regularly address the same type of misconduct—as is the case with prosecutors' offices that specialize in corruption or money laundering—may develop their own guidance on the requirements for an effective compliance program for that type of misconduct. If they do so, they should make the guidance publicly available and incorporate the guidance as a standard of care in their nontrial resolutions with organizations. For example, the Foreign Corrupt Practices Act Unit of the Fraud Section of the Department of Justice has developed expertise in both corruption and the underlying causes of corruption in organizations with detected misconduct, and it has developed provisions governing an effective compliance program that it incorporates into its settlement agreements.

*c. Organization-specific required reforms.* Enforcement officials presumptively should limit required reforms to those that are consistent with subsections (b)–(d). They presumptively should not require an organization to adopt specific reforms in other circumstances unless the specific reforms directly addresses an unremediated root cause of the offense or the enforcement official concludes that the organization's board of directors and executive management cannot be relied on to adopt and implement an effective compliance program.

Specific reforms are justified if directly aimed at an underlying cause of the misconduct that has yet to be remediated. For example, a pharmaceutical company found to have violated antibribery or antikickback laws through its consulting or research contracts with medical providers can appropriately be required to implement measures that provide additional oversight of those contracts if it has not already done so. In determining whether such reforms are appropriate, enforcement officials generally should consult with the regulator with primary authority over the activity impacted by the reform if they themselves are not affiliated with that regulator.

An enforcement official also may be justified in requiring the organization to undertake specific reforms beyond those consistent with subsections (b)–(d), if the official has substantial reasons for concluding that the current executive management or board of directors cannot be relied on to adopt and implement an effective compliance program, based on the considerations set forth in Comment *d*, and the organization is not subject to supervisory oversight by a regulator that is taking appropriate steps to ensure that the organization adopts and implements an effective compliance program. By contrast, prosecutors should not impose reforms beyond those consistent with subsections (b) and (c) if executive management and the board of directors can be relied on to adopt and implement an effective compliance program because, when they can be relied on, it is better to enable them to exercise their discretion to determine how best effectuate an effective compliance program given their superior understanding of the organization.

Should specific reforms be warranted under subsection (e), enforcement officials who require an organization to implement them should ensure that (i) the reforms are directly targeted at remediating the underlying causes of the misconduct, and (ii) the settlement agreement explicitly states why the reforms were required and their purpose.

In addition, when reforms are justified based on subsection (e)(2), enforcement officials should incorporate into the settlement agreement a provision that ensures effective oversight of the organization's compliance with the mandated reforms by someone independent of executive management. In some circumstances, this condition may be met by requiring that a committee of independent directors have authority over and bear responsibility for ensuring the organization adopts and implements an effective compliance program, as long as the independent directors have the expertise, time, demonstrated inclination, and resources needed to exercise genuine regular oversight over the organization's reform effort. In other situations, the requisite oversight may be provided by a regulatory authority with responsibility to audit the effectiveness of the organization's compliance program. In other situations, it may be necessary to require the organization to hire an outside monitor, in accordance with §§ 6.10–6.12.

*d. Assessing whether executive management and the board of directors can be relied on to adopt and maintain an effective compliance program in the future.* Deficiencies in an organization's compliance program as it existed at the time of the misconduct do not, in and of themselves, establish that the current management and the current board of directors cannot be relied upon to adopt and maintain an effective compliance program. Past deficiencies could have occurred even though the organization made appropriate and good-faith efforts to adopt and implement an effective compliance program. Alternatively, an organization that previously had an ineffective compliance program may have implemented reforms—including personnel changes—that have remedied deficiencies. Finally, perceived deficiencies could result either from the different information available at the time of the misconduct and after the fact, or could result from a legitimate, good-faith, reasonable difference of opinion between the organization and enforcement officials about the features of the organization's compliance program.

Enforcement officials can consider direct and circumstantial evidence when determining whether the organization's current high-level personnel and others with managerial authority to impact the organization's compliance program can be relied upon—in terms of commitment and implementation capacity—to adopt and implement an effective compliance program. Enforcement officials should focus on people who currently serve in management and on the board of directors, and not those who worked for the organization at the time of the misconduct but have since departed.

Many factors are relevant to determining whether the current executive management and the board are genuinely committed to and capable of adopting and implementing effective compliance program.

The first is whether any people who *currently* are members of the executive management, the board of directors, or a unit's high-level personnel committed, conspired to commit, or knowingly condoned the misconduct, were implicated in the misconduct, or were knowingly responsible for the organization's failure to prevent or terminate the misconduct.

The second consideration is whether the current board of directors or executive management failed to act in good faith to adopt or implement an effective compliance program—demonstrating a sustained indifference to compliance that indicates a lack of commitment to compliance and ethics. The focus is on the existing board and senior management team and not on those who may have worked for the organization at the time of the misconduct but are no longer with the organization.

The third consideration is whether the organization failed to identify and fully remediate the root causes of the misconduct and the organization's compliance deficiencies in accordance with § 6.07, and whether the individuals knowingly responsible for this failure remain with the organization in positions of authority. In considering whether the organization failed to fully remediate in good faith, enforcement officials should consider whether the organization continued to employ in high-level or substantial authority positions personnel who either: (1) knew about the misconduct and failed to take appropriate actions to either terminate it or to report it to the compliance department; or (2) impeded compliance officers from investigating, terminating, or remediating the misconduct. Other factors include the thoroughness of the organization's analysis of the root causes of the misconduct and its compliance deficiencies, and the organization's efforts to remedy them. Enforcement officials also should consider whether the organization's compensation, promotion, and retention policies and practices were a material cause of the misconduct and, if so, whether the organization has taken appropriate steps to remedy the problems.

Fourth, enforcement officials may conclude that an organization needs additional oversight if the organization failed to adopt and implement an effective compliance program or internal-reporting system after entering into a criminal or civil resolution for similar misconduct within the last five years, and the individuals substantially responsible for this failure remain with the organization in positions of authority. In making this assessment, enforcement officials should take into consideration the size of the organization, the magnitude of the risk of misconduct it faces, and whether its actions in implementing its compliance program were reasonable under the circumstances.

The simple fact that the organization had a prior violation does not establish that executive management failed to act appropriately to adopt and implement an effective compliance program. The nature of the legal violation, the organization's efforts to adopt an effective compliance program, the difficulty of ensuring compliance, and whether high-level personnel had notice of compliance deficiencies are among the factors that should be taken into account.

*e. Knowledge:* Knowledge is defined in § 1.01(hh) (see also § 6.01(p)). Consistent with this definition, an individual has knowledge of the misconduct or of a material compliance deficiency if he or she has actual knowledge, or if he or she was willfully blind to or consciously avoided knowledge of the misconduct. A person can be considered to have consciously avoided knowledge if it can be established that: (1) the person was aware of a high probability of the disputed fact (e.g., that misconduct was occurring); and (2) consciously and deliberately avoided confirming the fact. In order to establish factor (2), the person must either have taken deliberate actions or have made active efforts to avoid learning the fact *or* failed to take actions that the person ordinarily would have taken under the circumstances in order to avoid learning about the fact.

*f. Expert input on the design of required reforms.* Provisions in nontrial resolutions that require organizations to reform their compliance function can provide substantial benefits, when well designed, but they also can impose substantial costs, both directly and indirectly. Consequently, enforcement officials requiring internal reforms should adopt procedures to help ensure that their interventions are beneficial. When fashioning required reforms, enforcement officials should be encouraged to consult with the Department of Justice, Fraud Section's compliance expert, the relevant regulator with substantial authority over the organization, or other relevant sources of official expert guidance.

*g. Process to assess the effectiveness of the reforms imposed.* Internal reforms required by organizational settlement agreements can have substantial impacts on organizations. They can impose significant costs on the organization. They also may impact the organization's internal governance, and employee morale and productivity, for better or worse. Such impacts can be justified, even if costly, if the mandated measures are more effective at ensuring the organization's compliance than other less-costly substitutes. On the other hand, if other less-costly substitutes would be equally effective, the organization should not be required to incur unnecessary costs. Consequently, to the extent possible, enforcement officials should identify ways to assess the effectiveness of the measures they require, as well as the effectiveness of any alternatives preferred by experts. A database of specific reforms that other organizations have been required to implement in the past, as well as information on whether those organizations subsequently engaged in misconduct, could facilitate a subsequent assessment of the reforms' effectiveness.

## REPORTERS' NOTES

*a. Case law on judicial oversight over required reforms in nontrial resolutions.* At present, both federal prosecutors and civil regulators have an enormous degree of discretion when entering into either deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) or civil settlements. As a result, there is little, if any, genuine external oversight over enforcement officials' decisions as to whether to require internal reforms and, if so, what reforms to impose through such settlements.

Only DPAs are potentially subject to judicial review; NPAs, by contrast, are not filed in court and therefore are not subject to judicial review. The U.S. Department of Justice (DOJ) takes the position that courts do not have the right to second-guess either the prosecutors' decision to impose a DPA or the form of mandate imposed (unless the sanction violates the U.S. Constitution or other legal restriction). Consistent with this view, the U.S. Court of Appeals for the D.C. Circuit in *U.S. v. Fokker Services* held that trial judges reviewing a DPA under the Speedy Trial Act cannot reject it based on concerns about the prosecutors' charging decisions. The court also concluded that courts "play no role in monitoring the defendant's compliance with the DPA's conditions … Rather, the prosecution—and the prosecution alone—monitors a defendant's compliance with the agreement's conditions." United States v Fokker Services BV, 818 F.3d 733, 740-742 (D.C. Cir. 2016).

Similarly, in Sec. & Exch. Comm'n v. Citigroup Global Markets Inc., 752 F.3d 285 (2d Cir. 2014), the U.S. Court of Appeals for the Second Circuit held that a judge reviewing a consent decree has authority to determine whether the consent decree is fair and reasonable, but lacks authority to reject the decree on the grounds that the regulatory agency failed to bring proper charges. Instead, a court evaluating a proposed Securities and Exchange Commission consent decree for fairness and reasonableness should, at a minimum, assess (1) the basic legality of the decree; (2) whether the terms of the decree, including its enforcement mechanism, are clear; (3) whether the decree reflects a resolution of the actual claims in the complaint; and (4) whether the decree is tainted by improper collusion or corruption of some kind. Id. The court also ruled that the "job of determining whether a proposed S.E.C. consent decree best serves the public interest rests squarely with the S.E.C., and its decision merits significant deference."

As a result, prosecutors have enormous discretion over the decisions of whether to mandate reforms and what reforms to impose. While prosecutors can be expected to exercise their best judgment in so doing, the rule of law favors providing prosecutors with clear guidance on when to mandate reforms and what reforms to impose. It also favors having an oversight mechanism in place to ensure that there is some oversight of government decisions that limit or alter individuals' or organizations' rights or duties.

In addition, past experience with the decisions by some prosecutors to impose questionable mandated provisions—including those that provoked a DOJ response to limit their use—suggests that a mechanism to ensure that discretion is exercised appropriately would be beneficial. U.S. Dep't of Just., Just. Manual §§ 9-28.710 (2008), 9-28-720 (2017); Mark Filip, Deputy Att'y Gen., U.S. Dept. of Justice, Memorandum for Holders of the U.S. Attorneys' Manual Re: USAM 9-16.325: Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution" (May 14, 2008).

*b. Remedial orders under the Organizational Sentencing Guidelines.* U.S. Sentencing Commission's Guidelines Manual, Sentencing of Organizations ("Organizational Sentencing Guidelines") provides that a court may impose a remedial order on an organization as a condition of probation. The remedial order may require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm. If the magnitude of the expected future harm resulting from the misconduct can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm. U.S. SENT'G GUIDELINES MANUAL § 8B1.2 (U.S. SENT'G COMM'N 1991). The commentary provides that criminal remedial orders should be coordinated with any administrative or civil remedial measures undertaken or contemplated by a federal government agency (such as the Environmental Protection Agency) that is authorized to order remedial measures.

*c. Prosecutors' capacity to impose provisions governing compliance programs likely to produce effective reform*. In crafting provisions in enforcement resolutions that require companies to reform their compliance program, prosecutors must consider two countervailing concerns. On the one hand, prosecutors often will be unable to ensure that an organization whose management previously adopted or maintained a compliance program with multiple material deficiencies adopts and maintains a genuinely effective compliance program if they simply include a clause in the agreement that does no more than require the organization to adopt an effective compliance program consistent with the general standards for effective compliance set forth in the U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (U.S. SENT'G COMM'N 2013). These standards are sufficiently general that they cannot ensure effective compliance when management is not genuinely committed to compliance that comes at the expense of profits. See Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 CHI. L. REV. 323 (2017). Yet on the other hand, prosecutors often will not have the expertise in either the organization or the industry needed to fashion more detailed provisions governing required reforms that will lead to the organization to adopt a genuinely effective compliance program.

Specialty prosecutors' offices, however, such as the DOJ's Fraud Section, and in particular the Foreign Corrupt Practices Act (FCPA) Unit, can be expected to have considerable expertise in the range of compliance deficiencies to be avoided and also may have the benefit of a local compliance expert. At various times, the FCPA Unit has pursued a variety of initiatives to enhance the quality and consistency of the mandated reforms it imposes. First, there appears to be increased consistency in the terms of the required internal compliance program reforms included in settlement agreements for FCPA violations. Second, the DOJ's Fraud Section has hired a compliance consultant to advise prosecutors. A compliance consultant can provide a useful evaluation of an organization's claim that it had an effective compliance program in place. The compliance consultant can also provide useful input on the quality of an organization's remediation and the likely effectiveness of any provisions requiring internal reforms. Finally, the FCPA Unit, which has primary responsibility for all federal FCPA cases, can operate to provide some more centralized oversight over the mandated reforms imposed.

Prosecutors in other offices can pursue other approaches to the problem. Where there is joint jurisdiction by prosecutors and regulators over an enforcement action, prosecutors may be well advised to seek the advice of the relevant regulator in designing mandates reforms to the company's compliance function ("compliance mandates") as they may have more expertise. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* Prosecutors in the Board Room: Using Criminal Law to Regulate Corporate Conduct, 62 (Anthony Barkow & Rachel Barkow, eds., 2011); see Miriam Baer, *Governing Corporate Complianc*e, 50 B.C. L. Rev. 949, 1004 (2009).

*c. Oversight over DPAs, the rule of law, and the role of judges.* The current breadth of enforcement-official discretion over whether and what mandated reforms should be imposed does not appear to be consistent with the rule of law. Jennifer Arlen*, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. Legal Analysis 191 (2016); see also Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations (2016) (critiquing the breadth of discretion). In addition, prosecutors have not been provided appropriate guidance on when to mandate reforms and what reforms to impose to enable them to employ these reforms effectively to help deter organizational misconduct. Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 Chi. L. Rev. 323 (2017). Other scholars have examined structural reforms effected by civil enforcement authorities through an agreement not to proceed with threatened enforcement against an individual organization or many organizations in an industry provided that the organizations agreed to undertake specific changes. E.g., Rachel Barkow, *Prosecutor as a Regulatory Agency, in* Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 177 (A. Barkow & R. Barkow eds., 2011) (discussing the use by the New York Attorney General of structured settlements in civil, as well as criminal cases, brought under the Martin Act); Zachary Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. Legal. Analysis 235 (2016).

A number of scholars have argued for enhanced judicial oversight over mandated reforms imposed through DPAs and NPA. See, e.g., Garrett, Too Big to Jail. Such oversight is inconsistent with existing interpretations of the relevant statutes governing court oversight of DPAs and monitors. See *Fokker Servs. B.V.*, 818 F.3d 733; United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017). However, judicial review is not a panacea because judicial review risks substituting one discretionary decision for another unless judges are provided with a standard or set of principles that delineates when mandated reforms are, and are not, appropriate, and what type of mandated reforms should be used. See Arlen, *Prosecuting Beyond the Rule of Law*. Accordingly, to ensure that mandates are used appropriately, prosecutors can promote deterrence, public confidence, and the rule of law by adopting guidelines that delineate when it is appropriate to mandate reforms and what types can be imposed. It is advisable to have additional supervisory oversight of mandates given that mandated reforms can have substantial economic impact by altering the internal operations of organizations whose economic reach spans the country. Prosecutors should also be encouraged to obtain additional expert advice on mandated reforms.

*d. Academic literature on required internal reforms in DPAs and NPAs.* There is extensive scholarly literature addressing policy issues associated with settlement agreement provisions that require an organization to undertake internal reforms or hire a monitor ( "mandates"): E.g., Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 CHI. L. REV. 323 (2017); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Miriam H. Baer, *Governing Corporate Governance*, 50 B. C. L. REV. 949 (2009); Rachel Barkow, *The Prosecutor as Regulatory Agency, in Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 177 (Anthony S. Barkow and Rachel E. Barkow, eds., 2011); Lawrence Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigations and Reform*, 66 FLA. L. REV. 1 (2014); Brandon L. GARRETT, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008); Lawrence D. Finder, Ryan D. McConnell, & Scott L. Mitchell, *Betting the Corporation: Compliance or Defiance? Compliance Programs in the Context of Deferred and Non-Prosecution Agreements: Corporate Pre-trial Agreement Update – 2008*, 28 CORP. COUNS. REV. 1 (2009); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 323 (2007); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1724 (2007); see also U.S. Gov't Accountability Off., GAO-09-636T, Preliminary Observations on the Department of Justice's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements (2009) https://www.gao.gov/assets/130/122853.pdf.

*e. Academic literature on oversight of mandates reforms*. The question of whether prosecutors should be subject to greater oversight when fashioning mandates has been the subject of many academic articles, as has the question of whether prosecutors would benefit from obtaining additional expert advice. See, e.g., Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Miriam H. Baer, *Governing Corporate Governance*, 50 B. C. L. REV. 949 (2009); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

## § 6.10. Factors Relevant to the Appropriateness of a Monitor or Other External Oversight of an Organization

**(a) An organization is presumed not to need a monitor if it:**

**(1) self-reported, fully cooperated, and undertook full disgorgement, restitution, and remediation consistent with §§ 6.04, 6.05, and 6.07; or**

**(2) had an effective compliance program at the time of the misconduct, promptly terminated this misconduct and fully remediated the root causes of both the misconduct and any deficiencies in the organization's compliance program in accordance with § 6.07, and fully cooperated with the government's investigation in accordance with § 6.05.**

**(b) Enforcement officials should only require external oversight over an organization through a monitor (§6.01(s)) if:**

**(1) an organization's compliance program was not effective at the time of the misconduct and has not been fully remediated in accordance with § 6.07 prior to the nontrial resolution; and**

**(2) organizational actors with authority to ensure the future effectiveness of the compliance program have not demonstrated that they can be relied on to adopt and implement an effective compliance program consistent with §§ 5.16 and 6.08 and to implement other measures needed for full remediation without oversight.**

**(c) Enforcement officials may appropriately impose a monitor to oversee the organization's operations in a specific country if that country's laws prevent enforcement officials from fully investigating the misconduct or ascertaining whether an organization has fully remediated the underlying causes of the misconduct.**

**Comment:**

*a. Presumption that a monitor is not needed for organizations that self-report, fully cooperate, and fully remediate.* This Section establishes a presumption that a monitor (§6.01(s)) is not needed if an organization self-reported, fully cooperated, and undertook full disgorgement, restitution, and remediation in accordance with §§ 6.04, 6.05, and 6.07, even if there was widespread misconduct or a past violation. This presumption has two justifications.

First, a monitor is needed when an organization's board of directors and executive management cannot be relied upon to adopt and implement an effective compliance program without additional oversight. This situation is most likely to arise when the organization's high-level personnel are not genuinely committed to ensuring that the organization complies with the law. An organization that self-reports, fully cooperates, and fully remediates demonstrates its commitment to taking proactive steps to deter misconduct and adopt an effective compliance program and the willingness to take such actions even when they impose costs on the firm. Self-reporting is an important and often potentially costly step for an organization to undertake to help deter misconduct. Management that commits to self-reporting, and does self-report, prior to the threat of government detection, fully and in a timely way, acts proactively to support enforcement authorities' efforts to deter misconduct.

Moreover, an organization that fully remediates in accordance with § 6.07 has demonstrated an ability to identify and remediate the root causes of its misconduct and any compliance deficiencies. Any concern that past violations indicate inadequate commitment to compliance is best addressed by assessing whether the organization has indeed fully remediated the root causes of its misconduct, including taking appropriate action with respect to any high-level or substantial authority personnel found to be substantially and knowingly responsible for either the misconduct or any deficiencies in the organization's response.

Second, the presumption enhances deterrence by providing organizations with an additional incentive to take a very important but costly action to aid enforcement authorities: self-reporting misconduct. Organizations will be reluctant to self-report if they could be subject to a monitor even if they self-report, fully cooperate, and fully remediate.

*b. Presumption that a monitor is not needed if the organization had an effective compliance program at the time of the misconduct, fully cooperated, and fully remediated.* Enforcement officials appropriately impose a monitor when they need either expert advice on or external oversight of the organization's compliance program because they cannot rely on the organization's high-level personnel to ensure that the organization both adopts and implements an effective compliance program and to take any other necessary steps to remediate the root causes of the misconduct. Accordingly, a monitor is presumptively not needed if the organization demonstrates that it can adopt and implement an effective compliance program on its own—as is the case when the organization had an effective compliance program in place at the time of the misconduct and fully remediated any root causes of the misconduct once the misconduct was detected—and is fully committed to supporting enforcement authorities' efforts to enforce the law, as evidenced by its full cooperation with their investigation, in accordance with § 6.05.

*c. When is a monitor appropriate?* Enforcement officials likely should appoint a monitor when:

(1) an organization's compliance program was not effective at the time of the misconduct and has not been fully remediated in accordance with § 6.07 prior to the nontrial resolution; and

(2) actors within the organization with authority to ensure the future effectiveness of the compliance program have not demonstrated that they can be relied on to adopt and implement an effective compliance program consistent with §§ 5.16 and 6.08 and to implement other measures needed for full remediation (§ 6.07) without oversight.

A finding that the organization's compliance program was not effective at the time the misconduct occurred does not suffice to justify a monitor. A monitor is not needed if high-level personnel in the organization can be relied upon to effectuate the reforms needed to remediate the root causes of the misconduct, as well as the root causes of any deficiencies in the compliance program.

Similarly, the fact that the organization has not fully remediated by the time of nontrial resolution is being negotiated is not, in and of itself, a sufficient justification for appointment of a monitor. A monitor is not needed if the organization is proactively proceeding in good faith to undertake full remediation but needs additional time to complete its reforms.

It may be appropriate for enforcement officials to appoint a monitor if the organization has not fully remediated the root causes of either the misconduct or the sources of any deficiencies in its internal controls, and prosecutors or other enforcement officials reasonably believe that the organizational actors with authority to ensure the future effectiveness of the compliance program cannot be relied on to adopt and implement an effective compliance program consistent with §§ 5.16 and 6.08 and to implement other measures needed for full remediation (§6.07) without oversight.

In some situations, enforcement officials may be able to achieve needed oversight through enhanced monitoring and auditing by the relevant regulators. In other situations, a monitor may be needed. Monitors play a particularly valuable role when there is a need for reform reaching deep within an organization or when there are other reasons to conclude that oversight of the organization's efforts to comply with the law would benefit from an informed, independent expert's insights.

In determining whether an organization's management can be relied upon, it is important for enforcement officials to focus on the management in place at the time of the settlement, as opposed to that in place at the time of the violation. Enforcement officials also can appropriately consider whether the organization was purchased by another organization with an effective compliance program after the misconduct was detected.

*d. Factors indicating that a monitor may be appropriate.* A monitors is most likely to be needed when high-level personnel in an organization in a position to impact, directly or indirectly, whether the organization adopts and implements an effective compliance program have demonstrated that they are not committed to trying to ensure that the organization complies with the law. The focus should be on the behavior of high-level personnel who are in positions of authority at the time of the settlement agreement. Evidence that high-level personnel participated in the misconduct, in its cover-up, or failed to terminate detected misconduct also provides evidence that high-level personnel are not committed to compliance.

Enforcement officials also may conclude that a monitor is appropriate if an organization fails to fully cooperate in ways that reduces the likelihood of individual wrongdoers being detected and sanctioned or retains in positions of substantial authority people who participated in, condoned, knowingly helped to cover up, or knowingly impeded the investigation of, misconduct—absent specific facts and circumstances that indicate that the people can be relied on to actively promote compliance in the future.

Other factors that indicate that a monitor may be appropriate include findings that:

(1) the organization failed to adopt and maintain an effective compliance program or internal-reporting system after entering into a criminal or civil resolution for similar misconduct within the last five years and its failure to do so was a substantial factor in causing the misconduct;

(2) the organization's compensation and promotion systems played a role in motivating the misconduct that was, or reasonably should have been, anticipated by the board of directors or executive management but they have not taken adequate steps to address the problem; or

(3) the organization knowingly made material misrepresentations to a regulatory authority or other government agency and the responsible organizational actors remain in positions of authority.

In determining whether a monitor is needed, enforcement officials also can appropriately take into account whether the benefit the organization received from the misconduct at issue is sufficiently substantial that it creates a material risk that employees may be tempted to violate the law. This factor alone does not suffice to justify imposing a monitor. A monitor is appropriate if the current board of directors and executive management have created a culture in which pursuit of profit comes before all other concerns, but not if they have clearly demonstrated an adequate commitment and taken effective actions to adopt and implement an effective compliance program.

*e. Relevance of foreign laws such as blocking statutes.* In some situations, laws adopted in other countries prevent an organization from providing information to U.S. enforcement authorities that is needed either to determine the full scope of any misconduct committed or to identify the root causes of the misconduct. As a result, U.S. authorities may not have sufficient information to ensure that the organization fully remediated in the affected jurisdictions. In such situations, it may be appropriate to use a monitor located in that country in order simultaneously comply with the blocking statute while ensuring that the organization identifies, terminates, and remediates all material misconduct and fully remediates the root cause of the misconduct.

**REPORTERS' NOTES**

*a. Federal policy on the use of monitors*. The Department of Justice's FCPA Corporate Enforcement Policy specifically states that, in those situations in which a criminal resolution is warranted even when an organization self-reported, fully cooperated, and remediated—for example, because the misconduct was widespread or serious—prosecutors generally should not appoint a monitor if the organization has implemented an effective compliance program at the time of the resolution and made all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue. See U.S. Dep't of Just., Just. Manual § 9-47.120 (2020). This policy potentially enhances organization's incentives to self-report and fully cooperate by indicating, appropriately, that self-reporting is one of the indicia of an organization that is genuinely committed to compliance with the law.

The Department of Justice, Criminal Division's policy on monitors changed in 2018. In 2018, then Assistant Attorney General Brian Benczkowski issued a memo on the use of monitors by the Criminal Division. The guidance states that monitorships are not needed in many corporate criminal resolutions. The decision of whether to require a monitor depends on many factors.

Factors that weigh in favor of requiring a monitor include:

(a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems;

(b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;

(c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and

(d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

Brian A. Benczkowski, Assistant Att'y Gen., Crim. Div., U.S. Dept. of Just., Selection of Monitors in Criminal Division Matters, 2018 WL 4942006 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.

The guidance provides that considerations weighing against imposing a monitor include, most notably, the investments and improvements an organization has made to its corporate compliance program and internal controls, and whether remedial measures have been tested for the ability to prevent or detect similar misconduct in the future. Prosecutors also should examine whether the misconduct took place in an inadequate compliance environment that no longer exists. The policy directs Criminal Division attorneys to also consider the financial costs to an organization, as well as unnecessary burdens to the business's operations.

The guidance states that "the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary." Id.

In October 2021, Deputy Attorney General Lisa Monica announced a change to the DOJ's policy on the use of monitors, however. She stated that companies should not assume that monitors will be the exception, as opposed to the rule. Prosecutors should be free to require an independent monitor whenever it is appropriate to do "in order to satisfy prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA. U.S. Department of Justice, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021) https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

*b. Oversight of monitorships.* Like mandated reforms, provisions in organizational settlements that impose a monitor also in effect impose duties on organizations by means of the settlement agreement. The process for determining when and how these duties should be imposed ideally should be subject to both ex ante guidelines and external oversight. See Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016).

The 2018 guidance on monitors issued by then Assistant Attorney General Brian Benczkowski also addresses oversight of the process of requiring a monitor. Criminal Division attorneys are required to receive approval from their superiors, including the chief of the relevant section, as well as the concurrence of the assistant attorney general for the Criminal Division (AAG) (or his or her designee) before agreeing to the imposition of a monitor. The Criminal Division also has created a Standing Committee on the Selection of Monitors to review and vote on any recommended monitor candidates. Standing Committee decisions are sent to the division AAG for review. The official of the deputy attorney general has final approval authority over all monitors. Brian A. Benczkowski, Assistant Att'y Gen., Crim. Div., U.S. Dept. of Just., Selection of Monitors in Criminal Division Matters, 2018 WL 4942006, https://www.justice.gov/criminal-fraud/file/1100366/download.

*c. Academic literature*. For scholarly discussion of the appropriate use of monitors and other required internal reforms see, e.g., Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 CHI. L. REV. 323 (2017); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713 (2007); Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679 (2008); Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109 (2016); James Jacobs & Ronald Goldstock, *Monitors and IPSIGS: Emergence of a New Criminal Justice Rule*, 43 CRIM. L. BUL. 217 (2011); SHARON ODED, CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT 219-259 (2013); Veronica Root, *The Monitor−"Client" Relationship*, 100 VA. L REV. 523 (2014); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006).

## § 6.11. Duties and Authority of Compliance Monitors

**(a) A monitor's primary responsibility is to assess and monitor an organization's compliance with the terms of the settlement agreement that are specifically designed to address and reduce the risk of future material misconduct, including evaluation of and overseeing the implementation of the organization's compliance program.**

**(b) A compliance monitor should:**

**(1) be independent;**

**(2) not be an employee or agent of the organization or the government; and**

**(3) at all times exercise independent judgment with respect to the performance of his or her tasks.**

**(c) The agreement governing the monitorship should specify:**

**(1) the nature of the monitor's responsibilities; the extent and duration of the monitor's authority; arrangements for the monitor's compensation; the form,**

**frequency, and confidentiality of the monitor's reports; and the people who should receive the monitor's reports;**

**(2) that a monitor who detects potential material misconduct may undertake a preliminary investigation to determine whether misconduct has occurred and, if so, whether it warrants a report either to the organization or to both the organization and enforcement officials;**

**(3) that the monitor should:**

**(A) determine findings and conclusions fairly, objectively, and impartially, based on the relevant evidence;**

**(B) state the factual basis for findings and maintain records sufficient to show it; and**

**(C) disclose any material facts that are inconsistent with the monitor's conclusions and explain why the monitor nevertheless reached his or her ultimate decision;**

**(4) that the organization is obligated to provide accurate information to the monitor and correct any material errors or deficiencies if the organization learns that inaccurate information has been provided;**

**(5) that the monitor should promptly correct any detected material errors or inaccuracies in previously issued reports and formally notify all recipients of the reports;**

**(6) that the monitor has appropriate discretion to modify, adjust, or discontinue a remedial or compliance measure if the monitor finds that it is impractical or inadvisable to continue the measure and the applicable regulator or prosecutor approves;**

**(7) that the monitor should promptly report to enforcement authorities if the organization does not adopt a material recommendation of the monitor within a reasonable time, along with the organization's reasons for not complying;**

**(8) the basis for the monitor's compensation and require a regular report of that compensation to both the organization and enforcement authorities;**

**(9) the procedures to be used to resolve any dispute that may arise between the monitor and the organization; and**

**(10) that the monitor cannot have or obtain a financial interest in the organization and that the organization cannot hire the monitor to perform other services, directly or through any affiliated entity, for a material period after the end of the monitorship.**

**Comment:**

*a. Monitor as an independent third party.* A compliance monitor is an independent third party responsible for assuring an organization's compliance with both the requirements of the nontrial resolution settling civil or criminal enforcement actions, and more generally with the law. The monitor thus does not owe any fiduciary duties to the organization or its shareholders.

The monitor should at all times exercise independent judgment with respect to the performance of his or her tasks. A monitor should use his or her judgment to ensure that the organization adopts and maintains an effective compliance program reasonably designed to ensure the organization's compliance with the law.

In cases in which the monitor's activities or connections create the potential for compromising independence, the monitor should fully disclose those matters to the regulator or enforcement authority and should obtain its consent to the activity or connection in question. Consent should not be given if the activity in question creates a material risk of undermining the monitor's independence.

*b. Monitor compensation*. Monitors are ordinarily paid by the organization being monitored. The basis for the monitor's compensation should be specified in the nontrial resolution and in the agreement with the monitor.

It also is important to guard against excessive monitoring fees. The agreement should specify the types of services that the monitor can bill for, the billing rates, and a mechanism for oversight and dispute resolution.

Organizations that have agreed to a monitorship should be entitled to challenge a monitor's bills and, if no agreement can be reached, to submit the dispute to an appropriate governmental actor for resolution. The bill submitted by the monitor to the organization (showing the total bill, hours worked, and results obtained) also should be sent to the governmental authority tasked with the responsibility for selecting monitors so that this authority will have information about the monitors' billing practices when making future monitorship decisions.

*c. Avoidance of conflicts of interest.* In specifying the compensation arrangement, enforcement officials should ensure that the payment of a monitor by the organization in no way impairs the independence of the monitor's judgment or action. Accordingly, it is not appropriate to allow the monitor to be paid in stock, stock options, or any other forms of compensation tied to the organization's performance. The monitor also should not otherwise own stock in the organization, or have family members that do, except through passive indexed mutual funds.

Settlement agreements that impose a monitor should include a provision requiring the organization not to hire the monitor to perform other services, directly or through any affiliated entity, for a period after the date the monitorship is terminated t that is sufficient to ensure that the monitor will not be materially influenced in the performance of his or her duties by the prospect of future employment.

*d. Monitor's right of access to the organization's information*. An important aspect of the monitor's authority is his or her rights of access to information from the organization. These rights should be clearly set forth in the documents that establish the terms of the monitorship. Because the monitor is not an agent of the organization, no attorney–client relationship exists between the monitor and the organization even if the monitor is, or employs the services of, a lawyer. If appropriate, in order to reduce the danger of waiver of privilege, the organization and the monitor may seek to resolve disputes over access to information by means of confidentiality and nonwaiver agreements that limit the monitor's power to obtain other information or to disclose information to third parties.

*e. Specifying the duties of the monitor.* The governing documents should clearly set forth the monitor's responsibilities, the extent of his or her authority, arrangements for his or her compensation, and the term of the monitorship.

*f. Scope of the monitorship.* Generally, a monitor's primary responsibility should be to assess and monitor an organization's compliance with those terms of the organization's nontrial resolution governing its misconduct that are specifically designed to address and reduce the probability that the organization will commit future misconduct, including, in most cases, evaluating and, when appropriate, proposing internal controls and corporate ethics and compliance programs. Generally, the focus should be on ensuring that the organization adopts and implements an effective compliance program designed to prevent future misconduct, with particular focus on the type of misconduct that led to the settlement agreement.

There may be circumstances, however, in which the monitor may be appropriately charged with a more general oversight of the organization's efforts to comply with the law, or oversight over its compliance with legal requirements that were not addressed in the settlement agreement. This should occur in rare circumstances, but may be appropriate when the organization's internal controls in a variety of areas were deficient, and the prosecutor or regulator identified a reasonable basis for concluding that other types of misconduct had occurred and that the organization had not credibly remedied its deficiencies in its compliance program by the time of the settlement.

Monitors usually should be instructed to be forward-looking and focus on ensuring the organization's compliance with the law in the future. There are circumstances, however, in which it is necessary to give a monitor authority to conduct a backwards-looking investigation to determine the scope and root causes of the misconduct that gave rise to the nontrial resolution so that the monitor can effectively perform his or task of ensuring that the organization remediates its past deficiencies. Such a situation can arise when the organization either did not act proactively and effectively to fully investigate the misconduct or did not identify the root causes on its own, and enforcement officials conclude that their own investigation may not have fully determined the full scope of the misconduct or all the material root causes of it. In such situation, the monitor may need to conduct a backwards-looking investigation in order to enable the organization to effectively remediate the root causes of the misconduct. Should this situation arise, enforcement officials should explicitly set forth the need for such an investigation in both the nontrial resolution and in the monitor's agreement, either initially or should subsequent events reveal the need for such an investigation.

*g. Duration of the monitorship.* The duration of the monitorship should be stated in the nontrial resolution and in the monitor's agreement. The duration should be tailored to the depth and scope of the problems found to exist and the types of remedial measures needed to address them. The monitorship may be extended at the discretion of the government if the organization has been shown not to have satisfied its obligations under the agreement.

*h. Changing circumstances over time.* The compliance terms of agreements settling civil or criminal enforcement actions necessarily take account of the circumstances in existence at the time of settlement. Because these agreements typically remain effective for a sustained periods of time, it is always possible that changed circumstances will limit the effectiveness of the requirements in the agreements or make them unnecessarily burdensome. In such a case, the organization and the relevant enforcement official may attempt to negotiate a modified agreement; but such negotiations can be time consuming and expensive. Accordingly, the monitor should be given appropriate discretion to modify, adjust, or discontinue remedial or compliance measures if the monitor finds that continuation of the remedial measure in its recommended form is impractical or inadvisable. Any such modification should be approved by the applicable enforcement official.

*i. Monitor's duty to report.* The monitor should submit regular reports on the organization's progress in remediating the root causes of the misconduct and other detected compliance deficiencies to the enforcement authorities specified in the nontrial resolution establishing the monitorship. For example, in the case of a monitorship imposed through a plea agreement, the judge who entered the plea will have jurisdiction over the monitorship. The agreement also may provide, however, that the monitor should make reports to the prosecutor and to any relevant regulatory officials. In the case of a monitorship imposed through a DPA, the prosecutor has primary substantial authority over the monitorship, although the agreement may provide that reports should also be made to any relevant regulatory officials or to the judge who approved the nontrial resolution. Voluntary reporting is discussed in more detail in § 6.04.

*j. Responsibilities to report unaccepted recommendations.* Monitors may make recommendations from time to time about the ways in which organizations can improve their compliance programs. If an organization chooses not to adopt a recommendation by the monitor within a reasonable period of time, the monitor agreement should require the monitor to report this fact to the enforcement officials with authority over the nontrial resolution. The government may consider the organization's conduct when assessing whether the organization has fulfilled its duties under its nontrial resolution. Prior to making this assessment, the government should provide the organization with an opportunity to explain its reasons for not adopting the monitor's recommendations. Legitimate reasons include a credible claim that the organization adopted an effective alternative approach to achieving the same objective and that the undertakings recommended by the monitor imposed costs that would be grossly disproportionate when compared with their likely impact on the risk of expected material misconduct.

*k. Responsibilities to report detected misconduct.* The agreement establishing the monitorship should specify to whom the monitor should report in the event he or she detects or suspects material misconduct. Generally, monitors should be required to report material misconduct to the government. It may be appropriate for them to also report it—and indeed to initially report it—to the organization. Initial reporting to the organization is particularly appropriate when misconduct is ongoing and threatens health and safety, and when reporting to the organization is likely to lead it to expeditiously terminate the misconduct. Initial reporting to the organization also may be appropriate when misconduct is suspected, but not confirmed, as this may enable the organization to launch an immediate investigation to determine whether misconduct indeed has occurred.

The monitor should report immediately to the government, prior to or instead of reporting to the organization, if the misconduct involves either senior management of the organization, obstruction of justice, misconduct that the government can best investigate covertly, or misconduct involving serious harm that is likely to be terminated more expeditiously if the monitor reports to the government. If a monitor is appropriately authorized to report to the organization as well to government enforcement officials, the monitor should be given authority to report directly to disinterested members of the organization's board of directors in situations in which misconduct involves either senior officers or obstruction of justice.

Enforcement officials should ensure that the monitor does not report solely to the organization. The monitor also should report to the enforcement officials with jurisdiction over the nontrial resolution. Under these Principles, enforcement officials should not impose a monitor unless the organization failed to undertake full corrective action in accordance with § 6.01(m), and did not have (and could not be relied upon to adopt) an effective compliance program. A monitor is needed when enforcement official have evidence that they cannot rely on high-level personnel to implement an effective compliance program. In this situation, enforcement officials should require the monitor to report to the government, in addition to reporting to the organization, in order to ensure that the organization responds appropriately to the report of suspected misconduct.

*l. Procedures for resolving disputes*. Enforcement officials should specify in the monitor agreement the procedures to be used to resolve disputes that may arise between the monitor and the organization.

The procedures should enable the organization to bring the dispute to an external actor (other than the organization and the monitor) in certain circumstances. The external actor could be an enforcement official or a court. For example, the organization should be able to bring a dispute to an external actor to resolve issues relating to: (1) the potential for the monitor to take actions that exceed his or her authority; (2) recommendations from the monitor that the organization has a reasonable basis for contesting; and (3) expenses that the organization has a reasonable basis for deeming excessive. Although some disputes may not be within the expertise of most enforcement authorities, granting organizations the right to seek recourse to the relevant government authority in cases of abuse provides organizations with the only viable means for redress and helps constrain potential sources of problems.

## REPORTERS' NOTES

*a. Federal principles.* The Department of Justice, Criminal Division's policy on monitors has been revised many times. E.g., Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Justice, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008) https://www.justice.gov/archives/jm/criminal-resource-manual-163-selection-and-use-monitors (Morford Memo); Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, Selection of Monitors in Criminal Division Matters (June 24, 2009), ), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf; Gary G. Grindler, Acting Deputy Att'y Gen., U.S. Dep't of Justice, Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010) (Grindler Memo), https://www.justice.gov/archives/usam/criminal-resource-manual-166-additional-guidance-use-monitors-dpas-and-npas.

The current policy is contained in guidance issued by Assistant Attorney General Brian A. Benczkowski in 2018. Brian A. Benczkowski, Assistant Att'y Gen., Crim. Div., U.S. Dept. of Just., Selection of Monitors in Criminal Division Matters, 2018 WL 4942006 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download. The policy suggests that monitorships should be used sparingly and only where "there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens" the monitorship will impose on the company." Id. The most critical factors for determining whether a monitor is necessary is the quality and efficacy of the organization's compliance program.

Federal prosecutors consider the following additional factors, among others, in determining whether to impose a monitor:

> (1) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems;
>
> (2) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;
>
> (3) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and

(4) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

Id.; see CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 74 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download (discussing federal policy on monitors).

*b. Independence*. Personal independence is emphatically indicated by the Government Accountability Office, Department of Justice (DOJ), Securities and Exchange Commission (SEC), and Office of the Comptroller of the Currency (OCC) in discussing independent monitorships. U.S. Gov't Accountability Off., GAO-10-260T, Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts (2009) https://www.gao.gov/assets/130/123772.pdf; OFF. OF THE COMPTROLLER OF THE CURRENCY, THE DIRECTOR'S BOOK: ROLE OF DIRECTORS FOR NATIONAL BANKS AND FEDERAL SAVINGS ASSOCIATIONS 14 (2016); Off. of the Comptroller of the Currency, U.S. Treasury Dept., OCC Bull. No. 2013-33, Use and Review of Independent Consultants in Enforcement Actions (2013).

*c. Dispute resolution.* Enforcement authorities should adopt a clear policy on dispute resolution that gives authority to a specific actor—external to the monitor-organization relationship—to protect the organizations from burdensome and unnecessary requirements by the monitor and in turn to protect the monitor from unjustified resistance by the organization. See U.S. Gov't Accountability Off., GAO-10-260T, Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts (2009) https://www.gao.gov/assets/130/123772.pdf. The DOJ has addressed these concerns. Grindler Memo (discussing the DOJ's effort to take a more active and impartial role in resolving disputes between monitors and organizations, especially in allowing organizations to appeal unduly burdensome monitorship actions directly to the DOJ, while proposing a less burdensome alternative).

*d. Efficacy*. Monitorships cannot on their own create reform within an organization. For an organization to reform and reinforce its compliance program, it must build a sustainable, ethical culture through direct and meaningful involvement, rather than relying on compliance expertise from top-down monitors. Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 808 (2005). The Foreign Corrupt Practices Resource Guide published by the SEC and DOJ takes a similar approach to the enhanced value of an organization's direct involvement in supporting the efforts of the monitor: "The most successful monitoring relationships are those in which the company embraces the monitor or consultant. If the company takes the recommendations and suggestions seriously and uses the monitoring period as a time to find and fix any outstanding compliance issues, the company can emerge from the monitorship with a stronger, long-lasting compliance program." CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T

DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 74 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.

*e. Academic literature*. For scholarly treatments of monitors, see Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 CHI. L. REV. 323 (2017); James Jacobs & Ronald Goldstock, *Monitors and IPSIGS: Emergence of a New Criminal Justice Rule*, 43 CRIM. L. BUL. 217 (2011); Vikramaditya S. Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007); Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71 (2002); Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L REV. 523 (2014); Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109 (2016); Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679 (2008); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006); F. Joseph Warin, Michael S. Diamant, & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321 (2011).

## § 6.12. Selection and Oversight of Compliance Monitors by Enforcement Officials

**(a) Enforcement officials should adopt a process for selecting monitors that is designed to ensure that the monitor selected has the expertise, experience, integrity, resources, and independence needed to be an effective monitor for the type of organization that is the subject of the nontrial resolution.**

**(b) The integrity and quality of the selection process can be enhanced through the creation of a supervisory body, such as a standing committee, that is responsible for overseeing the selection of monitors.**

**(c) Prior to selecting a monitor, enforcement officials should consult with the organization and other regulatory authorities with expertise in the relevant areas to identify:**

**(1) the necessary qualifications for a monitor based on the facts and circumstances of the case; and**

**(2) a diverse pool of candidates with the expertise and other traits need to be a good monitor, including a detailed justification for the inclusion of each candidate.**

**(d) An individual should not be selected as a monitor if:**

**(1) there is a reasonable basis for concluding that the person is, for any substantial reason, incapable of making a decision in the best interests of the organization's legal compliance. Such reasons include that the person:**

**(A) has a financial stake in the organization or in any businesses owned or controlled by employees of the organization, directly or through an immediate family member;**

**(B) is currently receiving or reasonably expects to receive any benefit from the organization or any of its employees, other than the remuneration expressly agreed upon for monitor services;**

**(C) is loyal to, beholden to, or otherwise influenced by an organization-affiliated party, including members of executive management, so as to undermine the monitor's ability to perform his or her duties impartially, or**

**(2) the individual previously engaged in material misconduct.**

**(e) To enable oversight of the monitorship and the organization, the monitoring agreement should:**

**(1) require the monitor to make periodic, confidential written reports to both enforcement officials and the organization;**

**(2) require the monitor, in appropriate circumstances, to send his or her periodic written reports to a regulatory agency with substantial authority over the organization that was not a party to the monitor agreement and/or to the court that approved the agreement; and**

**(3) in appropriate circumstances, provide a mechanism for the organization to meet periodically with the relevant enforcement official to discuss its remediation activities and any material issues that have arisen during the monitorship.**

**Comment:**

*a. Qualifications.* A monitor should have the expertise needed to be an effective monitor. The material expertise will depend on the facts and circumstances of the monitorship, but may include expertise in the relevant laws or regulations that are the primary source of the organization's compliance obligations under the agreement, as well as expertise in designing and implementing an effective compliance program to govern the risk of misconduct by an organization in the industry in which the organization, or the unit of the organization that is subject to the monitorship, that it is engaged to monitor. The monitor also should have expertise in designing and implementing an effective compliance program to address the specific legal risk that led to the imposition of a monitor (e.g., corruption). The monitor should have the resources needed to be an effective monitor, as well as a reputation for integrity, thoroughness and effectiveness. The monitor also should be objective and independent of the organization (see § 6.11, Comments a–c). The monitor also should have, or have access to individuals with, any other expertise (such as in a foreign language or data analytics) necessary for the monitorship to be effective.

*b. Oversight of the decision to impose a monitor.* Monitorships often are incorporated into resolutions, such as DPAs and NPAs, which are not subject to judicial review. Enforcement officials in the supervisory body of the enforcement agency can enhance the effectiveness of monitors and prevent abuses by establishing an oversight mechanism such as an oversight committee. An oversight body can provide guidance on the identity of qualified monitors, best practices regarding monitor agreements, and best practices regarding oversight of monitors.

*c. Reporting to enforcement officials.* Enforcement officials can most effectively ensure that mandated organization reform and monitors serve their intended purposes by requiring monitors to file written reports. Enforcement officials also should maintain familiarity with both the organization's efforts to comply with the law and the monitor's activities and expert conclusions over the course of the agreement. Appropriate topics for a written report include:

(1) the monitor's activities;

(2) whether the organization is complying with the terms of the monitor agreement;

(3) any impediments (either structural or personnel-related) to the monitor's ability to perform his or her duties; and

(4) any changes that are necessary to foster the organization's compliance with the terms of the agreement.

Monitor reports are often confidential. Nevertheless, in some circumstances it may be in the public interest for enforcement authorities to disclose portions of the monitor's report. Disclosure is likely warranted when the misconduct entailed a risk of personal injury.

*d. Reporting to regulators and the courts.* In some circumstances, it may be appropriate to specify that the monitor should also provide reports to a regulatory agency with substantial authority over the organization that is not a party to the agreement. Requiring a monitor to provide reports to an outside agency is warranted when the misconduct the organization engaged in falls under the jurisdiction of that agency. In addition, there may be circumstances—such as when the misconduct involved serious harm to the public—in which enforcement officials should require that the monitor's report be provided to the court with jurisdiction over the nontrial resolution. It may be appropriate to require that a monitor's report be publicly disclosed in order to enhance confidence that the public's interests are being protected.

*e. Organization communication with enforcement officials*. It also may be appropriate for the enforcement authority and the organization to specify that they will meet annually during the pendency of the monitorship to discuss: (1) the organization's success at meeting its reform goals; (2) the organization's experience with the monitorship; and (3) any concerns or suggestions for improvement that the organization may want to make.

## REPORTERS' NOTES

*a. Department of Justice Criminal Division policy on the selection of monitors. Federal principles.* The Department of Justice's (DOJ's) Justice Manual contains provisions governing the use and selection of monitors. See *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements* § 163, Criminal Resource Manual, U.S. Attorneys Manual (March 7, 2008), and *Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* § 166, Criminal Resource Manual, U.S. Attorneys Manual (May 25, 2010). These principles were adopted to address concerns about the expertise and commitment of monitors and the criteria used to select monitors.

The current policy is contained in guidance issued by then Assistant Attorney General Brian A. Benczkowski in 2018. Brian A. Benczkowski, Assistant Att'y Gen., Crim. Div., U.S. Dept. of Just., Selection of Monitors in Criminal Division Matters, 2018 WL 4942006 (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366 /download.

This guidance governing the selection of monitors was intended both to enhance the quality of monitors selected and to avoid conflicts of interest. Towards that end, the DOJ's Criminal Division created a Standing Commission on the Selection of Monitors. It also established a process for identifying potential candidates for any specific monitorship. Under this policy:

> (1) the organization is entitled to recommend a pool of three qualified candidates (specifying their qualifications and also their undertakings to eliminate conflict of interests), and to specify the organization's first choice;
>
> (2) the Criminal Division then interviews the candidates and assesses their qualifications, experience and expertise, objectivity and independence, ability to undertake the monitorship effectively, and other relevant factors;
>
> (3) if none of the candidates are acceptable, the prosecutors inform the organization, which can offer another slate of three candidates; and
>
> (4) the prosecutors then submit their recommendation, and a memo justifying it, to the Standing Committee.

The choice is then reviewed by the assistant attorney general and eventually approved by the deputy attorney general. Id.

*b. Conflicts of interest in corporate law.* In the area of corporate law, courts have increasingly recognized that conflicts of interest can arise in many situations beyond a straightforward financial stake in an organization or financial ties to a person under review. In considering what counts as a material conflict of interest that precludes a finding that the members of an organization's special litigation committee are independent, a Delaware court stated that the central consideration is whether there is any substantial reason to conclude that the individual could not make the decision in question focused entirely on what is in the corporation's best interests. A substantial reason could be the existence of a familial relationship or close friendship between the member of the committee and the person under investigation. A committee member's independence cannot be established if the person under investigation plans to make a substantial donation to an institution for which the committee member is a professor, even if the committee member is tenured. See In re Oracle Corp. Derivative Action, 824 A.2d 917 (Del. Ch. 2003).

*c. Oversight of the decision to impose a monitor under federal law.* Monitorships are often required in settlements of criminal actions through a deferred prosecution agreement or non-prosecution agreement. In such cases, the decision to impose a monitor appears to fall outside of judicial oversight. NPAs are not filed in court and thus are not under court jurisdiction. Although DPAs are submitted to the court, recent cases have held that judges' authority to approve and oversee a DPA does not include the right to determine the contents of these settlement agreements. See U.S. v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016) (invoking the principle that the Executive Branch has primary authority to make criminal charging decisions, noting that the "'judicial authority is ... at its most limited' when reviewing the Executive's exercise of discretion over charging determinations."). In addition, the U.S. Court of Appeals for the Second Circuit has ruled that a monitor's report is not a "judicial document" that a judge has authority to unseal and make public. See United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017).

In the absence of judicial supervision, guidelines governing and oversight of monitorships are important to ensure that enforcement officials' right to impose such mandates conforms to the rule of law. See Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016). While some have argued for enhanced judicial oversight over mandates imposed through DPAs and NPAs, see, e.g., BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2016), such oversight is inconsistent with existing interpretations of the relevant statutes governing court oversight of DPAs and monitors. See *Fokker Servs. B.V.*, 818 F.3d 733; *HSBC Bank USA*, 863 F.3d 125. Judicial oversight also is not an effective check on individual discretion unless judges are provided guidance on the appropriate use of mandates. See Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016).

*Academic literature.* The academic literature on monitorships is discussed in the Reporters' Notes following §§ 6.10 and 6.11.

**§ 6.13. Compliance Consultants**

**(a) Compliance consultants are external entities that organizations retain to provide them guidance on the design, implementation, and/or execution of its compliance function.**

**(b) Compliance consultants are responsible for providing input and advice to an organization in the implementation of its compliance program.**

**(c) A compliance consultant should not counsel an organization to engage in, or assist an organization in engaging in, conduct that misleads or unlawfully impedes a government official in the performance of an official function.**

**(d) Enforcement officials who determine that a compliance consultant has not been acting in good faith to promote an organization's genuine compliance with the law can appropriately condition the decision to give the organization credit for remediation on the organization's agreement to cease using that compliance consultant and may treat use of that consultant as a factor weighing against the conclusion that the organization has an effective compliance program.**

**Comment:**

*a. Compliance consultants are external entities that are retained by an organization to provide it expert guidance concerning the design, implementation, and execution of its Compliance Policies and Procedures and the organization's Compliance Program (including compliance tools and metrics/measurements).*

*Accounting firms and law firms that advise the entity on specific questions pertaining to auditing, accounting or legal rules and regulations are not "Compliance Consultants" for purposes of this section, unless they have been specially retained to provide consulting services pertaining to the organization's Compliance Program.*

*b. Distinction between compliance consultants and compliance monitors.* Compliance consultants are hired by an organization to provide expert advice on the adoption and implementation of an effective compliance function. The consultant is an agent of the organization and thus does not report to enforcement officials. A compliance monitor also provides the organization with advice about the adoption and implementation of an effective compliance function, and also is paid for by the organization, but a compliance monitor's primary responsibility is to provide oversight of the compliance function and to report to the enforcement officials who imposed the monitor.

*c. Potential benefits of a compliance consultant.* With the growth in the complexity of compliance obligations and the attendant increase in exposure for violations, organizations are increasingly seeking assistance from third parties known as compliance consultants in designing and implementing compliance programs. Compliance consultants are responsible for providing input and advice to organizations in the implementation of their compliance programs.

*d. Duties of a compliance consultant.* A compliance consultant performs contractual services for its organization client. In general, the consultant's responsibility is to act in the best interest of the organization as that interest is defined by responsible officials within the organization. However, a compliance consultant's duty to the organization may be modified by overriding statutes, regulations, or other legal requirements (such as commitments made by the organization in consent decrees or other settlements of enforcement actions).

*e. Consultation within bounds of the law.* A compliance consultant should never counsel an organization to engage or assist an organization in engaging in conduct that materially misleads or unlawfully impedes a government official in the performance of an official function. Such behavior does not assist an organization in complying with the law, but rather facilitates violations of the law.

## REPORTERS' NOTES

*a. Regulators' response to consultant's involvement in legal violations*. The New York Department of Financial Services has been among the more active regulators in demanding that compliance consultants refrain from actions which, in the view of the regulator, materially mislead or unlawfully impede the agency in the performance of its official duties. See Cuomo Administration Reaches Reform Agreement With Deloitte Over Standard Chartered Consulting Flaws (June 18, 2013), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1306181; NYDFS Announces PricewaterhouseCoopers Regulatory Advisory Services Will Face 24-Month Consulting Suspension; Pay $25 Million; Implement Reforms After Misconduct During Work at Bank of Tokyo Mitsubishi (Aug. 18, 2014), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1408181; N.Y. State Dept. of Fin. Servs., Report on Investigation of Promontory Financial Group, LLC (2015), https://www.dfs.ny.gov/system/files/documents/2020/03/promontory_inv_rpt_201508.pdf.

*b. Conflicts of interest*. Compliance consultants are often drawn from a pool of experts and prominent members of the compliance community, members who have likely had extensive interaction with other prominent members and institutions, potentially posing conflict-of-interest concerns. In bringing on a compliance consultant, an organization's due diligence should properly highlight conflict-of-interest vulnerabilities. The Director's Book of the Office of the Comptroller of the Currency (OCC) states that "[T]he board should ensure that no improper conflicts of interest exist between the bank and the consultant so that the board receives only objective and independent advice." OFF. OF THE COMPTROLLER OF THE CURRENCY, THE DIRECTOR'S BOOK: ROLE OF DIRECTORS FOR NATIONAL BANKS AND FEDERAL SAVINGS ASSOCIATIONS 19 (Nov. 2020). The OCC also assesses, and will disqualify, independent consultants associated with enforcement actions if they are not sufficiently independent and free of conflicts of interest or biases. Off. of the Comptroller of the Currency, U.S. Treasury Dept., OCC Bull. No. 2013-33, Use and Review of Independent Consultants in Enforcement Actions (2013), 2013 WL 6060787, https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-33.html.

*c. Risks of consulting*. See generally Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 COLUM. BUS. L. REV. 793 (expressing skepticism about the utility and validity of compliance consultants).

## § 6.14. Mandated Limitations on an Organization's Business Activities

**(a) Enforcement officials should have a presumption against including any provision in a nontrial resolution that restricts an organization from engaging in specific lawful business activities unless statutes or regulations expressly authorize the enforcement authority to place limitations on the organization's ability to conduct its business.**

**(b) In rare circumstances, an enforcement official who is not expressly authorized by law to impose collateral consequences may appropriately include a provision in a nontrial resolution of a matter involving material misconduct that restricts the organization from engaging in a specific business activity for a specified period of time if:**

**(1) a substantial portion of the organization's engagement in such business activity was found to violate the law;**

**(2) the organization's continued engagement in this business activity presents an exceptionally high risk of future material misconduct that has not been adequately remediated; and**

**(3) the risk of future material misconduct cannot be adequately addressed through other measures, such as enhanced oversight by a regulator or a monitor or collateral consequences imposed by an agency with express authority to restrict the organization's business activities.**

**(c) A decision to restrict the scope of an organization's business activities under subsection (b) should be made by, or in consultation with, the appropriate regulator or in consultation with senior officials in the relevant enforcement authority.**

**Comment:**

*a. Presumption against restricting an organization's business activities.* Enforcement officials presumptively should not include provisions in organizational nontrial resolutions that restrict an organization's ability to engage in otherwise lawful business activities, unless the enforcement officials are acting pursuant to a statutory or regulatory authority to impose collateral consequences, such as exclusion, delicensing, or debarment. Enforcement officials are empowered to penalize and remedy misconduct. Their authority does not traditionally extend to regulating the appropriate scope of an organization's activities through nontrial resolutions, unless the enforcement authority has been given authority to impose collateral consequences such as exclusion, debarment, and delicensing (see § 6.26). Enforcement officials often can effectively deter future misconduct by a recalcitrant organization through activities designed to detect, and proactively and effectively sanction, any future misconduct.

*b. Rebutting the presumption.* In rare circumstances, it may be appropriate to include restrictions on the scope of an organization's business activities in a nontrial resolution. This should be done only when:

(1) a substantial portion of the organization's activities in a particular line of business was unlawful;

(2) the organization has not fully remediated the high risk of future misconduct;

(3) enforcement officials conclude that the board of directors and executive management are not fully committed to preventing misconduct in the future;

(4) the risk of future misconduct cannot be adequately addressed through less intrusive means, such as a monitor; and

(5) the risk of future misconduct cannot be better addressed through more standard measures, such as the imposition of collateral consequences (debarment, delicensing, or exclusion) by a regulatory agency with statutory or regulatory authority to impose such sanctions.

*c. Monitors as an alternative approach to ensuring compliance with the law.* When an organization did not have an effective compliance program at the time of its misconduct, has failed to remediate it, and enforcement officials have a reasonable basis for questioning the board and executive management's commitment to compliance, the first recourse should be to require the organization to undertake internal reforms. In some circumstances, enforcement officials can ensure that the organization implements an effective compliance program by imposing a monitor with authority to ensure that business practices in the suspect area comply with the law. When a monitorship is unlikely to ameliorate the exceptionally high risk of misconduct if the organization continues to engage in a particular line of business, enforcement officials should include in the resolution with the organization a prohibition on the organization engaging in such business activities for a limited period of time.

*d. Procedural protections.* Enforcement authorities should adopt a policy prohibiting enforcement officials from including provisions in nontrial resolutions that restrict an organization's ability to conduct otherwise lawful business unless § 6.14(b) is satisfied and the enforcement official seeking to impose the limitation on the organization's has consulted either with the regulatory agency or agencies with primary authority to regulate the organization or with senior officials within the enforcement authority.

*e. Interaction with collateral consequences.* In some circumstances, including provisions in a settlement agreement that restrict an organization from engaging in certain types of activities may be a more effective and less costly way for enforcement officials to prevent future misconduct than resorting to the relevant regulator's ability to impose collateral consequences (e.g., exclusion, debarment, disqualification, or delicensing) on the organization.

Provisions in a settlement agreement that restrict the organization from engaging in specific types of business have the advantage that they can be targeted to the type of business activity or division in the organization responsible for the misconduct. By contrast, many statutes and regulations governing collateral consequences effectively offer enforcement officials a choice between taking no action or excluding, delicensing, or debarring the entire organization (or the entire organization except to the extent it is the sole provider of an essential good or service). Targeting the adverse consequences at the sub-unit of the organization responsible for the misconduct offers several benefits. First, it imposes fewer costs on innocent customers who might benefit from—and indeed desperately need—other products or services made by units of the organization not implicated in any misconduct. Second, it can provide additional incentives to supervisors of other units to deter misconduct by employees under their supervision and thereby avoid the fate of the supervisors whose neglect resulted in a mandated end to their unit's activities. Finally, these targeted restrictions enhance deterrence because prosecutors can more readily impose them without fear of imposing unfair and excessive costs on innocent customers or employees in units of the organization that have not been implicated.

Nevertheless, enforcement officials should only adopt a provision placing restrictions on an organizations business activities that operate an alternative to collateral consequences such as exclusion, debarment, and delicensing after consulting with the regulator(s) with authority to impose such collateral consequences. Even then, such restrictions should be used only if other, less intrusive measures—such as imposing a monitor—are unlikely to be effective.

## REPORTERS' NOTES

*a. DPAs that restrict business activities.* A handful of DPAs entered into by federal prosecutors have placed restrictions on an organization's ability to engage in otherwise lawful business activities. For example, KPMG LLP was compelled to shut down its entire individual tax practice and to refrain from preparing prepackaged tax products. KPMG DPA (June 2005). German bank Bayerische Hypo-und Vereinsbank AG ("HVB") also was barred from marketing or selling prepackaged tax products. Canadian Imperial Bank of Commerce (CIBC) was prohibited from engaging in certain structured transactions. UBS AG was required to stop providing banking services to U.S. clients with undeclared accounts. UBS DPA (Feb. 2009). NeuroMetrix Inc. was required to stop its referral program. NeuroMetrix DPA (January 2009). DPAs, NPAs and guilty pleas entered into by federal authorities with organizations can be found at Corporate Prosecution Registry hosted by both Duke Law School and the University of Virginia School of Law, https://corporate-prosecution-registry.com/browse/.

## TOPIC 3

## CRIMINAL ENFORCEMENT POLICY FOR MISCONDUCT BY ORGANIZATIONS

**Introductory Note:** This Topic addresses criminal enforcement policies to guide nontrial criminal resolutions with organizations in those situations in which prosecutors have concluded that the organizations committed material criminal misconduct warranting enforcement through some form of criminal nontrial resolution. These Principles do not address the issue of when it is appropriate for prosecutors to pursue a criminal action for a particular type of organizational criminal conduct.

### § 6.15. Forms of Criminal Nontrial Resolutions for Organizations

**(a) Criminal prosecutors may use a variety of forms of nontrial criminal resolutions to resolve a criminal case with an organization that prosecutors have concluded engaged in**

**criminal misconduct as a result of criminal actions by its employees committed in the scope of their employment to benefit the organization, including a:**

**(1) guilty plea;**

**(2) deferred prosecution agreement (DPA);**

**(3) non-prosecution agreement (NPA);**

**(4) declination with disgorgement; or**

**(5) declination.**

**(b) A guilty plea and a DPA may share the following features:**

**(1) filing in court;**

**(2) a statement of the charges filed by indictment or information;**

**(3) a statement of facts in which the organization admits responsibility for criminal misconduct;**

**(4) a statement of the reasons why the organization was offered or refused a DPA;**

**(5) financial penalties including disgorgement of the profits attributable to the misconduct, payment of restitution, remediation for harms to others, and a criminal fine;**

**(6) a provision requiring the organization to fully cooperate in accordance with § 6.05;**

**(7) a provision requiring that the organization fully remediate in accordance with § 6.07, including through specified internal reforms when in accordance with § 6.09;**

**(8) a requirement that the organization pay for and cooperate with a monitor, in accordance with §§ 6.10–6.12; and**

**(9) a requirement that the organization periodically report to prosecutors concerning its internal investigation, its remediation activities, and any newly detected criminal misconduct.**

**(c) An NPA may contain all the provisions in § 6.15(b) except that NPAs are not filed in court and no charges are filed.**

**(d) Guilty pleas can produce consequences that do not result from resolution through a DPA or NPA:**

**(1) for certain offenses, a guilty plea can result in the organization being subject to presumptive or mandatory collateral consequences such as debarment, exclusion, or delicensing by federal, state, local, or other authorities.**

**(2) a guilty plea can establish the organization's liability in a civil or administrative enforcement action or private civil litigation through offensive collateral estoppel.**

**(e) A guilty plea, DPA, or NPA with an organization should be publicly disclosed and made available and should explain the facts of the misconduct, the crime the organization committed, the justification for using the form of nontrial resolution imposed, the sanctions and other consequences resulting from the resolution, any provisions for providing restitution or remediation to victims, any voluntary remediation by the organization, and the duration of the resolution.**

**Comment:**

*a. Collateral consequences*. Conviction for certain offenses can result in an organization being subject to presumptive or mandatory collateral consequences such as debarment, exclusion, or delicensing by federal, state, local, or foreign agencies, contracting parties, or other organizations, such as the World Bank or International Monetary Fund. For example, a conviction for federal felony health care fraud triggers mandatory debarment from doing business with the U.S. Department of Health and Human Services. Misdemeanor convictions trigger permissive debarment. Conviction of certain types of organizations for felony securities fraud can trigger presumptive debarment by the U.S. Securities and Exchange Commission.

Resolution through a DPA generally does not establish the condition precedent for triggering presumptive or mandatory debarment. Resolution through a DPA does not preclude government authorities from taking action against the organization for its misconduct, however. Government authorities and other organizations often have authority to make their own determination of whether the organization engaged in misconduct that warrants debarment, exclusion, or delicensing. For a discussion of collateral consequences see § 6.01(e), §6.01 Comment *a,* § 6.26 and Model Penal Code: Sentencing § 6x.01 (AM. LAW INST., Proposed Final Draft, 2017).

*b. Offensive collateral estoppel.* Civil litigants suing an organization for losses sustained as a result of its criminal misconduct can use an organization's guilty plea to establish that the organization engaged in the misconduct for which it pleaded guilty. Admissions of misconduct in DPAs and NPAs also may be admissible in private civil litigation to establish that the organization engaged in such misconduct.

*c. Declinations with disgorgement: value of publication*. Prosecutors decline to proceed against an organization for two main reasons. First, when enforcement against the organization is not warranted based on the facts of the alleged criminal misconduct—such as when the organization did not commit a crime, there is insufficient evidence to prove liability, the conduct was justified or excusable, or the misconduct was too minor to warrant an enforcement action. Second, when an enforcement action otherwise would be warranted against the organization based on the occurrence of the violation, but a declination nevertheless is appropriate in light of subsequent actions taken by the organization to deter misconduct (specifically, full corrective action). Prosecutors who decline to enforce in the latter circumstance promote deterrence, as well as public confidence, by announcing both the decision to decline and the reasons for its decision.

*d. Role of the judge.* Although both guilty pleas and DPAs are filed in court, under current federal law they are not subject to the same level of judicial review. When a guilty plea is filed in court, the judge gains jurisdiction to assess the merits of the plea and determine the sentence. The judge may accept the prosecutor's sentencing recommendation, but he or she has authority to impose a different sentence. Should a guilty plea result in the imposition of a monitor, the judge also would have jurisdiction over the monitor's report.

By contrast, federal courts have concluded that prosecutors, not judges, have primary authority over DPAs: authority to assess and determine the charges filed, to decide the appropriate sentence, and to oversee any monitorship that is imposed. The judge's role is largely restricted to determining whether the prosecutors, in seeking waiver of the Speedy Trial Act, 18 U.S.C. § 3161 (2008), during the pendency of the DPA, are abusing their discretion to do so. Judges also would appear to have authority to review any claims that the DPA imposes an unconstitutional condition.

## REPORTERS' NOTES

*a. Role of judges in overseeing DPAs and NPAs.* For a discussion of judicial review of DPAs, see § 6.02, Reporters' Notes l & q, § 6.09, Reporters Note a, and § 6.12, Reporters' Note c.

*b. Impact of DPAs and NPAs on collateral consequences.* A central motivation for the development of forms of nontrial resolution that do not result in a formal finding of liability is to enable prosecutors to sanction corporations without triggering presumptive or mandatory collateral consequences (such as debarment or exclusion) in situations in which the imposition of such sanctions is not in the public interest. A variety of federal statutes and regulations provide for mandatory or permissive exclusion of organizations convicted of particular offenses.

Yet a prosecutor's decision to resolve a matter through a DPA instead of a formal conviction generally does not preclude an agency or other entity from deciding to debar, exclude, or delicense the organization. Agencies generally retain the authority to initiate a proceeding to determine whether the organization engaged in conduct that justifies debarment, delicensing, and exclusion. These administrative sanctions generally do not require that the organization be formally convicted of the offense. Many of these statutes also provide that the regulator can permissively exclude, even without a conviction, based on its own findings. Federal agencies with discretion over exclusion tend to view it not as a form of punishment to be employed whenever a corporation committed misconduct, but instead as a mechanism to be used as a last resort when: (1) the organization presents a high risk of committing a future offense that will interests for which the agency is responsible; and (2) the agency determines that it cannot appropriately reduce this risk through less costly means, such as mandated reforms imposed through corporate-integrity agreements.

Most federal agencies have concluded that debarment or exclusion should not automatically result from a conviction or civil enforcement action. For example, federal regulations governing procurement provide that an individual or organization that violates the Foreign Corrupt Practices Act or other criminal statutes can be debarred from doing business with the federal government. The Federal Acquisition Regulations governing the use of debarment make clear that debarment should not be used as a punishment. It is intended to be used only if "in the public's interest for the Government's protection." 48 C.F.R. § 9.402(b) (2014); see generally CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., Sec. & Exch. Comm'n, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2nd. ed. 2020), https://www.justice.gov/criminal-fraud/file/1306671/download. Federal procurement regulations set forth a list of factors to consider. Consistent with the approach of these Principles, the regulations take into account, as factors weighing against debarment:

> (1) whether the organization had effective standards of conduct and internal-control systems in place at the time of the activity that constitutes cause for debarment;
>
> (2) whether the organization remediated and adopted effective procedures prior to any government investigation of the activity cited as a cause for debarment;
>
> (3) whether the organization provided timely self-reporting;
>
> (4) whether the organization fully investigated the misconduct and, if so, fully cooperated with prosecutors and with the debarring officials; and

(5) whether the organization fully remediated, including remedying the problems that gave rise to the misconduct and taking appropriate disciplinary action against the individuals responsible for the misconduct.

See 48 C.F.R. § 9.406-1.

Government agencies and organizations such as the World Bank regularly conclude that they can protect themselves, at lowest cost in terms of access to important goods or services, by imposing a variety of remediation requirements on organizations with detected misconduct, as opposed to simply refusing to deal with the organization. See Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed. 2018). For example, the U.S. Department of Health and Human Services often imposes its own oversight requirements, such as corporate-integrity agreements, to provide adequate assurance that the organization will comply with its legal requirements, thereby obviating the need for exclusion. See generally CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 51-52 (2nd ed. 2020), https://www.justice.gov/criminal-fraud/file/1306671/download. For a discussion of collateral consequences imposed by the World Bank, see STEFANO MANACORDA & COSTANINO GRASSO, FIGHTING FRAUD AND CORRUPTION AT THE WORLD BANK: A CRITICAL ANALYSIS OF THE SANCTIONS SYSTEM (2018); Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L.J. 277 (2007).

A prosecutor's decision to resolve a case through a DPA or NPA thus often regularly promotes the interests of agencies that would presumptively be required to impose collateral consequences on the organization if it was convicted, as it obviates the necessity of the agency undertaking the effort to initiate a formal proceeding to waive its right to impose presumptive collateral consequences that it did not want to impose. In addition, DPAs and NPAs, when properly done, can serve agencies' interests in reducing the risk of future misconduct. Many nontrial resolutions with organizations include provisions requiring the organization to undertake reforms. Some require the organization to accept and pay for a monitor. These provisions are intended to reduce the risk of future misconduct. See generally Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 CHI. L. REV. 323 (2017); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713 (2007). Such required reforms, if properly structured and effectively implemented, can help promote the aims—that would otherwise be served by collateral consequences—of protecting government agencies and consumers from being harmed by criminal conduct.

For a discussion of collateral consequences in criminal cases see Model Penal Code: Sentencing § 6x.01 (AM. L. INST., Proposed Final Draft, 2017).

*c. Mandatory debarment.* A number of statutes, including federal statutes governing felony health care fraud, impose mandatory debarment on organizations convicted of specified felonies. These statutes, which no doubt were adopted in an effort to be tough on crime, can undermine efforts to enforce the law, particularly as applied to large, publicly held organizations. Debarment of a publicly held organization can cause harm to employees and customers. This harm can outweigh the benefit to society of organizational debarment when there are less costly yet effective alternative mechanisms for reducing the risk that the organization will engage in misconduct in the future.

Agencies and prosecutors often are justifiably loath to have a publicly held organization enter into a resolution that would trigger mandatory debarment, out of concern for customers and others who could lose access to needed goods or services, such as prescription drugs. Prosecutors have responded by offering deferred prosecution agreements even when an organization failed to self-report or cooperate. In other cases, concern for collateral consequences have led prosecutors to convict a subsidiary of the organization in question, even though it was not genuinely implicated in the misconduct, in order to target the collateral consequences at an entity that does not provide important goods or services to the public. Evidence that federal agencies support this effort can be derived from the fact that they do not use their authority to initiate their own debarment or exclusion proceedings to debar publicly held firms. For a discussion of these issues see Alexander & Arlen, *Does Conviction Matter?, supra.*

*d. Do DPAs and NPAs also reduce the stigma resulting from an organizational criminal resolution?* Some scholars claim that the imposition on an organization of a DPA instead of a guilty plea reduces the cost to the organization of the criminal sanction by reducing its public stigmatization. See, e.g., David Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1335 (2013); see BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014). Yet good reasons exist to conclude that organizations suffer the same cost from reputational damage from DPAs as they do from guilty pleas, as long as the contents of the criminal resolutions are otherwise the same. See Alexander & Arlen, *Does Conviction Matter?, supra*.

Organizations can be expected to incur costs from reputational damage whenever a criminal resolution (with or without a conviction) leads customers, suppliers, and other counterparties to be less willing to deal with the organization on favorable terms. Counterparties will be less willing to deal with an organization if the criminal resolution leads them to conclude that the organization is more likely than others to engage in misconduct that could harm them. They can be expected to make this decision based on information contained in public announcements that the organization entered into a criminal resolution. In assessing such information, they can be expected to focus on whether the company entered into a criminal resolution and was subject to criminal penalties, as is the case with both DPAs and guilty pleas. They also can be expected to look at the type of misconduct (e.g., fraud versus a violation that does not harm any person); its seriousness, as evidenced by the magnitude of harm caused; its pervasiveness; duration; senior management's degree of culpability; the sanctions imposed; the organization's relationship to the misconduct (including the quality of its compliance program, self-reporting and full cooperation); and the prosecutor's statements about the need for mandated reforms and a monitor. These aspects of an organization's culpability are disclosed with equal salience in both a DPA and a guilty plea. In addition, both DPAs and guilty pleas generate substantial attention from the press if they involve substantial sanctions or a publicly held corporation; both DPAs and guilty pleas may garner little attention if they involve a closely held company subject to a relatively modest fine. Thus, both forms of criminal resolution can be expected to lead the company to incur the same costs from reputational damage if their contents are otherwise identical. See Alexander & Arlen, *Does Conviction Matter?, supra*.

*e. Use of DPAs and NPAs in other countries.* Following the United States' adoption of DPAs and NPAs, other countries have moved to implement negotiated nontrial corporate criminal resolutions, including DPAs (or their equivalent). Countries that have promulgated laws allowing DPAs (or their equivalent) include the United Kingdom (U.K.), France, Canada, Singapore, Chile, and the Netherlands. E.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS: SETTLEMENTS AND NON-TRIAL AGREEMENTS BY PARTIES TO THE ANTI-BRIBERY CONVENTION 21, 28-37, 49-50 (2019) [hereinafter RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS], https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf [https://perma.cc/6VPQ-9EQH] (describing other countries' growing use of nontrial corporate criminal resolutions); see Criminal Justice Reform Bill (Bill No. 14/2018) (Sing.).

In 2014, the U.K. was the first country outside the U.S. to embrace DPAs in certain corporate criminal cases. U.K. DPAs result in the simultaneous filing and immediate suspension of formal charges. U.K. DPAs must state the facts of the offense and often require the company to admit guilt. They also can require the company to pay a penalty, disgorge profits, implement or reform a compliance program, cooperate with authorities, and pay the prosecutor's reasonable costs attributable to investigating and prosecuting the misconduct. Companies also can be required to compensate victims, either directly or indirectly by providing benefits to a relevant nonprofit. DPAs last for a period of years and must include an expiration date. DPAs tend to impose lower sanctions than guilty pleas for similar misconduct. A central benefit of DPAs is that they do not trigger mandatory or presumptive collateral consequences. In the U.K., a court must approve a DPA. It has authority to review it to determine whether: (1) offering at DPA is in the interests of justice; and (2) its terms are fair, reasonable, and proportionate. Crimes and Courts Act of 2013, c. 22, § 45, sch. 17 (UK); see also U.K. SERIOUS FRAUD OFFICE ET AL., GUIDANCE ON CORPORATE PROSECUTIONS, https://www.sfo.gov.uk/?wpdmdl=1457 [https://perma.cc/P9RL-B9S4]; *Deferred Prosecution Agreements*, U.K. SERIOUS FRAUD OFFICE, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements [https://perma.cc/JQD9-A8BH].

France promulgated a law creating a similar form of corporate resolution in 2016. Loi 2016-1691 du 9 Décembre 2016 Relative à la Transparence à la Lutte Contre la Corruption et à la Modernisation de la Vie Économique [Law 2016-1691 of December 9, 2016 on Transparency in the Fight Against Corruption and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF THE FRENCH REPUBLIC], Dec. 10, 2016

("Sapin II"); see Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* RESEARCH HANDBOOK ON NEGOTIATED SETTLEMENTS (Abiola Makinwa & Tina Söreide eds., 2020) (discussing U.K. and French law on corporate criminal liability).

Other countries are considering legislation permitting the use of DPAs with organizational defendants, including Australia, Switzerland, and Ireland. In addition, the Organisation for Economic Co-operation and Development is formulating principles for corporate nontrial resolutions in corruption cases, which are likely to include the use of DPAs. Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Liability*, 93 S. CAL. L. REV. 697 (2020).

f. *Academic literature.* DPAs and NPAs have proven a fertile topic for academic analysis. See, e.g., Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*, in CRIMINALITÀ D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO, (Stefano Manacorda and F. Centonze eds., 2018); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 CHI. L. REV. 323 (2017); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel, eds., 2012); Samuel Buell, CAPITAL OFFENSES (2016); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2016); Lawrence D. Finder, Ryan D. McConnell & Scott L. Mitchell, *Betting the Corporation: Compliance or Defiance? Compliance Programs in the Context of Deferred and Non-Prosecution Agreements: Corporate Pre-trial Agreement Update – 2008*, 28 CORP. COUNS. REV. 1, 2-4 (2009); Lawrence Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigations and Reform*, 66 FLA. L. REV. 1 (2014); Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N. CA. L. REV. 23 (2010); Wolf A. Kaal & Timothy Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2000*, 70 BUS. LAW. 61 (2014); Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 186 (2008); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013); see also KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 154-155 (2019) (discussing enforcement in corruption cases).

Scholarship that provides empirical evidence on DPAs and NPAs includes: Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Resolutions: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015); Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CR. L. REV. 109, 129-134 (2020); Brandon L. Garrett, *Individual and Corporate Criminals*, *in* RESEARCH

HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING, 40 (Jennifer Arlen ed., 2018); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015); Brandon L. Garrett, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2016); Brandon L. Garrett, *Globalized Corporate* Prosecutions, 97 Va. L. Rev. 1776 (2011); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of Federal Criminal Sanctions*, 51 AMER. CR. L. REV 29 (2014); see also Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-prosecution*, 84 U. CHI. L. REV. 323, 353-365 (2017) (providing evidence on the use of required reforms and monitors in DPAs and NPAs); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007) (providing evidence on the use of monitors).

*g. Repository of federal organizational DPAs, NPAs and guilty pleas.* DPAs, NPAs and guilty pleas entered into by federal authorities with organizations can be found at Corporate Prosecution Registry hosted by both Duke Law School and the University of Virginia School of Law, https://corporate-prosecution-registry.com/browse/.

**§ 6.16. Declinations (traditional)**

**(a) An organization should be offered a declination (without a precondition of disgorgement, restitution or remediation) if the prosecutor determines that:**

**(1) the evidence does not establish beyond a reasonable doubt that the organization committed a crime; or**

**(2) the offense is not material, as defined in § 6.01(q), or otherwise does not warrant prosecution.**

**Comment:**

*a. A traditional declination.* In a traditional declination, the enforcement official declines to pursue official action without imposing conditions on the organization as a prerequisite to a declination. An enforcement official may decline to pursue an action for a variety of reasons, including that the organization did not engage in misconduct, there is not enough evidence to pursue an action, or the misconduct is not material.

*b. Disclosure.* This form of declination often is not public, although prosecutors may formally announce a declination. Disclosure may be warranted if the government had previously disclosed that the organization is under investigation.

*c. Distinguished from declination following disgorgement, restitution and remediation.* This form of declination should be distinguished from declinations following disgorgement, restitution and remediation, which are discussed in § 6.18.

## § 6.17. Guilty Pleas

**(a) Except as provided in subsection (c), prosecutors should presumptively resolve a case involving material criminal misconduct through a guilty plea unless the organization:**

**(1) either**

**(a) self-reported misconduct in accordance with § 6.04; or**

**(b) fully cooperated in accordance with § 6.05, including by identifying and providing all evidence reasonably available against all employees substantially involved in the misconduct,**

**(2) and engaged in full disgorgement, restitution, and remediation in accordance with § 6.07.**

**(b) Prosecutors should presumptively not seek to impose a guilty plea on an organization that self-reported in accordance with § 6.04, or fully cooperated in accordance with §6.05, and also fully remediated, in accordance with § 6.07.**

**(c) When a guilty plea is the presumptively appropriate form of criminal resolution under subsection (a), a prosecutor may instead offer to resolve a case involving material misconduct through a deferred prosecution agreement if:**

**(1) conviction would subject the organization:**

**(A) to presumptive or mandatory material collateral consequences in the United States or abroad that would impose material harm on consumers, employees in organizational units not involved in the misconduct, or the public, that cannot be addressed through a prior agreement with the authorities positioned to impose the collateral consequences; or**

**(B) additional civil or administrative sanctions to government agencies or private parties in the United States or abroad whose combined magnitude exceeds the sanctions appropriately imposed for the misconduct and it is impracticable for enforcement officials to enter into a coordinated resolution with all the parties who could impose liability on the organization, and**

**(C) one of the following conditions is met:**

**(i) the organization had an effective compliance program at the time of the misconduct; provided sufficient cooperation to identify and provide actionable evidence against all individuals who were knowingly or intentionally involved in committing, attempting to commit, conspiring to commit, aiding and abetting the commission of, the misconduct or who knowingly failed to internally report or terminate the misconduct; and the organization has engaged in full disgorgement, restitution, and remediation in accordance with § 6.07; or**

**(ii) the organization currently is acting in good faith to satisfy § 6.24(b)(3) and its failure to fully cooperate did not undermine prosecutors' ability to prosecute the individuals responsible for the misconduct; or**

**(iii) all high-level or substantial authority personnel responsible for the organization's earlier refusal to fully cooperate are no longer with the organization in a position of authority; the organization has provided sufficient cooperation to identify and provide actionable evidence against all individuals who were knowingly or intentionally involved in committing, attempting to commit, conspiring to commit, aiding and abetting the commission of the misconduct, or who knowingly failed to internally report or terminate the misconduct; and the organization has engaged in full disgorgement, restitution, and remediation in accordance with § 6.07.**

**(d) Guilty pleas should ensure full disgorgement, restitution, and remediation in accordance with § 6.07, should impose criminal fines, and may include provisions that require internal reforms or a monitor in accordance with §§ 6.09–6.12.**

**Comment:**

*a. Presumptions, not mandatory guidelines.* These Principles are phrased as presumptions to guide prosecutors in deciding what form of nontrial resolution should be used to resolve a criminal case against an organization. By establishing presumptions, these Principles promote deterrence by enabling organizations to predict how their decisions to self-report, cooperate, and remediate will affect the form of nontrial resolution that they will be offered. The presumptions also enhance consistency and transparency, thereby enabling prosecutors to use the choice of nontrial resolution to provide information to the public about whether the organization acted proactively to help deter misconduct and enforce the law from those that did not.

Prosecutors retain discretion to deviate from the recommendations in these Principles in situations in which they conclude that a different form of resolution than that recommended by these Principles would better serve the goals of criminal liability for organizations. A nonexclusive list of factors potentially warranting consideration, beyond those upon which the presumptions are predicated, include:

(1) the size of the organization;

(2) the role of the organization's owners in committing or condoning the offense;

(3) the form of organization, including whether it is a for-profit or nonprofit;

(4) the value to prosecutors of the organization's cooperation; and

(5) the type of offense (for example, whether the offense involved fraud or material harm to others).

*b. Guilty plea is the presumptively appropriate form of nontrial resolution for material misconduct unless the organization self-reported or fully cooperated.* Except as provided in § 6.17 (a) and (c), organizations that commit material misconduct should be convicted for their crimes if they neither self-report nor fully cooperate, as provided in § 6.04 and § 6.05.

Although organizational misconduct is committed by individuals, and individuals who are legally responsible for a crime should be subject to criminal sanctions, organizations also should be criminally liable for their employees' crimes because they can play a material role in promoting misconduct by motivating employees to commit crimes, enabling their misconduct through ineffective internal controls, or undermining deterrence by allowing individual wrongdoers to escape detection and sanction.

Organizations should be held criminally responsible for their employees' crimes through a guilty plea unless they affirmatively help prosecutors detect and prevent the misconduct and identify and obtain evidence against the individuals who committed it. Organizations that self-report detected misconduct or fully cooperate stand with society on the side of law enforcement by actively seeking to ensure that misconduct is detected, terminated, and remediated and that the individuals who committed it are identified and punished. By contrast, organizations that fail to either self-report detected misconduct or to fully cooperate with a government's investigation in effect elect to help wrongdoing escape detection and full remediation and wrongdoers to escape sanction. Except as provided in § 6.17 (c), organizations that do not self-report (§6.04) or fully cooperate (§ 6.05), and also fully remediate (§6.07) should not receive leniency from prosecutors in the form of a DPA, NPA, or declination, because they have not taken the actions that society most needs them to take in order to see that its laws are faithfully enforced, that misconduct is detected and terminated, and that those who commit it are identified and appropriately sanctioned.

Prosecutors should not show leniency even to an organization that has terminated the misconduct and fired those who committed it. While these actions are important facets of remediation (see § 6.07), they do not satisfy all of society's interests in criminal enforcement, such as deterrence, criminal punishment of individual wrongdoers, restitution to victims, and accountability to the public.

*c. Appropriate resolution for an organization with an effective compliance program:* Unless required to do so by applicable laws or regulations, prosecutors should not treat an organization's adoption and implementation of an effective compliance program as a sufficient basis for allowing an organization to resolve an action involving material criminal misconduct through a nontrial resolution other than a guilty plea, such as a DPA, NPA, or declination. An organization's adoption and implementation of an effective compliance program are important steps in the effort to prevent and detect organizational misconduct. Enforcement officials should reward such an organization through mitigation of the fine and other measures.

DPAs, NPAs, and declinations, however, generally should be reserved for organizations that proactively seek to aid law enforcement's and society's interests in ensuring that criminal misconduct is detected, terminated, and remediated and that the people substantially responsible for the misconduct are identified and punished. As discussed in § 6.02, criminal enforcement policy can most effectively promote deterrence, appropriate punishment of wrongdoers, restitution to victims, and remediation if it is structured to provide incentives to organizations to self-report and cooperate. Thus, in order to promote deterrence, DPAs, NPAs, and declinations should be reserved for organizations that self-report and cooperate. In particular, enforcement officials' ability to serve the vital goals of deterrence and the appropriate punishment of wrongdoers depends on their ability to identify and obtain evidence against individual wrongdoers. Consequently, all organizations should be required to identify individual wrongdoers and provide all evidence reasonably available against them as an absolute precondition for obtaining a nontrial resolution other than a guilty plea. Nevertheless, enforcement officials can best promote the interests of justice by offering a DPA to an organization that had an effective compliance program at the time of the misconduct, even if it did not self-report or fully cooperate, if two conditions are met. The first is that a conviction would trigger presumptive or mandatory collateral sanctions that would impose substantial harm on the organization. The second is that the organization provided sufficient cooperation to identify all individuals who committed or were legally responsible for the crime and provide prosecutors with all information reasonably available against them, in a sufficiently timely way to enable prosecutors to pursue criminal actions if warranted. When an organization meets both of these conditions, it clearly demonstrates that it is not an appropriate candidate for collateral sanctions.

The first requirement identifies organizations that had a strong commitment to compliance prior to the misconduct. The second requirement promotes deterrence and ensures that the organization is sufficiently committed to compliance and to providing enforcement officials with all the evidence reasonably available against the individuals who were responsible for, conspired to commit, or knowingly condoned the misconduct. By conditioning an organization's receipt of a DPA on its strict adherence to the second condition, prosecutors deter organizations from refusing to fully cooperate in an effort to protect culpable managers from criminal liability in the expectation of being able to obtain a DPA purely by drawing prosecutors' attention to the collateral consequences of conviction.

*d. Benefits of adopting an effective compliance program.* Although an effective compliance program is not a sufficient basis for avoiding conviction, these Principles do recognize the value of an effective compliance program and provide organizations with many incentives to adopt and implement one. First, effective compliance programs help prevent misconduct, thereby reducing an organization's risk of criminal sanction. Second, effective compliance helps organizations to detect misconduct, thereby enabling them to obtain the benefits of self-reporting. Third, effective compliance programs facilitate investigations, thereby aiding the organization's ability to obtain credit for full cooperation. Finally, the organization's adoption and maintenance of an effective compliance program is an important consideration in determining the magnitude of the fine imposed and also whether the criminal resolution should include mandated reforms and/or mandated external oversight (see §§ 6.10–6.12).

*e. Collateral consequences as a basis for avoiding conviction for material criminal conduct.* Prosecutors presumptively should not enable an organization that failed to self-report or fully cooperate to escape conviction solely on the grounds that conviction would trigger or threaten collateral consequences that would impose substantial and unwarranted costs on customers or employees who were not in any way responsible for the crime. Prosecutors would undermine the deterrent and moral message of the law were they to allow organizations to avoid conviction whenever conviction would threaten substantial collateral consequences without requiring corporations to self-report or fully cooperate as a precondition for avoiding conviction. As discussed in § 6.02, organizational criminal enforcement policy can most effectively promote deterrence, appropriate punishment of wrongdoers, restitution to victims, and remediation if it is structured to provide incentives to organizations to self-report and cooperate. Enforcement policies promote detection of misconduct and appropriate punishment of wrongdoers when they reserve DPAs, NPAs, and declinations for organizations that proactively act to help prosecutors detect misconduct or identify and obtain evidence against the individuals responsible for it. Enforcement policies would undermine their ability to achieve these important goals if organizations facing collateral consequences if convicted expected to be able to avoid conviction solely on that basis alone.

Moreover, prosecutors need not offer an alternative to a guilty plea to such organizations to avoid causing undue harm through conviction. To avoid conviction and the resulting collateral consequences pursuant to subsection (c), the organization may reasonably be required to cooperate by identifying and providing all evidence reasonably available against the individuals who committed or are otherwise responsible for the misconduct. In imposing this requirement, set forth in subsection (c)(2), the prosecutor imposes a condition on the organization that it is, at any given point in time, capable of complying with. After all, at any point during the government's investigation, the organization has the ability to conduct its own investigation and to cooperate. Even if it previously has failed to fully cooperate, it can still proactively act to identify all the individuals responsible for the misconduct and provide all evidence reasonably available against them. Should management refuse to do so, prosecutors should exhort them to inform their shareholders of their decision and its likely consequences. Indeed, management of a publicly held corporation would likely be legally obligated to do so.

In rare circumstances, the collateral consequences may justify use of a nontrial resolution other than conviction pursuant to § 6.17(c), even if the organization did not provide the requisite cooperation to identify the individuals who committed the misconduct, as provided in (c)(2). This can occur if the prosecutors do not have a material interest in pursuing actions against the individuals who committed the crimes, for example because: (1) the crimes were not material, so that the misconduct does not come within the scope of subsection (c); or (2) the crimes resulted from duties imposed on the organization that could be, and were, violated without any criminal culpability on the part of any individual. It also can arise if: (1) the individuals responsible for the misconduct do not benefit from the organization's failure to cooperate because prosecutors can obtain sufficient evidence to convict them without the organization's cooperation; or (2) the individuals responsible for the organization's misconduct and failure to cooperate either are no longer in a position of authority at the organization or are likely to be barred from serving as an officer or director of the organization by the relevant civil or administrative enforcement authority.

If an organization obtains a DPA solely on the basis of the threat of collateral sanctions, it generally should be subject to a monitor unless it had adopted and implemented an effective compliance program at the time of the misconduct and undertook full remediation of the misconduct in accordance with § 6.07. The organization also should be subject to enhanced ongoing oversight by its regulators. The penalties imposed should fully reflect the organization's failure to self-report or cooperate.

*f. Provisions included in a guilty plea.* Guilty pleas should impose criminal fines, should ensure full disgorgement, restitution and remediation in accordance with § 6.07, and may include provisions that require internal reforms or a monitor in accordance with §§ 6.09–6.12. It is reasonable for prosecutors to consider the behavior of senior management and the board of directors that resulted in the organization being required to plead guilty, instead of being offered a DPA, in determining whether the nontrial resolution should incorporate provisions designed to remediate the organization's compliance program or require the organization to pay for a monitor, or both.

## REPORTERS' NOTES

*a. Federal policies, approach in other countries, and academic literature.* Discussion of existing policies on forms on nontrial resolutions and the academic literature can be found in the Reporters' Notes following §§ 6.02, 6.04, 6.18, and 6.19.

*b. Federal policies on the impact of an effective compliance program.* See § 6.08, Reporters' Notes *f-j*, and § 6.18, Reporters' Note *f*.

## § 6.18. Declinations Following Disgorgement, Restitution, and Remediation

**(a) An organization that committed material criminal misconduct should not be offered a declination following disgorgement, restitution, and remediation unless it self-reported the criminal misconduct (in accordance with § 6.04), fully cooperated with prosecutors (in accordance with § 6.05), and engaged in timely and full disgorgement, restitution, and remediation (in accordance with § 6.07) [hereinafter "full corrective action" (§ 6.01(m)].**

**(b) An organization that undertook full corrective action should presumptively receive a declination with full disgorgement pursuant to this Section unless an aggravating circumstance is present, as defined in subsection (c).**

**(c) For purposes of determining the form of civil or criminal nontrial resolution with an organization, the following constitute aggravating circumstances:**

**(1) high-level or substantial authority personnel of the organization or a unit thereof:**

**(A) knowingly participated in committing material misconduct;**

**(B) knowingly participated in efforts to impede the detection or investigation of material misconduct;**

**(C) knowingly failed to intervene to terminate material misconduct or report it to appropriate authorities within the organization after becoming aware of it; or**

**(D) were willfully blind to material misconduct;**

**(2) the material misconduct caused substantial harm to persons, property, or the public interest;**

**(3) the material misconduct occurred over many years or was widespread within the organization; or**

**(4) the organization is a recidivist in that it entered into a criminal or civil enforcement resolution for similar material misconduct within the last five years, and**

**its remediation of the past misconduct was, in light of all surrounding circumstances, inadequate.**

**(d) An organization that engaged in full corrective action may appropriately be offered a declination following full disgorgement, restitution, and remediation, even if aggravating circumstances in subsection (c)(1) or (2) are present, provided that subsections (c)(3) or (4) do not apply and the following conditions are met:**

**(1) all high-level or substantial authority personnel who:**

**(A) knowingly participated in committing the offense;**

**(B) knowingly participated in undermining detection or investigation of the offense;**

**(C) knowingly failed to intervene to terminate the offense or report it to appropriate authorities within the organization after becoming aware of it; or**

**(D) were willfully blind to the misconduct;**

**are no longer with the organization in positions of authority;**

**(2) the organization has identified and provided the evidence reasonably available against all of its employees—including all high-level or substantial authority personnel—who participated in committing the offense with the requisite mens rea for the offense;**

**(3) the organization terminated and self-reported all detected misconduct promptly; and**

**(4) the organization undertook prompt and full disgorgement, restitution, and remediation sufficient to disgorge all profits from the offense, remedy the harm caused thereby, and establish and implement an effective compliance program.**

**(e) An organization that engaged in full corrective action (§ 6.01 (m)) should presumptively not be subject to a monitor, even if aggravating circumstances are present, consistent with §§ 6.10 and 6.12.**

**Comment:**

*a. Declination following disgorgement, restitution and remediation*. In the disposition addressed in this Section, no charges are filed against the organization provided that it self-reports the criminal misconduct (in accordance with § 6.04), fully cooperates with prosecutors (in accordance with § 6.05), *and* provides timely and full disgorgement, restitution and remediation (in accordance with § 6.07). The term "full corrective action" is used to describe all of these actions (§ 6.01(m)).

For a discussion of the use of the terms disgorgement, restitution and remediation in these Principles see § 6.07, Comments *a–i*.

*b. Material misconduct.* The standard for material misconduct is provided in § 6.01(q).

*c. Full cooperation, disgorgement, restitution, and remediation as a precondition for resolution through a declination under this Section.* Organizations that could appropriately be charged with material criminal misconduct should not be offered a declination unless, in addition to self-reporting, the organization undertakes full cooperation. Two particularly important considerations bearing on whether the organization is entitled to credit for full cooperation in accordance with § 6.05 are whether the organization produced evidence about the full extent of its material misconduct about which it was or should be aware and whether the organization identified and produced all evidence reasonably available on all high-level and substantial authority personnel of the organization or a unit of thereof who committed, aided and abetted the commission of, or conspired to commit the crime or who later detected criminal misconduct but negligently, knowingly, or willfully failed to terminate or report it.

In addition, the organization must undertake full disgorgement, restitution, and remediation in accordance with § 6.07 prior to obtaining a declination under this Section. As a result, this form of declination assures that victims receive restitution for their harms when appropriate, the organization pays for the harm it has caused, and the organization does not retain the benefit it received from criminal misconduct.

To be deemed to have fully remediated in accordance with § 6.07, the organization also must identify and effectively remediate the underlying causes of the misconduct, including any material deficiencies in its compliance program, appropriately discipline any high-level and supervisory personnel of the organization or the unit who committed the misconduct or acted to cover it up or impeded the investigation, and take appropriate actions with respect to any high-level and substantial authority personnel of the organization or the unit who know about the misconduct, were willfully blind to it, or should have known about it, and who failed to intervene to terminate the misconduct or report it to appropriate authorities within the organization.

*d. Justifications for declining to prosecute organizations that self-report, fully cooperate, fully remediate and do not have aggravating circumstances.* Prosecutors should presumptively offer declinations (following disgorgement, restitution and remediation) to organizations that self-report, fully cooperate, and undertake full disgorgement, restitution, and remediation if there are no aggravating circumstances.

The presumption in favor of offering declinations serves important interests of the criminal justice system. Prosecutors can best prevent, deter, and remediate criminal misconduct, limit the harm caused by criminal misconduct, obtain redress for victims, and punish the individuals who committed the misconduct when they are able to promptly detect misconduct and obtain the evidence needed to prosecute those responsible. Enforcement officials often can most effectively achieve these goals when organizations self-report, fully cooperate, and undertake full disgorgement, restitution, and remediation. Prompt self-reporting is especially important. First, organizations that report detected misconduct generally first intervene to terminate it. This can materially reduce the harm to victims. Second, self-reporting enables enforcement officials to learn about misconduct that often would have remained undiscovered, unpunished, and unremediated. It also enables them to sanction individual criminals who otherwise would have escaped sanction and retained the benefits of their crimes. Finally, organizational self-reporting can help prevent future misconduct if it is expected by employees. Employees contemplating misconduct face a greater, and more salient, risk of legal peril when they believe that their employers are committed to both detecting misconduct and reporting it to authorities, along with information about the individuals responsible for the misconduct.

Organizations that fully cooperate often materially enhance prosecutors' ability to identify and punish the individuals who committed the crime. It also increases their ability to determine the full scope of the misconduct. Such cooperation is particularly valuable when misconduct occurs overseas or in multiple jurisdictions. It is important that organizations identify the full scope of their misconduct in part because this information helps prosecutors ensure that all misconduct is terminated and remediated, the root causes are remediated, victims are redressed, and the individuals responsible are appropriately sanctioned or otherwise dealt with.

Thus, organizational self-reporting and full cooperation can enable prosecutors to assure prompt termination of misconduct that otherwise might have persisted, to sanction individual criminals who otherwise likely would have remained unpunished, and to remediate the harm from misconduct and its root causes in the organization that otherwise might have remained unaddressed.

Organizations will not self-report crimes for which they are potentially criminally liable, or fully cooperate by providing evidence about the misconduct and those responsible, unless they have a compelling reason to do so. Organizations will not take these valuable, but also costly and risky actions, unless they are confident that prosecutors will not subsequently convict them. Insulation from conviction is especially important when a convicted organization would face a material risk of collateral consequences. Organizations also will not disclose crimes that otherwise would likely remain undetected unless they are assured of getting a resolution that is much more favorable than the resolution they would obtain if they remained silent and subsequently fully cooperated if prosecutors were able to detect the misconduct. Accordingly, organizations do not have a material incentive to self-report unless they are confident of obtaining a substantially better resolution than a DPA if they do so.

Prosecutors should presumptively offer a declination to an organization that self-reports, fully cooperates, and undertakes full disgorgement, restitution, and remediation for several reasons. First, the requirement that the organization self-report, fully cooperate and undertake full disgorgement, restitution, and remediation as a precondition for obtaining a declination enables prosecutors to achieve many of the goals of criminal liability notwithstanding the declination. These important goals include identifying and obtaining evidence against the individuals who committed the crime, organizational rehabilitation, remediation and restitution (see § 6.03 & § 6.03 Comment *a*). Second, a presumption favoring a declination often is needed to induce organizations to self-report material misconduct that they expect would otherwise remain undetected because self-reporting does subject organizations to substantial costs that they likely otherwise would have avoided, including the cost of a full investigation, remediation, disgorgement, and restitution even with a declination. Yet an NPA or DPA could potentially subject the organization to far greater costs. These include both the additional costs directly imposed through the NPA or DPA—such as the criminal fine and any mandated reforms—and the costs flowing from the imposition of publicly disclosed criminal sanctions, such as follow-on enforcement actions in other countries.

A presumption that organizations obtain a declination if they self-report, fully cooperate and undertake full disgorgement, restitution, and remediation and do not have aggravating circumstances has the potential to create adequate incentives for organizations to undertake these actions, thereby promoting prompt detection, remediation and rehabilitation of misconduct and the punishment of the individuals responsible for it.

*e. Crimes that provide substantial benefits to the organization.* In situations in which the organization obtained substantial profits from its criminal misconduct, prosecutors should be certain that the organization fully cooperates and undertakes full and complete disgorgement, restitution, and remediation prior to offering a declination. A declination is only appropriate if the prosecutor is confident that the organization has undertaken full remediation sufficient to root out or address the individuals and systemic factors that were the chief causes of the misconduct such that the organization is unlikely to offend in the future, notwithstanding the substantial benefits to it of doing so.

*f. Application to small owner-managed, closely held organizations.* Most of the organizational crime that has been detected has been committed by small owner-managed, closely held organizations. Owner-managers regularly are implicated in, or are the underlying precipitating cause of, misconduct by such organizations, especially in cases involving environmental, worker-safety, immigration, and tax violations. Organizational liability may be the only tool for imposing costs on owner-managers, however, because they regularly take steps to avoid directly or personally committing an unlawful act. Section 6.18 is unlikely to operate to insulate such organizations from liability for two reasons. First, implicated owner-managers of closely held organizations are unlikely to cause their firms to self-report and fully cooperate, since doing so would both impose substantial costs on the organizations (e.g., disgorgement, restitution, and remediation) and produce evidence that could put the owner-managers in peril. Second, such organizations are unlikely to be eligible for a declination when their owner-managers are implicated because full remediation in accordance with § 6.07 is a precondition. Full remediation requires, among other things, identification of all high-level personnel who caused or knowingly condoned the misconduct followed by appropriate remediation, which often involves terminating such personnel. Implicated owners of closely held organizations are unlikely to part with their organizations in order to render them eligible for a declination.

As for small or closely held organizations that are not owner-managed, the effect of these Principles is likely to depend on whether the board of directors and senior management are sufficiently independent of the people involved in the misconduct to be willing to self-report, fully cooperate, and fully remediate. This may not occur in family owned organizations if a family member is implicated. These Principles, however, can be expected to encourage self-reporting and full cooperation by private organizations when their owners and board of directors are independent of those implicated in the misconduct.

*g. Aggravating circumstances.* Declinations following disgorgement, restitution, and remediation achieve many of the same goals as DPAs and NPAs. Declinations, however, differ from DPAs and NPAs in two important respects. First, a declination does not require an organization to pay a fine (although it will necessarily incur costs to disgorge its profits and remediate the misconduct and any compliance deficiencies in accordance with § 6.07). Second, following a declination, prosecutors do not retain jurisdiction over the organization to ensure that it fully remediates the issues with its compliance program and continues to implement reforms over the course of the agreement. Subsection (c) provides a set of "aggravating circumstances" under which a declination is presumptively not appropriate. This is because the aggravating circumstances generally are best addressed through a resolution that provides the prosecutor with an ongoing relationship with the organization or the ability to fine the organization, subject to the exceptions set forth in Subsection (d).

Aggravating factors suggesting that either a fine or oversight over the organization's efforts to rehabilitate itself or to provide remediation may be needed, absent countervailing factors (see Comment *h*) include a finding that:

(1) high-level or substantial authority personnel of the organization or a unit thereof knowingly participated in material misconduct or knowingly participated in efforts to impede the detection or investigation of material misconduct;

(2) high-level or substantial authority personnel of the organization or unit knowingly failed to intervene to terminate the misconduct or report it to appropriate authorities within the organization after becoming aware of the misconduct or were willfully blind to it;

(3) the crime caused substantial harm to persons, property, or the public interest;

(4) the crime occurred over many years or was widespread within the organization; or

(5) the organization is a recidivist in that it engaged in a new instance of material misconduct within five years of entering into a criminal or civil enforcement resolution for similar material misconduct, and its remediation of the past misconduct was, in light of all surrounding circumstances, inadequate.

*h. High-level or substantial authority personnel.* Misconduct committed by or condoned by high-level or substantial authority personnel is treated as an aggravating circumstance for several reasons. First, prosecutors view an organization as more culpable when management is involved in the misconduct. Second, prosecutors have more reason to be concerned about the effectiveness of an organization's remediation efforts when managers committed or supported the crime (see Comment *f*). High-level personnel are more likely to create a culture that leads others to violate the law. Managers in such a culture cannot necessarily be relied upon to deter misconduct.

High-level or substantial authority personnel condone misconduct when they either know that the misconduct is occurring, are aware of facts that create a substantial probability that misconduct is occurring, or are aware of facts that should be brought to the attention of the organization's compliance office, and they do not intervene to either terminate the misconduct or report it to the organization's compliance office.

This aggravating circumstance is established if evidence of material misconduct was reported to the organization's compliance office and the office, aware of or willfully blind to the existence of material evidence that the firm is engaging in material misconduct, either did not engage in a good faith, reasonable investigation or, having determined that material misconduct is occurring, did not take effective steps to ensure that it is terminated (e.g., by reporting to executive management or the board of directors). Similarly, this aggravating circumstance is established if executive management or the board of directors received credible material evidence that the firm is engaging in material misconduct and fails to act in good faith to terminate it.

The organization should not be deemed to be an organization whose high-level or substantial authority personnel condoned misconduct based on its failure to investigate organizational misconduct if the high-level or substantial authority personnel who received information about the misconduct did not conduct a thorough investigation because the information that reached them did not provide them with a reasonable belief that there was a sufficient likelihood that misconduct was occurring to justify further investigation. The aggravating circumstance also is not established if high-level or substantial authority personnel conducted a good-faith and reasonable investigation and, following the investigation, and in consultation with legal counsel, reached a good-faith and reasonable conclusion that the conduct did not violate the law.

*i. Declination in the presence of aggravating circumstances that have been appropriately mitigated.* A decision not to offer a declination to an organization that has aggravating circumstances has the benefit of permitting additional oversight of and punishment for cases when it would appear to be warranted, but at the expense of potentially substantially reducing the likelihood that prosecutors can detect this misconduct. Organizations can be expected to be materially less likely to self-report misconduct that would otherwise be detected if they expect to be offered a DPA or NPA, rather than a declination, especially when the misconduct also could be subject to enforcement actions by other jurisdictions. This is a concern because the misconduct associated with aggravating circumstances often comprises misconduct where prompt detection, termination, investigation, and remediation is particularly valuable and important. Such misconduct is more likely to involve a material business decision with potential to cause greater harm to victims. It also has a greater tendency to weaken an organization's culture at its roots, potentially leading other employees to commit additional crimes. This misconduct also can be the hardest to detect because senior managers can employ a variety of ways to protect themselves, including co-opting employees and removing potential whistleblowers.

Accordingly, in order to enhance organizations' incentives to self-report misconduct involving high-level or substantial authority personnel, Subsection (d) provides an avenue for an organization to obtain a declination if it self-reports, fully cooperates, and undertakes full disgorgement, restitution, and remediation when specific aggravating circumstances are present, provided that the organization has undertaken specific steps that ameliorate the concerns raised by those aggravating circumstances. Thus, these Principles provide that prosecutors may offer a declination, even when high level or substantial authority personnel were involved in the misconduct (§ 6.18(c)(1)), if the high-level or substantial authority personnel who participated in the misconduct no longer hold positions of authority in the organization and the organization has taken steps designed to enable prosecutors to sanction these wrongdoers. Thus, the organization must provide full cooperation (§6.05) that gives prosecutors evidence sufficient to charge the high-level personnel and substantial authority personnel responsible for the misconduct. Providing such evidence against high-level and substantial authority personnel involved in the misconduct serves the important goal of helping to ensure that managers who commit crimes are prosecuted when it is appropriate to do so.

In addition, the organization must take other actions designed to remediate the pernicious impact on the organization of authority having been vested in people who committed criminal misconduct. The organization also must root out, or otherwise adequately deal with, all those high-level and substantial authority personnel who committed, helped cover-up, or who knew of or were willfully blind to the misconduct and failed to terminate it or to report it to appropriate authorities within the organization, as specified in § 6.18(d)(1)-(4).

The provisions of § 6.18(d)(1)-(4) set forth the actions that an organization arguably should undertake as part of full cooperation and full remediation. These provisions make clear, however, that an organization should not be granted a declination in such circumstances simply for using its best efforts to provide information on the role of individuals. The organization must to ensure that *all* high-level or substantial authority personnel who knowingly participated in committing the offense, knowingly participated in undermining detection or investigation of the offense, or who failed to intervene to terminate it or report it to appropriate authorities within the organization after becoming aware of the offense, or who were willfully blind to the misconduct, are no longer with the organization in positions of authority. The organization also must actually provide—as opposed to taking reasonable efforts to provide—prosecutors with material evidence that helps establish the guilt of those high-level and supervisory personnel who participated in committing the offense with the requisite mens rea for the offense.

A declination also is not appropriate unless the organization's efforts to identify and remediate all the underlying causes of the misconduct is sufficiently thorough and effective that prosecutors are confident that the organization has truly reformed itself, especially in those areas that were impacted by the presence of the wrongful high-level or substantial authority personnel. Prosecutors who offer a declination under these circumstances should, as in all cases, proactively pursue a criminal action against the high-level and substantial authority personnel who committed the crime, as well as any others who committed the crime who are appropriately subject to criminal sanction (see § 6.03). An organization should not obtain a declination under these circumstances unless it satisfies all of the requirements set forth in §§ 6.04, 6.05, 6.07, and 6.18(d)(1)-(4).

Prosecutors also may offer a declination to an organization that self-reported, fully cooperated, and undertook full disgorgement, restitution, and remediation, even if the crime imposed substantial harm on persons, property, or the public interest, if the organization took the actions specified in § 6.18(d)(1)-(4). Crimes involving substantial harm are especially deserving of punishment. They also are particularly important to detect and terminate—promptly. As a result, society often benefits substantially when the organization acts to help enforcement authorities deter misconduct. Accordingly, to encourage organizations to self-report such misconduct, promptly, prosecutors should have a policy of offering a declination for any organizations that self-reports, fully cooperates, and provides full disgorgement, restitution, and remediation when the conditions specified in § 6.18(d)(1)-(4) are met. These conditions restrict declinations to situations in which the organization:

(1) reported promptly and fully;

(2) enabled prosecutors to satisfy society's interest in punishing the misconduct by identifying and providing actionable evidence against all the individuals responsible for it;

(3) provided the restitution and remediation needed to remedy the harm caused and provide compensation to victims; and

(4) fully remediated the causes of the misconduct, including taking appropriate disciplinary actions and establishing and implementing an effective compliance program.

An organization should not obtain a declination for crimes that imposed substantial harm unless it satisfies all of the requirements set forth in §§ 6.18(d)(1)-(4).

While these Principles create a presumption favoring a declination if the conditions specified in § 6.18(d)(1)-(4) are met, prosecutors retain discretion to offer an alternative form of nontrial resolution, such as an NPA. An NPA may be preferable to a declination, for example, in order to ensure the organization's full cooperation in circumstances where prosecutors have charged employees of the organization with misconduct but cannot bring them to trial because the employees reside in a country that does not extradite to the United States.

These Principles do not provide a similar avenue to a declination to organizations: (1) that are guilty of widespread misconduct—occurring in multiple offices or units of the organizations or widely across a single unit—or misconduct occurring over a long period of time; or (2) that are criminal recidivists, under these Principles. These exclusions are likely to make organizations less likely to self-report such misconduct, absent a material threat of detection (for example, through a whistleblower). Nevertheless, these circumstances create a sufficiently strong presumption that the organization's compliance problems run so deep that resolution through a DPA or NPA is more appropriate.

*j. Criminal recidivism.* Organizations presumptively should not obtain a declination if they entered into a criminal or civil enforcement resolution for similar material criminal misconduct within the recent past when the surrounding circumstances indicate that the organization was not genuinely committed to remediating the deficiencies that caused the original misconduct and to implementing a compliance program effectively designed to prevent misconduct.

The purpose of offering incentives to organizations to self-report, to cooperate with prosecutors, and to remediate effectively is to reduce misconduct sustainably. Repetition of the misconduct by the same organization appears to mean that the incentives did not work. To deter recidivism, it may be appropriate to sanction the organization for its misconduct and to impose additional requirements, such as required reforms (§ 6.09) or a monitor (see §§ 6.10–6.12). In such situation, resolution through a DPA or NPA may be appropriate in part because this provides prosecutors with the ability to exercise ongoing oversight of the organization's remediation efforts over the course of the agreement. In situations in which the organization presents a substantial risk of a future material violation that cannot be adequately addressed through internal reforms or external oversight, additional actions may be needed, which could include debarment or exclusion by a regulatory agency or, in rare situations, a restriction on the organization's ability to engage in certain business activities (see § 6.14).

Repeated misconduct does not necessarily mean that an organization is not committed to or capable of deterring misconduct. For example, an organization might operate in a heavily regulated area that imposes strict liability for causing particular harms whose occurrence the organization cannot completely prevent even with the exercise of reasonable care. In addition, very large organizations often need to manage populations that are the size of a small city but may be spread throughout the world. Such organizations may be unable to eliminate the risk of crime, even with utmost care. What is important is whether the organization is exerting the appropriate effort, dedication, and resources to preventing, detecting, and punishing criminal behavior. The incidence, cause, context, and management responses to offenses are all factors to be considered. The genuineness of management's commitment to compliance can be tested by taking evidence about such commitment from employees, agents, customers, and vendors and by evaluating whether the organization has devoted adequate resources to compliance given its size and the nature of its operations.

Accordingly, this Section limits the circumstances under which an organization is considered a criminal recidivist to those in which the instant crime, occurring after past misconduct, provides a basis for concluding either that the organization did not fully remediate the underlying causes of its past misconduct or that there otherwise is a basis for concluding that executive management—and those supporting it, performing high-level functions such as compliance and oversight of the organization's self-reporting and cooperation—are not committed to taking the actions needed to effectively deter misconduct. Organizations that either were convicted of misdemeanors or entered into DPAs for material misconduct also may be deemed recidivists if the circumstances of the misconduct or the resolution indicate that the organization committed a material violation and failed to respond appropriately to remediate it and deter future violations.

By contrast, an organization that pleads guilty to a misdemeanor that is not material, as this term is defined in § 6.01(q), should not be deemed to be a recidivist if it demonstrated its commitment to deterring misconduct. An organization that entered into a criminal resolution for a felony that it detected, self-reported, and remediated also should not be treated as a recidivist if it also fully cooperated and remediated in good faith, as that organization is providing affirmative aid to law enforcement.

*k. Cartels and other misconduct involving multiple organizations.* This Section presents principles that are appropriate for organizations (or corporate groups) that engage in misconduct on their own. Some forms of misconduct, specifically price-fixing and other collusive behavior, require the cooperation of multiple organizations. Such misconduct can be particularly harmful as well as difficult to detect. Thus, it is appropriate to target all the benefits of self-reporting at the first organization to self-report, as this approach has the greatest potential to encourage individual members of the cartel to defect and self-report.

Cartel members that are not the first to self-report should not be eligible for a declination or NPA. A DPA may be appropriate if the organization fully cooperated and remediated, particularly if the organization had an effective compliance program. Credit for full cooperation can be accomplished through sanction adjustments.

*l. Legal duty to self-report.* This Section is structured to provide incentives to self-report in situations in which the organization does not have a legal duty to self-report. When the organization has a legal duty to report either misconduct or a risk of harm, prosecutors can enhance deterrence through a commitment to pursuing enforcement actions against those that did not self-report when they were legally required to do so. Resolution of any liability for the underlying misconduct (as distinct from the breach of duty to report) is warranted through a declination if the organization self-reported, fully cooperated, and had an effective compliance program (and no aggravating circumstances are present). Prosecutors should resolve through an NPA if no aggravating circumstances are present, and an organization with a legal duty to report self-reported, fully cooperated, and remediated, but did not have an effective compliance program at the time of this misconduct (§ 6.08).

*m. Importance of individual prosecutions.* Prosecutors entering into declinations for material criminal misconduct should undertake their best efforts to pursue criminal cases against all individuals who committed, attempted to commit, aided and abetted or conspired to commit material criminal misconduct, and were substantially responsible for the crime, provided that they can be appropriately charged with the crime in the United States, in accordance with § 6.03. Cases involving material criminal misconduct that are resolved through declinations with the organization, and that do not later result in criminal charges against the individuals who committed the crimes, are inconsistent with the policy justifications for organizational declinations.

## REPORTERS' NOTES

*a. Incentivizing self-reporting and the Fifth Amendment right against compelled incriminating testimony.* Fifth Amendment concerns are not implicated when enforcement officials structure enforcement policy to incentivize, or even pressure, organizations to provide incriminating information about individuals as discussed in § 6.02, Reporters' Note *i*.

*b. Relationship to federal policy governing enforcement against business organizations.* The approach in this section is consistent with the policy of the Criminal Division of the U.S. Department of Justice (DOJ) as set forth in the FCPA Corporate Enforcement Policy. U.S. Dep't of Just., Just. Manual § 9-47.120 (2019). The DOJ's Criminal Division has instructed prosecutors to treat the FCPA Corporate Enforcement Policy as nonbinding guidance in all cases. Remarks by John P. Cronan, acting head of the DOJ's Criminal Division, and Benjamin Singer, Chief of the Fraud Section's Securities and Financial Fraud Unit, announced at the American Bar Association's 32nd Annual National Institute on White Collar Crime (March 1, 2018).

The FCPA Corporate Enforcement Policy provides that there is a presumption that an organization should receive a declination if it voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, unless there are aggravating circumstances. Aggravating circumstances include "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct;

pervasiveness of the misconduct within the company; and criminal recidivism." U.S. Dep't of Just., Just. Manual § 9-47.120 (2019).

When aggravating circumstances are present, federal prosecutors are directed to determine the appropriate form of nontrial resolution through reference to the Principles of Federal Prosecution of Business Organizations. U.S. Dep't of Just., Just. Manual § 9-28.000. The FCPA Corporate Enforcement Policy provides that if an organization is subject to a nontrial resolution, such as a DPA or NPA, after it self-reports, fully cooperates, and remediates, then prosecutors should impose a fine that provides a 50 percent reduction off the low end of the U.S. Sentencing Guidelines range. U.S. Dep't of Just., Just. Manual § 9-47.120(1) (2019).

To determine the appropriate form of resolution under the Principles of Federal Prosecution, federal prosecutors are directed to consider and balance 11 factors when determining whether to proceed against an organization and, if so, what form of resolution to employ:

(1) the nature and seriousness of the offense;

(2) the pervasiveness of wrongdoing within the organization;

(3) the organization's history of similar misconduct;

(4) the organization's willingness to cooperate in the investigation of its agents;

(5) the existence and effectiveness of the organizations' preexisting compliance program;

(6) the organization's timely and voluntary disclosure of wrongdoing;

(7) the organization's remedial actions;

(8) collateral consequences;

(9) the adequacy of remedies such as civil or regulatory enforcement actions;

(10) the adequacy of the prosecution of individuals responsible for the organization's malfeasance; and

(11) the interests of any victims.

U.S. Dep't of Just., Just. Manual § 9-28.300 (2020). Under the Justice Manual, prosecutors have discretion as to how to weigh each of the factors.

These provisions are not themselves structured to enable an organization to predict with confidence the form of nontrial resolution that will be offered should it self-report, fully cooperate, and undertake full disgorgement, restitution, and remediation. A prosecutor who is informed about pervasive or substantial misconduct does have discretion to insist on a guilty plea under these provisions.

These Principles diverge from this written policy in providing more specific guidance on the appropriate resolution for organizations that self-reported, fully cooperated, and engaged in full disgorgement, restitution, and remediation, but have aggravating circumstances. These Principles also explicitly provide a path to a declination for organizations that have certain aggravating circumstances—including participation in the misconduct by senior management. These Principles include provisions that explicitly offer a path to a declination for an organization with certain aggravating circumstances in recognition of the high public interest in detecting misconduct and punishing wrongdoers in cases with aggravating circumstances. This Section limits declinations to situations in which the organization has truly acted to enable prosecutors to identify and obtain evidence against all the individuals who committed the crime, and has fully remediated the root causes of the offense (including pursuing appropriate actions against any individuals responsible), among other requirements. Providing organizations with a presumption that they will receive a declination under the circumstances set forth in this section should help provide strong incentives for organizations to self-report misconduct involving senior managers or substantial harms and to take steps to provide evidence against the individuals responsible for it.

Moreover, while this approach differs from the written provisions in the Federal Corporate Enforcement Principles, it is consistent with the actual practice of the Fraud Section of the Department of Justice, which is the office that accounts for most federal DPAs and NPAs.

The Fraud Section has introduced more predictability by adopting a consistent practice of offering declinations and NPAs to organizations that self-report, fully cooperate, and fully remediate, even in the presence of aggravating factors. The Fraud Section also will offer a declination to an organization that self-reported, even if senior managers were involved in the misconduct, if the organization provided cooperation that included identifying the managers involved in the misconduct and providing evidence against them.

Indeed, an analysis of 68 nontrial corporate criminal resolutions for violations of the Foreign Corrupt Practices Act (FCPA) entered into between January 2015 and August 2020 conducted in the course of drafting these Principles found that 19 of these involved an organization that received credit for self-reporting. All but one of those cases resulted in a published declination (15) or an NPA (3). One firm, Airbus, entered into a DPA. No organization that self-reported was required to plead guilty.

Two of the three self-reporting companies that resolved through NPAs only received partial credit for their cooperation with the DOJ's investigation because of their untimely or incomplete responses or failure to disclose relevant facts learned during the investigation. The third had multiple aggravating factors, including widespread misconduct.

In the Airbus case, the DOJ filed a two-count information against Airbus alleging both violations of arms-trafficking laws and conspiracy to violate the FCPA. Airbus received credit for voluntary disclosure of the first offense but did not receive full voluntary-disclosure credit for the FCPA-related misconduct.

Several of the declinations involved organizations that had cooperated to provide evidence on managers who had participated in the misconduct. Organizations that received a declination notwithstanding managers' involvement in the crime include Cognizant Technology Solutions Corporation (2019), https://www.justice.gov/criminal-fraud/file/1132666/download; Insurance Corporation of Barbados Limited (2018), https://www.justice.gov/criminal-fraud/page/file/1089626/download; and HMT LLC (2016) https://www.justice.gov/criminal-fraud/file/899116/download. For a list of the 14 declinations that the Fraud Section has published (as of Aug. 6, 2020), see Fraud Section, Criminal Division, Department of Justice, https://www.justice.gov/criminal-fraud/pilot-program/declinations.

Section § 6.18 also differs from federal policy in distinguishing between criminal recidivists based on a number of factors, including whether the crime is of the same type, and the organization's role in attempting to deter or respond to the misconduct. This Section recognizes that not all past misconduct reflects badly on the organization. The organization could have been criminally sanctioned as a result of misconduct by a single employee, notwithstanding its adoption and maintenance of an effective compliance program that detected the misconduct, after which the organization self-reported, cooperated, and fully remediated. In addition, some organizations face a much higher risk of a legal violation, notwithstanding managerial diligence. Of particular note, some organizations can be criminally sanctioned not just for affirmative acts of misconduct, but for failure to adopt effective systems to detect misconduct by others, such as anti-money laundering; others face strict criminal liability for misconduct, as in the health care area. Liability in such cases can arise even when the organization made good-faith reasonable efforts to comply with the law. These types of misconduct are best deterred when organizations retain strong incentives to detect misconduct, investigate and self-report it, and fully cooperate, even when they have been subject to a prior enforcement action.

*c. Corporate Recidivists.* In October, 2021 Deputy Attorney General Announced changes to the DOJ criminal division's approach towards corporate recidivists. First, she stated that prosecutors will evaluate all prior misconduct—criminal, civil and regulatory—by a company when deciding on the appropriate resolution with a company, instead of considering only misconduct of they that is similar to the misconduct that prosecutors are investigating. Prosecutors are directed to consider all prior misconduct because all prior misconduct provides material information on the company's overall commitment to compliance and the company's commitment to, and effectiveness at, creating a culture that disincentivizes criminal conduct. U.S. Department of Justice, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021) https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

She also announced that, going forward, the DOJ will be examining the issue of whether DPAs and NPAs are the appropriate form a resolution for certain recidivist companies. According to Deputy Attorney General Monaco "[c]orporate recidivism undermines the purpose of pretrial diversion, which is after all to give a break to corporations in exchange for their promise to fix what ails them, as well as to recognize a company's cooperation." She also indicated that the DOJ would be looking with particular disfavor on companies who have subsequent misconduct while still under the terms of a DPA or NPA. Companies can expect "serious consequences" for violating the terms of either type of agreement. *Id.*

*d. Morgan Stanley declination.* The Morgan Stanley declination is an early prominent example of a declination of prosecution against an organization even though a senior executive had been charged with civil and criminal violations. In determining not to charge the organization for FCPA violations committed by one of its employees, the DOJ noted Morgan Stanley's decision to self-report and fully cooperate. It also noted the strengths of the organization's compliance program, including matters such as extensive due diligence on business partners, controls over payments to business partners, extensive monitoring and auditing activities, proper leadership and oversight, rigorous internal controls, extensive compliance training and reminders, and internal policies on relevant risks. See Off. of Pub. Affs., Dept. of Justice, 12-534, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (April 25, 2012), 2012 WL 1426120, http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required.

*e. Federal policy governing environmental and antitrust cases.* Under its Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (Audit Policy) the Environmental Protection Agency (EPA) generally will not recommend an organization for criminal sanction, will reduce penalties, and will not request routine audit reports if the organization discovered the misconduct through an environmental audit or through its compliance management system, promptly reported it before the EPA or another regulator would have identified the violation through its own investigation or based on information provided by a third party, corrected the violation, took steps to prevent its recurrence, and cooperated, provided certain aggravating circumstances are not present, such as that the organization is not a recidivist and the violation did not threaten serious harm. Environmental Protection Agency Audit Policy (Apr. 2000) https://www.epa.gov/compliance/epas-audit-policy.

The DOJ's Antitrust Division offers leniency to organizations that self-report if six conditions are met, including reporting fully before the illegal activity is reported from any other source. See U.S. Dep't of Just., Just. Manual § 9-28.900 (2015) (discussing the policy of the U.S. Department of Justice, Antitrust Division); see also Antitrust Division Corporate Leniency Policy https://www.justice.gov/atr/file/810281/download.

In 2019, Assistant U.S. Attorney General for the Antitrust Division Makan Delrahim announced that an effective compliance program should be a considered in determining whether an organization should obtain a DPA in a criminal or civil action predicated on an antitrust violation. Delrahim emphasized, however, that the Principles of Federal Prosecution of Business Organizations in the Justice Manual "counsel[s] against crediting a compliance program when the other three hallmarks of good corporate citizenship are absent": specifically, (1) prompt self-reporting, (2) full cooperation with the Antitrust Division's investigation, and (3) remediation. Delrahim also noted that the division continues to treat NPAs as resolutions that are reserved for companies that were the first to self-report and that otherwise met the requirements of the division's Corporate Leniency Policy. Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Just., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

*f. Relevance of an effective compliance program for organizations that do not self-report detected misconduct under the Organizational Sentencing Guidelines.* Under the Organizational Sentencing Guidelines, an organization is not entitled to the fine mitigation normally accorded to organizations that adopted and implemented an effective compliance program if the organization failed to self-report any detected misconduct within a reasonable time after detecting it. See U.S. SENT'G GUIDELINES MANUAL § 8C5.2(f)(2) (U.S. SENT'G COMM'N 2018). This approach reflects the view that the central enforcement objectives for encouraging effective compliance are to both prevent misconduct and enhance prosecutors' ability to detect misconduct that does occur. An organization that detects misconduct and fails to self-report it has failed to employ its compliance program to achieve one of its important enforcement benefits; and thus prosecutors can reasonably refuse to give the organization credit, consistent with the Organizational Sentencing Guidelines.

*g. Disgorgement, restitution and remediation.* For a discussion of the use of these terms in the Justice Manual and in these Principles as compared with the Restatement of the Law Third, Restitution and Unjust Enrichment (AM. L. INST. 2011), see § 6.07, Comments *a–i* and Reporters' Note *a*.

*h. Academic literature*. Extensive academic literature provides analysis that favors offering predictable incentives for organizations to self-report, fully cooperate, and undertake full disgorgement, restitution, and remediation, as well as criticisms of this practice. This literature includes, but is not limited to: Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH (Abiola Makinwa & Tina Søreide eds., 2020); Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel, ed., 2012); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1 (2010); SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 109-175 (2016); KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 154-155 (2019); JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015), BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); see also Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*; 81 IND. L.J. 473 (2006); Jed S. Rakoff, *The Financial Crisis: Why Have No High Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014); see also Samuel Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROB. 25 (2020); cf. Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROB. 23 (1997) (discussing what makes business crimes a criminal case).

### § 6.19. Deferred and Non-Prosecution Agreements

**(a) An organization that did not self-report or fully cooperate (in accordance with §§ 6.04 and 6.05) should presumptively not be offered a deferred prosecution agreement**

**(DPA) or a non-prosecution agreement (NPA) in a case involving material criminal misconduct except as provided in § 6.17(c).**

**(b) An organization that undertook full corrective action in accordance with §6.01(m), but is not eligible for a presumptive declination pursuant to § 6.18(c), should presumptively be offered an NPA if § 6.18(d) is satisfied and the prosecutor decides that a declination is not appropriate under the circumstances..**

**(c) An organization that fully cooperated (in accordance with § 6.05), and undertook full disgorgement, restitution, and remediation (in accordance with § 6.07), should presumptively be offered a DPA, and not an NPA or declination, if:**

**(1) it did not self-report detected material misconduct in accordance with § 6.04; or**

**(2) it self-reported detected misconduct but the aggravating circumstances set forth in § 6.18(c)(3) or (4) are present.**

**Comment:**

*a. Full corrective action.* The term full corrective action is defined in § 6.01(m), and refers to an organization that self-reports the criminal misconduct (in accordance with § 6.04), fully cooperates with prosecutors (in accordance with § 6.05), *and* engages in timely and full disgorgement, restitution and remediation (in accordance with § 6.07).

*b. Organizations that undertook full corrective action but had aggravating circumstances.* An organization that undertook full corrective action, in accordance with § 6.01(m) and §§ 6.04, 6.05, and 6.07, but is not entitled to a declination pursuant to § 6.18(c) (aggravating circumstances), should presumptively be offered an NPA if the conditions set forth in § 6.18 (d) are satisfied and the prosecutor has determined that a declination is not appropriate, for example because the prosecutor wants to ensure the organization's on-going cooperation after the resolution is finalized.

Section 6.19(b) establishes a presumption in favor of an NPA, instead of a DPA or guilty plea, when an organization self-reported, fully cooperated, and remediated, but certain aggravating circumstances are present, and those individuals responsible for material criminal misconduct are no longer in positions of authority in the organization, and the organization has identified and provided evidence regarding the culpability of all individuals who committed material criminal misconduct, along with other requirements. This presumption is designed to provide the organization with a material incentive to self-report, fully cooperate, and remediate, because it achieves the important goal of enabling enforcement officials to identify and prosecute the individuals who committed material criminal misconduct.

Subsection (b) favors using an NPA in such circumstances, even when the misconduct causes serious harm, because such misconduct is particularly harmful to society if it is not terminated and remediated promptly. In order to protect people from substantial harm, prosecutors need to provide companies with meaningful incentives to self-report, fully cooperate, and remediate widespread misconduct. This subsection seeks to ensure that substantial misconduct is appropriately punished by requiring organizations to identify the individuals responsible and provide evidence against them as a precondition for obtaining an NPA. This section creates a presumption favoring an NPA, instead of recommending that prosecutors consider the facts and circumstances of each individual case, in order to provide the predictability needed to provide organizations with strong incentives to self-report, fully cooperate, and undertake full disgorgement, restitution and remediation. This subsection also promotes consistency across similarly situated cases.

Subsection (b) does not apply if the material criminal misconduct was widespread or the organization is a recidivist, in accordance with § 6.18(c)(3) & (4). In these situations, prosecutors should presumptively offer a DPA to an organization that self-reported, fully cooperates, and undertakes full disgorgement, restitution and remediation, as set forth in § 6.19(c). A DPA is appropriate in these circumstances because widespread material criminal misconduct and recidivism indicate pervasive compliance issues within the organization. Accordingly, prosecutors may appropriately consider additional interventions such as required compliance program reforms (§6.09) or additional oversight of the organization's reform efforts (§6.10-6.12). In these circumstances it also is important for prosecutors to pay particular attention to the organization's remediation efforts, including whether it has appropriately addressed the individuals who committed material criminal misconduct, detected it without terminating it, or whose sustained indifference to compliance was a substantial factor in causing the misconduct.

*b. Organizations that fully cooperate and provide full disgorgement, restitution, and remediation, but did not self-report detected material misconduct.* Organizations that detect material misconduct should not be eligible for a declination or NPA unless they self-report it. Thus, organizations that fully cooperate and provide full disgorgement, restitution, and remediation, but did not self-report detected material misconduct, should presumptively be offered a DPA, and not a declination or an NPA. This presumption is intended to help ensure that organizations can be confident of obtaining a substantially more favorable form of nontrial resolution if they self-report material misconduct than if they do not. By contrast, an enforcement policy that allows organizations to obtain a declination or NPA for material misconduct without self-reporting would seriously undermines incentives to self-report by permitting organizations to keep quiet when they detect material misconduct in the expectation that they will still be eligible for a declination or NPA should prosecutors later detect the misconduct.

Making self-reporting a precondition for obtaining a declination also provides organizations an incentive to adopt a compliance program that is effective at detecting any misconduct, as detection enables the organization to self-report.

An organization that fully cooperated (in accordance with § 6.05), and undertook full disgorgement, restitution, and remediation (in accordance with § 6.07), but did not self-report can be (and should be) presumptively offered an NPA under this Section if it did not fail to self-report *detected material* misconduct. Thus, an organization may be eligible for an NPA if it did not self-report because it did not detect the misconduct before enforcement officials did provided that it had an effective compliance program at the time of the misconduct and conducted a good-faith and reasonable investigation of any suspected misconduct. Prosecutors evaluating an organization's claim should carefully consider whether an organization with an effective compliance program would likely have failed to detect this misconduct. An organization seeking an NPA also should, as always, be required to fully cooperate, which includes identifying the individuals responsible for the misconduct and providing all evidence reasonably available against them.

Similarly, an organization should be eligible for an NPA, notwithstanding its failure to self-report, if the misconduct was not material. An organization may be eligible if the misconduct was an isolated event involving a small number of employees.

*c. Full cooperation, disgorgement, restitution and remediation as a precondition for resolution through a DPA or an NPA for material criminal misconduct.* Organizations that committed material criminal misconduct should not be offered a DPA or an NPA unless the organization engaged in full cooperation in accordance with § 6.05, except as provided in § 6.17(c). These Principles predicate DPAs and NPAs on an organization's willingness to provide full cooperation to ensure that DPAs and NPAs promote the central goals of criminal enforcement, which include deterrence, punishment of individuals who commit misconduct, restitution, and rehabilitation. The goals of deterrence and punishment are best served when the individuals who committed and were substantially responsible for the misconduct are identified and punished. An organization that seeks leniency from prosecution should be willing to proactively and effectively aid prosecutors' efforts to achieve these goals. In addition, to fully ensure that an organization fully remediates the root causes of the misconduct, prosecutors need to have identified the individuals substantially responsible for the misconduct and the organization's compliance deficiencies. Thus, in order to ensure full remediation, organizations also must fully cooperate by identifying the individuals who committed the misconduct and providing evidence of their culpability.

The requirement that organizations fully cooperate also serves to reward, indirectly, organizations that established and implemented an effective compliance program. Organizations can most effectively detect and investigate misconduct if, prior to the misconduct, they implemented an effective compliance program.

*d. Evidence against responsible individuals: differences in the types of crimes.* In considering whether an organization provided genuine full cooperation, prosecutors should consider both the timeliness of the cooperation and whether the organization provided prosecutors with evidence about the complicity of the individuals who knowingly committed, conspired to commit, or aided and abetted the commission of, condoned, material misconduct that materially improved prosecutors' ability to pursue appropriate criminal charges against those individuals. The provision of this evidence is the most effective measure of the diligence and genuineness of an organization's investigation.

Nevertheless, in considering whether it would be appropriate to charge individuals, prosecutors should recognize that the fact that the organization committed a crime does not always imply that an individual within the organization knowingly and intentionally engaged in a criminal act warranting imposition of criminal sanctions. Individual culpability is more likely to be absent when the organization is charged under a statute providing for strict criminal liability, or is charged with a crime predicated on its failure to adopt and maintain an effective system of internal controls of some form (as under the accounting provisions of the Foreign Corrupt Practices Act).

*e. Full cooperation and owner-managed or closely held organizations.* When prosecutors evaluate whether an organization with a controlling owner or group of owners has fully cooperated by providing evidence against those substantially responsible for the crime, they should take special care to ensure that the organization is indeed identifying all those responsible for the misconduct—including owners—and is pursuing appropriate remediation.

*f. Organizations that refuse to fully cooperate or remediate.* An organization that does not self-report, fully cooperate, or remediate is presumptively ineligible to resolve a case through a declination, NPA or DPA, unless a conviction would subject the organization to substantial harm from collateral consequences that appear unwarranted under the circumstances.

Thus, adoption and maintenance of an effective compliance program, in and of itself, does not support resolution through a declination, an NPA or a DPA, if the organization does not fully cooperate and remediate, for the reasons articulated in Comments c & d to § 6.17. This requirement reserves the ability to resolve through a declination, NPA, or DPA for organizations that self-report, fully cooperate, and remediate because these are the actions that directly promote deterrence by enabling prosecutors to detect misconduct and obtain evidence needed to sanction those responsible for it. In addition, organizations with an effective compliance program that do not use it to fully cooperate in effect vitiate an important benefit to society of encouraging effective compliance, which is the increased ability not only to prevent misconduct but to detect it and obtain evidence against individual wrongdoers. Moreover, given the potential negative impact on organizations of self-reporting and cooperation—including the threat of being sanctioned for misconduct that might otherwise have gone undetected—organizations often would eschew these valuable activities, and rely instead on compliance programs, if effective compliance sufficed to enable them to obtain a declination, NPA, or DPA.

These Principles nevertheless provide organizations with strong reasons to adopt an effective compliance program. First, effective compliance programs help prevent misconduct, thereby reducing an organization's risk of criminal sanction. Second, effective compliance programs promote detection of misconduct, thereby enabling the organization to obtain the benefit of self-reporting. Third, effective compliance programs facilitate investigations, thereby aiding the organization's ability to obtain credit for full cooperation. Finally, the organization's adoption and maintenance of an effective compliance program is an important consideration in determining the magnitude of the fine imposed and also whether the criminal resolution should include mandated reforms (§ 6.09) and/or mandated external oversight (see §§ 6.10–6.12).

*g. DPAs predicated on collateral consequences.* In rare circumstances, a DPA may be justified even when an organization did not self-report, fully cooperate, or remediate if conviction would subject the organization to substantial collateral consequences that would impose undue harm on employees not responsible for the misconduct or on consumers. Organizations should not be able to undermine the goals of these Principles by obtaining easy access to DPAs under such circumstances. Thus, prosecutors should not presumptively resolve a matter through a DPA for an organization that refused to fully cooperate and remediate, notwithstanding the threat to the organization or to consumers of collateral consequences, unless the organization is now willing to cooperate and remediate, and it has fully remediated the root cause of its earlier failure to cooperate, including by appropriately disciplining all high-level or substantial authority personnel who were substantially responsible for the organization's failure to cooperate. In addition, an organization's failure to fully cooperate and remediate will generally provide a basis for both greater sanctions and the inclusion in the agreement of provisions requiring that the company improve its compliance program (§ 6.09) or accept and pay for a monitor (see §§ 6.10–6.12).

Nevertheless, a DPA may be warranted if the organization provides adequate, albeit not full and prompt, cooperation in a situation in which the misconduct is minor, isolated, and fully remediated by the organization.

## REPORTERS' NOTES

*a. Federal enforcement policy.* For a discussion of federal policy governing criminal enforcement against organizations, including DPAs and NPAs, see the Reporters' Notes following §§ 6.02, 6.04, and 6.18.

*b. Cooperation with government investigations.* The federal government may administer a particularly harsh penalty against an organization believed to have been uncooperative. For a leading example, see Off. of Publ. Affs., Dept. of Justice, DOJ 14-686, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial#:~:text=BNPP%2C%20the%20world's%20fourth%20largest,Sudan%2C%20Iran%2C%20and%20Cuba.

*c. Academic literature*. DPAs and NPAs have proven a fertile topic for academic analysis, see, e.g., Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*, *in* CRIMINALITÀ D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO, (Stefano Manacorda and F.

Centonze eds., 2018); Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel, eds., 2012); Samuel Buell, CAPITAL OFFENSES (2016); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2016) Lawrence D. Finder, Ryan D. McConnell & Scott L. Mitchell, *Betting the Corporation: Compliance or Defiance? Compliance Programs in the Context of Deferred and Non-Prosecution Agreements: Corporate Pre-trial Agreement Update – 2008*, 28 CORP. COUNS. REV. 1, 2-4 (2009); Lawrence Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigations and Reform*, 66 FLA. L. REV. 1 (2014); Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23 (2010); Wolf A. Kaal & Timothy Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2000*, 70 BUS. LAW. 61 (2014); Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of Federal Criminal Sanctions*, 51 AMER. CR. L. REV 29 (2014); Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 186 (2008); see also Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1724 (2007) (discussing monitor provisions in deferred prosecution agreements).

**§ 6.20. Monetary Penalties in Nontrial Criminal Resolutions with Organizations that Committed Material Criminal Misconduct**

**(a) An organization that committed detected material misconduct should be required to undertake full disgorgement, restitution, and remediation in accordance with § 6.07.**

**(b) Criminal enforcement officials should structure their policy governing monetary penalties to recommend substantially lower fines for those organizations with material criminal misconduct that self-reported and fully cooperated (in accordance §§ 6.04 & 6.05) than for organizations that either:**

**(1) fully cooperated; or**

**(2) had an effective compliance program at the time of the misconduct, but did not self-report.**

**(c) An organization that undertakes full corrective action (§6.01(m)) (including full disgorgement) should presumptively not be subject to a criminal fine if the organization is presumptively eligible for a non-prosecution agreement under § 6.19(b).**

**(d) Criminal and civil enforcement officials should coordinate the penalties imposed on an organization sanctioned for misconduct.**

**(e) Prosecutors considering a request to adjust sanctions based on an organization's inability to pay should:**

**(1) determine the veracity of the claim, including by assessing recent and projected disbursements to shareholders and owner-managers;**

**(2) predicate a downward adjustment on the organization undertaking all appropriate remedial actions available to it, including appropriate disciplinary actions;**

**(3) place a priority on ensuring victim restitution and remediation of harm and evaluate mechanisms for providing restitution and remediation through the organization's future earnings; and**

**(4) ensure that the nontrial resolution prohibits the organization from either making any distributions to shareholders or providing incentive compensation or bonuses to high-level personnel until the organization has satisfied its obligations to make payments to criminal, civil, and administrative authorities.**

**Comment:**

*a. Disgorgement of the benefits of and remediation of harm from the misconduct.* Organizations that could appropriately be charged for engaging in material misconduct should be required to undertake full disgorgement, restitution, and remediation in accordance with § 6.07, either in a nontrial resolution or as a precondition for obtaining a declination. Prosecutors should ensure that the organization does not retain any benefit from the misconduct. The organization may undertake voluntary disgorgement prior to the criminal resolution. Alternatively, the organization may be required to do so as a condition of a non-prosecution agreement (NPA), deferred prosecution agreement (DPA), or guilty plea.

Consistent with § 6.07, the organization need not be required to disgorge the benefit of the misconduct if the restitution and remediation payments intended to remedy the harm caused by its misconduct exceed its benefit from the misconduct. For example, in cases (such as environmental cases) in which an organization's crime caused substantial harm that it can remedy by incurring remediation costs, and those costs exceed the benefit the organization received from its misconduct, the organization should simply be required to remediate the harm caused by the misconduct. The cost to the organization of remediating its compliance program should not affect the organization's obligation to disgorge its benefits from the misconduct, however. The benefit of misconduct can include the cost savings to the organization of not complying with the law.

When imposition of a fine is appropriate, it should be imposed in addition to the organization's forfeiture of any net benefit received and the expense of remediation measures.

*b. Reduction in monetary penalties to induce self-reporting and full cooperation.* Prosecutors' offices can promote self-reporting by adopting policies that grant a substantially greater reduction in monetary penalties to organizations that self-report, fully cooperate, and remediate, than is available to those that did not self-report but either fully cooperated or had an effective compliance program at the time of the misconduct. The fine imposed on an organization that undertook full corrective action (in accordance with §§ 6.01(m), 6.04, 6.05, and 6.07) should be substantially lower than the fine imposed on an organization that fully cooperates or had effective compliance program, but did not undertake full corrective action.

Organizations are unlikely to be inclined to self-report misconduct—particularly substantial misconduct that could lead to a large sanction—unless the additional mitigation they receive for self-reporting, above the mitigation for cooperating and remediating, is both predictable and proportionate to the impact that self-reporting has on the organization's likelihood of being sanctioned. Thus, the amount of additional mitigation for self-reporting should consider the cost to the organization, as well as the benefit to prosecutors and the public, of the organization reporting misconduct. This benefit includes consideration of the likelihood that the misconduct would have been detected, in a reasonable time, if the organization did not self-report. The lower the likelihood that the misconduct would have been detected, the greater should be the amount of fine mitigation.

Thus, should an organization face a 1-in-4 chance that it would be caught if does not self-report (but would cooperate if detected), but a near guarantee of being sanctioned if it does self-report and cooperate, then it is likely not to self-report unless the monetary penalty imposed on organizations that both self-report and cooperate is one quarter (25%) as great as the sanction imposed on organizations that do not self-report but do cooperate. Thus, the amount of mitigation should be much larger when prosecutors conclude that they would have been very unlikely to detect the misconduct had the organization not self-reported. Indeed, it can be appropriate for enforcement officials to only require the organization to disgorge the benefit (and remediate) in situations in which the organization reveals material misconduct that prosecutors very likely would not have detected, thus enabling prosecutors here or abroad to sanction the responsible individuals. Evidence that misconduct regularly is not self-reported (with the result that the responsible individuals are not punished) provides a strong policy rationale for taking active steps to provide greater incentives to organizations to self-report.

*c. No fines imposed on organizations that self-report, fully cooperate, and fully remediate and that are eligible for a NPA*. Organizations that self-report, fully cooperate, and undertake full disgorgement, restitution and remediation in accordance with § 6.07 presumptively should not be subject to a criminal fine if the organization is presumptively eligible for resolution through an NPA under § 6.19(b)**.** To satisfy § 6.07, the organization should be required to undertake full disgorgement, restitution, and remediation. The disgorgement, restitution, and remediation obligation imposed on organizations subject to an NPA for material misconduct under § 6.07 is likely to be substantial. Thus, even in the absence of a fine, the organization shouldincur material costs.

The decision not to imposes fines on such organizations is justified by the substantial benefit to the public of providing strong incentives for organizations to self-report and cooperate.

This benefit is particularly great in situations in which the organization promptly self-reported misconduct that involved either substantial harm or high-level or substantial authority personnel and provided actionable evidence against all high-level or substantial authority personnel involved in the misconduct. The provision of this evidence, and the prosecutors' subsequent efforts to convict the individuals appropriately charged with the crimes, satisfies the public's interest in punishing the perpetrators responsible for the misconduct.

Prosecutors also promote both appropriate accountability and remediation through reasonable efforts to ensure that high-level and substantial authority personnel who knowingly induced or condoned the misconduct do not remain with the organization in positions of authority.

*d. Fines imposed on organizations that self-report, fully cooperate, and remediate and that are eligible for a DPA*. Organizations that self-report, fully cooperate, and undertake full disgorgement, restitution, and remediation in accordance with § 6.07 but are presumptively eligible only for a deferred prosecution agreement as a result of aggravating circumstances should be subject to a fine.

The fine should reflect the seriousness of the crime, the aggravating circumstances, and the fullness of the organization's efforts to identify and provide evidence against the individuals who committed the crime, as well as evidence of the organization's efforts to remediate the misconduct. Enforcement authorities should draft provisions that provide guidance to prosecutors to ensure that, notwithstanding such aggravating circumstances, organizations can rely on faring better if they self-report, fully cooperate, and remediate than if they do not self-report, but later fully cooperate and remediate.

*e. Benefits of predictability.* Organizations are more inclined to self-report, cooperate, remediate, and adopt effective compliance programs when they can predict how these costly actions will impact the total monetary penalties that they pay. Self-reporting can be particularly costly to an organization, especially when there is a substantial likelihood that the misconduct would have remained undetected and thus unsanctioned if the organization did not self-report. Self-reporting presents a substantial threat of being sanctioned, both in the United States and abroad. Thus, to encourage self-reporting, it is important that organizations expect to obtain benefits for self-reporting that substantially exceed those available to organizations that do not self-report.

*f. Inability to pay.* Organizations regularly request a downward adjustment of the criminal sanction based on their inability to pay. Prosecutors should evaluate the genuineness of such a claim by considering a variety of factors including:

(1) whether the organization is closely held and, if so, what is the compensation of any owner-managers who played a responsible role in the misconduct; and

(2) whether the organization has paid dividends to shareholders in the past three years and has it committed to not paying dividends to shareholders until its fine has been paid. Prosecutors also should predicate a downward adjustment of the fine on the organization undertaking full remediation through all the avenues available to it, including appropriate discipline of high-level and substantial authority personnel.

In addition, enforcement officials should give priority to obtaining restitution for victims and remediation of the harm, as well as to ensuring that culpable owners and senior managers are not able to profit from the firm in the near future after having received a downward adjustment in the sanction based on the organization's inability to pay. Enforcement officials can adjust fines downwards to protect the future health of the organization without simultaneously allowing senior management or the organization's owners to avoid their financial responsibility for the misconduct. This is particularly important when the organization has a small number of owners who were either directly implicated in the misconduct or made management decisions that were a substantial factor in either causing the misconduct or enabling it to continue for an unreasonable amount of time. Enforcement officials contemplating sanction adjustments thus should ensure that the organization undertakes remediation to the full extent possible, which should include ceasing to employ, in supervisory positions, high-level personnel who committed or condoned the misconduct.

To ensure that victims obtain full restitution and that the organization undertakes remediation enforcement officials can require the organization to make payments into a fund designed to provide restitution to victims in the future, or to issue securities (for example, preferred stock or debt) to victims designed to ensure that the organization's distributions of its future income prioritizes payments to victims over payments to others. Other measures could include requiring the organization not to make dividend payments and to limitations on the compensation paid to high-level personnel until the organization has made restitution to victims and provided full remediation. Prosecutors also should consider whether any individuals involved in the misconduct should be referred to the appropriate administrative agency to consider a temporary or permanent debarment. Finally, when a majority of the owners are implicated, authorities should consider whether it is appropriate to condition sanction mitigation on their agreement to sell their ownership stake to people who were not involved in the organization at the time of the misconduct.

## REPORTERS' NOTES

*a. Scope of these Principles.* These Principles do not provide a full set of guidelines governing sentencing in light of both the Organizational Sentencing Guidelines and the American Law Institute's project on Sentencing.

*b. Federal policy on corporate sentencing, self-reporting, and cooperation.* The Foreign Corrupt Practices Act Corporate Enforcement Policy provides that when organizations that self-report, cooperate, and remediate are sanctioned, they should be subject to a criminal fine that is up to 50 percent below the minimum fine set forth in the Sentencing Guidelines for Organizations for organizations that self-report or cooperate. Organizations that fully cooperate and remediate, without self-reporting, should receive up to a 25 percent reduction in the fine below the minimum fine set forth in the Sentencing Guidelines for Organizations for organizations that only cooperate. The FCPA Corporate Enforcement Policy does not recommend a reduction in the fine below that provided in the Sentencing Guidelines for Organizations for companies with an effective compliance program that do not self-report or fully cooperate. See U.S. Dep't of Just., Just. Manual § 9-47.120 (2019).

*c. Organizational Sentencing Guidelines.* The Organizational Sentencing Guidelines target mitigation for self-reporting, cooperation and compliance at one type of monetary criminal penalty: the criminal fine. The Organizational Sentencing Guidelines provide more fine mitigation to an organization that self-reports, cooperates, and accepts responsibility than to one that only cooperates and accepts responsibility. U.S. SENT'G GUIDELINES MANUAL ch. 8. (U.S. SENT'G COMM'N 2018) Under these guidelines, an organization that fully cooperates and accepts responsibility receives a two-point reduction in its culpability score, while one that also self-reports receives a five-point reduction. For a large organization that starts with a culpability score of 10, this translates into a 50 percent reduction for organizations that self-report, cooperate, and accept responsibility and a 20 percent reduction for those that cooperate without self-reporting. This additional fine mitigation for self-reporting is less significant than it might seem at first because the organization will likely be expected to pay restitution, which is not mitigated. The resulting difference in the monetary award for an organization that self-reports versus one that does not is sufficient to provide a strong incentive to self-report if self-reporting no more than doubles the likelihood of the organization getting caught. If, by contrast, the organization faces only a 10 percent chance of getting caught if it does not self-report, the promise of a 50 percent mitigation for self-reporting is unlikely to lead an organization to take an action that would increase its likelihood of sanction by tenfold. See Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. OF MIAMI L. REV. 321 (2012).

*d. Restitution under the Organizational Sentencing Guidelines.* The Organizational Sentencing Guidelines provide that restitution should be ordered for the full amount of the victim's loss when there is an identifiable victim. U.S. SENT'G GUIDELINES MANUAL § 8B1.1 (U.S. SENT'G COMM'N 2018). The Organizational Guidelines note that Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation if the order otherwise meets the requirement of 18 U.S.C. § 3553(a)(1). Restitution should not be ordered if full restitution has already been made. The provision favoring restitution also does not apply:

> in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

U.S. SENT'G GUIDELINES MANUAL § 8B1.1(b)(2) (U.S. SENT'G COMM'N 1991).

*e. Remedial orders under the Organizational Sentencing Guidelines.* The Organizational Sentencing Guidelines provide that a court may impose a remedial order on an organization as a condition of probation. The remedial order may require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm. If the magnitude of the expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm. U.S. SENT'G GUIDELINES MANUAL § 8B1.2 (U.S. SENT'G COMM'N 1991). The commentary provides that criminal remedial orders should be coordinated with any administrative or civil remedial measures undertaken or contemplated by a federal government agency (such as the Environmental Protection Agency) that is authorized to order remedial measures.

*f. Inability to pay.* Most organizations sanctioned for criminal misconduct are both small and closely held. Many are unable to pay the fines imposed. Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, 148, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel eds., 2012). Federal enforcement policies encourage prosecutors to consider adjustments to monetary sanctions when the recommended sanctions could bankrupt the organization and harm innocent employees or customers. U.S. SENT'G GUIDELINES MANUAL § 8C3.3(b) (U.S. SENT'G COMM'N 1991) (providing mechanisms for downward adjustment when necessary to avoid substantially jeopardizing the continued viability of the organization.) This occurs regularly, particularly, but not exclusively, in cases involving smaller organizations. Indeed, a recent analysis of fines imposed under the federal sentencing guidelines found that 20.6 percent of solvent organizations, 55.1 percent of financially distressed organizations, and 69.4 percent of defunct organizations had their fines reduced due to concerns about financial distress. Nathan Atkinson, *Corporate Liability, Collateral Consequences, and Capital Structure* (Oct. 21, 2020) (working paper 2020), http://nathanatkinson.com/wp-content/uploads/2020/10/Atkinson-Corporate-Liability.pdf. For data on the number of organizations sentenced under the federal sentencing guidelines who were unable to pay the criminal fine see, e.g., Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Resolutions: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 584 n. 193 (2015); Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, 148, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel eds., 2012); Nathan Atkinson, *Corporate Liability, Collateral Consequences, and Capital Structure* (Oct. 21, 2020) (working paper 2020), http://nathanatkinson.com/wp-content/uploads/2020/10/Atkinson-Corporate-Liability.pdf. Inability to pay is also a factor favoring sanction mitigation under many civil statutes. The Environmental Protection Agency (EPA) has a policy of reducing liability when sanctions would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business. The EPA explicitly states that it will generally not request penalties that are clearly beyond the means of the violator. Therefore, the EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. The EPA has the burden to establish that it has considered all appropriate factors in setting the civil penalty, including ability to pay. Yet the EPA does not have to establish that the violator can pay. Instead, it simply needs to provide evidence regarding the violator's financial health, from which it can be inferred that the violator's ability to pay should not affect the penalty amount. The agency also starts with an assumption that the violator is financially healthy. The violator has the burden of establishing that it is not able to pay. The violator should expect to provide detailed financial information extending beyond its tax returns. Susan Shinkman, Dir., Off. of Civil Enf't, & Cynthia L. Mackey, Dir., Off. of Site Remediation Enf't, Env't Prot. Agency, Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action, pp. 3-4 (June 29, 2015), https://www.epa.gov/sites/production/files/2015-06/documents/atp-penalty-evaluate-2015.pdf; Thomas, L. Adams, Jr., Assistant Adm'r for Enf't and Compliance Monitoring, Env't Prot. Agency, Memorandum: Guidance on Determining a Violator's Ability to Pay a Civil Penalty, p. 3 (Dec. 16, 1986), https://www.epa.gov/sites/production/files/documents/civilpenalty-violators.pdf. In determining whether the violator can pay the agency considers multiple avenues available for the violator to pay a civil penalty, including using profits that would normally be distributed to shareholders, selling assets, deferring planned investments, selling stocks, and borrowing. Id. at pp. 2-3; see also Barry Breen, Dir., Off. of Site Remediation Enf't, Env't Prot. Agency, General Policy on Superfund Ability to Pay Determinations (Sept. 30, 1997), https://www.epa.gov/ sites/production /files/2013-09/documents/genpol-atp-rpt.pdf. Other sanction-adjustment provisions include:

- Clean Water Act § 309(g)(3), 33 U.S.C. § 1319(g)(3);
- Toxic Substances Control Act §§ 16(a)(2)(B) and 207(c)(1)(C), 15 U.S.C. §§ 2615(a)(2)(B) & 2647(c)(1)(C);
- Comprehensive Environmental Response, Compensation, and Liability Act § 109(a)(3), 42 U.S.C. § 9609(a)(3);
- Emergency Planning and Community Right-to-Know Act § 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C);
- Act to Prevent Pollution from Ships § 9(b), 33 U.S.C. § 1908(b);
- Federal Housing Finance Agency, 12 U.S.C. § 4636(c)(2);
- Federal Trade Commission, 15 U.S.C. § 45(m)(1)(C); and Mining Safety and Health Administration, 30 C.F.R. § 100.3(a)(vi).

## TOPIC 4

## CORPORATE CIVIL AND ADMINISTRATIVE ENFORCEMENT POLICY FOR ORGANIZATIONS

**Introductory Note**: This Topic sets forth policies to guide civil and administrative enforcement decisions for organizational misconduct, focusing on what form of nontrial resolution and collateral consequences are appropriate for an organization that is legally responsible for having committed knowing or intentional material corporate misconduct. These policies focus on the choice of nontrial resolution in circumstances in which a determination that the organization is culpable for the misconduct, or the imposition of particular remedies, could trigger the presumptive or mandatory imposition of collateral consequences, such as debarment, exclusion, or delicensing, in the United States or abroad. This Topic also addresses enforcement officials' actions to protect employees who report misconduct internally or to government authorities from either contractual provisions that deter such reporting or from retaliatory actions. While the Sections in this Topic do not expressly apply to nontrial resolutions predicated on either negligence or strict liability, civil or regulatory authorities may find that these Sections offer guidance in such circumstances, depending on the nature of the harm, the statutory violation, and the organization's legal-reporting obligations.

In setting forth policies guiding the use of different forms of nontrial resolution, the Sections in this Topic distinguish between forms of resolution based on the legal effect the resolution would have on an organization, instead of based on the form of the resolution itself (e.g., deferred prosecution agreement, consent decree, or injunction). This Topic focuses on the consequences of the nontrial resolution, rather than developing policies for specific legal forms of nontrial resolution, because policies governing enforcement should be predicated on the consequences of the enforcement action. Across the different agencies and industries, each specific type of civil and administrative nontrial resolution can have materially different consequences for an organization depending the legal violation, the industry in which the organization operates, and the enforcement authority responsible for the resolution. Thus, in order to focus on the consequences that should guide enforcement decisions, these Sections predicate the guidance on the consequences of a nontrial resolution for knowing or intentional misconduct rather than on specific forms of nontrial resolution. Specifically, these Sections focus on three questions. First, when should civil or administrative enforcement officials employ, or agree to not employ, a nontrial resolution that could trigger mandatory, presumptive, or permissive collateral consequences? Second, when should civil or administrative enforcement officials allow an organization to enter into a nontrial resolution that does not require the organization to admit that it engaged in the misconduct? Finally, when should civil or administrative enforcement officials allow an organization to enter into a resolution that allows the organization not to admit to the misconduct while also prohibiting it from denying that it engaged in the misconduct? It is important to develop policies governing decisions affecting these three consequences of a nontrial resolution because these consequences are material to the public and also will directly affect organization's incentives to self-report and fully cooperate.

These Sections assume that organizations' civil and administrative liability is governed by respondeat superior, as is generally the case under state and federal law. They also apply to enforcement under other organizational liability rules. Sections 6.01-6.14 also are applicable to civil and administrative enforcement proceedings.

## § 6.21. Forms of Civil Nontrial Resolutions and Sanctions for Organizations

**(a) Civil and regulatory enforcement officials may resolve a matter with an organization that they have determined engaged in knowing or intentional material misconduct through the following forms of nontrial resolutions:**

**(1) a resolution in which the organization is formally adjudicated without a trial to have committed the misconduct;**

**(2) a full-admission resolution under which the organization is required to admit to all of the facts needed to establish that the organization engaged in the misconduct but is not formally adjudicated to have committed the misconduct (e.g., many regulatory deferred prosecution agreements);**

**(3) a partial-admission resolution under which the organization admits to some of the material facts of the misconduct, but not to all the facts needed to establish that it engaged in the misconduct, and is not formally adjudicated to have committed the misconduct;**

**(4) a neither-admit-nor-deny resolution under which the organization is found to have engaged in the misconduct and is prohibited from publicly denying that it engaged in the misconduct (except in certain limited circumstances, such as in litigation against the organization by a party other than the enforcement authority that entered into the resolution), but is not required to admit that it engaged in misconduct; or**

**(5) a no-admission/denial-permitted resolution under which the organization is found to have engaged in the misconduct, but is not required to admit to any facts of the misconduct and may publicly deny that it engaged in the misconduct.**

**(b) Civil and regulatory authorities may seek a variety of forms of relief including:**

**(1) civil or administrative monetary sanctions;**

**(2) an injunction against future misconduct;**

**(3) disgorgement or forfeiture of the benefit of misconduct;**

**(4) remediation;**

**(5) restitution;**

**(6) debarment, exclusion, or delicensing; and**

**(7) remedial measures, such as requiring compliance-program reforms and appointing a compliance monitor (§ 6.01 (s)).**

**Comment:**

*a. Mandatory or presumptive collateral consequences of civil or administrative resolutions*. The selection of the form of nontrial resolution and the form of relief can have material implications for whether an organization is subject to mandatory, presumptive, or permissive collateral consequences. A variety of statutes provide that if an organization is subject to specific forms of civil or administrative resolution, a regulatory authority can—and in some cases must—impose collateral consequences such as delicensing of the organization by federal, state, local, or foreign government agencies or debarment or exclusion of the organization from contracting with or providing services to such agencies or customers whose costs are covered by such agencies. Organizations' basis for concern about collateral consequences extends beyond those that can be imposed by government authorities. In addition, in some circumstances, self-regulatory organizations, or international organizations such as the World Bank or International Monetary Fund, that serve as gatekeepers for certain markets or sources of financing also can impose collateral consequences on an organization with detected misconduct. Private contracts also can include clauses that subject an organization adjudicated to have committed specific offenses to collateral consequences.

The collateral consequences of a civil or administrative resolution do not depend entirely or even primarily on the form of the nontrial resolution. Instead, they can depend on what enforcement authority brought the action, what organization is the subject of the action, the type of misconduct, and the sanctions imposed. For example, in some circumstances, an organization can be found culpable for engaging in material misconduct without that finding triggering mandatory, presumptive, or permissive collateral consequences imposed by government authorities, self-regulatory authorities, or international organizations in the United States or abroad. In other circumstances, mandatory, presumptive, or permissive collateral consequences are triggered if an enforcement authority enters into a resolution that results in a formal adjudication that an organization engaged in misconduct, but they are not triggered if the enforcement authority enters into a resolution that does not result in a formal adjudication that the organization is culpable. Yet there are situations in which an organization can be potentially subject to collateral consequences even if it enters into a resolution that does not require it to admit culpability. For example, a no-admission resolution that is predicated on a regulatory authority's factual finding that an organization engaged in a particular form of misconduct can serve as the trigger for that regulatory authority or another entity, such as a self-regulatory organization, to impose collateral consequences on the organization. For this reason, the Sections in this Topic are predicated on whether a nontrial resolution could trigger mandatory, permissive, or presumptive collateral consequences and not on the specific form of nontrial resolution imposed.

Some statutes allow a governmental regulatory authority to waive imposing collateral consequences at its discretion. Others limit its ability to waive. Some government authorities determine whether to impose collateral consequences at the same time they enter into a resolution with an organization. Other authorities make the decision whether to impose collateral consequences separate from the decision as to what form of nontrial resolution to use.

When enforcement of a statute or regulation could result in a civil or administrative enforcement action that triggers mandatory, presumptive, or permissive collateral consequences imposed by governmental authorities, self-regulatory authorities, or international organizations, government authorities should ensure that civil and administrative enforcement officials are able to enter into forms of nontrial resolution for corporate misconduct that do not result in such collateral consequences, to the extent they have legal authority to do so. Civil and regulatory authorities also should provide guidance on when it is appropriate for civil or administrative enforcement officials to do so.

This Section provide guidelines on enforcement policies to guide the use of forms of nontrial resolution that avoid triggering collateral consequences that would otherwise result from enforcement of the misconduct in question. The guidelines do not specify the specific form of resolution that should be adopted because different forms of nontrial resolution and different remedies may or may not trigger collateral consequences depending on the industry, the regulatory authority, and the type of misconduct. See § 6.24, Comment *d*.

*b. Civil or administrative settlement that adjudicates that an organization engaged in misconduct.* Civil enforcement authorities can file a civil action in court, and administrative enforcement authorities can bring an administrative action before the relevant administrative agency, and then simultaneously or subsequently enter into a settlement with the organization under which the organization accepts certain findings of facts, conclusions of law, or determinations of liability with respect to the misconduct at issue and agrees to the remedies set forth in the settlement. Section 6.21(a) describes the various forms such a settlement may take. Section 6.21(b) lists possible remedies that a settlement can provide. These remedies can include monetary penalties, disgorgement, restitution, remediation of the harm caused, an injunction against future misconduct, and internal reforms.

Some settlements filed in court can result in a formal legal determination that the organization committed the misconduct. Agencies entering into settlements also can, and regularly do, make a legal determination, based on evidence, that the organization committed the misconduct. An organization that has thus been adjudicated to have engaged in misconduct, that admits to having engaged in misconduct, or is subject to particular forms of relief as a result of a determination that it engaged in certain types of misconduct may be subject to mandatory, presumptive, or permissive collateral consequences, as is discussed in Comment *a*. Section 6.24 provides guidance on when enforcement officials should offer to resolve a civil or administrative enforcement action through a form of nontrial resolution that would not trigger mandatory, presumptive, or permissive collateral consequences that otherwise might follow from an enforcement action.

A determination that an organization engaged in misconduct, or an organization's admission either to having engaged in misconduct or to facts that constitute misconduct, also can have material effects on both the public and the organization that go beyond any potential collateral consequences. The public potentially benefits because such determinations provides it—and thus potential customers, employees, creditors, and suppliers—with credible evidence about whether the organization engaged in the misconduct. The organization can incur costs beyond any potential collateral consequences because such determinations can be introduced against the organization in other actions—enforcement actions, criminal actions, and private civil litigation—to establish that the organization engaged in misconduct. Section 6.25 provides guidance on when enforcement officials should require a determination of culpability or a full admission by the organization and when, by contrast, enforcement officials should offer to resolve a matter through a nontrial resolution that does not adjudicate the organization's culpability.

*c. Nontrial resolutions with admissions of facts but no legal determination of culpability*: Nontrial resolutions of civil or administrative actions can require an organization to admit to all, or some, of the facts of the misconduct and impose sanctions for the misconduct, without also providing a legal determination that the organization committed the misconduct. A nontrial resolution with admissions can provide the public with material information about whether the organization engaged in misconduct, although the public may view it as less credible than a litigated determination that the organization engaged in misconduct. An organization that admits to all the facts of the misconduct may incur costs to the extent that other government authorities, self-regulatory agencies, or private parties can introduce the admission in separate actions as evidence to establish the organization's culpability.

Nontrial resolutions that do not adjudicate the organization's culpability but do require it to admit to the facts of the misconduct can take a variety of forms. Two forms that arose in the criminal context but are now being used by some civil or administrative enforcement authorities are deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Under a civil or administrative DPA, the enforcement authority files a complaint against the company but suspends the action as long as the company complies with the provisions in the DPA. Under a civil or administrative NPA, the civil or regulatory enforcement authority agrees not to file an action against the company, provided that the company complies with the provisions in the NPA.

Civil DPAs and NPAs can impose the same financial penalties and the same non-financial consequences (such as mandated internal reforms, appointment of a compliance monitor (§6.01 (s)), or an obligation to report to criminal or civil authorities) as would be imposed on an organization after a successful trial in a civil or administrative enforcement action. The primary impact of resolving a civil or administrative case through a DPA or NPA, instead of a formal enforcement action, is that a DPA or NPA does not result in a formal legal determination that the organization committed the misconduct. By contrast, a settlement in which the organization is adjudicated to be culpable of the misconduct by a court or agency often can trigger mandatory or presumptive collateral consequences and also establish the organization's liability for purposes of a private action by civil litigants.

There is a central distinction between civil DPAs and neither-admit-nor-deny resolutions and other consent decrees. DPAs include both a statement of facts and an admission by the organization that it engaged in the facts that constitute the misconduct. By comparison, neither-admit-nor-deny resolutions, and many consent decrees, tend to involve a court's or administrative agency's factual finding that an organization engaged in misconduct, but they do not require the organization to either admit that it engaged in the misconduct or make factual admissions relating to the misconduct.

Organizations that enter into consent decrees usually are not required to either admit culpability for the misconduct or to the facts of the misconduct. In some situations, however, this distinction is less material that it would appear. While a neither-admit-nor-deny resolution does not entail an admission by the organization, it may follow a factual finding by a regulator, such as the Securities and Exchange Commission, that the organization engaged in misconduct. The finding, in turn, could trigger the mandatory, presumptive, or permissive imposition of collateral consequences. Some regulated organizations also are potentially subject to collateral consequences if they were enjoined from violating certain statutes, regardless of whether the organization admitted culpability.

In the criminal context, DPAs tend to require organizations to admit of all the facts of the misconduct. Civil and administrative DPAs should require admissions of facts of the misconduct (the act) to the extent this can be done in accordance with the principles in this Section. In accordance with § 6.24 (b) and § 6.25, enforcement officials should allow organizations that self-report or fully cooperate to admit to most of the facts of the misconduct without admitting to every fact (e.g., scienter) needed to establish the organization's legal liability for the misconduct.

Civil and regulatory enforcement authorities should enable their enforcement officials to employ DPAs and NPAs, consistent with this Section, if: (1) the enforcement authority is able to use DPAs and NPAs; and (2) the enforcement authorities' jurisdiction includes situations in which a successful formal enforcement action could trigger mandatory, presumptive, or permissive collateral consequences (see Comment *a*).

*d. Nontrial resolutions without admissions: Consent decrees.* Consent decrees are a regularly-used form of nontrial resolution. Under a negotiated consent decree, an organization agrees to comply with the order's remedial requirements but generally does not formally admit that it has committed a violation of the law. An organization that enters into a consent decree that does not constitute a "neither admit nor deny" resolution is not estopped from denying that it engaged in the misconduct.

Civil and administrative enforcement authorities enter into a consent decree after concluding that an organization engaged in material misconduct. Some administrative agencies entering into a consent decree do so only after making a formal finding that the organization engaged in misconduct. The administrative agency's factual findings that an organization engaged in material misconduct can serve as the basis for the agency's decision to impose collateral consequences on the organization if it has authority to do so and the organization engaged in the type of misconduct that could serve as a predicate for collateral consequences. Such a factual finding also could trigger collateral consequences imposed by others.

Consent decrees generally do not require organizations to admit to the misconduct or to the facts of the misconduct. Some consents decrees preclude an organization from denying their misconduct (except in actions brought by third parties). Others stipulate that the organizations need not admit to their misconduct but do not preclude the organizations from publicly denying that they engaged in the misconduct that was alleged.

Consent decrees are filed in court or with the relevant administrative agency. An organization must comply with the terms of a consent agreement, usually under threat of contempt sanctions for failure to do so.

Consent decrees should contain the following elements:

(1) a description of the facts of the misconduct that the organization engaged in;

(2) a statement of any remedial actions and other internal reforms that the organization has undertaken voluntarily;

(3) an agreement by the organization to cooperate with any ongoing investigation of the misconduct by the civil or administrative enforcement authority that brought the enforcement action;

(4) provisions that govern the monetary sanctions, disgorgement, or other remedial measures (such as internal reforms) imposed by the nontrial resolution;

(5) a reporting requirement under which the organization must provide periodic reporting to the civil or administrative enforcement authority with jurisdiction over the action regarding its compliance with the consent decree; and

(6) a provision that delineates the specific and measurable actions that would trigger the termination of the consent decree, as well as a provision that specifies the date on which the agreement terminates, regardless of the decree's specific requirements. If a monitor (§ 6.01 (s)) is imposed, the agreement should include provisions relating to the appropriate scope, selection, and governance of the monitor, in accordance with §§ 6.10–6.12.

*e. Nontrial resolutions without admissions: neither-admit-nor-deny resolutions.* Neither-admit-nor-deny resolutions are nontrial civil or administrative resolutions under which an organization is subject to remedial measures for its misconduct and is not allowed to deny that it engaged in the misconduct (except in litigation brought by other enforcement authorities or private litigants), but is not required to admit that it engaged in the misconduct.

Neither-admit-nor-deny resolutions often take the form of an administrative resolution entered into by an administrative enforcement authority after it has concluded that an organization engaged in material misconduct. The resolution does not require the organization to admit that it engaged in the misconduct, but it does preclude the organization from denying that it engaged in the misconduct, except to defend itself in actions brought against it by other enforcement authorities or by private litigants.

Administrative enforcement authorities enter into neither-admit-nor-deny resolutions after concluding that an organization engaged in material misconduct. Some agencies make formal findings that organizations engaged in misconduct. An agency's factual findings that an organization engaged in material misconduct can serve as the basis for the agency's decision to impose collateral consequences on the organization if it has authority to do so and the organization engaged in the type of misconduct that could serve as a predicate for collateral consequences.

Neither-admit-nor-deny resolutions usually should contain the following elements:

(1) a description of the facts of the misconduct that the organization engaged in;

(2) a statement that the organization cannot deny that it engaged in misconduct, except in litigation brought by other enforcement authorities or private litigants;

(3) a statement that the organization does not admit that it engaged in misconduct;

(4) an agreement by the organization to cooperate with any ongoing investigation by the government of the misconduct;

(5) a statement of any remedial actions that the organization has agreed to undertake;

(6) provisions that govern the remedies imposed;

(7) a reporting requirement under which the organization must provide periodic reporting to the enforcement authority with jurisdiction over the enforcement action regarding its compliance or noncompliance with the resolution; and

(8) a provision that states the specific and measureable actions that would trigger the termination of the resolution, as well as a provision that specifies the date on which the resolution terminates, regardless of its specific requirements.

*f. Cease-and-desist orders.* An administrative agency may have authority to impose a cease-and-desist order. A cease-and-desist order enjoins an organization from future violations of the law. It also can impose monetary penalties and remedial measures.

This Section provides guidance on when it is appropriate to structure cease-and-desist orders to avoid either adjudicating an organization's culpability or requiring it to admit to the full facts of certain forms of misconduct, when it is possible to do so. They also bear on when other forms of resolution should be employed in situations in which it is not possible to structure a cease-and-desist order to avoid either triggering mandatory, presumptive, or permissive collateral consequences or establishing facts that would determine the organization's liability in an action brought by third parties. A cease-and-desist order is predicated on a legal finding, for example, by an administrative agency, that the organization engaged in misconduct. The nontrial resolution imposing the order can be structured so that the organization does not admit that it engaged in the misconduct. A cease-and-desist order may, but does not have to, include a clause that precludes the organization from denying that it engaged in the misconduct. The organization must comply with the terms of the cease-and-desist order under threat of contempt sanctions for failure to do so.

A cease-and-desist order should contain the following elements:

(1) a finding of fact regarding and description of the facts of the misconduct that the organization engaged in;

(2) an order requiring the organization not to commit future violations of the laws at issue;

(3) a statement of any remedial actions that the organization must undertake;

(4) a requirement that the organization shall cooperate with any ongoing investigation into the misconduct by the enforcement officials with jurisdiction over the cease-and-desist order;

(5) provisions governing the remedies imposed;

(6) a reporting requirement under which the organization must provide periodic reporting to the enforcement authority and the court or agency with jurisdiction over the enforcement action regarding its compliance or noncompliance with the cease-and-desist order; and

(7) a provision that states the specific and measurable actions that would trigger the termination of the cease-and-desist order, as well as a provision that specifies the date that the order terminates, regardless of its specific requirements.

If a compliance monitor (§ 6.01 (s)) is imposed, the order should include provisions relating to how the monitor is selected, and the scope and governance of the monitor's authority, in accordance with §§ 6.10–6.12.

*g. Injunctions.* Enforcement authorities often have authority to seek an injunction. To obtain an injunction, the enforcement authority must establish a threat of future misconduct. An organization that violates an injunction can be subject to contempt sanctions. Injunctions for certain violations can result in collateral consequences. Accordingly, the guidance in this Topic applies to the use of injunctions that could trigger collateral consequences—or could provide an adjudication of culpability or an admission by the organization to the facts of the misconduct—that others could use in an action against the organization as evidence that the organization engaged in misconduct.

*h. Restitution, remediation, and disgorgement.* For a discussion of organizational disgorgement, restitution, and remediation, see § 6.07.

*i. Collateral consequences: Debarment, exclusion, and delicensing.* Principles governing the decision whether to impose collateral consequences are discussed in § 6.24, Comment *i*, and § 6.26.

## REPORTERS' NOTES

*a. Existing regulatory approaches.* Civil and regulatory enforcement authorities have a variety of nontrial resolutions available to them. Some have officially adopted the use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). The resolutions are referred to as DPAs and NPAs, notwithstanding the fact that no criminal "prosecution" is or could be contemplated. See, e.g., DIV. OF ENFORCEMENT, SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL §§ 6.2.2. & 6.2.3. (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf; DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 78-79 (2020) (discussing the SEC's policy on and use of DPAs and NPAs in Foreign Corrupt Practices Act cases); James McDonald, Dir., Div. of Enf't, Commodity Futures Trading Comm'n, *Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC,* COMPLIANCE AND ENFORCEMENT, https://wp.nyu.edu/compliance_enforcement2017/09/25/; Andrew Ceresney, Dir., Div. of Enf't, Sec. & Exch. Comm'n, ACI's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html (predicating DPAs and NPAs on whether the organization self-reported); see also Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release No. 1470, 2001 WL 1301408 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.

*b. Impact on collateral consequences of DPAs, NPAs, and nontrial resolutions without admissions.* A determination in court or by an administrative agency—whether following trial or through settlement of a civil or administrative action—that an organization is liable for engaging in certain types of misconduct, such as securities fraud or healthcare fraud, can result in the organization being subject to mandatory, presumptive, or permissive collateral consequences such as exclusion from doing business with a specific federal agency, debarment, or delicensing (see

Comment *a*). By contrast, resolution of an enforcement action through a DPA, NPA, neither-admit-nor-deny settlement, or a consent decrees may not trigger these collateral consequences.

Even when such resolutions do not trigger collateral consequences, they do not preclude any relevant federal agency from instituting its own action to determine whether the organization or an organizational actor engaged in the misconduct and should be subject to collateral consequences, as is discussed in § 6.15, Reporters' Note *b*. For a discussion of the appropriate use of DPAs with individuals in cases in which "neither justice nor public safety demands that the individual be stigmatized by formal charge and conviction, with their attendant collateral consequences," see Model Penal Code § 6.02A, Comment *d* (AM. L. INST. 1985).

*c. Impact on reputational damage to the organization of DPAs, NPAs, and nontrial resolutions without admissions.* For a discussion of why DPAs and NPAs that are publicly disclosed, contain a statement of facts about the misconduct, and require organizations to admit culpability for the misconduct should not reduce the cost from reputational damage to the organization relative to a civil settlement that imposes liability and has the same features, see § 6.15, Reporters' Note *d*. This same conclusion would not apply if a resolution either is not publicly disclosed or does not require the organization to admit that it engaged in the misconduct, such as a consent decree or a neither-admit-nor-deny resolution. A person contemplating dealing with the organization (a counterparty) who is aware of such a resolution would probably be more uncertain about the organization's culpability for the misconduct following a nontrial resolution that does not require the organization to admit its misconduct than following a nontrial resolution in which the organization admits culpability.

*d. Role of judges in overseeing DPAs and NPAs.* For a discussion of judicial review of DPAs in the criminal context, see § 6.02, Reporters' Note *l*; § 6.09, Reporters' Note *a*; and § 6.12, Reporters' Note *c*.

*e. Role of judges in overseeing negotiated administrative settlements, such as consent decrees.* Administrative agencies have a duty to consider settlement offers, see Administrative Procedure Act (APA), 5 U.S.C. § 554(c)(1), but the APA grants considerable discretion to agencies to accept or reject an offer. Courts have consistently held that judicial review over an agency's decision to settle a pending case is narrow or nonexistent, see, e.g., Nat'l Lab. Rel. Bd. v. United Food & Com. Workers Loc. 23, 484 U.S. 112 (1987).

Courts have also held that judges have limited authority to challenge a consent decree, even when they are asked to approve the judgment. In *Sec. & Exch. Comm'n v. Citigroup Global Markets, Inc.*, the Securities and Exchange Commission (SEC) filed a complaint against Citigroup alleging, among other things, that it negligently misrepresented its role and economic interest in a billion-dollar fund, in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933. Shortly thereafter, the SEC proposed a consent decree which, among other things, imposed a $95 million penalty but did not require Citigroup to admit to the misconduct in the U.S. District Court for the Southern District of New York. U.S. District Judge Jed Rakoff refused to approve the consent decree and instead set a trial date. He wrote that before a court may employ its injunctive and contempt powers in support of an administrative order:

> it is required, even after giving substantial deference to the views of the administrative agency, to be satisfied that it is not being used as a tool to enforce an agreement that is unfair, unreasonable, inadequate, or in contravention of the public interest.

*Sec. & Exch. Comm'n v. Citigroup Global Markets Inc.,* 827 F.Supp.2d 328, 334 (S.D.N.Y. 2011)

Judge Rakoff concluded that the proposed consent decree was not fair, reasonable, adequate, or in the public interest because:

> it does not provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified under any of these standards. Purely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint. But when a public agency asks a court to become its partner in enforcement by imposing wide-ranging injunctive remedies on a defendant, enforced by the formidable judicial power of contempt, the court, and the public, need some knowledge of what the underlying facts are: for otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.

Id. (footnotes omitted).

Both the SEC and Citigroup appealed. The U.S. Court of Appeals for the Second Circuit reversed. The court concluded that a district court has authority to review a consent decree to determine whether it is "fair and reasonable" in that the public interest would not be disserved, but the court does not have authority to reject a consent decree on the grounds that it is inadequate. It also concluded that "[a]bsent a substantial basis in the record for concluding that the consent decree does not meet these requirements, the district court is required to enter the order." Sec. & Exch. Comm'n v. Citigroup Global Markets, Inc., 752 F.3d 285 (2014).

The Second Circuit went on to explain that:

> A court evaluating a proposed S.E.C. consent decree for fairness and reasonableness should, at a minimum, assess (1) the basic legality of the decree, … (2) whether the terms of the decree, including its enforcement mechanism, are clear, … (3) whether the consent decree reflects a resolution of the actual claims in the complaint … and (4) whether the consent decree is tainted by improper collusion or corruption of some kind. … The primary focus of the court's inquiry should … be on whether the consent decree is procedurally proper, using objective measures similar to the factors set out above, taking care not to infringe on the S.E.C.'s discretionary authority to settle on a particular set of terms.
>
> The Second Circuit added that "when the proposed relief includes injunctive relief, the district court must also consider the public interest in deciding whether to grant the injunction." Id. (citations omitted).

The court concluded that it is "an abuse of discretion to require, as the district court did here, that the S.E.C. establish the "truth" of the allegations against a settling party as a condition for approving the consent decrees. Id.

*f. Informal agency actions*. Agencies have at times resolved matters through informal means, including threatening to take action unless an organization, or all organizations in an industry, voluntarily undertake certain reforms. Informal agency actions designed to effect industry-wide reforms should be avoided as they are not subject to either the notice-and-comment constraints associated with agency rulemaking or the valuable constraint on unfettered agency discretion that comes with judicial oversight in civil litigation. These informal actions are outside the scope of this Section. For a discussion of the rule of law issues raised by informal agency actions see, e.g., Edward Rubin, *Executive Action: Its History, its Dilemmas, and its Potential Remedies*, 8 J. LEGAL ANALYSIS 1 (2016); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and* Waiver, 8 J. LEGAL ANALYSIS 191 (2016); see also Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion,* 46 UCLA L. REV. 757 (1999); cf. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1977); Edward Rubin, *Discretion and its Discontents*, 72 CHIC.-KENT L. REV. 1299 (1997).

Agencies also have resolved matters through arbitration and mediation. Congress authorized such forms of resolution in the Administrative Dispute Resolution Act, 5 U.S.C. § 571 et seq.

*g. SEC injunctions.* The SEC has authority to sue for an injunction prohibiting an organization from violating the securities laws, see, e.g., Securities Act of 1933, § 20(b), 15 U.S.C. § 78t(b); Securities and Exchange Act of 1934, § 21(d)(1), 15 U.S.C. § 78u-2(e). To obtain an injunction, courts require the SEC to establish that there exists a cognizable danger of a recurrent violation. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 59 (1975). The ultimate determination turns on whether the facts and circumstances of the defendant's past misconduct, and subsequent events, establish that there is a reasonable likelihood of future violations by the defendant. E.g., Goshen Mfg. Co. v Hubert A. Myers Mfg. Co., 242 U.S. 202 (1916); Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 856-857 (2d Cir. 1968), cert. denied sub. nom. Coates v. Sec. & Exch. Comm'n, 394 U.S. 976 (1969). Misconduct that occurred many years ago and was not repeated generally will not support an injunction. The U.S. Supreme Court has described injunctions imposed for securities violations as "a drastic remedy." Aaron v. Sec. & Exch. Comm'n, 446 U.S. 680, 703 (1980).

The typical SEC injunction for fraud bars the defendant from making any future untrue statements of material fact concerning a number of specific matters, or any untrue statement of material fact similar to those statements specifically set forth in the agreement or of similar purpose and object. Sec. & Exch. Comm'n v. Savoy Indus., Inc., 665 F.2d 1310, 1316-1319 (D.C. Cir. 1981).

The SEC has authority to seek monetary penalties in any civil injunction action brought under the Securities Act of 1933, 15 U.S.C. § 77a et seq; the Securities and Exchange Act of 1934, 15 U.S.C. § 78a et seq; the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq., and the Investment Advisors Act. Remedies Act. Pub. L. No. 101-429, 104 Stat. 931, 15 U.S.C. § 80b-1 et seq.

*h. Cease and desist.* In 1990, Congress authorized the SEC to issue permanent and temporary cease-and-desist orders against any respondent that the agency finds has violated or is about to violate the federal securities laws. Securities Enforcement Remedies and Penny Stock Report Act of 1990 (Remedies Act), Pub. L. No. 101-429, 104 Stat. 93 (1990) (codified as amended in scattered sections of 15 U.S.C.). The commission can order the respondent to cease the violation, disgorge profits, and take affirmative actions to comply with the securities laws.

Other agencies, such as the Commodity Futures Trading Commission (CFTC), Federal Trade Commission (FTC), National Labor Relations Board (NLRB), and bank regulatory agencies also have cease-and-desist authority. See H.R. Rep. No. 101-616, at 23 (1990), reprinted in 1990 U.S.C.C.A.N. 1379, 1390 (same); 12 U.S.C. § 1818(b) (1994) (authorizing banking agencies to impose cease-and-desist order upon showing that person has violated law); 29 U.S.C. § 160(c) (1994) (authorizing NLRB to impose cease-and-desist order upon showing that person has violated law); 15 U.S.C. § 45(b) (1994) (authorizing FTC to impose cease-and-desist order upon showing that person has violated law); 7 U.S.C. § 13(b) (1994) (authorizing CFTC to impose cease-and-desist order upon showing that person has violated law).

An important issue with regard to cease-and-desist orders is whether a finding of a likelihood of a future violation is a prerequisite to their imposition. The SEC has concluded that to issue a cease-and-desist order it must first find some likelihood of a future violation, but the likelihood is less than is necessary for a court to issue an injunction. KPMG Peat Marwick, LLP, AAER 1360, 74 SEC Dock. 357, 380 (2001); see also Andrew M. Smith, *SEC Cease-and-Desist Orders*, 51 ADMIN. L. REV. 1197 (1999).

The CFTC requires a finding that violations are likely to persist in the future before a cease-and-desist order can be issued. See In re Brody, [1986-87 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,081, at 32,181 (May 20, 1986) (concluding that a cease-and-desist order is an appropriate enforcement tool if there is a reasonable likelihood that earlier violations will be repeated) (citing In re Dillon-Gage, Inc., [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,574, at 30, 482-483 (June 20, 1984).

By contrast, several, but not all, courts have found that the Federal Deposit Insurance Corporation (FDIC) and other bank regulatory agencies do not need to find a likelihood of future violations prior to imposing a cease-and-desist order, in recognition of their authority to prevent unsound business practices. See Lindquist & Vennum v. Fed. Deposit Ins. Corp., 103 F.3d 1409, 1418 (8th Cir. 1997) (FDIC need only show proof of misconduct to exercise its power to order a party to cease and desist from engaging in that misconduct); Greene Cnty. Bank v. Fed. Deposit Ins. Corp., 92 F.3d 633, 636 (8th Cir. 1996) (proof of misconduct alone entitles FDIC to invoke its broad cease-and-desist enforcement powers). See, e.g., Interamericas Invs. Ltd. v. Bd. of

Governors of Fed. Rsrv. Sys., 111 F.3d 376 (5th Cir. 1997); Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 879 F.2d 689 (9th Cir. 1989).

*i. Injunctions: direct and indirect effects of a violation.* An injunction imposed as a result of organizational misconduct compels the person or entity subject to not to engage in future misconduct upon threat of being found in contempt of the court issuing the injunction. Such a finding can result in the imposition of fines, imprisonment, or other civil or criminal penalties. Injunctions also have collateral consequences. First, an administrative injunction tends to be predicated on a finding that the organization engaged in misconduct. This finding may have a preclusive effect in subsequent litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (judicial findings of fact may be used offensively to establish the defendant's misconduct in subsequent private litigation under some circumstances). In addition, an injunction may subject the organization to additional disciplinary action by the agency, including debarment, see, e.g., Exchange Act §§ 15(b)(4)(C), 15(b)(6)(A), 15 U.S.C. §§ 78o(b)(4)(C), 78o(b)(6)(A) (1994); Investment Advisers Act of 1940, §§ 3(e) and 3(f), 15 U.S.C §§ 80b-3(e), 80b-3(f) (1994 & Supp. II 1996); 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(4)(E), 78o(b)(6)(A) (1994). Certain injunctions may trigger statutory disqualification and result in loss of membership in various self-regulatory organizations, such as the securities exchanges. See Investment Company Act §§ 9(a) & 9(b), 15 U.S.C. §§ 80a-9(a), 9(b) (1994); see also Securities and Exchange Act of 1934, § 15A(g)(2) (the Financial Industry Regulatory Authority has authority to deny membership to those enjoined from violating the securities laws).

*j. SEC disgorgement remedy.* In Liu v. Sec. & Exch. Comm'n, 591 U.S. __, 140 S. Ct. 1936 (2020), the U.S. Supreme Court addressed the scope of the SEC's authority to seek disgorgement as a remedy in enforcement actions in federal court, as opposed to an agency administrative proceeding. The Court held that disgorgement is an appropriate and traditional equitable remedy, but placed three limitations on disgorgement. First, the remedy must be linked to each individual defendant's profits—defendants are not jointly and severally liable for the total profits gained. Second, the remedy should be based on net profits, after expenses. Finally, the remedy is justified only as a way of returning the defendant's wrongful gain to those harmed by the defendant's misconduct, although the Court left open the possibility that the government might retain the funds when it is infeasible to distribute the collected funds to investors. The Court concluded that in the case in question the SEC's pursuit of disgorgement had transgressed each of those limits. For an additional discussion of *Liu*, see § 6.07, Reporters' Note *b*.

Subsequently, Congress amended Section 21(d) of the Securities and Exchange Act of 1934 to grant the SEC express authority to obtain disgorgement in civil actions of "any unjust enrichment by the person who received such unjust enrichment as a result of such violation." The statute provides a five-year statute of limitations for most disgorgement actions, but it allows the SEC to seek disgorgement up to 10 years after the latest date of the violation for scienter-based violations, including the antifraud provisions of Section 10(b) of the Exchange Act, Section 17(a)(1) of the Securities Act, and Section 206(1) of the Investment Advisers Act. National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501.

*k. Enforcement actions in Article III courts vs. administrative proceedings.* Federal agencies often have a choice between bringing an action for civil penalties in a district court or an administrative proceeding. Administrative proceedings are decided, initially, by administrative law judges who are employees of the agency. Some have expressed concern that administrative actions are unfair to the defendant because the agency has a "home court" advantage. See, e.g., U.S. CHAMBER OF COM. CTR. FOR CAPITAL MARKETS COMPETITIVENESS, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES (July 15, 2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf; see also Robert Anello, *Addressing the SEC's Administrative "Home Court" Advantage in Enforcement Proceedings*, FORBES (Sept. 7, 2015). For a defense of specialized courts see, e.g., Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 136 UNIV. PA. L. REV. 111 (1990). One of the potential advantages of administrative enforcement is that the factual findings are made by an administrative judge with expertise in the area, instead of by a jury.

*l. SEC's use of administrative actions after Dodd-Frank*. The SEC enjoys particularly broad authority to pursue actions before its own administrative law judges. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 authorizes the SEC to impose (in most cases) civil penalties in administrative proceedings on those violating the federal securities laws. See Stephen J. Choi and A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1 (2017). An empirical assessment of the SEC's use of administrative actions following Dodd-Frank's enactment found that the SEC increased its use of administrative actions (both in absolute numbers and relative to civil actions). Civil penalties in both administrative and civil actions increased. Corporate cooperation also increased. The authors also found that, post-Dodd-Frank, administrative actions were less likely to prevail and less likely to garner media attention. Id. Another analysis of SEC administrative actions is: Urška Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017).

## § 6.22. Enforcement Policy for Civil and Administrative Nontrial Resolutions

**(a) A civil or administrative enforcement authority should issue and make publicly available a written enforcement policy setting forth the factors that its enforcement officials will use when determining whether to employ a form of nontrial resolution that would:**

**(1) trigger, or avoid triggering, mandatory, presumptive, or permissive collateral consequences;**

**(2) adjudicate that the organization engaged in material misconduct;**

**(3) require the organization to admit to all or some of the facts of the misconduct;**

**(4) preclude the organization from denying—or permit the organization to deny—that it engaged in misconduct; or**

**(5) lead to actions against individuals legally responsible for misconduct undertaken on behalf of an organization, in accordance with § 6.03.**

**(b) The written enforcement policy should provide that an organization should not be granted a downward adjustment in monetary penalty based on the organization's inability to pay unless:**

**(1) enforcement officials have determined that the organization truly cannot pay;**

**(2) the organization did not make substantial disbursements to shareholders or high-level personnel during the period between when the organization became aware of the misconduct and the nontrial resolution;**

**(3) the organization has undertaken all appropriate remedial actions available to it, including appropriate disciplinary actions against employees and agents who committed, conspired to commit, or aided and abetted the commission of the misconduct or failed to take appropriate action upon becoming aware of the misconduct, in accordance with § 6.07;**

**(4) the nontrial resolution is structured to place a priority on ensuring that victims receive restitution and that harm is remediated, including through measures designed to require that restitution payments be made from the organization's future earnings; and**

**(5) the nontrial resolution prohibits the organization from providing distributions to shareholders, or incentive compensation or bonuses to high-level personnel, until the organization has satisfied its obligations under the agreement.**

**Comment:**

*a. Policies for civil and administrative enforcement.* See § 6.02 and the accompanying Comment for a discussion of the elements of an effective enforcement policy. See § 6.03 for a discussion of enforcement policies to govern individual liability for organizational misconduct.

*b. Guidance on the use of resolutions that trigger collateral consequences, adjudicate culpability, or preclude organizations from denying that they engaged in misconduct before the agency or to the public.* An enforcement policy targeted at knowing or intentional material misconduct should be structured to promote deterrence, in addition to other goals of civil and administrative enforcement. Deterrence is broadly defined, in accordance with § 1.01(p) and § 6.02, Comments *a* & *f*, to include any intervention designed to reduce—or induce organizations to help reduce—organizational misconduct. Enforcement authorities promote deterrence when they structure enforcement policies to provide material incentives for organizations to undertake full corrective action in accordance with § 6.01(m), as is discussed in §§ 6.02, 6.04, 6.05, 6.07 and their Comments, as well as in the Comments to §§ 6.18–6.19. As these Sections and Comments explain, organizations need material incentives to detect, investigate, and self-report misconduct; to fully cooperate (including by providing enforcement officials with evidence relating to both the full extent of any material misconduct, as well as the role of the individuals responsible for it); and to fully remediate.

To achieve these goals, civil and administrative enforcement officials should adopt clear, written enforcement policies that enable organizations to predict how their decisions to self-report, fully cooperate, and fully remediate will affect the form of nontrial resolution that will be offered to them. The policies also should ensure that organizations that either undertake full corrective action or fully cooperate and fully remediate will obtain resolutions that offer them predictable and substantially more favorable terms would be offered to organizations that do not undertake these actions.

Enforcement policies should therefore provide guidance relating to when enforcement authorities should use nontrial resolutions that have consequences or features that tend to be material to organizations or the public. These include the following:

(1) whether the resolution should be structured to avoid triggering mandatory, presumptive, or permissive collateral consequences imposed by federal, state, local, or foreign governmental authorities, or by self-regulatory or international organizations, that would otherwise result from a determination following a trial that the organization that engaged in the misconduct;

(2) whether the resolution should adjudicate that the organization engaged in the misconduct, or otherwise require an admission by the organization that it engaged in the misconduct, that could be used by another party (e.g., another agency or private litigants) to establish the organization's culpability for the misconduct;

(3) whether the resolution should require the organization to admit to all or some of the material facts of its misconduct;

(4) whether the resolution should preclude the organization from denying in public that it engaged in misconduct;

(5) whether the resolution should require the organization to cooperate with the enforcement authority's ongoing investigation of the individuals responsible for the misconduct;

(6) whether the resolution should require the organization to undertake internal reforms or to accept a compliance monitor (§6.01(s)); and

(7) the magnitude of the penalty imposed by the nontrial resolution.

This Section focuses on providing guidance on policies relating to the first five issues. Guidance on policies for the fifth issue is governed by the principles set forth in §§ 6.09–6.12.

*c. Enforcement policy governing admissions and organization's ability to deny culpability.* An enforcement official entering into a civil or administrative nontrial resolution often can decide whether to require the organization to admit to all, some, or none of the facts of the alleged misconduct. When the organization is not required to admit to misconduct, the enforcement official should structure the resolution to preclude the organization from denying that it engaged in the misconduct (except in litigation against it by others) or permit the organization to freely deny its culpability.

Enforcement authorities should adopt guidelines to govern—and provide organizations with notice of—the factors relevant to enforcement officials' decisions whether to offer an organization a form of nontrial resolution that requires a full or partial admission or does not require an admission at all. Enforcement authorities also should adopt and publicize policies that govern their decisions whether to permit an organization to deny its culpability in all circumstances or preclude an organization from denying that it engaged in the misconduct except in litigation brought by a third party.

In fashioning such guidelines, it is important for enforcement authorities to take into account the impact on the public—and on the effort to deter misconduct—of allowing organizations to avoid admitting and/or to deny that they engaged in misconduct. The public may have a strong interest in learning both the facts of material knowing and intentional misconduct and whether the organization had a role in the misconduct. Resolutions that allow organizations to deny legal responsibility for their misconduct are inconsistent with the goal of informing the public about the misconduct when used in cases in which enforcement officials have sufficient evidence to prove that the organization engaged in the misconduct.

A resolution that allows an organization to deny that it engaged in misconduct can also harm efforts to deter misconduct because it can signal to the organization's employees that the actions that led to the sanctioned conduct were not unlawful or unethical. By contrast, a resolution that requires an organization to admit misconduct or precludes it from denying it can promote the effectiveness of the organization's compliance function. An organization can more effectively undertake internal reforms—and send a clear message to employees that they should not engage in the types of conduct that led to the violation—if the organization must admit that the actions for which it was held liable did indeed constitute misconduct.

Notwithstanding these concerns, there are circumstances in which enforcement authorities can best serve the public interest by allowing organizations to enter into resolutions that do not require them to admit to all of the elements of their misconduct. No-admissions resolutions should only be used with organizations whose misconduct could be proven in court if their use substantially enhanced deterrence by inducing self-reporting or full cooperation. No-admission resolutions can be structured to remove the risk to organizations of the collateral consequences that can result from other types of nontrial resolution. No-admission resolutions also can be structured so that private litigants cannot use them as evidence against the organizations. Because no-admission resolutions provide a substantial benefit to organizations, these resolutions can promote the goals of civil and administrative enforcement *only* when used with organizations that assisted enforcement authorities by undertaking full corrective action or by fully cooperating and remediating.

Enforcement officials promote the public interest when they adopt a presumption than an organization that committed knowing or intentional material misconduct can avoid admitting to all of the facts of its misconduct *only* if the admission could subject the organization to costs imposed by third parties *and* the organization actively sought to aid enforcement authorities by: (1) undertaking full corrective action, as defined in § 6.01(m); or (2) fully cooperating and remediating, in accordance with § 6.05 and § 6.07, respectively, as set forth in § 6.24(b), or under circumstances set forth in §6.24(c) or § 6.25. If an enforcement authority can show that an organization engaged in knowing or intentional material misconduct, it should not offer a nontrial resolution that allows the organization to avoid admitting that it engaged in the misconduct in circumstances other than those specified above.

In developing a policy on partial- or no-admission resolutions, an enforcement authority should adopt a presumption that such nontrial resolutions should take the form of "no denial" resolutions in all cases of knowing or intentional material misconduct in which enforcement officials conclude that there is sufficient evidence to establish under the applicable legal standard that the organizations engaged in misconduct. A no-denial resolution precludes an organization from denying that it committed the misconduct except in litigation brought by a third party.

*d. Public disclosure of civil and administrative nontrial resolutions*. Nontrial civil and administrative resolutions with an organization that engaged in knowing or intentional material misconduct generally should be disclosed and made available publicly, in accordance with § 6.02(b)(5). The public disclosure should explain:

(1) the facts of the misconduct;

(2) the legal violation that the organization is alleged to have committed;

(3) the misconduct that the organization was found to have committed;

(4) the justification for using the form of nontrial resolution employed;

(5) the sanctions imposed by the resolution;

(6) any provisions for providing restitution or remediation to victims;

(7) any voluntary remediation by the organization;

(8) any required internal reforms;

(9) any appointment of a monitor;

(10) the provisions requiring the organization to report to civil or regulatory authorities its ongoing efforts to comply with the law; and

(11) the duration of the resolution.

Enforcement authorities can promote public access to their nontrial resolutions by posting them on their websites on a page dedicated to disclosure of nontrial resolutions.

Nevertheless, when an organization has engaged in full corrective action (in accordance with § 6.01(m)), then it may be appropriate for an enforcement authority to refrain from publicizing the enforcement action if doing so could subject the organization to material adverse consequences that would otherwise have deterred it from self-reporting its material misconduct.

For a discussion of why it is important for enforcement officials to set forth, in a publicly available resolution, the factual basis for an enforcement action, the justifications for the form of resolution used, the sanctions imposed and other consequences of the nontrial resolution, as well as other factors, see § 6.02, Comments *b-d*.

*e. Disgorgement, restitution, and remediation.* Civil and administrative nontrial resolutions with organizations that engaged in material misconduct should ensure that the organizations undertake full disgorgement, restitution, and remediation in accordance with § 6.07.

*f. Organizational cooperation and accountability of individuals who are responsible for knowingly or intentionally causing an organization to commit material misconduct.* In accordance with § 6.03, in order to obtain credit for full cooperation, organizations should investigate and provide enforcement officials with the identity of and all information reasonably available about the individuals responsible for the misconduct. These actions can help deter misconduct if—but only if—civil and administrative enforcement authorities adopt a policy that their enforcement officials should pursue enforcement actions against all individuals who acted with the mental state required to prove the misconduct alleged and were substantially responsible for causing their organizations to engage in material misconduct. Enforcement authorities should seek to hold individuals responsible for their knowing or intentional misconduct, even in situations in which the individuals cannot pay substantial penalties. The imposition of liability on individual wrongdoers can operate as a deterrent. It also expresses society's condemnation of the individuals' misconduct and informs the public about the individuals' responsibility for their misconduct. Such enforcement actions also can result in the individuals being subject to collateral consequences. For further discussion of individual liability, see § 6.03.

*g. Factual findings in agreements with organizations not binding on individuals implicated in the misconduct.* Enforcement officials should adopt clear rules or guidelines specifying that factual findings contained in an agreement with an organization are binding only on the parties to the agreement and do not constitute adjudicated facts for purposes of determining the legal responsibility of individuals who are not parties to the agreement. Express provisions are needed given the multinational nature of enforcement and the potential for other countries to treat a resolution with an organization as admissible evidence of the facts of the misconduct in a case against the individuals.

*h. Policy governing organization's inability to pay.* See § 6.20, Comment *f*.

**REPORTERS' NOTES**

*a. Enforcement policies.* See Reporters' Notes following § 6.02.

*b. Federal policies governing civil and administrative nontrial resolutions.* Many federal agencies have adopted policies governing nontrial resolutions specifically aimed at the circumstances under which an organization should be eligible for a form of resolution, such as a deferred prosecution agreement (DPA), that enables it to avoid the presumptive or mandatory collateral consequences that otherwise could be triggered by an adjudicated civil or administrative enforcement action. See, e.g., DIV. OF ENFORCEMENT, SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL §§ 6.2.2. & 6.2.3. (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf; CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 78-79 (2nd ed. 2020) (discussing the Securities and Exchange Commission's policy on and use of DPAs and non-prosecution agreements [NPAs] in Foreign Corrupt Practices Act cases); James McDonald, Dir., Div. of Enf't, Commodity Futures Trading Comm'n, Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC, Speech at the NYU Program on Corporate Compliance & Enforcement/Institute for Corporate Governance & Finance (Sept. 25, 2017), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517; Andrew Ceresney, Dir., Div. of Enf't, Sec. & Exch. Comm'n, ACI's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html (predicating DPAs and NPAs on whether the organization self-reported); see also Sec. & Exch. Comm'n, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release No. 1470, 2001 WL 1301408 (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm; Environmental Protection Agency Audit Policy (Apr. 2000) https://www.epa.gov/compliance/epas-audit-policy (under the Environmental Protection Act audit policy, the Environmental Protection Agency [EPA] generally will not recommend criminal sanctions, will reduce penalties, and will not request routine audit reports if the organization:

(a) discovered the misconduct through an environmental audit or through its compliance-management system;

(b) promptly reported it before the EPA detected or was likely to detect the misconduct;

(c) corrected the violation;

(d) took steps to prevent its recurrence; and

(e) cooperated, provided the violation did not threaten serious harm).

Some of these policies treat self-reporting as one of many factors for the enforcing agency to consider when evaluating whether to enter into a settlement on more favorable terms. Other policies provide stronger incentives for organizations to self-report by setting forth a set of benefits that are provided only to organizations that self-report and, in turn, a set of negative terms (e.g., higher sanctions and an enhanced probability of a monitor) that organizations are more likely to face if they detect and do not self-report. The Securities and Exchange Commission moved in this direction in 2015 when it announced that organizations are eligible for DPAs and NPAs only if they self-report (as discussed below), Ceresney, ACI's 32nd FCPA Conference Keynote Address.

In 2017, the Commodity Futures Trading Commission announced a policy intended to promote self-reporting that offers more favorable terms to organizations that self-report, cooperate, and remediate than are available to those that only cooperate and remediate. See McDonald, Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC; see also Vincent A. McGonagle, Acting Dir., Div. of Enf't, Commodities Futures Trading Comm'n, Memorandum on Recognizing Cooperation, Self-Reporting, and Remediation in Commission Enforcement Orders (Oct. 29, 2020), https://www.cftc.gov/PressRoom/PressReleases/8296-20.

*c. Academic literature.* Articles on civil enforcement that discuss optimal civil enforcement policy, the political economy of enforcement, or the benefits of coordinated criminal and civil enforcement include: Jennifer Arlen, Countering Capture: A Political Theory of Corporate Criminal Liability, J. CORP. LAW (forthcoming 2022); Samuel Buell, *The Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62 (A. Barkow & R. Barkow eds., 2011); Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 MD. L. REV. 985 (2018); Maria M. Correia, *Political Connections and SEC Enforcement*, 57 J. ACCOUNTING & ECON. 241 (2014) (SEC); Roger L. Faith, et al. *Antitrust Pork Barrel*, 25 J. LAW & ECON. 329 (1982) (Federal Trade Commission); Franklin G. Mixon, Jr., *Public Choice and the EPA: Empirical Evidence on Carbon Emissions Violations*, 83 PUBLIC CHOICE 127 (1995) (EPA); William J. Hunter & Michael A. Nelson, *Tax Enforcement: A Public Choice Perspective*, 82 PUBLIC CHOICE 1 (1995) (IRS); see also Brian D. Feinstein & M. Todd Henderson, *Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions*, 38 YALE J. REG. 175, 182-83 (2021) (discussing Congress's efforts to influence agencies through placement of loyal staffers on agency's commissions).

## § 6.23. Traditional Declinations and Decisions Not to Pursue an Enforcement Action

**(a) Enforcement officials should decline to pursue an enforcement action if they determine that:**

> **(1) they do not have, and would be unlikely to obtain through a full and thorough investigation, sufficient evidence to establish that the organization violated the law; or**
>
> **(2) the misconduct is not material, as defined in § 6.01(q), or otherwise does not warrant an enforcement action.**

**Comment:**

*a. Relevance of Comment following § 6.17.* The Comment following § 6.17 also is relevant to § 6.23.

*b. Declinations versus no action.* Civil and administrative enforcement officials who decide not to pursue an enforcement action can make a formal determination that the authority will not pursue the action. This is a declination. Alternatively, the enforcement officials may simply decide that they do not want to pursue the action at this point in time (e.g., because of insufficient evidence), while reserving their ability to pursue the action later if circumstances change.

In situations in which an enforcement authority has made public its investigation of an organization for potential misconduct, enforcement officials should, in the interests of justice, publicly disclose any formal determination that they are not going to pursue the enforcement action. In situations in which the agency has not made such a formal determination and the investigation is ongoing, such a disclosure is not warranted. When a publicly disclosed investigation has been suspended and is unlikely to be restarted, enforcement officials should, in the interests of fairness, make a public announcement of the fact that the investigation has been suspended so that the organization, its shareholders, its counterparties, and others can better assess the likelihood that the organization will be sanctioned for the misconduct for which it was being investigated.

## REPORTERS' NOTES

*a. Relevance of Reporters' Notes following § 6.17.* The Reporters' Notes following § 6.17 also are relevant to § 6.23.

## § 6.24. Choice of Nontrial Resolution When an Adjudicated Resolution Could Trigger Collateral Consequences in the United States or Abroad

**(a) An organization that engaged in knowing or intentional material misconduct should presumptively be offered a nontrial resolution that finds the organization culpable for the misconduct and is not structured to avoid triggering mandatory, presumptive, or permissive collateral consequences for the organization, except as provided in subsections (b) and (c).**

**(b) An organization that engaged in knowing or intentional material misconduct should presumptively be offered a nontrial resolution that is structured to avoid triggering**

**mandatory, presumptive, or permissive collateral consequences for the organization in the United States or abroad if the organization:**

**(1) engaged in full corrective action in accordance with § 6.01(m), 6.04, 6.05, and 6.07;**

**(2) fully cooperated in accordance with § 6.05 and undertook full disgorgement, restitution, and remediation in accordance with § 6.07, or**

**(3) undertook full disgorgement, restitution, and remediation in accordance with § 6.07 and engaged in substantial material cooperation which, while not fully in accordance with § 6.05, provided enforcement officials with material evidence that they otherwise did not have, and could not readily obtain, about:**

**(A) the full extent of the organization's knowing or intentional material misconduct, and**

**(B) the identity and culpability of all employees—including all high-level or substantial authority personnel—who:**

**(i) knowingly participated in committing, conspiring to commit, attempting to commit, or aiding and abetting the commission of the misconduct;**

**(ii) knowingly participated in undermining efforts to detect or investigate the misconduct, or failed to intervene to terminate it or report it to appropriate authorities within the organization after becoming aware of it; or**

**(iii) were willfully blind to the misconduct.**

**(c) An organization that engaged in knowing or intentional material misconduct should presumptively be offered a nontrial resolution that is structured to avoid triggering mandatory, presumptive, or permissive collateral consequences for the organization in the United States or abroad, even if it has not satisfied the requirements of subsection (b), if, but only if:**

**(1) imposing collateral consequences on the organization would likely cause material harm to consumers, employees in units of the organization that were not involved in the misconduct, or the public, and the magnitude of that harm would exceed the likely benefits of imposing collateral consequences given the availability of**

**other means for reducing the organization's future risk of misconduct, such as appointing a compliance monitor;**

**(2) the organization has fully remediated in accordance with § 6.07 or will be required to fully remediate in accordance with § 6.09; and**

**(3) one of the following conditions is satisfied:**

**(A) the organization did not fully cooperate based on a good-faith belief, predicated on a reasonable interpretation of the law, that it did not engage in misconduct;**

**(B) the organization did not have an effective compliance program at the time it knowingly or intentionally engaged in material misconduct, and the nontrial resolution requires the organization that to accept and pay for oversight by a compliance monitor (in accordance with §§ 6.10–6.12); or**

**(C) the organization's compliance function was effective compliance in accordance with § 6.08 and Chapter 5.**

**(d) A nontrial resolution structured to avoid collateral consequences because the organization engaged in full corrective action in accordance with § 6.01(m) should presumptively not impose a monitor on the organization, even if aggravating circumstance were present, consistent with §§ 6.10–6.12.**

**Comment:**

*a. Full corrective action.* In accordance with § 6.01(m), the term "full corrective action" refers to an organization taking the following steps: self-reporting its material knowing or intentional misconduct (in accordance with § 6.04), fully cooperating with enforcement officials (in accordance with § 6.05), *and* engaging in timely and full disgorgement, restitution, and remediation (in accordance with § 6.07). An organization has undertaken full corrective action if it has either already engaged in or has committed to engaging in the conduct necessary to comply with §6.01(m). An organization that has committed to satisfying § 6.01(m) in a nontrial resolution but later fails to do so in a material way would be in breach of the agreement.

*b. Material misconduct.* The standard for a material misconduct is provided in § 6.01(q) and Comment *h* to that Section.

*c. Full cooperation and full remediation.* For a discussion of full cooperation and remediation, disgorgement, and restitution, see §§ 6.05 & 6.07.

In assessing whether an organization undertook full disgorgement, restitution, and remediation in accordance with § 6.07, enforcement officials should ensure that:

(1) the organization promptly terminated all detected misconduct;

(2) the organization has undertaken any reforms needed to implement an effective compliance program; and

(3) all high-level or substantial authority personnel who knowingly participated in committing the offense, knowingly participated in undermining detection or investigation of the offense, or knew about material misconduct and failed to intervene to terminate it or report it to appropriate authorities within the organization after becoming aware of it, are no longer in positions of authority with the organization.

An organization should be determined to have complied with §§ 6.05 or 6.07 if it has already taken steps to satisfy or has committed in good faith to taking steps to satisfy §§ 6.05 or 6.07, respectively. An organization that commits to satisfying §§ 6.05 or 6.07 in a nontrial resolution but later fails to do so in a material way would be in breach of the agreement.

*d. Presumptions, not mandatory guidelines.* The Principles in this Section are phrased as presumptions to guide civil and regulatory enforcement officials when making decisions as to the appropriate form of nontrial resolution for organizations.

By establishing presumptions to guide enforcement decisions, enforcement authorities promote deterrence and transparency because the presumptions enable organizations to predict how their conduct will impact the form of resolution. By establishing presumptions, enforcement authorities also promote consistency in the use of various forms of nontrial resolution among the enforcement officials governed by the presumptions. This enables enforcement officials to offer favorable forms of nontrial resolutions to induce both self-reporting and cooperation. It also enables them to use their selection of the form of nontrial resolution to publicly differentiate organizations that acted proactively to help deter misconduct and enforce the law from those that did not.

Enforcement officials retain discretion to deviate from the recommendations in this Section in situations in which they conclude that a different form of resolution than is recommended by this Section would better serve the goals of civil or administrative enforcement against organizations. A nonexclusive list of factors that enforcement officials can take into account, beyond those upon which the presumptions are predicated, include:

(1) the size of the organization;

(2) the role of the organization's owners in committing or condoning the offense;

(3) the form of organization, including whether it is for-profit or nonprofit;

(4) the value to enforcement officials of the organization's cooperation;

(5) the type of offense (for example, whether the offense involved fraud or material harm to others); and

(6) whether the delay or costs associated with a trial would harm enforcement officials' ability to achieve justice because, for example:

(A) important witnesses may no longer be available (e.g., for health reasons);

(B) the misconduct was not substantial enough to justify the cost and delay of a trial; or

(C) a nontrial resolution that does not require admissions would better enable enforcement officials to: cause the organization to promptly terminate and remediate misconduct that risks material future harm to persons or property or to provide prompt restitution to victims who were materially injured by the misconduct.

While enforcement officials have discretion in determining the appropriate form of resolution, this Section reflects the view that the following considerations do not, in and of themselves, justify using a nontrial resolution structured to avoid collateral consequences in cases in which an organization engaged in knowing or intentional material misconduct and did not satisfy the conditions set forth in § 6.24(b) and (c): (1) the desire for a prompt resolution (absent additional factors supporting a conclusion that promptness would serve a material social interest); and (2) concern about the collateral consequences of enforcement on shareholders or management.

Collateral consequences alone do not justify an adjustment to the form of nontrial resolution, except as provided in § 6.24(b) & (c), because, throughout the negotiation process, an organization retains the ability to obtain the more favorable treatment needed to avoid collateral consequences by providing the requisite cooperation. An organization that persists in refusing to cooperate or fully remediate should not be protected from the adverse consequences of its decision to do so.

*e. Guidelines governing the use of resolutions that do not trigger mandatory, presumptive, or permissive collateral consequences.* Section 6.24 focuses on the decision whether to use a form of nontrial resolution that could trigger mandatory, presumptive, or permissive collateral consequences in the United States or abroad, instead of on the choice between specific forms of nontrial resolutions or remedies. The reason for this is that in the civil and administrative enforcement context, there is not a specific set of nontrial resolutions and/or remedies that generally trigger collateral consequences across all civil and administrative enforcement authorities and another set that do not, as is the case in the criminal context. In the civil and administrative enforcement context, different forms of nontrial resolution, and different remedies contained in a nontrial resolution, can trigger collateral consequences depending on: (1) the industry in which the organization operates; (2) the civil, administrative, or self-regulatory authority with jurisdiction over the organization; and (3) the type of misconduct involved.

Nontrial resolutions for knowing or intentional civil misconduct can trigger mandatory, presumptive, or permissive collateral consequences under many, but not all, statutes. In addition, some agencies impose collateral consequences on organizations that were subject to certain remedies, such as an injunction against future violations of specific laws or an order requiring that the organization cease and desist from violating specific laws. Administrative agencies and self-regulatory authorities often can waive collateral consequences.

This Section uses the term "no collateral consequences" resolution to refer to nontrial resolutions that are structured to avoid collateral consequences that otherwise could result from an adjudicated resolution or a resolution that imposes certain direct consequences, such as an injunction.

*f. Enforcement guidelines structured to reduce knowing or intentional material misconduct by incentivizing full corrective action or full cooperation.* Civil and regulatory enforcement serves many goals including preventing, deterring, and remediating misconduct; rehabilitating organizations that have engaged in misconduct; providing restitution to victims; and providing credible information to the public about organizations that engaged in misconduct.

In the case of knowing and intentional misconduct by large organizations, enforcement authorities can most effectively deter, terminate, and remediate misconduct if they are able to expeditiously detect and terminate it, ensure that the organization disgorges any benefit from the misconduct, and are able to obtain in a reasonable time the evidence needed to bring the individuals responsible for the misconduct to justice. Enforcement policies that ensure that organizations always must disgorge the benefit of their employees' misconduct promote deterrence by providing firms with a profit-oriented motivation to deter their employees' misconduct. Enforcement policies that ensure full remediation also enhance organizations' ability to deter misconduct. Enforcement policies that promote prompt detection and full cooperation help deter to the extent they cause employees contemplating misconduct to face a material and salient risk that the organization would detect and report any misconduct they commit and provide enforcement authorities with sufficient evidence to sanction the employees.

These actions also can enable enforcement officials to obtain restitution for victims and promote the rehabilitation of organizations. Enforcement authorities often can best achieve these goals by providing organizations with substantial incentives to self-report and cooperate, however. Enforcement authorities thus should structure their enforcement policies to induce organizations to self-report, fully cooperate and remediate and should avoid policies that would deter such actions in pursuit of objectives other than deterrence. A decision to reduce the deterrent effect of enforcement can be expected to lead to more misconduct and more public harm.

Accordingly, civil and administrative enforcement authorities should adopt and publicly disclose their policies that govern how they chose nontrial resolutions for organizations that have engaged in knowing or intentional material misconduct. These policies should be designed to provide organizations with substantial incentives to self-report and cooperate for the reasons given in § 6.02, Comment *f*.

Civil and regulatory enforcement authorities also should structure their enforcement policies to provide strong incentives for organizations to fully cooperate. Of particular importance, enforcement authorities should ensure that organizations: (1) thoroughly investigate detected material misconduct, ascertain its full scope, and share information, including evidence found during the investigation, with enforcement authorities; and (2) identify the individuals responsible for the misconduct and provide enforcement authorities with evidence relating to their involvement, in accordance with § 6.05. By cooperating, organizations also may enable enforcement authorities to expeditiously detect, terminate, and ensure remediation of additional misconduct that had not been detected by the government. A policy that promotes full cooperation also promotes deterrence, rehabilitation, and restitution by enabling enforcement authorities to pursue appropriate actions against organizations and individuals. Employees should be deterred from engaging in misconduct if they expect their organization to proactively strive to detect and investigate misconduct and to provide the resulting evidence about employees' misconduct to the government.

Organizations generally will not self-report misconduct or provide prompt and full cooperation that supplies civil or administrative enforcement officials with evidence that can be used against them unless they have a substantial reason to do so. To provide such incentives, civil and regulatory enforcement officials should ensure that organizations are aware that: (1) they can obtain a resolution that avoids collateral consequences if they undertake these actions; and (2) they will not be able to resolve a case of material misconduct through a resolution structured to avoid collateral consequences if they neither self-report nor fully cooperate (see §6.24(b)), except as provided in § 6.24(c).

Accordingly, to ensure that organizations are confident that they will be offered a form of nontrial resolution that does not trigger mandatory, presumptive, or permissive collateral consequences if they either (1) undertake full corrective action or (2) fully cooperate and remediate in accordance with §§ 6.05 and 6.07, enforcement officials should adopt a presumption that an organization that undertakes full corrective action or that undertakes full cooperation and full disgorgement, restitution, and remediation will be able to resolve a matter through a form of nontrial resolution that does not trigger presumptive or mandatory collateral consequences, in the United States or abroad.

Such a presumption will not operate to provide strong incentives for organizations to self-report or fully cooperate, however, if organizations also can readily resolve cases involving knowing or intentional material misconduct through forms of nontrial resolution designed to avoid collateral consequences even if they do not self-report or fully cooperate. When an organization can readily obtain leniency by agreeing to settle promptly or taking other actions that do not involve self-reporting or cooperation, a presumption favoring a no-collateral consequence resolution for organizations that self-report or fully cooperate will provide little incentive for the organization to undertake such actions.

Accordingly, § 6.24 establishes a presumption that enforcement officials should *not* offer a nontrial resolution designed to avoid collateral consequences unless the organization satisfies either subsection (b) or (c). Thus, an organization should not be eligible for a no-collateral-consequence form of resolution based on nothing more than its willingness to promptly settle the case, make restitution payments to victims, and undertake some internal reforms.

*g. Insulating an organization from collateral consequences notwithstanding aggravating circumstances.* Section 6.24 establishes a presumption in favor of resolving misconduct allegations through a nontrial resolution that does not trigger mandatory, presumptive, or permissive collateral consequences if the conditions set forth in subsections (b) or (c) are satisfied, even in cases in which the aggravating circumstances set forth in § 6.18(c) exist.

The presumption should remain in place even when aggravating circumstances are present because the presumption is needed to incentivize self-reporting, full cooperation, and remediation. When aggravating circumstances are present, it is particularly important that enforcement authorities be able to promptly detect and terminate misconduct that causes serious harm or involves managers. The presumption helps enable enforcement authorities to detect and enforce material misconduct that otherwise might remain undetected. It also better enables enforcement officials to identify organizations in need of remediation and to enter into nontrial resolutions that effectuate effective internal reforms more rapidly than they could have without the organization's cooperation. This resulting improved enforcement also can promote the goal of providing restitution to victims by ensuring that enforcement officials obtain the information they need to induce individuals and organizations to enter into nontrial resolutions for misconduct that provide redress to the individuals harmed by the misconduct. Finally, it serves the important goal of informing the public about both the nature of the organization's misconduct and the type of individuals who were responsible for it by enabling enforcement officials to more promptly detect and sanction misconduct that otherwise might have remained undetected. Thus, as long as the organization has truly satisfied § 6.24(b) by, among other actions, identifying the full scope of the misconduct and providing all reasonably available evidence against those responsible for it, the organization should be confident of avoiding collateral consequences even though the misconduct caused serious harm or involved senior management, or even if the organization was previously involved in misconduct.

While aggravating circumstances should not negate the presumptions set forth in § 6.24 (b) and (c), they may be relevant to other aspects of the nontrial resolution, such as sanctions and remedial measures. Enforcement officials can address aggravating circumstances that indicate that an organization has an enhanced risk of engaging in future misconduct through measures aimed directly at this risk, such as the appointment of a compliance monitor.

*h. Less-than-full cooperation.* Section 6.24 establishes a presumption that an organization should not be eligible for a nontrial resolution structured to avoid imposing mandatory, presumptive, or permissive collateral consequences unless the organization both fully cooperated (in accordance with § 6.05) and undertook full disgorgement, restitution, and remediation in accordance with § 6.07.

However, the Section provides two exceptions to this presumption. The first is where the organization undertook full remediation (see § 6.07) and provided enforcement officials with material evidence that they otherwise did not have, and could not readily obtain, about:

(A) the full extent of the organization's knowing or intentional material misconduct and (B) the identity and culpability of all employees—including all high-level or substantial authority personnel—who:

(i) knowingly participated in committing, conspiring to commit, attempting to commit, or aiding and abetting the commission of the offense;

(ii) knowingly participated in undermining detection or investigation of the offense;

(iii) failed to intervene to terminate it or report it to appropriate authorities within the organization after becoming aware of it; or

(iv) were willfully blind to the misconduct (§ 6.24 (b)(3)).

The exception provided in subsection (b)(3) recognizes that civil and administrative enforcement authorities regularly face substantial resource challenges in investigating knowing or intentional material misconduct. Many civil and administrative enforcement authorities do not have sufficient resources to detect or promptly pursue effective enforcement actions against most of the misconduct under their jurisdiction. In light of these challenges, enforcement authorities can promote the goals of deterrence, rehabilitation, and restitution to victims by offering no-collateral consequences nontrial resolutions to organizations that did not fully cooperate, so long as the organization:

(1) provided enforcement officials with substantial material cooperation involving evidence enforcement officials did not already have—and would be unlikely to readily obtain—about the scope of it misconduct and identity of the individuals responsible for the misconduct and their roles in it; and

(2) undertook full disgorgement, restitution, and remediation (in accordance with § 6.07). The requirement that the organization fully remediate includes a requirement it ensures that all employees who were knowingly responsible for the organization's failure to fully cooperate are no longer in positions of authority with the organization.

*i. Disproportionate collateral consequences*. Section 6.24(c) states that, notwithstanding an organization's failure to satisfy § 6.24(b), enforcement officials should offer to resolve a case involving knowing or intentional material misconduct through a nontrial resolution that avoids triggering collateral consequences if, but only if, three conditions are met. First, subsection (c) is limited to situations in which the collateral consequences would harm innocent parties such as customers (e.g., patients who purchase pharmaceuticals from the organization) or employees in organizational units that were not involved in the misconduct. The term "innocent parties" does not refer to shareholders because otherwise every publicly held firm would be able to avoid collateral consequences without satisfying § 6.24(b).

Second, the organization must undertake full remediation in accordance with § 6.07. Collateral consequences can be an important tool for reducing the risk that an organization will cause future harm (as discussed in § 6.26). Accordingly, an organization that is otherwise subject to collateral consequences should undertakes full remediation that is designed to address the root causes of its misconduct. Full remediation entails taking appropriate actions to ensure that any officials in the organization who are knowingly responsible for either the organization's misconduct or its failure to fully cooperate are no longer in positions of authority.

Finally, enforcement officials should determine whether the organization's failure to fully cooperate and remediate provided a basis for concluding that the organization has a heightened risk of future misconduct. An organization evidences a lack of commitment to deterring and remediating misconduct if it fails to fully cooperate and remediate with respect to knowing or intentional misconduct about which it is aware. Accordingly, this Section creates a presumption that enforcement officials should impose a compliance monitor on any an organization as a precondition of it obtaining a nontrial resolution that avoids collateral consequences pursuant to § 6.24(c) unless the organization had an effective compliance program at the time of the misconduct or was justified in its initial failure to cooperate. An organization is justified in its initial failure to fully cooperate if it can establish that its decision not to investigate or cooperate was predicated on a reasonable good-faith belief, based on a reasonable interpretation of the law, that it did not engage in misconduct. This exception applies only when the organization does not have notice that the civil or regulatory enforcement authority has a good faith, reasonable interpretation of the law under which the organization violated the law. When an enforcement authority offers an organization a nontrial resolution that avoids triggering collateral consequences based on the fact that organization believed reasonably and in good faith that it did not violate the law, the resolution should explicitly set forth basis for the organization's legal conclusion that it did not violate the law and the basis for the enforcement authority's conclusion that it did violate the law.

By contrast, if the organization lacked justification for its failure to cooperate, an enforcement authority can justifiably infer that the organization is not fully committed to deterrence and to complying with the law in the future. In this situation, enforcement officials should only offer a no-collateral consequences resolution to an organization that did not satisfy § 6.24(b) if they impose a compliance monitor on the organization, in accordance with §§ 6.10-6.12. An organization's unjustified failure to fully cooperate in accordance with § 6.05 provide a strong factual basis for enforcement authorities to conclude that its management cannot be relied on to either ensure the organization will comply with the law or fully remediate the harm that it caused. If an organization did not have an effective compliance program in place at the time of the misconduct, a monitor should be appointed. However, a monitor may not be necessary if the organization had an effective compliance program at the time of the misconduct and the misconduct was an isolated event that did not involve high-level or substantial authority personnel.

In addition, when seeking to ensure that the organization fully remediates the root causes of the misconduct and the organization's compliance deficiencies, enforcement officials should ensure that the organization removes from positions of authority all individuals who were knowingly and materially responsible for either the misconduct or for the organization's unjustified refusal to cooperate.

This Section does not permit an organization to obtain a resolution that avoids collateral consequences simply by asserting that the costs of the collateral consequences would be ruinous. Collateral consequences are aimed at protecting the public and others from an organization that presents a high risk of misconduct. When an organization commits knowing or intentional misconduct and then unjustifiably fails to provide the cooperation and remediation set forth in § 6.24(b), the facts favor imposing collateral consequences in accordance with § 6.26. An organization that wants to avoid such collateral consequences should act in accordance with § 6.07 and cooperate consistent with § 6.24(b).

*j. Benefits of adopting and implementing an effective compliance program.* Enforcement authorities should not offer a no-collateral consequences resolution to an organization that engaged in knowing or intentional material misconduct, but did not satisfy § 6.24(b) or (c), even if the organization had an effective compliance program. An effective compliance program is not, in and of itself, a sufficient basis for obtaining a nontrial resolution that avoids collateral consequences for the reasons discussed in the context of criminal prosecution in § 6.17, Comments *c* & *d*. The only exception to this general rule in the context of civil and administrative enforcement is when the organization's liability under a statute or regulations is predicated on its failure to adopt or maintain an effective compliance program to address a particular legal risk (e.g., money-laundering).

While this Section does not predicate access to a no-collateral consequences resolution on an effective compliance program, this Topic both recognizes that effective compliance programs are valuable and provides material incentives for organizations incentives to adopt and implement an effective compliance program. This Section provides direct incentives for organizations to adopt an effective compliance program that helps detect and obtain evidence about misconduct by offering substantial benefits to organizations that self-report and cooperate. In addition, an organization's adoption and maintenance of an effective compliance program is an important consideration in determining: (1) the magnitude of the penalty imposed; (2) whether mandated internal reforms should be required in accordance with § 6.09; and (3) whether the nontrial resolution should impose a monitor in accordance with §§ 6.10–6.12.

*k. Collateral consequences.* For discussion of the impact of collateral consequences on the form of a criminal nontrial resolution see § 6.17, Comment *e*.

*l. Application to small, owner-managed, closely held organizations.* Small, owner-managed, closely held organizations make up the bulk of the cases in which enforcement authorities have detected misconduct. Owner-managers regularly are implicated in, or their actions are the underlying precipitating cause of, misconduct committed by such organizations, especially when the misconduct involved violations of environmental, worker-safety, immigration, and tax laws. However, because owner-managers regularly take steps to avoid directly committing an unlawful act, often the only way of seeking recourse is to hold the organizations liable. Organizational liability combined with collateral consequences can be a particularly important tool for ensuring that owner-managers who knowingly allow their organizations to engage in material misconduct are both punished and prevented from engaging in future violations.

The presumptions in this Section are unlikely to result in such organizations becoming eligible for a no-collateral-consequences resolutions for their misconduct when their owners are implicated for two reasons. First, implicated owner-managers of closely held companies are unlikely to allow their firms to self-report and fully cooperate since such actions could put the owner-managers in peril. Second, implicated owner-managers will not undertake full remediation in accordance with § 6.07, as is required by this Section, because such remediation would threaten their jobs, as it requires that the organizations identify, discipline, and possibly dismiss all high-level personnel who caused or knowingly condoned the misconduct.

Whether small or closely held organizations that are not owner-managed are good candidates for no-collateral-consequences resolutions of their misconduct likely depends on whether the boards of directors and senior management of such organizations are sufficiently independent of those involved in the misconduct that they are willing to self-report, fully cooperate, and fully remediate. A family-owned organization is unlikely to take such steps when a family member is implicated in the misconduct. This Section should encourage self-reporting and full cooperation by private organizations whose owners and boards of directors are independent of those individuals implicated in the misconduct.

*m. Recidivism.* The presumption of § 6.24(b) applies to organizations that previously engaged in misconduct. Enforcement authorities benefit from using the presumption to induce organizations to self-report and fully cooperate, regardless of whether the organization previously engaged in misconduct. In addition, an organization's past misconduct need not indicate that it fails to take its legal obligations seriously. Very large organizations that operate in heavily regulated sectors face the omnipresent risk that an employee will violate the law even if the organization has adopted and maintains an optimal compliance program. Accordingly, in order to ensure that all organizations have material incentives to undertake full corrective action or to fully cooperate and undertake full disgorgement, restitution, and remediation, Section 6.24 applies to all organizations.

The concern that this approach might cause organizations to be overly willing to violate the law in a quest for profits, confident of their ability to satisfy § 6.24, is addressed in three ways. First, sanctions should be adjusted to reflect past knowing or intentional material misconduct of a similar type. Second, managers contemplating such an approach should be deterred by appropriate application of § 6.07, which exhorts enforcement authorities to ensure that organizations remediate the root causes of their misconduct, including by taking appropriate actions with respect to supervisors who encouraged, induced, or condoned the misconduct. Finally, organizations that repeatedly violate the law are more likely, depending on other factors, to be good candidates for mandated internal reforms, in accordance with § 6.09, and the appointment of a compliance monitor, in accordance with §§ 6.10–6.12. For a discussion of criminal recidivism see § 6.18, Comment *j*.

*n. Legal duty to self-report.* Section 6.24 is predicated on the assumption that organizations do not have a legal obligation to self-report misconduct. When organizations do have a legal duty to report either misconduct or a risk of harm, enforcement officials should proactively pursue enforcement actions against those that do not self-report when they were legally required to do so. An organization nevertheless can be presumptively eligible for a no-collateral consequences resolution if it satisfied § 6.24(b) and if it took actions, such as fully cooperating or remediating, that it was not legally required to take.

*o. Importance of individual enforcement actions.* Enforcement officials entering into no-collateral consequences resolutions for knowing or intentional material misconduct should undertake their best efforts to pursue civil or administrative enforcement against individuals who knowingly or intentionally committed, attempted to commit, or aided and abetted or conspired to commit material misconduct, if they were substantially responsible for the misconduct and are appropriately held liable for it in the United States, in accordance with § 6.03. They also should refer such individuals to prosecutors. If a case involving knowing or intentional material misconduct is resolved through a no-collateral consequences resolution with the organization, but no civil or regulatory action is taken against any individuals who knowingly or intentionally engaged in the misconduct, that would be inconsistent with the central policy justifications for no-culpability resolutions with organizations.

*p. No collateral consequences resolution versus a declination with disgorgement.* Section 6.24 adopts the presumption that an organization that engaged in knowing or intentional material misconduct should be subject to a civil or administrative enforcement action even if the organization undertook full corrective action. A civil or administrative enforcement action provides important public notice about the facts of the misconduct and the steps taken to remediate it. It also can be needed to ensure that the organization does not retain the benefit of misconduct, among other goals. Nevertheless, there are circumstances in which deterrence and the interests of justice may best be served through a policy that offer organizations that undertake full corrective action—and only those organizations—a declination with disgorgement (consistent with § 6.18). Such a policy may be appropriate in circumstances in which the threat of a public nontrial resolution that sanctions an organization for knowing or intentional misconduct would deter organizations subject to an enforcement authorities' jurisdiction from self-reporting and fully cooperating with respect to material misconduct that enforcement authorities would be unlikely to detect on their own even if the resolution were structured in accordance with § 6.24 and 6.25. This is particularly likely if the resolution could result in the organization incurring substantial costs imposed by other public authorities (domestic or foreign) or private litigation. When enforcement authorities can best protect the public by inducing prompt self-reporting, then a policy favoring a declination with disgorgement in accordance with the requirements of § 6.18 may be appropriate. Such a policy can also promote the interests of victims through provisions requiring full disgorgement, restitution, and remediation in accordance with § 6.07 as a precondition of obtaining a declination with disgorgement.

*r. Relevance of the Comments in Topic 3.* The Comments in Topic 3 relating to the policies governing the choice between guilty pleas, declinations with disgorgement, DPAs, and NPAs also are relevant to civil and regulatory enforcement authorities' policies governing the choice between a civil or administrative enforcement action (seeking a judicial decree or order that the company violated the law) on the one hand, and a form of nontrial resolution that either does not trigger collateral sanctions (such as a DPA or NPA) or does not require the organization to admit to all the facts of the misconduct, on the other. See §§ 6.15–6.19.

## REPORTERS' NOTES

*a. Policy of federal regulators on the impact of self-reporting on the form of the enforcement action.* The Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), and the U.S. Department of Justice, Antitrust Division (Antitrust Division) each have adopted policies under which organizations may be able to obtain leniency if they self-report or cooperate, and remediate. Leniency under these policies either takes the form of a declination or of a nontrial resolution that would not trigger collateral consequences. Some of these programs treat self-reporting as one of many factors to consider when evaluating whether to enter into a settlement on more favorable terms. Other programs provide stronger incentives to self-report by setting forth a set of benefits that are only provided to organizations that self-report, and in turn a set of negative terms (e.g., higher sanctions and an enhanced probability that a monitor will be appointed) that organizations are more likely to face if they detect and do not self-report.

For a discussion of these policies see the Reporters' Notes below and § 6.18, Reporters' Notes *b* & *e*.

*b. SEC policy regarding organizational nontrial resolutions and the use of DPAs and NPAs.* The SEC adopted its original policy on organizational leniency in the Seaboard Report. See Sec. & Exchange Comm'n, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release No. 1470, 2001 WL 1301408 (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm. In the Seaboard Report, the SEC explained its decision not to pursue an enforcement action against a public company for certain accounting violations caused by its subsidiary, detailing the factors that supported leniency. The report identified four important considerations: (1) self-reporting of detected misconduct; (2) remediation (including dismissing or appropriately disciplining wrongdoers) and improvements to the organization's compliance program; (3) full cooperation; and (4) maintenance of an effective compliance program prior to the discovery of the misconduct.

In 2010, the SEC announced a policy of encouraging full cooperation through the use of deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), and other alternatives to formal enforcement. Sec. & Exchange Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, SEC 10-6, 2010 WL 109926 (Jan. 13, 2010), https://www.sec.gov/news/press/2010/2010-6.htm. The SEC's Enforcement Manual identifies four measures of a company's cooperation: (1) self-policing prior to the company's discovery of the misconduct; (2) self-reporting after discovering the misconduct; (3) remediation of the misconduct; and (4) cooperation with law enforcement. The Enforcement Manual identifies a continuum of tools designed to reward cooperation from proffer and cooperation agreements, to DPAs and NPAs, to criminal immunity requests. See DIV. OF ENFORCEMENT, SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL § 6.1.2 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

Although the initial policy enabled companies to obtain a DPA or NPA without self-reporting, on Nov. 17, 2015, the SEC announced a new policy that requires companies to self-report Foreign Corrupt Practices Act violations in order to be eligible to settle through a DPA or NPA. Andrew Ceresney, Dir., Div. of Enf't, Sec. & Exch. Comm'n, ACI's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

It might appear that DPAs and NPAs do not serve the same purpose when implemented by the SEC as they do in the criminal context because SEC commissioners have authority to simultaneously settle enforcement actions and ensure that the organization is not subject to most collateral consequences imposed by the commission. See § 6.21, Reporters' Note *g*. In fact, officials in the SEC's enforcement division can benefit from adopting a policy regarding DPAs and NPAs that offers companies access to these forms of resolution if, but only if, they self-report and cooperate, for two reasons. First, such settlements would not trigger those collateral consequences that the SEC does not have authority to waive. For example, a company is not eligible for the safe harbor if it:

(1) was convicted of a felony or certain misdemeanors; or

(2) was made the subject of a judicial or administrative decree or order arising out of a governmental action that:

(a) determines that the issuer violated;

(b) requires that the issuer cease and desist from violating; or

(c) prohibits future violations of, the antifraud provisions of the securities laws.

15 U.S. C. § 78u-5(b).

Second, such settlements allow the SEC's Enforcement Division to provide strong incentives to companies to self-report and cooperate in order to obtain a DPA or NPA, because the Enforcement Division cannot guarantee that the SEC will waive collateral consequences on a company that is subject to a formal enforcement action. This is because the recommendation of whether collateral consequences should be imposed is made by SEC officials in a different division of the SEC, prior to ultimate referral to the SEC. In addition, as with criminal DPAs and NPAs, SEC DPAs and NPAs can insulate organizations from collateral consequences imposed by other authorities that could be triggered by the SEC imposing civil penalties for fraud-related misconduct. James McDonald, Dir., Div. of Enf't, Commodity Futures Trading Comm'n, Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC, Speech at the NYU Program on Corporate Compliance & Enforcement/Institute for Corporate Governance & Finance (Sept. 25, 2017), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517.

*c. CFTC policy regarding nontrial resolutions with organizations and the use of DPAs.* In 2017, the CFTC announced a policy intended to promote self-reporting by offering more favorable terms to organizations that self-report, cooperate, and remediate than those that are available to organizations that only cooperate and remediate. McDonald, *Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC*.

*d. Antitrust Division policy on corporate nontrial resolutions and leniency.* For an example of an early effort to provide predictability, see Antitrust Division Corporate Leniency Policy (offering leniency to organizations that self-report if six conditions are met, including reporting fully before the illegal activity is reported from any other source). https://www.justice.gov/atr/file/810281/download. This policy thus restricted leniency to the first company to self-report (offering leniency to organizations that self-report).

More recently, the Antitrust Division has indicated that NPAs would be reserved for such firms, but that firms that were not the first to self-report might obtain a DPA. Factors favoring a DPA include adoption and maintenance of an effective compliance program, full cooperation, and remediation. Assistant Attorney General Makan Delrahim has stated, however, that the Principles of Federal Prosecution of Business Organizations "counsel against crediting a compliance program when the other three hallmarks of good corporate citizenship are absent": specifically, (1) prompt self-reporting, (2) full cooperation with the Antitrust Division's investigation, and (3) remediation.

Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Just., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

*e. Federal policy on the impact of an effective compliance program.* See § 6.08, Reporters' Notes *f* & *g*.

*f. Legal obligation to self-report.* These Principles in this Topic focus on enforcement policy in the situation in which an organization is not legally required to self-report. Some organizations are subject to legal requirements to self-report some or all violations or potential harms. Self-reporting requirements are particularly common for products that could cause personal injury. These requirements also are commonly imposed on heavily regulated industries. These may be imposed by statute or regulation or by a self-regulatory authority, such as the Financial Industry Regulatory Authority.

In those situations, the existence of a duty to self-report, if adequately enforced and accompanied by adequate sanctions, may be sufficient incentive for organizations to self-report misconduct. If the duty includes a duty to investigate and fully cooperate, then organizations may undertake those activities too. Nevertheless, enforcement officials may enhance deterrence by offering more favorable settlement terms for the underlying misconduct if an organization self-reports and fully cooperates in situations where its failure to do so is unlikely to be detected, especially if otherwise the sanction for the misconduct would trigger mandatory or presumptive collateral consequences, such as delicensing, debarment, or exclusion. For a discussion of how agencies should approach collateral consequences to protect their interests while not deterring self-reporting and full cooperation, see Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018).

*g. Increased risk of unsuccessful enforcement actions and oversight by the executive branch and the legislature.* Adherence to the Principle in this Section, and a commitment to reserving no-culpability nontrial resolutions for knowing or intentional material misconduct for organizations that satisfied the provisions of § 6.24, can be expected to result in situations where enforcement officials need to pursue litigation against an organization that refused to provide adequate cooperation to satisfy § 6.24. This investment is justified by the long-term benefits of providing clear and strong incentives to organizations to self-report and fully cooperate. These benefits include speedier detection of (and thus less harm resulting from) misconduct, enhanced ability to detect, terminate, and remediate the full scope of the misconduct, and enhanced deterrence resulting from increased self-reporting and cooperation, and as a result stronger enforcement actions against individuals who knowingly or intentionally commit material misconduct. Nevertheless, the effort to obtain these long-term benefits may come at a cost of fewer successful enforcement actions in any given year for two reasons. First, enforcement officials can be expected to lose some of the cases they take to trial. Second, in the short run, they also may be able to pursue fewer other actions as a result of the time spent on the litigation. This short-term decrease in successful enforcement resolutions can be expected to enable enforcement authorities to be more effective in the future and thus should be supported by other government authorities.

Civil and regulatory enforcement authorities regularly must report on their activities both to more senior officials in the executive branch (such as the office of the governor or president) and to the legislature. This reporting regularly includes information on the number of successful enforcement resolutions. The executive branch and the legislature can promote the public interest by not treating the number of successful enforcement resolutions as the measure of an enforcement authority's effectiveness and by not treating unsuccessful litigation as a presumptive indication of the enforcement authority's deficiency. They also can promote the public interest by asking enforcement authorities to provide information on the seriousness of the harm associated with the misconduct (mean, median, 25th percentile, and 75th percentile), the level of culpability (e.g., intentional misconduct versus negligence), the percentage of cases involving intentional or knowing organizational misconduct that resulted in a case being brought against an individual and the number of successful resolutions of those cases, the collateral consequences imposed against individuals, and the percentage of organizational resolutions for intentional or knowing misconduct that took the form of full-admission, partial-admission, neither-admit-nor-deny, or denial-permitted resolutions. Legislatures also can enhance deterrence by ensuring that enforcement authorities have sufficient resources to be able to pursue effective investigations and litigation in those circumstances where an organization does not fully cooperate.

*h. Use of DPAs and NPAs in other countries.* For a discussion of the use of DPAs, NPAs and their equivalent in other countries see § 6.04, Reporters' Note *f*; § 6.05, Reporters' Note *j*; § 6.15, Reporters' Note *e*.

*i. Academic literature on DPAs and NPAs with organizations in criminal cases.* For a discussion of the academic literature on the use of DPAs and NPAs in criminal cases against organizations, see § 6.15, Reporters' Note *f*; § 6.18, Reporters' Note *h*; and § 6.19, Reporters' Note *c*; see also § 6.09, Reporters' Notes *d and e*.

*j. Academic literature on the use of nontrial resolutions, including DPAs, in civil enforcement actions.* Scholarship on the use of DPAs, NPAs, and other forms of nontrial resolutions in civil enforcement actions includes: Rachel Barkow, *Prosecutor as a Regulatory Agency,* in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 177 (A. Barkow & R. Barkow eds., 2011) (discussing the use by the New York attorney general of structured settlements in civil as well as criminal cases brought under the Martin Act); Samuel Buell, *The Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62 (A. Barkow & R. Barkow eds., 2011) (discussing corporate civil liability).

The extensive literature on public enforcement of the securities laws against organizations includes: Steven Choi and Adam C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27 (2016); Steven Choi and Adam C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J.

ON REG. 1 (2017); Steven Choi and Adam C. Pritchard, *Securities Law and Its Enforcers*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 219 (Jennifer Arlen, ed., 2018); James Cox & Randall Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?,* 80 Notre Dame L. Rev. 893 (2005); Michael Klausner & Jason Hegland, *Corporate and Individual Liability in SEC Enforcement Actions*, RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018); Urška Velikonja, *Politics in Securities Enforcement,* 50 GA. L. REV. 17 (2015); Urška Velikonja, *Public Enforcement After* Kokesh*: Evidence from SEC Actions*, 108 GEO. L.J. 389 (2019). See also Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992); Anat Carmy Wiechman, Steven Choi and Adam C. Pritchard, *Scandal Enforcement at the SEC: The Arc of the Option Backdating Investigations*, 15 AM. L. & ECON. REV. 542 (2013).

The extensive literature on environment enforcement includes: Eric Helland, *Prosecutorial Discretion at the EPA: Some Evidence on Litigation Strategy*, 19 J. REG. ECON. 271 (2001); Eric Helland, The Enforcement of Pollution Control Laws: Inspections, Violations and Self-reporting, 80 Rev. Econ. Stat. 141 (1998); Eric Helland, *The Revealed Preferences of a State EPA: Stringency, Enforcement and Substitution*, J. ENV'T. ECON. & MGMT. 242 (1998).

## § 6.25. Policies Governing Admissions of Facts and Denials of Culpability

**(a) An organization that engaged in knowing or intentional material misconduct should presumptively be offered a nontrial resolution that formally adjudicates the organization's culpability or require the organization to fully admit to the facts underlying the misconduct unless:**

**(1) the organization meets the requirements for a nontrial resolution that avoids triggering collateral consequences under § 6.24(b);**

**(2) such a determination or admission would trigger mandatory, presumptive, or permissive collateral consequences and § 6.24(c) is satisfied; or**

**(3) the following conditions are met:**

**(A) the organization fully remediated in accordance with § 6.07;**

**(B) the organization provided substantial material cooperation to enforcement officials that either enabled them to either detect and terminate misconduct more rapidly than they could have on their own or provided them with evidence material to their case(s) against the individuals responsible for**

**the misconduct that they could not reasonably have obtained on their own in a timely way; and**

**(C) a finding of culpability or a full admission could subject the organization to substantial penalties or liability imposed by other parties that cannot be addressed through a coordinated resolution with those parties.**

**(b) Except as provided in subsection (c), nontrial resolutions that do not adjudicate the organization's culpability or require a full admission of the facts of the misconduct should:**

**(1) require the organization to admit to most of the material facts of the misconduct; and**

**(2) state that the organization cannot deny its culpability for the misconduct except in litigation brought against it by others who are not parties to the nontrial resolution.**

**(c) Civil and administrative enforcement officials entering into a nontrial resolution that does not involve a finding of culpability or a full admission of the facts needed to establish the alleged misconduct should not preclude the organization from denying its culpability for the misconduct if, at the time of the resolution:**

**(1) the organization provided full cooperation in accordance with § 6.05;**

**(2) enforcement officials lack sufficient evidence to establish the organization's culpability for the alleged misconduct and do not expect to be able to obtain the evidence needed to prove the misconduct without incurring costs that are excessive relative to the benefit to the public that an admission would provide;**

**(3) enforcement officials have good-faith and reasonable belief that they could obtain the necessary evidence if they incurred the necessary cost; and**

**(4) the nontrial resolution sets forth the reasons why the enforcement authority is agreeing to a denial-permitted resolution with the organization.**

**Comment:**

*a. Relationship to Section 6.24.* Section 6.24 provides guidance on when civil or administrative enforcement officials should resolve a case through a nontrial resolution that would not trigger collateral consequences. Section 6.25 provides guidance on when enforcement officials should enter into a nontrial resolution that does not adjudicate the organization's culpability or require it to admit to the full facts of the misconduct. Such admissions may be material to the organization because of they could result in the imposition of collateral consequences. The considerations that support a no-collateral consequences resolution thus also support nontrial resolutions that do not require full admissions in such circumstances. Yet admissions can be material to the organization for other reasons, including the threat of liability to third parties. This Section offers guidance on the policies to govern no-admission or partial-admission resolutions when the ability to avoid a full admission provides a material benefit to the organization that can be used as an incentive for it to self-report, fully cooperate, and remediate.

*b. External consequences of either a determination of the organization's culpability or a full admission of the underlying facts.* A nontrial resolution that formally adjudicates an organization's culpability or requires the organization to admit to all of the facts of its misconduct could cause the organization to incur substantial and unpredictable additional costs if other actors, including other enforcement authorities, use the finding or admission to establish the organization's culpability and liability in a separate action. The potential downstream effects of such a nontrial resolution could deter organizations from self-reporting misconduct or fully cooperating and thereby undermine enforcement efforts. This, in turn, may result in misconduct remaining undetected and unremediated and individual wrongdoers escaping justice.

Civil or administrative enforcement officials with jurisdiction over situations in which the threat of follow-on third party litigation is likely to deter organizations from self-reporting or fully cooperating if they are required to admit to the full facts of this misconduct should adopt a presumption that organizations that undertake full corrective action or cooperate in accordance with § 6.25(a) can enter into a nontrial resolution that does not either involve a formal finding of culpability or require the organization to admit to all the facts of the misconduct. By including provisions in such nontrial resolutions that require disgorgement, restitution, and remediation in accordance with § 6.07, civil and administrative enforcement officials often can ensure that victims' harms are redressed.

*c. Culpability resolutions and full admissions.* Enforcement authorities should adopt a presumption favoring nontrial resolutions that require an organization to admit to the facts of its knowing or intentional material misconduct when the admission would not trigger collateral consequences or present the organization with an enhanced material risk of liability to third-parties.

Several important goals of civil and administrative enforcement are served when enforcement authorities require organizations to admit to their wrongdoing. Such an admission unambiguously establishes —for the public, the organization's employees, and the organization's current and future counterparties—that it engaged in misconduct. It promotes the law's ability to identify and appropriately blame those who engaged in misconduct. It also promotes the goals of deterrence and, in some cases, public safety, by providing third parties with information that may be material to their decisions whether to engage in future dealing with the organization.

Enforcement authorities should not require a full admission when they do not have sufficient evidence to establish an organization's culpability under the requisite legal standard, however.

*d. Considerations justifying a partial-admission or no-admission resolution.* Enforcement authorities should adopt a policy of offering an organization a no-culpability, partial-admission resolution when:

(1) the organization meets the requirements for a nontrial resolution that avoids triggering collateral consequences under § 6.24(b);

(2) the organization's actions enabled enforcement officials to either detect and terminate misconduct more rapidly than they could have on their own or provided enforcement officials with evidence material to their investigation that they could not reasonably have obtained on their own in a timely way; and

(3) a culpability determination by the agency or full admission to the underlying facts of the misconduct could be used by other parties, such as other government authorities or private parties, to establish the organization's liability to those other parties.

Partial or no-admission resolutions are justified under these circumstances by the benefit to the public of providing strong incentives for organizations to self-report and cooperate. Self-reporting and cooperation in these circumstances should help to deter misconduct by making detection and enforcement more likely, terminate and remediate existing misconduct more rapidly, promote rehabilitation of the organization, provide faster restitution to victims, and help ensure that individual wrongdoers are brought to justice. They should not be granted in other situations.

*e. Considerations that do not justify a partial-admission or no-admission resolution.* Enforcement authorities should adopt a presumption against resolving enforcement actions involving knowing or intentional material misconduct through partial- or no-admissions resolutions in situations in which the organization has not provided the level of cooperation needed to satisfy § 6.24(b). The desire to expedite the enforcement action or to avoid the delay and risk of going to trial are generally not adequate reasons to offer an organization a no-admission nontrial resolution, except as provided in § 6.25(c). To offer organizations no-admission nontrial resolutions on these bases alone would undermine enforcement officials' ability to structure enforcement policy to induce organizations to self-report, fully cooperate, and remediate. Organizations would have substantially weaker incentives to self-report, fully cooperate, or fully remediate if they have good reason to believe that enforcement officials are likely to offer them a partial-admission or no-admission resolution even when they fail to take such corrective actions but agree to settle expeditiously. Favoring expeditious resolution of an individual case at the expense of creating strong incentives for organizations to self-report and fully cooperate would undermine enforcement officials' ability to detect misconduct, to more expeditiously determine the full scope of any misconduct, and to identify and obtain the information necessary to pursue enforcement actions against the individuals who knowingly or intentionally committed material misconduct. The temptation to obtain a speedy resolution in a specific individual case is unlikely to be worth the negative impact of signaling to organizations that they need not satisfy § 6.25(a) if they are willing to enter into a speedy no-admission resolution.

In addition, allowing organizations to obtain no-admission resolutions without cooperating in order to speed the process in effect rewards organizations that help create problems of proof by refusing to fully cooperate. A policy of presumptively taking organizations to court if they do not fully cooperate serves the interests of justice by providing strong incentives for organizations to fully cooperate, even if the policy delays resolution of those cases in which organizations do refuse to cooperate.

Enforcement authorities can better address the twin challenges of obtaining the needed evidence and motivating organization to cooperate by adopting enforcement policies—and, when applicable, regulations—that enhance their access to evidence. Such policies include those that favor:

(1) using cooperation agreements with individuals who are implicated in the misconduct but who are not primarily responsible for it and are subordinate to other individuals implicated in the misconduct;

(2) using data analytics to detect misconduct and identify wrongdoers;

(3) using investigators trained to investigate the misconduct in question; and

(4) adopting (or taking actions to urge legislatures to adopt) effective whistleblower bounty provisions designed to give adequate compensation and protections against retaliation to whistleblowers who provide enforcement authorities with material evidence of misconduct.

*f. Importance of obtaining evidence against and pursing enforcement actions against individuals that engage in knowing or intentional material misconduct.* An organization should not be permitted to obtain a partial- or no-admission resolution for misconduct involving knowing or intentional material misconduct by individuals unless the organization provides the government with all material information that is reasonably available to it about the responsible individuals' role in the misconduct. Enforcement officials should pursue civil or regulatory enforcement actions against individuals who knowingly or intentionally committed material misconduct that warrants enforcement, even if the individuals do not have sufficient assets to pay substantial monetary sanctions. Enforcement is needed to deter misconduct. A monetary sanction that is large relative to the individual's available assets can have a powerful deterrent effect on the individuals who are responsible for the misconduct. Enforcement officials can also deter misconduct by imposing collateral sanctions on individuals with a history of misconduct who present a heightened risk of future misconduct. Individual enforcement actions also provide a strong statement to the public—that should reverberate within the organization—that the individuals' actions were unlawful and sufficiently serious to warrant enforcement.

*g. Presumption favoring no-denial resolutions.* An enforcement official entering into a partial-admission or no-admission resolution should presumptively structure the nontrial resolution as a no-denial resolution if he or she have, or reasonably and in good faith believe he or she could obtain, sufficient evidence to establish the organization's culpability. A provision that precludes an organization from denying the misconduct in public should nevertheless allow the organization to deny the misconduct in any legal action brought by a third party unless the nontrial resolution adjudicated the organization's culpability or required it to fully admit to all the facts of the misconduct. But the organization should not be allowed to deny the misconduct in statements to its employees or to the public.

The presumption against denial-permitted enforcement actions arises from two considerations. First, the public has a strong interest in having a clear statement about whether the organization engaged in misconduct. Second, the organization's public acceptance of responsibility for its knowing or intentional misconduct should facilitate its efforts to address the internal root causes of the misconduct. An organization that denies that its actions constituted misconduct is unlikely to be able to convince its employees that ethics and the law require that they avoid such conduct in the future.

The presumption that an organization should not be permitted to deny its misconduct rests on the assumption that enforcement officials are acting appropriately in requiring the organization to accept responsibility for misconduct. Thus, enforcement officials should have, or expect to be able to obtain, sufficient evidence to make a strong prima facie case against the organization that would support a finding that the organization is liable.

*h. Denial-permitted resolutions.* Section 6.25(c) recognizes that a denial-permitted resolution is appropriate in the rare circumstances in which:

(1) enforcement officials have a sufficient factual and evidentiary basis for believing that an organization engaged in knowing or intentional material misconduct;

(2) the organization fully cooperated;

(3) enforcement officials do not currently have sufficient evidence to establish the organization's culpability; and

(4) enforcement officials believe that they would need to spend excessive resources to conduct a full investigation in order to obtain that evidence.

When enforcement officials enter into a nontrial resolution with an organization without having sufficient evidence to prove that the organization committed the alleged misconduct, they should permit the organization to deny its misconduct even when the organization is settling because it expects they will be able to obtain such evidence. By contrast, given the public's strong interest in knowing whether an organization engaged in material misconduct, organizations should not be permitted to publicly deny (outside of the context of litigation) any knowing or material misconduct that enforcement officials have sufficient evidence to establish.

Organizations should not be allowed to deny misconduct if the organization helped contribute to enforcement officials' inability to prove the misconduct by failing to cooperate. Thus, this Section establishes that enforcement officials should permit an organization to deny its misconduct only when it has fully cooperated. This limitation addresses the concern that organizations would otherwise be tempted to delay cooperation in the hope of undermining the government's ability to prove its case while simultaneously obtaining a partial-admission, denial permitted resolution by satisfying § 6.25(b). To deter organizations from providing only partial cooperation, enforcement authorities should adopt a policy of proactively targeting their investigative resources at organizations that engaged in knowing or intentional material misconduct and refused to fully cooperate.

Enforcement officials also should not use denial-permitted resolutions in situations in which they do not have, and do not reasonably expect to be able to obtain, the evidence needed to sanction organizations. Rather, in such situations, enforcement officials should not pursue an enforcement action.

## REPORTERS' NOTES

*a. Admissions.* For a discussion of resolutions with full admissions, partial admissions, and no admissions, see the Reporters Notes following § 6.21. For a discussion of the importance of providing the public with a full picture of the nature of an organization's misconduct and its culpability for it, see § 6.02, Comments *b-d*.

*b. Denials following an enforcement authority's determination that the organization engaged in misconduct.* No-admission resolutions are regularly predicated on an official determination by the relevant enforcement authority that the organization engaged in the misconduct. In order to promote public confidence in such determinations, enforcement authorities should only make a finding that an organization violated the law if there is sufficient evidence to establish each element needed to prove the violation under the relevant standard of proof. When there is sufficient evidence, it is difficult to justify allowing an organization to deny its culpability because a denial would undermine both the faith of both the public and the organization's own employees in the legitimacy of the enforcement authority's actions. Thus, when an organization refuses to provide adequate cooperation, enforcement authorities may need to incur the costs needed to establish its culpability, even in circumstances in which the resources required to do so appear to be excessive given the magnitude of the violation.

Enforcement authorities need to pursue enforcement actions against organizations that committed material misconduct and refused to cooperate in order to promote deterrence (specific and general). Enforcement authorities can promote public confidence in their other enforcement actions by reserving an organization's ability to deny culpability for circumstances in which enforcement officials conclude that the costs of pursuing an investigation sufficient to establish the organization's liability are excessive. This policy would offer the important benefit of deterring enforcement officials from making too ready use of "denial-permitted" resolutions in order to expedite resolving cases in order to be able to report a high number of resolved cases. If the policy were implemented, a "denial-permitted" resolution would indicate that enforcement officials had not yet obtained sufficient evidence to establish that the organization committed the misconduct.

*c. Enforcement losses.* Achieving the goal of promoting admissions and limiting denials in cases involving knowing and intentional misconduct will likely require enforcement authorities to pursue litigation in cases that otherwise might have been resolved through no-admission and denial-permitted nontrial resolutions. Enforcement officials will lose some of these actions. Legislatures and other oversight authorities can promote the goals of these Principles by refraining from expressing public disapproval of enforcement authorities that lose a case absent evidence that establishes beyond a reasonable doubt that either enforcement officials did not have a good-faith reasonable basis for bringing the enforcement action or were grossly negligent in handling the case.

*d. SEC Consent Decrees and Bars Against Denials of Culpability.* In *SEC v. Romeril*, the U.S. Court of Appeals for the Second Circuit held that the SEC has authority to impose a lifetime gag order in civil enforcement actions. The court concluded that former executive, Barry Romeril, permanently waived his right to publicly comment on the case against him other Xerox officers for misleading investors by inflating the company's pre-tax earnings when he entered into a consent decree precluding him from publicly denying the allegations against him. *SEC v. Romeril*, 15 F.4th 166 (2021) (Sept. 27, 2021). The SEC has long had a rule barring defendants who enter into consent decrees from publicly denying the allegations against them. 37 Fed. Reg. 25, 224 (Nov. 29, 1972) as codified in 17 § C.F.R. 202.5(e). The court concluded that the decree did not violate Romeril's First Amendment rights or Due Process because he voluntarily waived his right to deny his culpability when he entered into the consent decree instead of proceeding to trial. Romeril, *supra*.

e. *Admissions in False Claims Act Cases*. For an enlightening empirical analysis of admissions in False Claims Act cases see Jacob T. Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 WASH. L. REV. 371 (2021).

**§ 6.26. Collateral Consequences: Debarment, Exclusion, and Delicensing**

**The following Principles set forth the most effective use of a government agency's authority and discretion to impose collateral consequences on an organization under the agency's jurisdiction.**

**(a) Collateral consequences, such as debarment, exclusion, and delicensing for knowing or intentional material misconduct, should be reserved for situations in which the agency has established that an organization engaged in the misconduct and concluded that:**

**(1) the organization continues to present a significant risk of committing future material violations that pose harm to the interests that the agency is charged with protecting; and**

**(2) the risk of future violations cannot be adequately addressed through other means, such as mandated internal reforms, enhanced oversight, or the appointment of a compliance monitor in accordance with §§ 6.09–6.12.**

**(b) Government officials with authority to impose collateral consequences on an organization that engaged in misconduct presumptively should not impose them on organizations that satisfied § 6.24(b) or (c).**

**(c) Evidence that an organization committed a violation generally does not, in and of itself, establish that the organization presents a significant risk of committing future misconduct when the organization's liability is predicated on either respondeat superior or on absolute liability imposed by a public welfare statute.**

**(d) In determining whether an organization continues to present a significant risk of committing future material violations sufficient to justify imposing collateral consequences on it, officials should consider the following factors:**

**(1) whether the misconduct was committed or condoned by high-level personnel in the organization or a unit thereof who remain in positions of authority;**

**(2) whether the misconduct was widespread within a unit of the organization or across multiple units of the organization and was committed**

**or knowingly condoned by high-level or substantial authority personnel who remain in positions of authority;**

**(3) whether the misconduct conferred benefits on the organization that were sufficiently large to potentially motivate the organization to engage in similar misconduct in the future, and the risk of this misconduct cannot be adequately reduced through measures such as appointing a compliance monitor;**

**(4) whether the organization's compensation, promotion, retention, or disciplinary policies were a substantial cause of the misconduct and whether the organization has fully remediated them;**

**(5) whether the organization has fully remediated all of the deficiencies in its compliance function that existed at the time of the misconduct; and**

**(6) whether the organization has fully demonstrated its commitment to preventing and deterring misconduct by providing all information reasonably available to it regarding the scope of the misconduct and the identity of, and evidence against, those individuals responsible for it.**

**(e) Collateral consequences should be restricted to the specific business unit or units within the organization that committed the misconduct and continue to present an ongoing risk, whenever applicable laws allow the authorities to do so. The collateral consequences should remain in place for the period of time necessary for the organization to remediate the internal root causes of the misconduct.**

**(f) When an organization does not present a substantial risk of committing the same offense in the future, it may be appropriate for those officials with authority over whether to impose collateral consequences to inform both the organization and any other enforcement officials with the authority to sanction the organization that the organization will not be subject to collateral consequences should it be sanctioned for the detected misconduct, if such a waiver is allowed under applicable law.**

**Comment:**

*a. Scope of this Section.* The Section applies when an agency has both authority to impose collateral consequences –such as debarment, exclusion, and delicensing—on individuals or organizations under its jurisdiction and has sufficient discretion over when to do so to apply these Principles.

*b. Purpose of collateral consequences.* Collateral consequences should not be used as a form of retribution against organizations that have engaged in material misconduct. They should be used only to protect the relevant agency, or those that it is authorized to protect, from the risk of future harm that could result from future dealings with an organization that the agency has determined presents a significant risk of future material misconduct.

An organization that engaged in knowing or intentional material misconduct should not be automatically deemed to present a significant risk of future material misconduct. This statement applies even when the organization has been found to have engaged in fraud or other misconduct involving moral turpitude. When a natural person is accused of fraud, it can reasonably be demonstrated that person possessed the necessary mental state for the offense. But, under U.S. law, a large multinational organization can be found to have engaged in fraud if a single, low-level employee at one of its locations committed fraud in the scope of his or her employment, notwithstanding the organization's good faith, genuine, and active commitment to preventing, deterring, and detecting fraud and punishing those responsible. In such circumstances, the culpability of the employee does not indicate that the organization itself is willing to commit misconduct in pursuit of gain.

Thus, while the violation of certain laws or regulations, or the imposition of certain forms of relief for violations of the law or regulations, can trigger collateral consequences, authorities charged with imposing collateral consequences should, to the extent consistent with applicable law, look beyond the violation to assess whether the facts of the misconduct and the organization's response to it support the conclusion that the organization presents a significant risk of future material misconduct that cannot be better addressed through other means that are less costly to society, such as mandated internal reforms, enhanced oversight, or the appointment of a monitor.

*c. Preconditions for imposing collateral sanctions.* To the extent permitted by applicable laws, a government agency should create a presumption against imposing collateral consequences on an organization unless:

(1) both the facts of the misconduct and the organization's response to it provide a reasonable basis for concluding that the organization presents a significant risk of future

material misconduct that could cause substantial harm to the agency or those it is charged with protecting; and

(2) the risk of future violations cannot be adequately addressed through other means, such as mandated reforms imposed in accordance with § 6.09, enhanced oversight by a regulatory authority, or a monitor imposed in accordance with §§ 6.10–6.12.

*d. Factors that support imposing collateral consequences.* Enforcement authorities should assess certain factors when determining whether the organization presents a significant risk of future material misconduct.

First, government authorities should assess whether the misconduct was isolated or appears to have arisen out of deeper problems with the organization's culture and/or compliance program. One important consideration when determining whether the organization was plagued by fundamental compliance problems at the time of the misconduct is whether the organization failed to have an effective compliance program in place at the time of the misconduct. Additional factors that indicate that the organization was plagued by fundamental problems at the time of the misconduct include that:

(1) the misconduct was committed or condoned by high-level personnel of the organization or a unit of the organization;

(2) the misconduct was widespread within a unit of the organization or across multiple units of the organization; or

(3) the misconduct conferred substantial benefits on the organization and the organization could repeat the misconduct.

Second, government authorities should assess whether the organization has presently demonstrated a genuine commitment to ensuring its future compliance with the law. The pertinent question is whether the organization has taken all the steps that should be expected of an organization that engaged in knowing and intentional misconduct and is committed to ensuring that its employees know that such conduct should not reoccur. Specifically, enforcement officials should look to see whether the organization fully demonstrated its commitment to preventing and deterring misconduct by:

(1) providing all information reasonably available on the scope of the misconduct and the identity of, and evidence against, those responsible for it;

(2) acting reasonably and in good faith to implement an effective compliance program in accordance with §§ 5.06, 6.08; and

(3) acting reasonably and in good faith to fully remediate the root causes of the misconduct in accordance with § 6.07, including by ensuring that any high-level or substantial authority personnel who committed, knowingly condoned, or detected and knowingly failed to act in good faith to terminate the misconduct no longer hold positions of authority at the organization.

Enforcement officials may reasonably infer that organizations that have not taken these actions or took them reluctantly and with considerable delay are unlikely to be effective at undertaking the reforms needed to transform the preexisting internal culture of the organization into a culture that is effective at ensuring that employees comply with the law.

*e. Mandated reforms, disciplinary actions, enhanced oversight by regulatory authorities and compliance monitors as alternatives to collateral consequences.* To the extent that an agency has discretion to waive collateral consequences, government officials with authority to impose collateral consequences should assess whether the significant risk of an organization engaging in future material misconduct can be effectively addressed through a combination of mandated reforms of the organization's compliance function, in accordance with § 6.09; appropriate disciplinary action involving those responsible for committing or knowingly condoning misconduct, in accordance with § 6.07; additional oversight or auditing by the regulator; and/or the appointment of a compliance monitor, in accordance with § 6.10-6.12. These approaches to ensuring the organization's future compliance with the law generally are superior to collateral consequences such as debarment, exclusion, or delicensing because they are directly aimed at ensuring the organization's compliance and place the costs of achieving compliance squarely on the organization with relatively little collateral damage to consumers, suppliers, and employees in units that had no role in the misconduct.

*e. Targeted collateral consequences*. To the extent that the agency imposing collateral consequences has authority over their scope, it should restrict collateral consequences such as debarment, exclusion, and delicensing to the specific business unit or units within the organization that engaged in the misconduct and continue to present an ongoing risk. These consequences should be imposed until the organization has fully remediated the root causes of the misconduct.

A policy of targeting collateral consequences at those units that were both involved in the misconduct and continue to present a risk of future misconduct—instead of imposing them on the entire organization—promotes the goals of prevention, deterrence, rehabilitation, and ensuring that restitution is provided to victims in a variety of ways. The policy promotes those goals by enabling enforcement authorities to target collateral consequences at those units within an organization that were both responsible for the misconduct and have not fully remediated the root causes of the misconduct, without imposing unjustified hardship on customers, suppliers, and employees of units that had no involvement in the misconduct and do not present a significant risk of future material misconduct.

This policy also helps ensure that restitution is provided to victims. Organization-wide debarment can undermine that goal if it leads the organization to declare bankruptcy. By targeting collateral consequences at the unit(s) that present an enhanced risk of harm, enforcement officials leave the rest of the organization free to generate the profits that may be needed to provide funds to compensate victims for their losses.

While targeted collateral consequences are generally preferable to organization-wide collateral consequences, when enforcement officials enter into an enforcement resolution with an organization whose executive management or controlling shareholders participated in or knowingly condoned the misconduct, they should predicate any offer to impose targeted—as opposed to organization-wide—collateral consequences on the organization demonstrating that the executives or controlling shareholders who were responsible for the misconduct are no longer in positions to influence the organization.

## REPORTERS' NOTES

*a. Potentially perverse effects of collateral consequences.* Legislatures and administrative agencies regularly adopt statutes or regulations, respectively, that provide that certain forms of misconduct can result in an organization being precluded from: (1) providing goods or services to the agency or the customers it serves: or (2) having access to certain markets or otherwise being disadvantaged in a market. There are good reasons to impose such consequences when they serve to protect the public. But many statutes and regulations both:

(1) set forth conditions for triggering mandatory or presumptive collateral consequences that result in the imposition of collateral consequences n a great many situations in which they are not appropriate; and

(2) do not provide an effective mechanism for obtaining a waiver of such consequences that would enable a criminal or civil enforcement official negotiating

a nontrial resolution for organizational misconduct to readily obtain a waiver of the collateral consequences at the time of resolution is being negotiated, when a waiver would be appropriate.

As a result, laws providing for collateral consequences can have the perverse effect of undermining deterrence in the very situations in which it is most needed if criminal and civil enforcement officials feel compelled to eschew full and appropriate enforcement against an organization that engaged in material misconduct because of the cost to society of the collateral consequences that would be triggered by their actions.

Criminal, civil, and administrative enforcement officials are justifiably loath to enter into a nontrial resolution, such as a guilty plea, with a publicly held corporation that would trigger collateral consequences because they are concerned that customers and others could lose access to needed goods or services, such as prescription drugs.

The problem of perverse effects is particularly great with laws that provide for mandatory debarment of an entire organization if any unit of it is found to have committed certain forms of misconduct. But it also can arise when certain enforcement actions presumptively trigger a material collateral consequence imposed on the entire organization and the procedure for determining whether the collateral consequence is imposed or waived is such that the waiver decision cannot practicably be made at the time that the nontrial resolution for the material misconduct is negotiated.

This perverse effect can undermine the effectiveness of enforcement. Responding to the threat of collateral consequences, prosecutors have offered deferred prosecution agreements (DPAs) to organizations that did not fully cooperate because they were the leading providers of certain medical devices. Of course, this creates the risk that organizations that make vital goods and services will not feel compelled to self-report or fully cooperate because they are confident of obtaining a DPA without engaging in full cooperation because of the cost to society of convicting them.

Laws providing for collateral consequences also can distort enforcement outcomes. For example, concern for about the adverse consequences of imposing collateral consequences on an entire organization has led prosecutors to enter into agreements under which a subsidiary of the organization pleads guilty and is debarred, even though it was not genuinely implicated in the organization's misconduct, in order to target the collateral consequences at an entity that does not provide important goods or services to the public. For a discussion of these issues see Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, Section 5, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed. 2018).

*b. Collateral consequences of material violations of the securities laws*. An organization convicted of violating the securities laws or found liable in a civil or administrative action may face a variety of collateral consequences. These include:

(1) loss of well-known seasoned issuer (WKSI) status for the purposes of securities offerings;

(2) disqualification under Section 9(a) of the Investment Company Act of 1940 (1940 Act);

(3) loss of private-offering exemptions provided by Regulations A and D under the Securities Act of 1933 (Securities Act);

(4) loss of the exemption from registration under the Securities Act for securities issued by certain small business investment companies and business development companies provided by Regulation E; and

(5) a prohibition barring a registered investment adviser from receiving cash fees for solicitation under Rule 206(4)-3 of the Investment Advisers Act of 1940 (Advisers Act).

See generally Richard A. Rosen & David S. Hunington, *Waivers from the Automatic Disqualification Provisions of the Federal Securities Law*, 29 INSIGHTS 2 (Aug. 2015). The Securities and Exchange Commission (SEC) can waive disqualifications, usually upon a showing of "good cause." Id.

An organization can face disqualification in a variety of circumstances involving less culpability than a finding that the organization engaged in intentional securities fraud. For example, under Rule 405 of the Securities Act, an issuer that is the subject of an administrative order that either determines that it violated the antifraud provisions of the federal securities laws or prohibits a future violation of such laws can be rendered ineligible for WKSI status. This can result from violations for misconduct that did not involve scienter because Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 206(2) and 206(4) of the Advisers Act are non-scienter-based antifraud provisions. Disqualification applies to a dually registered company and any parent public issuer.

Broker-dealers and investment advisers may be disqualified from participating in either Rule 506 offerings or offerings under other offering exemptions (Rule 504, Regulation A, Regulation CF) as, among other things, an issuer, beneficial owner, investment manager, underwriter, or compensated solicitor, or in Reg E transactions as, among other things, an issuer, beneficial owner, underwriter, or compensated solicitor by, respectively:

(1) the SEC's entry of a cease-and-desist order that will include "ordered" undertakings or other limitations on activities or functions (e.g., multistep remedial measures); or

(2) an SEC order entered pursuant to the Securities Exchange Act of 1934 (Exchange Act) § 15(b) and Advisers Act § 203(e) with ongoing sanctions (i.e., action to still be completed).

In addition, companies found to have violated the antifraud provisions of the securities laws may be more vulnerable to private litigation, both through the operation of offensive collateral estoppel and as a result of the loss of an important safe harbor. Both the Securities Act and the Exchange Act offer companies a safe harbor for certain forward-looking statements. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-5. A company is not eligible for the safe harbor if it was:

(1) was convicted of a felony or certain misdemeanors; or

(2) was made the subject of a judicial or administrative decree or order arising out of a governmental action that:

(a) determines that the issuer violated;

(b) requires that the issuer cease and desist from violating; or

(c) prohibits future violations of; the antifraud provisions of the securities laws. 15 U.S.C. § 78u-5(b).

*c. Federal debarment for FCPA violations.* Federal regulations governing procurement provide that an individual or company that violates the Foreign Corrupt Practices Act or other criminal statutes can be barred from doing business with the federal government. The Federal Acquisition Regulations governing the use of debarment make clear that debarment should not be used as a punishment. It is intended to be used only if "in the public's interest for the Government's protection." Debarment is intended to be used when the government concludes that the facts and circumstances of the misconduct and subsequent events provide sufficiently strong indicia that the organization lacks business integrity or honesty to "seriously and directly affect[] the present responsibility of a Government contractor or subcontractor." 48 C.F.R. § 9.402(b); see generally CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 72-73 (2d. ed. 2020) https://www.justice.gov/criminal-fraud/file/1292051/download.

Federal procurement regulations set forth a list of factors to consider. Consistent with the approach of this Section—and with the approach taken to monitors in §§ 6.10 & 6.12, 6.18(e)—the regulations take into account, as factors weighing against debarment:

(1) whether the organization had effective standards of conduct and internal control systems in place at the time of the activity that constitutes a cause for debarment;

(2) whether the organization remediated and adopted effective procedures prior to any government investigation of the activity cited as a cause for debarment;

(3) whether the organization engaged in timely self-reporting;

(4) whether the organization fully investigated the misconduct and, if so, fully cooperated with enforcement authorities and with the debarring officials; and

(5) whether the organization fully remediated, including remedying the problems that gave rise to the misconduct and taking appropriate disciplinary action against the individuals responsible for the misconduct.

See 48 C.F.R. § 9.406–1.

*d. Federal debarment and exclusion of organizations found liable for health-care fraud.* Pursuant to its governing statute, the Department of Health and Human Services (HHS) can exclude an organization from engaging in business with the agency—including, but not limited to, seeking reimbursement for services provided to Medicare and Medicaid patients—if the organization had been found liable for committing a variety of offenses. The predicate offenses that can trigger mandatory or presumptive exclusion include misconduct aimed directly at the agency (such as filing a false claim with the agency) and offenses that are within the agency's direct enforcement authority. The types of misconduct potentially triggering exclusion include: submitting claims for excessive charges or unnecessary services; engaging in fraud, kickbacks, or other prohibited activities; knowingly making or causing to be made certain types of false statements; and a range of other offenses that bear on the entities' suitability as either a government counterparty or a provider of services to patients. In addition, some other forms of fraud (such as false claims against other agencies) may trigger permissive exclusion, but only under certain circumstances, discussed below. See Social Security Act, 42 U.S.C. § 1320a-7(a)(3) & (4).

A firm that engaged in misconduct of the type described above can be excluded if the firm was convicted of the offense or the organization was found to have engaged in the misconduct in a civil-enforcement action or in an administrative proceeding of the agency. Id. Some determinations result in mandatory exclusion (see Reporters' Note *d*), and others result in permissive exclusion.

The Social Security Act allows permissive exclusion if the firm was convicted "(B) of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (other than a health care program) operated by or financed in whole or in part by any Federal, State, or local government agency." Social Security Act Section 1128B(f), 42 U.S.C. § 1320a-7. The Social Security Act also provides for permissive exclusion if the agency determines that an organization committed health-care fraud or crimes relating to controlled substances, whereas HHS's own determination that the firm committed these offenses triggers mandatory exclusion. 42 U.S.C. § 1320a-7(a)(3) & (4).

In determining whether to exercise its permissive-exclusion authority, HHS, like many other federal agencies, assesses whether the organization presents a future risk to the interests it is authorized to protect—here federal health-care programs. Of particular importance, the agency has determined that exclusion "often" is not necessary if any risk of future misconduct can be effectively ameliorated by "appropriate integrity obligations," such as voluntary reforms undertaken by the organization, mandatory reforms imposed by the agency through a corporate-integrity agreement or the appointment of a monitor. See Criteria for Implementing Section 1128(b)(7) Off. of Inspector Gen., U.S. Dept. of Health & Human Servs., Criteria for implementing section 1128(b)(7) exclusion authority (April 18, 2016), https://oig.hhs.gov/exclusions/files/1128b7exclusion-criteria.pdf. For a discussion of mandatory compliance program reforms, see § 6.09; for a discussion of monitors, see §§ 6.10–6.12.

By contrast, the Social Security Act provides that an organization that was convicted of a felony relating to health-care fraud or crimes relating to controlled substances is subject to mandatory exclusion. 42 U.S.C. § 1320a-7(a)(3) & (4). The law also substantially restricts the agency's ability to waive mandatory exclusion. The agency can only exempt an organization from exclusion if it determines that: (1) the organization is the sole source of an "essential service in a community"; (2) exclusion would impose a hardship on the beneficiaries; and (3) exclusion would not be in the public interest. 42 C.F.R. § 1001.1801. The agency's authority to waive is restricted to the program and the service for which the organization is the "sole source." Thus, under these provisions, a convicted firm could end up excluded from selling most of its products to Medicaid beneficiaries, even if it is granted a waiver with respect to some of them. As a result, conviction can force the agency to exclude a firm that it otherwise would not want to exclude.

*e. Mandated reforms as an alternative to debarment*. The availability of mandated reforms, including appointment of a monitor, also appear to weigh against debarment. For example, the Department of Health and Human Services often imposes its own oversight requirements, such as corporate-integrity agreements, to provide adequate assurance that the organization will comply with its legal requirements, thereby obviating the need for exclusion. See generally CRIMINAL DIV., U.S. DEPT. OF JUSTICE; ENF'T DIV., SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 72-73 (2d. ed. 2020).

*f. Individuals and collateral consequences.* A variety of federal agencies have authority to bar individuals who have engaged in certain types of misconduct from either serving as officers or directors of organizations under the agency's jurisdiction or appearing before the agency.

For example, an individual found to have violated the antifraud provisions of the securities laws may be temporarily or permanently barred by either a court or the SEC from serving as an officer or director of a public company under certain circumstances. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, 15 U.S.C. §§ 77t(e) & 78u(d)(2); Sarbanes-Oxley Act of 2002, amending § 20(e) of the Securities Act and § 21(d)(2) of the Exchange Act.Rule 102(e) of the SEC's Rules of Practice provide that the SEC may permanently or temporarily deny the privilege of appearing or practicing before it in any way to an attorney or accountant under certain circumstances. One finding sufficient to justify a bar is that the person was found "to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws, or the rules and regulations thereunder."

*g. Academic literature*. Scholarly discussion of collateral consequences include Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, Section 5, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed. 2018); Erling Hjelmeng & Tina Søreide, *Debarment in Public Procurement: Rationales and Realization*, *in* INTEGRITY AND EFFICIENCY IN SUSTAINABLE PUBLIC CONTRACTS (G.M. Racca & C. Yukins eds., 2014); Urška Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?,* 103 CALIF. L. REV. 1081 (2015). For a discussion of collateral sanctions imposed by the World Bank, see STEFANO MANACORDA & COSTANINO GRASSO, FIGHTING FRAUD AND CORRUPTION AT THE WORLD BANK: A CRITICAL ANALYSIS OF THE SANCTIONS SYSTEM (2018); Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L.J. 277 (2007).

## § 6.27. Protecting Employees and Agents Who Uphold the Law or Report Misconduct from Retaliation

**(a) To the extent permitted by law, civil and administrative enforcement authorities should adopt provisions that provide credible assurances that individuals who provide**

**information about material misconduct to government authorities will not have their identity disclosed, directly or indirectly, until any whistleblower award has been paid, except when enforcement officials:**

**(1) need to identify the individual in the course of producing documents or calling witnesses during the course of a legal proceeding;**

**(2) receive authorization from the whistleblower to reveal the person's identity; or**

**(3) are ordered to reveal the person's identity by a court of law or a statute.**

**(b) To the extent allowed by law, civil and administrative authorities should protect whistleblowers from retaliation and pretaliation that is, or would be, based on their good-faith decision to report material misconduct internally or to the government.**

**(1) "Retaliation" includes termination, demotion, reduction of salary, and reduction of responsibilities and authority.**

**(2) "Pretaliation" is a preemptive effort by an employer to deter whistleblowing. An employer presumptively engages in pretaliation if it adopts any policy likely to be interpreted by a reasonable employee as restricting the employee's ability to disclose nonpublic information about misconduct within the organization to government authorities or self-regulatory bodies. Policies that potentially operate as pretaliation, absent a clause specifically stating that an employee retains the right to report suspected misconduct to the government or self-regulatory bodies and to obtain any recovery that might result from reporting, include:**

**(A) confidentiality and nondisclosure agreements;**

**(B) separation and severance agreements;**

**(C) nondisparagement agreements; and**

**(D) clauses establishing trade secret or other intellectual property rights in the organization's nonpublic information.**

**(c) To the extent allowed by law, civil and administrative authorities should adopt and enforce provisions that protect employees from retaliation or pretaliation if they object to conduct that they reasonably believe violates or would violate the law.**

**(d) An employer that acts adversely against an employee who reported misconduct or objected to engaging in misconduct should not be treated as having acted in retaliation if the employer:**

**(1) had taken material steps to take the adverse action against the employee prior to when:**

**(A) the employee decided to report the misconduct internally to the employee's superior or externally to the government;**

**(B) the organization anticipated that the employee was likely to report misconduct; and**

**(C) the employee objected to or the employer anticipated that the employee would object to conduct that the employee reasonably and in good faith believed violated the law; and**

**(2) the employee's decision or anticipated decision to report the misconduct internally or externally or to object to engaging in the misconduct was not a contributing cause of the employer's decision to act adversely against the employee.**

**Comment:**

*a. Scope of this Section.* This Section addresses provisions governing retaliation and pretaliation against whistleblowers applicable to government authorities who have discretion to enact rules or regulations that protect whistleblowers from retaliation.

This Section does do not cover whistleblower-award provisions. Government authorities' ability to offer bounties to whistleblowers is governed by statute. Statutes authorizing bounties are relatively rare. Moreover, the existing statutes that permit whistleblower awards differ materially from each other, including on fundamental questions such as whether the whistleblower can bring a private action on behalf of the government and whether the whistleblower's identity should remain anonymous. Thus, this Section does not make recommendations to government authorities about to how to implement whistleblower-award programs because officials with authority to do so tend to be operating within the constraints of statutes that differ materially from each other.

*b. Defining "whistleblower" and "retaliation".* A whistleblower is a person who provides any information to:

(a) relevant government authorities about any activity or conduct that the person reasonably and in good faith believes to be a violation of any laws applicable to the organization; or

(b) the organization about any activity or conduct that the person reasonably and in good faith believes to violate:

(1) laws applicable to the organization; or

(2) the organization's own ethical rules or internal standards of conduct.

Whistleblower protections also should apply to people who in good faith provide information to any government authority investigating an organization's misconduct or to internal investigators engaged in an ongoing inquiry that is relevant to the government investigation, whether or not the person believes the organization engaged in misconduct. Employees and agents should be protected against retaliation if they provide information about misconduct that they reasonably and in good faith believe is or may be occurring, even if they are mistaken.

Retaliatory action/retaliation includes but is not limited to any adverse action taken by the organization against a whistleblower if the organization's knowledge that the individual was, or was likely to be, a whistleblower was a contributing factor in its decision to pursue an adverse action. Prohibited retaliation also includes acts that have the effect of discouraging employees from reporting misconduct, as discussed in Comment *f*.

These definitions are consistent with The Principles of the Law, Government Ethics § 715.

*c. Anonymity of whistleblowers.* There are many reasons why whistleblowers who come forward to reveal confidential information about an organization to a government authority may desire that their identities not be revealed to the public or their employers even if they are legally protected against retaliation. They may still work at the organization and wish to avoid imperiling their jobs or suffering other negative consequences. They may have friendships with people still in the organization that would be damaged if their identities were revealed. They may fear that being revealed as "snitches" may harm their prospects of being employed elsewhere. Wherever possible, government officials should protect the identity of a whistleblower for as long as possible. Ideally, the whistleblower's identity should never be disclosed to the organization or should not be disclosed until a whistleblower award is paid to the whistleblower.

In situations in which enforcement officials cannot investigate or bring an enforcement action without providing information to the organization that could reveal the whistleblower's identity, they should affirmatively remind the employer, and the high-level and substantial authority personnel with whom they deal, about the legal prohibitions against retaliating against suspected whistleblowers and the potential consequences for organizations and individuals who violate them.

*d. Importance of protecting against retaliation.* Government authorities encourage whistleblowing by giving assurances that persons who provide sensitive information to them will not thereafter suffer retaliation. Accordingly, government authorities should establish and publicize whistleblower-protection policies. Protections against retaliation include civil rights of action, government enforcement actions, and safeguards against adverse employment actions. Government authorities may require a regulated organization to disclose whistleblower-protection policies to its employees and agents.

*e. Prohibited forms of retaliation.* Whistleblower protections apply to actions directed against the whistleblower that are at least in part a response to the whistleblowing. For example, if an employer terminates a whistleblower without knowing or suspecting that the person had provided or information to a government authority, the whistleblower cannot claim the protection of a nonretaliation rule. By contrast, a retaliatory motive need not be the sole reason for the negative action taken against the whistleblower. It should be sufficient to trigger these protections if the party that is inflicting harm on the whistleblower is motivated in part by hostility stemming from the whistleblowing, even if other motivations also were present.

**Illustration:**

1. An employee of a university, A, informs the accreditation agency that the university has understated its student–teacher ratios. A's job is already in jeopardy because she finds it difficult to work with others in a team setting. When A's superior learns of A's report to the accreditation agency, the supervisor declares this to be the "last straw" and terminates A from her job. A can claim whistleblower protection against retaliation because even though the employer had other, potentially benign, reasons for terminating her, part of the motivation behind the job action was anger at A for whistleblowing.

*f. Nondisclosure/nondisparagement agreements.* Organizations often have valid reasons for requiring employees not to disclose confidential information obtained during the course of employment, and for prohibiting employees or former employees from disparaging the organization. But organizations must ensure that all confidentiality and non-disparagement clauses in agreements with employees expressly state that the clause does not apply to any action taken by the employee to bring suspected misconduct to the attention of either government authorities or a self-regulatory organization with jurisdiction over the organization. Contracts with employees that threaten them with costs should they disclose confidential information in the course of reporting misconduct to government authorities constitute a form of preemptive retaliation for whistleblowing, referred to as pretaliation.

Several factors counsel strongly in favor of explicit provisions in nondisclosure or nondisparagement agreements stating that they do not prohibit employees from reporting misconduct to government authorities or self-regulatory bodies. Such provisions reinforce a culture of compliance within the organization and help deter misconduct. Failing to exclude communications with government authorities or self-regulatory bodies may be viewed as a signal that the organization wishes to discourage whistleblowing.

However, any exclusion for communications with government authorities or self-regulatory bodies should not be construed as a waiver of the organization's attorney–client privilege. It is appropriate for attorneys representing an organization in a government investigation to instruct employee witnesses to maintain the confidentiality of attorney–client communications in order to avoid any claim of waiver.

In some cases, pretaliation agreements may be prohibited by law. For example, Securities and Exchange Commission Rule 21F-17—implementing a provision of the Dodd–Frank Wall Street Reform and Consumer Protection Act—states that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement … with respect to such communications."

For a discussion of best practices for organizations' internal-reporting systems and policies against retaliation, see § 5.18.

*g. Protections for internal as well as external reporting.* To the extent allowed by law, civil and administrative authorities should protect employees and other agents from retaliation whether they report externally to government authorities or internally to the organization.

To the extent allowed by law, civil and administrative authorities can seek to encourage reporting to the government by offering whistleblower awards to employees if they either provided information about potential misconduct directly to the government or reported the information to the organization, which in turn reported to government authorities, provided that the internal report was a substantial factor in informing the government about material misconduct and resulted in a successful enforcement resolution.

*h. Protections for information that would not qualify for an award.* Whistleblower protections against retaliation should apply when a purported whistleblower has provided potentially valuable, credible information to the government. It is not necessary that this information qualify for a whistleblower award, if the government authority has power to make such awards. At the time he or she comes forward, the whistleblower may not know whether the information he or she is providing is already in the hands of the government, whether it will be useful in a subsequent enforcement proceeding, or whether the government's enforcement efforts will be successful. Protections against retaliation would be undermined if whistleblowers could rely on them only if the information leads to a successful enforcement action. The information provided by the whistleblower must, however, be credible, be made in good faith, and be of potential value in exposing a violation of law.

*i. Organization's ability to investigate internally reported misconduct.* Organizations can help protect employees who report suspected misconduct from retaliation by creating internal-reporting systems that allow for anonymous reporting, as discussed in § 5.18. Nevertheless, circumstances can arise in which the organization cannot effectively investigate the reported suspected misconduct without creating a risk that other employees will suspect that the whistleblowing employee reported the misconduct. This risk is particularly great when the employee made objections about the misconduct to others in the organization outside of the internal-reporting system. An organization that proceeds to investigate material misconduct in this situation should not be deemed to be acting in a retaliatory fashion against the whistleblowing employee if it takes all reasonable measures to protect the person's identity, consistent with its legal obligation to investigate and terminate violations of the law. The organization should proactively take steps to protect the employee from explicit or implicit retaliation, including ostracism, in such circumstances. Sometimes, the organization may be the better able to effectively protect the employee and emphasize its commitment to compliance by giving the employee a desirable (and desired) promotion. In other situations, the organization can proactively protect the employee from direct or indirect retaliation in the short run and provide longer-run protections by taking appropriate disciplinary measures against all employees who committed, conspired to commit, or knowingly condoned the misconduct or had knowledge of misconduct committed by employees under their supervision and knowingly failed to act to terminate it.

*j. Protections for employees who report on activities of other organizations*. In general, nonretaliation policies cover actions by organizations that employ the whistleblower or by employees and agents of those organizations. The scope of whistleblower protections can extend further, however. They may, for example, cover employees of companies in a contractual relationship with the organization. A nonretaliation policy could even extend to other individuals, regardless of their relationship with the organization, on the theory that there is no social value in retaliation against whistleblowers. As the scope of coverage increases, however, it will become increasingly difficult for a whistleblower to establish that the harm experienced was due to retaliation for whistleblowing rather than some other reason.

**Illustration:**

2. Whistleblower A is an employee of a biomedical laboratory that provides testing services for hospital research studies. A tells a government authority that one of the hospital's research projects has failed to comply with a mandatory experimental protocol. The government authority commences an investigation into the charges. A's employer has reason to suspect that A is the source of the information. A few months later, A is terminated on grounds of persistent tardiness and falsification of expense-account records. A may claim protection of the government authority's whistleblower policy if the policy covers employees of contractors with entities under the authority's jurisdiction. To prevail on her claim, however, A must persuade the trier of fact that the adverse employment decision was at least partially a result of A's whistleblowing rather than entirely for some legitimate reason.

## REPORTERS' NOTES

*a. Internal policies on nonretaliation.* For a discussion of best practices for organization's internal-reporting systems and policies against retaliation see § 5.18.

*b. Retaliation as a significant concern.* Notwithstanding legal prohibitions on retaliation, actual retaliation and the perceived threat of retaliation remain significant impediments to efforts to encourage employees to report organizational misconduct. See Rachel Louise Ensign, *Survey:*

*Companies Finding More Whistleblower Retaliation*, WALL STREET J. RISK & COMPLIANCE BLOG (Mar. 9, 2015, 6:21 PM), https://www.wsj.com/articles/BL-252B-6407; see also ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY, 13, 34 (2014) http://www.ethics.org/research/eci-research/nbes/nbes-reports/nbes-2013 (indicating fear amongst and relatively high levels of retaliation against those who report misconduct through internal channels).

*c. Restatement of the Law, Employment Law.* The Restatement of the Law, Employment Law addresses protections for whistleblowers under the sections providing for liability in tort for wrongful discharge in violation of public policy. Restatement of the Law, Employment Law §§ 5.01–5.03 (AM. L. INST. 2015).

Section 5.02 sets forth a list of protected activities that employers cannot discharge an employee for undertaking without being subject to liability for wrongful discharge. The protected activities include "report[ing] or inquir[ing] about conduct that the employee reasonably and in good faith believes violates a law or an established principle of a professional or occupational code of conduct protective of the public interest." Restatement of the Law, Employment Law § 5.02 (AM. L. INST. 2015).

Section 5.02, Comment *f* states that in order to be protected, the employee must act reasonably in reporting the illegal conduct. The factors relevant to whether the employee's conduct is protected include:

> (1) whether the employee reported the matter in good faith believing that the employer's conduct was illegal;
> (2) whether the employee's belief was reasonable; and
> (3) whether the employee made the report in a reasonable manner.

Restatement of the Law, Employment Law § 5.02, Comment *f* (AM. L. INST. 2015).

Section 5.02, Comment *f* further states that "[i]f the belief and manner of reporting are reasonable, and the employee acted in good faith, then the employee's report is protected under this subsection." Id.

Under Section 5.02, an employee is not protected if the employee believes the reported conduct is merely unwise or inappropriate rather than illegal, or if the employee believes the conduct is illegal but the belief is either unreasonable or not held in good faith. Id. An employee who blows the whistle based on a reasonable and good-faith belief that his or her employer is engaging in illegal conduct is protected, however, even if that belief is mistaken. Comment *g* explains that:

> Requiring employees to be correct in assessing illegality would unduly chill them from acting in the public interest. Employees usually are not trained in the law and lack access to all the relevant facts. Extending protection to employees with mistaken but reasonable, good-faith beliefs about the employer's illegal conduct encourages such reports and thereby curbs the incidence of illegal acts.

Restatement of the Law, Employment Law § 5.02, Comment *g* (AM. L. INST. 2015).

Section 5.01, Comment *b* provides that an employer's decision to discharge an employee who reported misconduct is only actionable if the employer: (a) knows of the employee's participation, or plan to participate, in the protected activity, and (b) discharges the employee because of that participation or plan to participate. The employer's intent to punish or deter protected activity is an element of the claim. Restatement of the Law, Employment Law § 5.01, Comment *b* (AM. L. INST. 2015).

*d. Government employees*: The Principles of the Law, Government Ethics § 713 and § 715, Comment *a*, also recognize the importance of enabling whistleblowers to provide information confidentially and of protecting them from a broad range of retaliatory acts. Principles of the Law, Government Ethics § 713, § 715, Comment *a* (AM. L. INST., Tentative Draft No. 3, 2021).

*e. Coverage.* On whistleblower protections for employees of contractors or subcontractors with an organization, see Lawson v. FMR LLC, 571 U.S. 429 (2014) (whistleblower protections of Sarbanes-Oxley Act of 2002 apply to employees of contractors and subcontractors to public companies).

*f. Whistleblower protections: anonymity and confidentiality.* The whistleblower-award regime of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) also includes protections for whistleblowers. Whistleblowers are allowed to submit their information anonymously and remain eligible for an award if they are represented by counsel. See 15 U.S.C. § 78u-6(d)(2); 17 C.F.R. §§ 240.21F-7(b), 240.21.F-9(c). In addition, the Securities and Exchange Commission (SEC) is committed to keeping whistleblowers' identity confidential to the fullest extent possible. The SEC will not disclose a whistleblower's identity in response to a Freedom of Information Act request. Nevertheless, the SEC's use of the information provided during its investigation may indirectly reveal the person's identity. The whistleblower's identity may come to light through documents produced during legal proceedings. https://www.sec.gov/whistleblower/frequently-asked-questions#faq-7.

*g. Dodd-Frank antiretaliation provisions.* The earliest whistleblower programs recognized the need to protect whistleblowers from retaliation. For example, the qui tam provisions of the False Claims Act contain language prohibiting retaliation against whistleblowers. 31 U.S.C. § 3730(h).

The Dodd-Frank Act includes antiretaliation provisions that protect people in the United States who report to government authorities. 15 U.S.C. § 78u-6(h)(1)(C). An individual who reports internally to his or her firm, and then later reports to the SEC, can qualify as a whistleblower if he or she reports to the SEC within 120 days of reporting to the firm. But in *Digital Realty Trust, Inc. v. Somers*, 583 U.S. (2018), the U.S. Supreme Court ruled that Dodd-Frank's antiretaliation provisions only apply to employees who report to the SEC, and not to those who have only reported internally. As a result, an employee who is terminated after making an internal report but before he or she reports to the SEC would not have a valid antiretaliation claim under Dodd-Frank, but might be entitled to a whistleblower award.

Employees who report internally are not necessarily without recourse, however. They may be protected by the Sarbanes-Oxley Act of 2002, which prohibits certain companies from retaliating against an employee who "provid[es] information … or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain delineated fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders." The protections of Sarbanes-Oxley are weaker than those of Dodd-Frank, however, as the former includes an administrative-exhaustion requirement and limits recovery to back pay with interest, as opposed to two-times back pay with interest. 18 U.S.C. § 1514A - Civil action to protect against retaliation in fraud cases.

For additional discussion of anti-retaliation provisions see § 6.08 Reptr. Note n.

*h. SEC position on employment contracts that discourage reporting.* SEC Rule 21F-17 prohibits covered persons from taking any actions to prohibit or impede someone from reporting to the agency. Firms violate the law if they require employees to sign a contract that prevents disclosure of the firm's private information to outsiders unless it makes clear that employees are not prohibited from reporting misconduct to authorities such as the SEC. A firm can also violate the law if its internal-reporting system or internal investigation requires employees to keep matters confidential (including from the SEC).

The SEC has filed a variety of enforcement actions against companies found to have contract language that stifles whistleblowing communications. For example, in the 2015 action *In re KBR*, the SEC sanctioned KBR Inc. for including the following confidentiality clause in its internal-reporting system:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

The SEC sanctioned the company because the clause had a chilling effect without first establishing that any employee had been sanctioned for violating the clause. The SEC required the company to ensure that its confidentiality clause affirmatively informed employees of their right to report:

> Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the SEC, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

In re KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015), https://www.sec.gov/litigation/admin/2015/34-74619.pdf.

In 2017, the SEC sanctioned BlackRock Inc. based on a clause in a separation agreement that stated that the employee waived any right to recovery of incentives for reporting of misconduct, including, without limitation, under the Dodd-Frank Act and the Sarbanes-Oxley Act of 2002, relating to conduct occurring prior to the date of the agreement. https://www.sec.gov/news/pressrelease/2017-14.html.

In the same year, the SEC sanctioned HomeStreet Inc. for entering into an indemnification agreement with an employee that stated that the firm would pay for an employee's counsel if, but only if, the employee confirmed that he was not a whistleblower. Sec. & Exchange Comm'n, Financial Company Charged with Improper Accounting and Impeding Whistleblowers, SEC 17-24, 2017 WL 218598 (Jan. 19, 2017), https://www.sec.gov/news/pressrelease/2017-24.html. The firm's post-settlement provisions on indemnification provide:

- Employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with any federal, state or local governmental agency or commission ("Government Agencies");
- Employee further understands that this Agreement does not limit Employee's ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be commenced by any Government Agency including providing documents or other information without notice to the Company; and
- This Agreement does not limit the Employee's right to receive an award for information provided to any Government Agencies.

For additional discussion of anti-retaliation and pretaliation provisions see § 6.08 Reptr. Note *n*.

*i. Whistleblower protections under state laws.* Many states have statutes that prohibit making false claims to the government that include protections for those who report fraud to the government. For example, the California False Claims Act states that whistleblowers are entitled to job protection if any "employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employment." CAL. GOV'T CODE § 12653. Under California law, whistleblowers who are retaliated against are entitled to reinstatement with the same seniority status, two times the amount of back pay, as well as interest on the back pay, compensation for any special damages, and, when appropriate, punitive damages. The company that violated the law also must pay the whistleblower's litigation costs and attorneys' fees.

Under New Jersey's Conscientious Employee Protection Act, an employee is protected from acts of retaliation—such as being fired, demoted, passed up for protection, or harassed—if he or she:

(a) discloses or threatens to disclose to a supervisor or public body conduct or a policy that the employee reasonably believes violates the law;

(b) provides information to any public body investigating or conducting a hearing or inquiry into a legal violation;

(c) provides information involving deception or misrepresentation to any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

(d) provides information regarding any perceived criminal or fraudulent activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(e) objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation issued under the law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J. STAT. ANN. § 34:19-3.

The protection against retaliation, when a disclosure is made to a public body, does not apply unless the employee has brought the activity, policy, or practice to the attention of his or her supervisor by written notice and given the employer a reasonable opportunity to correct the activity, policy, or practice. However, disclosure is not required when the employee reasonably believes that the activity, policy, or practice is known to one or more employees of the organization with supervisory authority or when the employee fears physical harm as a result of the disclosure, provided that the situation is emergency in nature.

State-law protections against retaliation vary in their effectiveness, however, depending in part on the rules for determining whether a negative action against a whistleblower can be deemed retaliatory. Some states deem an official action retaliatory if the whistleblowing was a contributing cause of the negative action against the employee. Yet others require that it be the "sole cause"—a standard that undermines protections for whistleblowers and thereby undermines incentives to report misconduct. See Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. RICH. L. REV. 1193, 1201-1210, 1225 (2016); see also Principles of the Law, Government Ethics § 715, Reporters' Note *a* (AM. L. INST., Tentative Draft No. 3, 2021).

*j. Other whistleblower programs.* Many other government programs or regulatory statutes provide whistleblowers with assurances against retaliation. See Occupational Safety and Health Administration, The Whistleblower Protection Programs, available at http://www.whistleblowers.gov/wb_filing_time_limits.html. Federal whistleblower protections include:

• Occupational Safety & Health Act, 29 U.S.C. § 660(c);

- Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651;
- Clean Air Act, 42 U.S.C. § 7622;
- Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610;
- Energy Reorganization Act, 42 U.S.C. § 5851;
- Federal Water Pollution Control Act, 33 U.S.C. § 1367;
- Safe Drinking Water Act, 42 U.S.C. § 300j-9(i);
- Solid Waste Disposal Act, 42 U.S.C. § 6971;
- Toxic Substances Control Act, 15 U.S.C. § 2622;
- Federal Railroad Safety Act, 49 U.S.C § 20109;
- International Safe Container Act, 46 U.S.C. § 80507;
- Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171;
- Pipeline Safety Improvement Act, 49 U.S.C. § 60129;
- Seaman's Protection Act, 46 U.S.C. § 2114;
- Surface Transportation Assistance Act, 49 U.S.C § 31105;
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121;
- Affordable Care Act, 29 U.S.C. § 218C;
- Consumer Financial Protection Act, 12 U.S.C. § 5567;
- Sarbanes-Oxley Act, 18 U.S.C. § 1514A;
- Consumer Product Safety Improvement Act, 15 U.S.C. § 2087;
- FDA Food Safety Modernization Act, 21 U.S.C. § 399d.

*k. International comparison.* In the United Kingdom, retaliation against a whistleblower is prohibited. In addition, the Enterprise Regulatory Reform Act of 2013 imposes vicarious liability on employers for any negative actions taken by coworkers against a worker who made a protected disclosure. The company will have a defense if it took all reasonable steps to prevent the detrimental treatment. In addition, companies are now prohibited from including any clause in a nondisclosure agreement with an employee that is designed to prevent the employee from making a whistleblower disclosure. Companies under the jurisdiction of the Financial Conduct Authority have to ensure that any settlement agreement with an employee clarifies that nothing in that agreement prevents the worker from making a protected whistleblowing disclosure. Jillian Naylor, et. al, *Whistleblower: The U.K. Perspective*, THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS (4th ed. 2020).