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Creating an Effective Corporate Compliance Plan: Part II

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Part II

By Pamela Bucy Pierson and Anthony A. Joseph

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An effective corporate compliance plan is essential for every business, large or small, public or private. Here's why: in today's world, businesses are able to significantly limit possible criminal and civil exposure if they have an effective corporate compliance program at the time an offense may occur.[1]

An effective corporate compliance plan consists of steps taken by a business to inform its employees, executives and directors about the laws that apply to them when executing their business duties; to encourage law-abiding behavior by its personnel; to establish protocols for detecting as early as possible any violations of the law committed within the business; and to deal appropriately with any violations that may occur.

The components of an effective corporate compliance plan are: (1) a corporate governance structure sensitive to compliance issues; (2) a general standard of conduct, and specific standards of conduct tailored to employees and their duties; (3) involvement by high-level personnel in corporate compliance issues; (4) an emphasis on corporate compliance when hiring, compensating and disciplining employees; (5) training directors, officers and employees about the laws and rules that apply to them; (6) establishing reporting mechanisms for instances of non-compliance; (7) conducting compliance audits; (8) assessing the "compliance health" of a target business prior to merger or acquisition; (9) protocols for updating a corporate compliance program; and (10) identifying and responding to instances of non-compliance.[2] This article briefly discusses these components.

Corporate Governance

The governing board of a company is responsible for ensuring that a company is attentive to compliance issues. This means at least three things.

First, as reflected in the agenda and minutes of board meetings, the board of directors (or an appropriate committee of the board) regularly receives reports on, discusses and reviews compliance issues, including current risk areas and whether new risk areas have arisen, internal training on compliance for all personnel, violations of the law that may have occurred, and the company's response to violations.

Second, board members should be competent to perform their compliance oversight duty. This means that in addition to appropriate credentials and experience, relevant board members receive regular training on compliance oversight, and have adequate time, free from other responsibilities (including service on too many boards), to fully execute their compliance oversight duties.

Third, directors should ensure that executive compensation is tied, at least in part, to achieving specific compliance goals.

Standards of Conduct

A business should have three different "standards of conduct." First, every business should have a mission statement that is brief, broadly applicable throughout the company and makes clear that ethical and law-abiding behavior is expected of all employees, executives and directors.

Second, every business should have a comprehensive statement, prepared through a collaborative effort that gathers input throughout the business at all levels, and applies generally to all personnel. Such a statement should cover compliance issues on generic topics, such as expense reimbursement, leave policy, employee harassment and discrimination and dealings with third parties (avoiding bribery, kickbacks, collusion, etc.).

Third, each business should have multiple, short, specific codes of conduct tailored to particular employment duties. Each of these codes should identify current and potential risk areas and provide guidance for dealing with these areas. For example, a hospital should have a specific code of conduct for emergency room patient care employees covering issues unique to the emergency room setting,[3] a separate code of conduct for emergency room billing employees[4] and another code of conduct for hospital employees who negotiate contracts with emergency room physicians.[5]

Most businesses will have dozens of these last, more detailed, codes of conduct. Such codes should be brief, comprehensible to the relevant employees and updated often. In quickly moving and highly regulated areas, quarterly, even monthly, revisions of these codes may be necessary. In other areas, annual reviews may be sufficient. Always, these codes should be specific. For example, instead of prohibiting employees from providing extravagant gifts to vendors, a code should specify that employees should not provide to any vendor (where vendor is defined) gifts, meals, items or services (where services are defined) valued at more than a specified dollar amount, unless the employee obtains a written waiver (where a specific authorizing individual is named).

Employment personnel policies should make clear that all employees, including executives, are subject to discipline if they fail to follow company codes of conduct.

Oversight by High-Level Personnel

Whether a company's corporate compliance plan is genuine and operated in good faith, or a sham designed for show, will be judged by the level of involvement by the company's high-level personnel. The exact role of high-level personnel will vary among businesses. Large companies should have a full-time compliance officer, if not a full compliance department. Small companies should directly involve the president in compliance issues. Whatever is the case, the person(s) performing compliance duties should have: adequate training and stature within the company to command clout; access to every aspect of a business; adequate resources to oversee compliance issues; a direct reporting route to top company executives; and an independent reporting route to the company's board of directors.

A compliance officer's job includes: assessing risk areas within the company where violations may occur; updating risk areas; ensuring that compliance training and monitoring is effective in addressing risk areas; ensuring that adequate mechanisms exist within the company for detecting violations of law and company codes of conduct; dealing appropriately with any violations; and documenting all of the above. In addition to maintaining effective corporate compliance, the point of adequate documentation is to demonstrate to regulators, FBI agents or a judge or jury, if the need arises, that the company has an effective corporate compliance plan even though a violation of the law has occurred.

Employment Relations

Vetting potential employees should include not only a criminal background check, but also a review of the candidate's compliance experience. Potential employees should be required to certify that they have no prior compliance violations. The compensation of employees, executives and directors should be tied, in part, to company codes of conduct, including attendance at, and successful completion of, training programs.

Stated employment duties should include the obligation to report internally (following a specified protocol) any known or suspected instances of noncompliance. Internal reporting serves two purposes. First, it gets information about violations or suspected violations to those within the company who can deal appropriately with the problem. Second, internal reporting limits the ability of employees to become "whistleblowers" who create additional liability for businesses by filing their own lawsuits or otherwise reporting their suspicions to authorities.[6]

Employment personnel policies should make clear that all employees, including executives, are subject to discipline if they fail to follow company codes of conduct. Possible sanctions should be specified and should include: publicity within and outside the company; community service; a letter of reprimand; additional compliance training; suspension; loss of pay; and termination.

Training of Directors, Executives and Employees

Compliance training should be provided for all personnel and, in some instances, third parties who work with a company. Directors and executives should receive training specific to their

obligations, and employees should be instructed on the compliance requirements specific to their duties. Everyone should understand why compliance is important, how to recognize events of non-compliance and what to do if they observe such events.

Because people learn in different ways, effective compliance training should be presented through a variety of methods: oral presentations, written materials, interactive and video sessions, role-playing, demonstrations, and question-and-answer sessions. High-level personnel should be involved in training, even if they only can appear by video. Compliance training should be presented in multiple languages when necessary. Attendance and successful completion of compliance training should be mandatory for all employees, executives and directors. All participants should be tested as part of their training and compensation should be tied, at least in part, to attendance and successful completion of training. All training should be updated regularly as risk areas, laws, regulations and market conditions change.

Reporting Events of Non-Compliance

The keys to effective mechanisms for reporting suspected events of non-compliance are adequate confidentiality and documentation. Every credible tip should be addressed, not only to deal with the potential problem, but also to avoid the appearance of cover-up or obstruction of justice. A variety of reporting mechanisms should be provided to personnel and third parties who deal with a business. A dedicated phone line, fax number, postal or e-mail address, suggestion box, exit interview, ombudsman, and focus group are all viable reporting options.

Compliance Audits

Compliance audits should be conducted periodically. They should follow the same protocol from audit to audit to better identify aberrations. As compared to "internal investigations," which are conducted when there is a reported problem, compliance audits are not intended to target a specific problem. They are more cursory and routine in nature and likely would not adequately address a reported or suspected problem. Rather, the goal of compliance audits is to assess activity in risk areas, detect possible problems, remind employees of their compliance duties and demonstrate to the outside world that a business is committed to lawful, ethical behavior.

Mergers and Acquisitions

Because a business acquires compliance problems along with the other assets and liabilities of any business it purchases or with which it merges, an acquiring company's due diligence should include a "compliance health check" of the target company. This assessment will be relevant to the terms

of the transaction as well as the future liability of the acquiring company.

Protocol for Updating a Corporate Compliance Plan

Every component of a corporate compliance plan should be regularly reviewed and revised. What was reviewed, what was changed or not changed, and why should be documented. Revisions to corporate compliance plans should be made when laws or regulations are passed or amended, case law changes, regulators undertake new initiatives, competitors encounter issues which suggest industry-wide problems or which spark attention to the industry as a whole, or an industry experiences events that call into question current "best practices." Corporate compliance plans also should be revised when "triggering events" occur, such as execution of a search warrant, service of subpoenas, activity by a whistleblower or filing of civil lawsuits.

Identifying and Responding to Instances of Non-Compliance

What is a "problem of non-compliance?"

Recognizing that there has been a problem of non-compliance is the first step in appropriately addressing any such problem. Sometimes this is not difficult. The problem is obvious: the FBI arrives to execute a search warrant, or a business is served with a grand jury subpoena and identified as a "target" of the grand jury investigation. Other problems present themselves more subtly: rambling, anonymous tips on the company hotline; a civil lawsuit; regulatory activity directed at competitors; new regulatory initiatives; unusual employee activity; a missing laptop, etc. The point is that a company's corporate compliance plan should provide a guidance on which response fits which problem.

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Responding appropriately

Once a problem of non-compliance has been identified, the goal is to calibrate the response to the seriousness of the problem. Overreaction can be as disruptive and costly as complacency.

Current law enforcement and regulatory expectations should be taken into account when deciding how to respond. Reactions that may have been appropriate in the past may be inappropriate today. For example, historically, companies responded to publicity about a possible violation of law by "circling the wagons" and stonewalling. This made some sense. Such a strategy allowed a company time to assess what was going on, made it more difficult and costly for plaintiffs (or prosecutors) to prove their case, and let publicity subside. Today, especially if the plaintiff or potential plaintiff is a prosecutor, such an approach can be disastrous. Businesses, like individuals, are rewarded by U.S. Department of Justice policy[7] and by U.S. Sentencing Guidelines[8] for cooperating with law enforcement, and they are punished for not cooperating. This "cooperation" almost always includes conducting an internal investigation, and may include disclosing findings to law enforcement, identifying culpable individuals and making victims whole.

When the potential violation of law is serious, the response may need to be immediate, stunningly so. Company leaders and counsel may need to react within hours of learning of the problem. Public companies will need to reassure the market. All companies–public and private–will need to reassure business partners, lenders, employees, clients, customers, insurers, and other key third parties with which it deals.

When addressing problems of non-compliance, especially the more serious problems, the attorney for a business will need to gather as much information as possible, and as quickly as possible. Counsel will need to assess what the business is facing to evaluate conflicts of interest and potential conflicts of interest among the company and its directors, officers and employees. Such conflict information is essential for the company to "lawyer up" its various personnel.[9]

Specific problems

1. Execution of a search warrant

There will be no notice before law enforcement officials show up with a search warrant. Surprise (and preempting possible destruction or alteration of documents) is one of the major reasons law enforcement agents seek a search warrant instead of serving a subpoena for records. To obtain a search warrant, law enforcement officials must demonstrate, under oath to a judicial officer, that probable cause exists to believe that a business has, is currently or is about to commit a crime, and that the records or items listed in the warrant are evidence of the crime.[10]

Service of a search warrant is a scary experience for those who are searched. For safety and practical reasons, a fairly large team of armed law enforcement agents will arrive to execute any search warrant. When a business is searched, employees, customers and clients will be directed to stop their activities and move aside, or assist, as agents search for items, documents and computers listed in the warrant. If computers are listed in the warrant, the law enforcement team will include computer experts, who will shut down or dismantle computers before removing them.

When a business experiences the execution of a search warrant, company officials should immediately contact counsel. Ideally, counsel will be on the premises during the execution of the warrant and can direct the company's response. Obtaining a copy of the search warrant should be the first step. The warrant will list what the agents are searching for and are authorized to seize. The agents should provide the company and counsel with a copy of the warrant when they arrive.

If possible, counsel should obtain a copy of the affidavit supporting the warrant. The affidavit potentially is one of the few ways a company has to figure out what prosecutors are looking for and is also a great source of information about the company's possible legal vulnerability. Because there is almost no discovery in the criminal justice system (generally no interrogatories or depositions), access to the details in a search warrant affidavit may be the most information a company can get about an investigation until indictment. The affidavit may be under seal and on file with the court that issued the warrant, and not available to anyone until the seal is lifted. In this situation, counsel should move the court for "partial unsealing," which releases the affidavit only to the company. If the allegations are expected to be damaging to the company, counsel should not seek a complete unsealing of the affidavit since doing so gives the public and press access to all details in the affidavit.

During execution of the search warrant, counsel should also consider permitting non-essential employees to leave for the rest of the day. Law enforcement agents executing a search warrant generally seek to interview any willing employees while they are executing a search warrant. Care should be taken, however, that allowing employees to leave is not viewed as obstruction of justice, or evidence of concealment, or a sign of criminal intent.

During execution of the search warrant, counsel should decide if filming the process is feasible and, if so, appropriate. Knowledge that their behavior is being memorialized on film may have a calming influence on everyone. However, filming the execution of a search warrant will also document possibly inappropriate behavior by nervous or ill-prepared company personnel. In such instances, filming may not be in a business's best interest. Counsel will have to assess the volatility of a situation when making the decision whether to have the process filmed.

Perhaps most importantly, counsel should seek to negotiate with the agents who are executing the warrant to determine what the agents will actually seize. This is important for two reasons. First, it can facilitate cooperation. The agents may be willing to take less than all items listed on the warrant. They may also be willing, or required, to provide back-up data of computers or documents they are authorized to remove. Company personnel may need to work closely with the agents during the execution of the warrant, perhaps for hours, for this to occur. Second, such interaction may be an opportunity for counsel to learn more

about the investigation and the company's potential liability. As noted, since discovery in criminal investigations is essentially non-existent, this interaction becomes all the more valuable.

2. Receipt of a subpoena

Many businesses regularly receive subpoenas. It is important to understand the difference between subpoenas issued at the request of private parties as part of private lawsuits, and subpoenas issued by grand juries and regulators. If the subpoena is issued by a grand jury, the matter is a criminal investigation. If a subpoena is issued by regulators (an "administrative subpoena"), the matter may be a civil or criminal investigation.[11] Whichever, it should be taken seriously. Grand jury or "administrative" subpoenas are issued to "targets," "subjects'" and "witnesses," in official criminal or civil investigations. "Target" means that the investigation has focused on a particular person(s) or entit(ies), that criminal liability is a strong possibility and that an indictment is likely. "Subject" means that one is not yet a target but is a serious focus of the investigation. "Witness" is simply that: a company may have records that are needed by law enforcement to investigate a target or subject. It is essential that counsel determine a company's status upon receipt of a subpoena issued by a grand jury or regulator. Generally, this information may be obtained from the government official authorizing the subpoena or directing the investigation. One's status can and often does change during an investigation, however, so counsel will need to continually assess a company's status. Also, even though a company may be only a "witness," there may be cause for concern. If a company's officers, directors or employees are "targets" or "subjects" of the investigation, their ultimate liability could lead to derivative liability or even criminal liability on the part of the company.[12]

In short, an effective corporate compliance plan should include all details for responding when law enforcement officials arrive at a business's premises ready to execute a search warrant.

3. Other problems

Other compliance problems that may arise in a business are as varied as the businesses that experience them. Internal reporting mechanisms, such as hot lines, ombudsmen, suggestion boxes and the like, will yield information about issues involving every aspect of a business's activity. An effective corporate compliance plan should list possible problems and risk areas, and protocols for dealing with problems. The protocols should include steps for gathering information, for corroborating the information, for addressing the problem, for revising the corporate compliance program in light of this new "risk area," and for raising employment procedures to deal with the individuals who created the problem and those who reported the problem.

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"Lawyering up" personnel

If the problem of non-compliance is one in which company personnel may incur personal civil or criminal liability, a company should move quickly to ensure that its personnel have legal representation. Not only may a company be obligated to provide counsel for various personnel (under bylaws, state incorporation code, employment contracts)[13] but there are strategic reasons to act quickly, and cost is one of them. When there are no conflicts in interest among those to be represented (for example, their status is "witness" only), one attorney may be able to represent a number of individuals. Obviously, this is cheaper than retaining separate counsel for each individual. Counsel will need to assess the facts quickly to determine how many individuals one attorney may represent without a conflict of interest.

The second reason a company should act quickly to ensure that its personnel have legal representation arises from rules of professional responsibility, in particular, the admonition that lawyers shall not communicate on a matter with individuals they know are represented by counsel in that matter.[14]

Document issues

There are three key issues to consider regarding documents when a business is facing a problem of non-compliance: (1) preserving records, (2) preserving attorney-client and work product privileges and (3) maintaining required privacy.

The first, immediate task of counsel when it appears there has been a compliance problem is to protect documents, electronic or otherwise, from destruction, or possible alteration. Immediately after becoming aware that there may be a compliance problem, company counsel should notify all company personnel that no records regarding the problem should be destroyed. Among other things, this means that "document retention" policies should be halted since such policies are also, of course, "document destruction" policies which provide a schedule for retaining certain records and destroying others.[15] Given the breadth of federal obstruction of justice statutes,[16] a company, its counsel, the company's leadership and its employees are at peril if any documents relevant or possibly relevant to the compliance issue are destroyed once it can be "contemplated" that an investigation may commence.[17]

In addition, company counsel should ensure that the company's attorney-client and work-product privileges are maintained. Utilizing the *Massachusetts v. Upjohn*[18] test, counsel should determine whose communications within the company are privileged. Privileged documents should be clearly identified as attorney-client communications or attorney work product, and segregated as such. A company ultimately may decide not to invoke attorney client or work-product privileges[19] but steps should be maintained from the beginning of an investigation to keep open the option of invocation.

Lastly, many businesses have obligations to maintain privacy of records in the course of its business, such as healthcare data on patients or financial records

for customers. Care should be taken that these records are adequately segregated and protected as required by applicable laws and regulations.[20]

Conducting an internal investigation

An internal investigation should be undertaken when there is a specific, credible report of non-compliance within the company. The investigation could be short and simple: interviewing one individual. Or it could be extensive, requiring hundreds of interviews with multiple personnel. Whichever the situation, the goals of an internal investigation are to determine if the event of non-compliance occurred; if there are other related, but not yet reported, events of non-compliance; who was involved; what damage, if any, resulted from the event; what response is appropriate; and what steps should be taken to prevent future events of non-compliance.

It is beyond the scope of this article to address the complex issues raised by internal investigations. Briefly, however, there are the three key decisions for a company's counsel. The first decision is whether an internal investigation should be conducted by in-house counsel or outside counsel. It will be more cost-efficient and probably less disruptive to the business for in-house counsel to conduct the investigation. However, if there is a question as to whether in-house counsel may have some involvement, wittingly or unwittingly, in the event of noncompliance, or if the investigation is likely to require considerable time and divert in-house counsel from other duties, a company should retain outside counsel to do the internal investigation.

The second set of decisions concerns how the internal investigation should be conducted. Are interviews necessary? If so, with whom and in what order? What record should be made during the interviews and who should make that record? When company counsel (in-house or outside) interviews company personnel, counsel should inform each person that counsel represents the company and not the individual. If the individual is entitled to counsel according to company policy (or as a matter of strategy if providing legal assistance is not required), the individual should be informed that the company will provide counsel. Opinions among experts differ as to whether counsel should also give a version of *Miranda*[21] rights informing the individual that the company will decide whether it will disclose the findings of its internal investigation to law enforcement or other regulatory authorities, including the individual's comments during the interview.

The final decision may be the hardest: what to do with the findings of the internal investigation. Should a written report be made? If so, what level of detail is appropriate? Should the findings be disclosed to relevant regulators? Should the company assert attorney-client or work product privileges? Should the company identify "culpable" individuals? What should the company do with the culpable individuals? What changes in the existing corporate compliance plan, including in the corporate leadership, may be needed? Each situation is different and will require a fresh assessment of these issues.

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Conclusion

Businesses today have no choice but to develop an effective corporate compliance plan. Such a plan should permeate every aspect of a business. Developing, maintaining and updating an effective corporate compliance plan will require a variety of legal specialties, vigilance in monitoring and updating the plan, and adequate commitment of time and resources. ▲▼▲

Endnotes

1. See also, Pamela H. Bucy & Anthony A. Joseph, *Conducting Business in the Twenty-First Century: How to Avoid Organizational Suicide,* 70 ALA. LAW. 185 (2009).

2. Excellent resources on the components of corporate compliance plans include: ETHICS AND COMPLIANCE OFFICER ASSOCIATION FOUNDATION, THE ETHICS AND COMPLIANCE HANDBOOK (2008); ANTHONY TARANTINO, THE GOVERNANCE, RISK AND COMPLIANCE HANDBOOK: TECHNOLOGY, FINANCE, ENVIRONMENTAL AND INTERNAL GUIDANCE AND BEST PRACTICES (2008 John Wiley & Sons, Inc.); MICHAEL G. SILVERMAN, COMPLIANCE MANAGEMENT FOR PUBLIC, PRIVATE AND NON-PROFIT ORGANIZATIONS (2008 McGraw-Hill).

3. Such as the Emergency Medical Treatment and Active Labor Law (EMTALA), 42 U.S.C. § 1395dd.

4. Covering issues such as unbundling, secondary insurance fraud, double-billing, inadequate documentation, etc. *See* PAMELA H. BUCY, HEALTH CARE FRAUD: ENFORCEMENT AND COMPLIANCE § 2.02 (co-authors: Robert Fabrikant, Paul E. Kalb, MD, Mark D. Hopson, 2008 Law Journal Seminars Press).

5. Covering issues of STARK, 42 U.S.C. § 1395nn and Anti-kickback, 42 U.S.C. § 1320a-7b; *See, e.g.* Ala. Code § 22-1-11; D.C. Code Ann. § 4-802; Fla Stat. §§ 395.0185, 456.054.

6. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, §4.02 (2008); Pamela H. Bucy, *States, Statutes and Fraud,* 80 TUL. L. REV. 465 (2005) (co-authors: James F. Barger, Jr., Melinda M. Eubanks, Marc S. Raspanti).

7. U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations,* U.S. ATTY'S MANUAL § § 9.28.000. The United States Department of Justice began developing *Principles of Federal Prosecution of Business Organizations* almost 20 years ago to guide federal prosecutors in determining whether to charge a fictional entity with a crime.

   Until 2008, the *Principles of Federal Prosecution* instructed federal prosecutors to request in certain circumstances corporate waiver of attorney-client and work product privileges and to consider such waiver favorably when determining whether to indict a company which otherwise met the standard for corporate criminal liability ("McNulty Memorandum").

   In August 2008, however, after coming under fire from courts and the American Bar Association among others, the Department of Justice revised its *Principles of Federal Prosecution* stating "prosecutors should not ask for such waivers and are directed not to do so." U.S. ATTY'S MANUAL § § 9.28.710. However, the *Principles* note that, "[e]veryone agrees that a corporation may freely waive its own privileges if it chooses to do so," and that federal prosecutors may continue to consider "whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives." *Id.* Thus, it appears that full disclosure, without assertion of attorney-client and work product privileges, may still be rewarded by the U.S. DOJ.

   It is also significant to note before leaving this topic that businesses in heavily regulated industries such as financial services and healthcare are often required by regulatory agencies to fully disclose and open their books and records, thereby effectively preventing such businesses from asserting attorney-client and work product privileges.

8. U.S. Sentencing Comm'n, *Federal Sentencing Guidelines,* Chapter 8 (Sentencing of Organizations).

9. See Section IV *infra.*

10. See, e.g., *Spinelli v. United States,* 393 U.S. 410 (1969); *Illinois v. Gates,* 462 U.S. 213 (1983).

11. For example, "Inspector General" subpoenas are issued by Offices of Inspectors General in federal departments to investigate suspected criminal or civil fraud involving that department. *See, e.g.* 42 C.F.R. § 1006.1(a). "Certificates of Demand" (CID), also known as "Authorized Investigative Demands" (AID), may be issued by the United States Attorney General, or authorized designee, to investigate suspected violations of specific statutes. *See, e.g.* 31 U.S.C. § 3733 (regarding the Federal False Claims Act). For a discussion of these types of administrative subpoenas, see PAMELA H. BUCY, HEALTH CARE FRAUD: ENFORCEMENT AND COMPLIANCE §§ 6. 04-05.

12. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability,* 75 MINN. L. REV. 1095 (1991) (explaining how the standard for imposing criminal liability on corporations is "strict liability:" if an agent of a business commits a crime, the company may be held criminally liable.)

13. Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes,* 24 IND. L. REV. 279 (1991); IAN YOUNGMAN, DIRECTORS' AND OFFICERS' LIABILITY INSURANCE: A GUIDE TO INTERNATIONAL PRACTICE, 2D ED. (1999 Woodhead Publishing Ltd.).

14. For example, *Alabama Rule of Professional Conduct* 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

15. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
16. See, e.g., 18 U.S.C. §§ 1512, 1519.
17. 18 U.S.C. § 1519 (new obstruction of justice statute, passed as part of SOX, § 802 P.L. 107-204 in 2002).
18. 466 U.S. 727 (1984).
19. In some heavily regulated industries such as healthcare or banking, regulators have full access to a provider's records as part of the credentialing process. Also, though not "required," a company may "voluntarily" waive attorney-client and work product privileges if it decides to cooperate under *Principles of Federal Prosecution of Business Organizations*, and federal sentencing guidelines. See Section II *supra*.
20. See, e.g., Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1301 *et seq.*; 45 C.F.R. §§ 160-164 (regarding personal health information); 42 U.S.C. § 290dd-2 (medical records relating to treatment of drug and alcohol abuse).
21. 384 U.S. 436 (1966).

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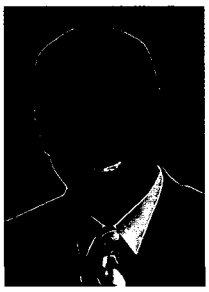

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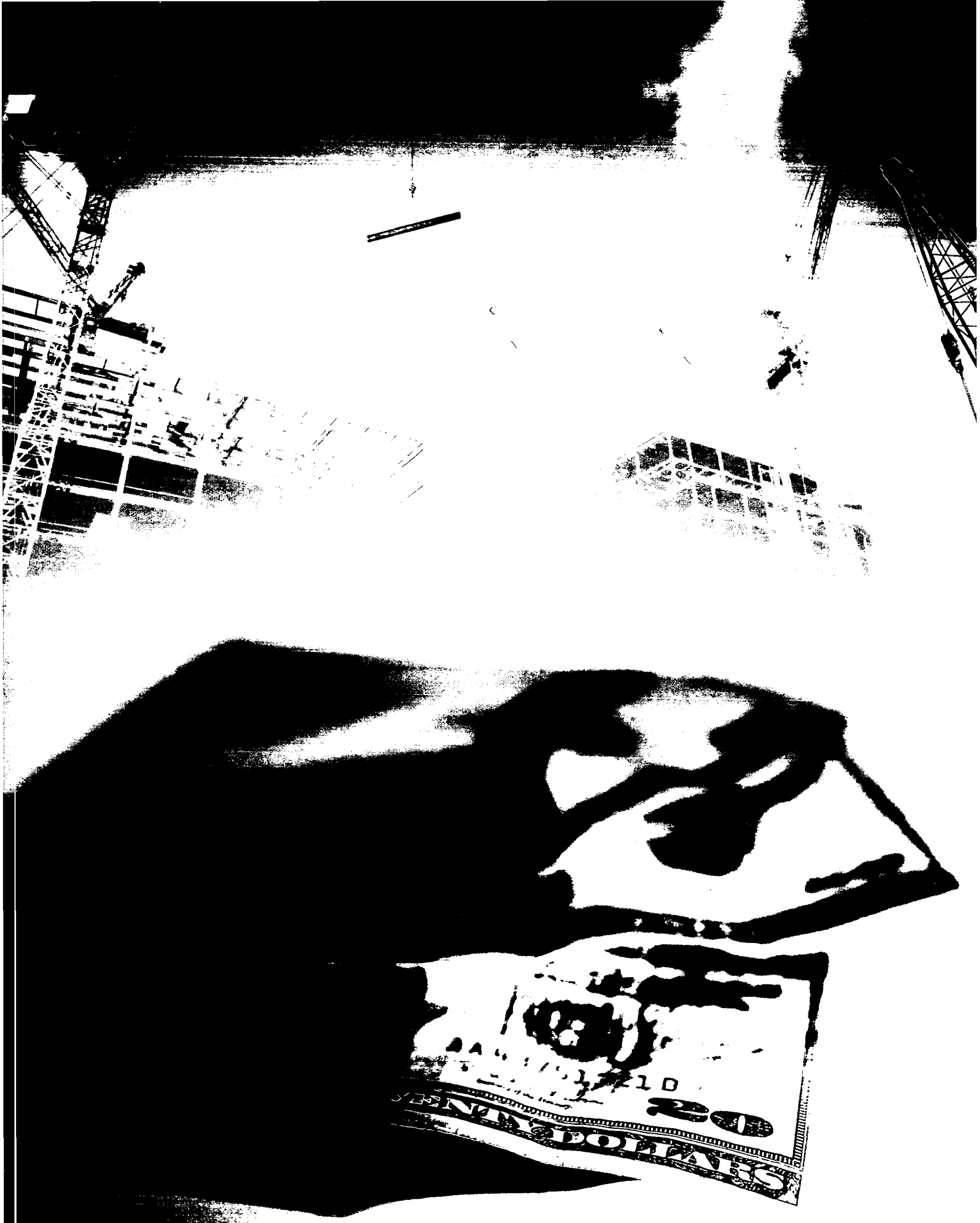
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