

# TABLE OF CONTENTS

## CHAPTER 1

### Characteristics of Corporate Crime

§ 1.01	Introduction . . . . .	1-3
§ 1.02	Defining Corporate Crime . . . . .	1-7
§ 1.03	Social Significance of Corporate Crime . . . . .	1-10
§ 1.04	Public Injuries from Corporate Offenses . . . . .	1-12
§ 1.05	Relationship Between Corporate Crime and Corporate Management . . . . .	1-14.1
§ 1.06	Sources of Corporate Crime . . . . .	1-16
	[1] Individual Offenders . . . . .	1-17
	[2] Corporate Environments . . . . .	1-20
	[3] Management Policies and Practices . . . . .	1-22
	[a] Offenses Consciously Desired by Managers . . . . .	1-23
	[b] Policies and Practices Unintentionally Encouraging Illegal Conduct . . . . .	1-27
	[c] Constraints on Information Transfers and Decision Making . . . . .	1-29
	[d] Crime Prevention Measures . . . . .	1-30
	[e] Incentive Compensation Encouraging Criminal Risk Taking . . . . .	1-30
§ 1.07	Distinctive Features of Corporate Crime . . . . .	1-30.2
	[1] Concealment . . . . .	1-30.2
	[a] Secrecy Concerning Legitimate Business Activities . . . . .	1-30.2
	[b] Secrecy in Corporate Law Compliance Programs . . . . .	1-31
	[c] Secrecy in Defending Against Corporate Prosecutions . . . . .	1-31
	[d] Corporate Control over Information Sources . . . . .	1-32
	[e] Dispersion of Relevant Evidence . . . . .	1-33
	[f] Internal Corporate Pressures Discouraging Disclosures of Misconduct . . . . .	1-33
	[g] Uncertain Illegality of Corporate Behavior . . . . .	1-35

**CORPORATE CRIMINAL LIABILITY**

	[h]	Overcoming Pressures to Conceal Offenses . . . . .	1-36
	[i]	Disparities in Enforcement and Compliance Resources. . . . .	1-36.2
	[2]	Diffuse Responsibility. . . . .	1-36.3
	[a]	Specialization Effects. . . . .	1-36.3
	[b]	Information Barriers. . . . .	1-37
	[c]	Incentive Systems. . . . .	1-38
	[d]	Measuring Culpability . . . . .	1-39
§ 1.08		Distinctive Agency Relationships Constraining Corporate Crime. . . . .	1-41
	[1]	Top Managers as Law Enforcement Agents Serving Corporate Shareholders . . . . .	1-42
	[2]	Operating Employees as Law Enforcement Agents of Corporate Principals . . . . .	1-44
	[3]	Corporate Managers as Agents of Law Enforcement Officials . . . . .	1-45
§ 1.09		Measuring Corporate Crime . . . . .	1-47
	[1]	Broad Range of Affected Firms. . . . .	1-47
	[2]	Federal Offenses . . . . .	1-48
	[a]	Types of Offenses Prosecuted . . . . .	1-48
	[b]	Sanctions Imposed . . . . .	1-50
	[c]	The Relationship Between Corporate and Individual Prosecutions . . . . .	1-51
	[d]	Prosecutorial Discretion . . . . .	1-52
	[3]	State Offenses . . . . .	1-53
	[4]	Economic Crime Patterns . . . . .	1-56
	[a]	Crime Levels . . . . .	1-56
	[b]	Types of Crimes. . . . .	1-57
	[c]	Victim Losses. . . . .	1-58
	[d]	Civil and Criminal Penalties . . . . .	1-58
	[e]	Collateral Damage . . . . .	1-58.1
	[5]	Case Study: Financial Consequences of the BP Oil Well Blowout . . . . .	1-58.2
	[6]	Consequences of Corporate Convictions: Empirical Research on Penalties Threatening Corporate Survival. . . . .	1-58.4
§ 1.10		A New Perspective: Evaluating Corporate Crime as a Manageable Defect in Corporate Performance. . . . .	1-56.7
	[1]	Components of a Performance Defect Interpretation of Corporate Crime . . . . .	1-58.8
	[a]	Viewing Managers as Potential Architects of Corporate Law Compliance . . . . .	1-58.8
	[b]	Measuring Corporate Fault and Liability . . . . .	1-59
	[c]	Evaluating Corporate Crimes as Defects in Corporate Performance. . . . .	1-60

## TABLE OF CONTENTS

xxi

[2]	A Taxonomy of Corporate Crime in Terms of Performance Defects and Prevention Methods. . . . .	1-61
	[a] Offenses Resulting from Management Misdirection . . . . .	1-61
	[b] Offenses Resulting from Inadequate Provisions for Law Compliance . . . . .	1-62
	[i] Inadequate Identification of Compliance Behaviors . . . . .	1-62
	[ii] Failures to Properly Reward and Motivate Employees . . . . .	1-63
	[iii] Failures to Properly Select or Advance Employees. . . . .	1-63
	[iv] Failures of Control Measures . . . . .	1-63
	[c] Offenses Resulting from Poorly Organized Offense Responses. . . . .	1-64
	[i] Distinguishing Common and Special Causes of Corporate Offenses. . . . .	1-64
	[ii] Responses to Offenses from Special Causes . . . . .	1-65
	[iii] Responses to Offenses from Systemic Causes . . . . .	1-65
	[d] Additional, Unpreventable Offenses. . . . .	1-66
	[i] Offenses by Rogue Employees. . . . .	1-67
	[ii] Offenses from Justifiably Tolerated Systemic Sources . . . . .	1-67
[3]	The Role of Compliance Programs in Corporate Criminal Law . . . . .	1-67
§ 1.11	Conclusion. . . . .	1-74

## CHAPTER 2

### Rationales for Corporate Criminal Liability

§ 2.01	Why Punish Inanimate Corporate Entities? . . . . .	2-3
§ 2.02	Historical Roots of Corporate Criminal Liability . . . . .	2-7
	[1] Irrelevance of Corporate “Personhood” . . . . .	2-7
	[2] Rejection of Organizational Fault as a Basis for Corporate Criminal Liability . . . . .	2-10
§ 2.03	Policy Justifications for Corporate Criminal Liability. . . . .	2-13
	[1] Corporate Fault Rationales . . . . .	2-13
	[a] Finding Organizational Fault: The Misguided Search for a Corporate Personality . . . . .	2-14

**CORPORATE CRIMINAL LIABILITY**

	[b]	Advantages of Fault Limitations on Corporate Criminal Liability.....	2-18
	[c]	Whose Fault Should Matter?.....	2-20
		[i] Fault of Operating Employees.....	2-20
		[ii] The Need for Further Managerial Fault.....	2-21
	[d]	What Fault Should Be Sufficient?....	2-22
		[i] Intentional Misconduct.....	2-22
		[ii] Preventive Fault.....	2-24
		[iii] Consent.....	2-26
		[iv] Group Fault.....	2-28
	[e]	The Need for Corporate Liability as a Supplement to Individual Liability... .	2-28
		[i] Corporate Liability as a Reflection of Management Contributions to Employee Offenses.....	2-29
		[ii] Corporate Liability as a Means to Properly Allocate Managerial and Individual Accountability for Corporate Crimes.....	2-31
		[iii] Corporate Liability as a Narrow Alternative to Promote Liability of Individual Offenders.....	2-35
[2]		Incentive Rationales.....	2-36
	[a]	Encouraging Crime Prevention.....	2-36
		[i] Effective Techniques for Corporate Deterrence.....	2-41
	[b]	Promoting Post-Offense Assistance to Public Authorities.....	2-42.2
		[i] Balancing Corporate and Individual Prosecutions.....	2-42.3
[3]		Economic Rationales.....	2-42.4
	[a]	Influencing Returns on Investment for Alternative Corporate Ventures and Practices.....	2-43
	[b]	Consumer Discipline of Firms with Poor Compliance Practices.....	2-43
	[c]	Investor Discipline of Firms with Poor Compliance Practices.....	2-45
		[i] Impacts on Stock Prices.....	2-45
		[ii] Bankruptcy.....	2-46
		[iii] Shareholder Monitoring and Discipline of Corporate Managers.....	2-47

## TABLE OF CONTENTS

xxiii

	[d] Pricing Corporate Conduct with Irreducible Risks . . . . .	2-48
[4]	Signaling Rationales . . . . .	2-49
	[a] Signals Promoting Corporate Differentiation . . . . .	2-49
	[b] Signals Promoting Self-Protection by Potential Crime Victims . . . . .	2-50
	[c] Signals Promoting Follow-Ups to Misconduct . . . . .	2-51
	[i] Redistribution of Blame, Liability, and Punishment. . . . .	2-51
	[ii] Identifying Corporate Practices Needing Review and Repair . . . . .	2-52
	[iii] Clarifying the Seriousness of Misconduct . . . . .	2-53
	[5] Retributive Rationales . . . . .	2-53
	[6] Reformatory Rationales . . . . .	2-58
	[7] Compensatory Rationales . . . . .	2-60
§ 2.04	Constraints on Corporate Criminal Liability . . . . .	2-62
	[1] Constraints Derived from Individual Liability Principles . . . . .	2-62
	[a] Promoting Respect . . . . .	2-63
	[b] Focusing Prosecutions . . . . .	2-63
	[c] Ensuring Sentence Consistency . . . . .	2-65
	[d] Aiding Planning . . . . .	2-66
	[2] Economic Constraints . . . . .	2-66
§ 2.05	Criminal Liability for Corporations Closely Aligned with Their Owners . . . . .	2-69
§ 2.06	Conclusion—The Need for a Corporate Jurisprudence . . . . .	2-71

## CHAPTER 3

### Corporate Criminal Liability Under Federal Law

§ 3.01	Types of Corporate Criminal Liability Under Federal Law . . . . .	3-4
§ 3.02	Corporations as “Persons” Under Federal Statutes . . . . .	3-5
	[1] Corporate Provisions of the Federal Dictionary Statute . . . . .	3-5
	[2] Grounds for Excluding Corporations from Criminal Statutes . . . . .	3-7
	[a] Exclusions for “Impossible” Corporate Crimes . . . . .	3-7
	[b] Determining the “Impossibility” of Corporate Crimes . . . . .	3-7

**CORPORATE CRIMINAL LIABILITY**

	[c] Defendant Features Not Possessed by Corporations . . . . .	3-8
	[d] Offense Conduct Not Generally Undertaken by Corporations . . . . .	3-9
	[e] Punishments Not Applicable to Corporations . . . . .	3-10
§ 3.03	<i>Respondeat Superior</i> Bases for Corporate Criminal Liability under Federal Law . . . . .	3-11
	[1] History of <i>Respondeat Superior</i> Standards for Corporate Criminal Liability . . . . .	3-11
	[2] Generally Applicable Standard for Corporate Criminal Liability Under Federal Law . . . . .	3-19
	[3] Goals of <i>Respondeat Superior</i> Liability. . . . .	3-20
	[a] Crime Control Benefits . . . . .	3-20
	[b] Equal Treatment of Corporate and Individual Actors . . . . .	3-22
	[c] Balancing of Benefits and Burdens of Unlawful Corporate Activities . . . . .	3-23
	[4] Organizational Failure to Satisfy Nondelegable Law Compliance Duties . . . . .	3-24
	[a] Nondelegable Duties as a Basis for Corporate Criminal Liability . . . . .	3-24
	[b] Recognizing the Importance of Criminal Law Compliance . . . . .	3-27
	[c] Avoiding Liability Variations Based on Differences in Work Delegation Patterns . . . . .	3-28
	[d] Clarifying Management Control over Legal Risks . . . . .	3-30
§ 3.04	Features of Corporate Criminal Liability Controlled by <i>Respondeat Superior</i> Principles . . . . .	3-32
	[1] Imputing Conduct . . . . .	3-32
	[a] Evaluating Offense Conduct . . . . .	3-32
	[b] Identifying Corporate Activity . . . . .	3-32
	[c] Defining Corporate Duties . . . . .	3-32
	[d] Determining Corporate Accountability for Factual Representations by Employees . . . . .	3-33
	[e] Establishing Jurisdiction . . . . .	3-33
	[f] Interpreting Indictments . . . . .	3-34
	[2] Imputing Mental States . . . . .	3-35
	[a] Willfulness . . . . .	3-35
	[b] Special Knowledge . . . . .	3-37
	[c] Specific Intent . . . . .	3-39
§ 3.05	Scope of Employment Limitations on Corporate Criminal Liability . . . . .	3-40

## TABLE OF CONTENTS

xxv

[1]	Role of the Scope of Employment in Determining Corporate Criminal Liability. . . . .	3-40
[2]	Purposes Underlying Scope of Employment Limitations on Corporate Criminal Liability. . . . .	3-43
[a]	Establishing Minimum Managerial Culpability Thresholds for Corporate Criminal Liability. . . . .	3-43
[b]	Defining the Limits of Partial Managerial Responsibility for Employee Offenses . . . . .	3-43
[c]	Creating Criteria for Preventive Fault Evaluations of Corporate Crimes . . . . .	3-44
[d]	Defining Crime Prevention Goals for Corporate Managers. . . . .	3-44
[3]	Types of Employee Actions Falling Within the Scope of Corporate Employment . . . . .	3-46
[a]	Acts Authorized by Management . . . . .	3-47
[i]	Acts Understood to be Illegal When Authorized . . . . .	3-47
[ii]	Acts Not Understood to Be Illegal When Authorized . . . . .	3-48
[iii]	Acts Not Intended to Be Authorized But Reasonably Perceived by Corporate Employees as Authorized . . . . .	3-49
[b]	Impliedly Authorized Acts That Are Necessary or Highly Effective Means to Complete Expressly Authorized Tasks. . . . .	3-49
[c]	Unauthorized Acts That Are Foreseeable Deviations from Authorized Conduct to Pursue Corporate Interests. . . . .	3-50.1
[i]	Illegal Means Toward Legitimate, Assigned Ends . . . . .	3-50.4
[ii]	Illegal Extensions of Assigned Duties . . . . .	3-50.6
[iii]	Illegal Actions Within an Employee's Apparent Authority . . . . .	3-50.9
[d]	Unauthorized Acts Regularly Undertaken with Authorized Conduct . . . . .	3-51

**CORPORATE CRIMINAL LIABILITY**

	[e]	Prohibited But Foreseeable Acts . . . . .	3-52	
		[i] Result the Employee Was Assigned to Produce. . . . .	3-54	
		[ii] Customs of the Enterprise or Other Like Enterprises. . . . .	3-55	
		[iii] Capabilities of the Person Undertaking an Assignment. . . . .	3-55	
	[f]	Prohibited and Unforeseeable Acts . . . . .	3-55	
§ 3.06		Corporate Benefit Limitations on Corporate Criminal Liability. . . . .	3-57	
	[1]	Benefit Tests for Corporate Criminal Liability. . . . .	3-57	
	[2]	Purposes Underlying Corporate Benefit Limitations on Corporate Criminal Liability. . . . .	3-58	
		[a] Withholding Corporate Criminal Liability for Firms That Are Victims of Employee Crimes . . . . .	3-58	
		[b] Tailoring Crime Prevention Incentives . . . . .	3-60	
		[c] Establishing Fair Limits on Corporate Self-Policing Obligations. . . . .	3-60	
		[d] Recognizing Circumstantial Evidence of Corporate Fault . . . . .	3-61	
		[e] Establishing Boundaries on Corporate Responsibility. . . . .	3-62	
	[3]	Sufficient Types of Corporate Benefit. . . . .	3-62	
		[a] Intended and Realized Gains . . . . .	3-62	
			[i] Incremental Revenues . . . . .	3-62
			[ii] Cost Savings . . . . .	3-63
			[iii] Improved Legal Position . . . . .	3-64
			[iv] Monitoring Cost Savings. . . . .	3-64
		[b] Intended But Unrealized Gains . . . . .	3-64	
		[c] Unintended But Realized Gain . . . . .	3-65	
		[d] Gain to Sole Shareholder. . . . .	3-65	
	[4]	Time Period for Assessing Corporate Benefit. . . . .	3-66	
	[5]	Corporate Criminal Liability Absent Corporate Gain . . . . .	3-66	
		[a] Offenses Facilitated by an Individual's Corporate Position. . . . .	3-67	
		[b] Foreseeable Offenses . . . . .	3-68	
		[c] Offenses Involving Breach of Corporate Duty to Take Actions or Achieve Results. . . . .	3-69	
	[6]	Insufficient Corporate Benefit for Corporate Criminal Liability. . . . .	3-69	



## TABLE OF CONTENTS

xxvii

	[a]	Offenses Injuring Corporations . . . . .	3-69
	[b]	Offenses Neither Benefiting Nor Harming Corporations . . . . .	3-71
	[c]	Offenses Involving Personal Motivations or Objectives Unrelated to Corporate Interests . . . . .	3-72
	[7]	Potential Impact of Corporate Law Compliance Programs on Offense Benefit Assessments . . . . .	3-73
§ 3.07		Rejected Limits on <i>Respondeat Superior</i> Liability . . . . .	3-75
	[1]	Managerial or Supervisory Fault Need Not Be Shown . . . . .	3-75
	[2]	Authorization to Complete Illegal Conduct is Not Needed . . . . .	3-75
	[3]	Policies or Instructions Prohibiting Illegal Conduct Will Not Prevent Liability . . . . .	3-76
	[4]	Failure to Convict Responsible Individuals Does Not Preclude Corporate Criminal Liability . . . . .	3-80
	[a]	Differences in the Scope of Conduct and Knowledge Considered . . . . .	3-81
	[b]	Jury Allocations of Liability to Reflect Relative Blameworthiness . . . . .	3-82
§ 3.08		Corporate Criminal Liability Based on the Actions of Corporate Managers . . . . .	3-85
	[1]	Directing Corporate Agents to Undertake Criminal Conduct . . . . .	3-85
	[2]	Plain Indifference to Legal Requirements . . . . .	3-86
	[3]	Ratifying Offenses Committed by Employees Outside the Scope of Employment . . . . .	3-86
§ 3.09		Improving the Clarity and Fairness of Corporate Criminal Liability Based on <i>Respondeat Superior</i> . . . . .	3-88

## CHAPTER 4

### Corporate Criminal Liability Based on Collective Knowledge and Action

§ 4.01		Collective Knowledge and Action as a Basis for Corporate Criminal Liability . . . . .	4-2
	[1]	Basic Principles . . . . .	4-2
	[2]	Goals of Collective Liability . . . . .	4-3
	[a]	Recognizing Organizational Culpability . . . . .	4-3
	[b]	Encouraging Due Care . . . . .	4-4

**CORPORATE CRIMINAL LIABILITY**

§ 4.02	Offense Features That Can Be Established Through Collective Knowledge and Action . . . . .	4-6
	[1] Corporate Knowledge Based on Group Knowledge . . . . .	4-7
	[2] Willful Corporate Action Based on Group Knowledge . . . . .	4-13
	[a] Willful Action Based on Uncommunicated Legal Requirements . . . . .	4-15
	[b] Willful Action Based on Uncommunicated Factual Information. . . . .	4-16
	[3] Corporate Specific Intent . . . . .	4-22
	[a] Specific Intent Based on Group Knowledge . . . . .	4-22
	[b] Specific Intent Based on Distributed Intent . . . . .	4-24
	[4] Corporate Entity Liability Without Agreement on the Responsible Individuals. . . . .	4-24.1
§ 4.03	Outer Boundaries of Corporate Liability Based on Collective Knowledge and Group Action . . . . .	4-25
	[1] No Liability for Failure to Collect Information . . . . .	4-25
	[2] Collective Knowledge is Limited to Information with a Reasonably Identifiable Relationship to Law Compliance . . . . .	4-26
	[3] Collective Knowledge is Limited to Material Information . . . . .	4-28
§ 4.04	Implications of the Collective Knowledge Doctrine in Corporate Criminal Law . . . . .	4-29

**CHAPTER 5****Special Sources and Limitations of Corporate Criminal Liability Under Federal Law**

§ 5.01	Corporate Conspiracy Liability. . . . .	5-2
	[1] Corporate Liability Under the Federal Conspiracy Statute . . . . .	5-3
	[2] Corporate Conspiracies to Restrain Trade . . . . .	5-6
	[3] Corporate Conspiracies Under Other Statutes . . . . .	5-8
§ 5.02	Corporate Criminal Liability Based on Conduct of Parties Outside of Corporate Organizations . . . . .	5-9
	[1] Corporate Liability for Offenses by Independent Contractors and Other Independent Agents . . . . .	5-9

## TABLE OF CONTENTS

xxix

	[a] Strict Liability Offenses . . . . .	5-9
	[b] Other Criminal Standards. . . . .	5-11
	[2] Corporate Criminal Liability Based on Conduct of Employees of Corporate Subsidiaries. . . . .	5-14
	[a] Agency Basis for Parent Company Liability . . . . .	5-14
	[b] Unitary Enterprise Basis for Parent Company Liability. . . . .	5-15
	[3] The Minimum Unit for Measuring Liability: Criminal Liability of Corporate Divisions and Other Independently Managed Corporate Subcomponents . . . . .	5-17
§ 5.03	Criminal Liability for Offenses of Dissolved Corporations . . . . .	5-19
§ 5.04	Criminal Liability for Offenses of Predecessor Corporations . . . . .	5-22
	[1] Liability for Offenses of Constituent Corporations in Mergers and Consolidations. . . . .	5-22
	[2] Liability of Successor Companies for Offenses of Acquired Firms. . . . .	5-23
	[3] Liability of Companies Based on Acquisition of Stock of Corporate Offender . . . . .	5-24
	[4] Liability of Companies Based on Acquisition of Assets of Corporate Offender . . . . .	5-24
	[a] General Standard . . . . .	5-24
	[b] Exceptions to General Rule . . . . .	5-25
	[c] Accomplice Liability . . . . .	5-25
	[5] Prosecutorial Discretion Principles Limiting Successor Liability for Corporate Crimes . . . . .	5-26
	[a] Underlying Successor Liability . . . . .	5-26
	[b] Criteria for Withholding Charges Against Successor Corporations . . . . .	5-26.1
	[c] Remaining Types of Successor Liability . . . . .	5-26.2
	[d] Concrete Steps to Avoid Successor Liability . . . . .	5-26.3
	[i] Obtaining an Opinion . . . . .	5-26.3
	[ii] Procedures for Pre-Acquisition Due Diligence Studies . . . . .	5-26.5
§ 5.05	Corporate Criminal Liability After Bankruptcy. . . . .	5-27
	[1] The Status of Corporate Criminal Fines in Bankruptcy Proceedings. . . . .	5-27
	[2] Corporate Criminal Fines as “Debts”. . . . .	5-28

**CORPORATE CRIMINAL LIABILITY**

	[3]	Limits on Dischargeability of Fines Imposed on “Individual Debtor” . . . . .	5-30
	[4]	A Case Study in Discharge of Corporate Criminal Fines . . . . .	5-31
§ 5.06		Constitutional Limitations on Corporate Criminal Liability . . . . .	5-33
	[1]	Due Process and Equal Protection . . . . .	5-33
	[2]	Procedural Protections . . . . .	5-33
	[3]	Search and Seizure Limitations . . . . .	5-34
	[4]	Self-Incrimination . . . . .	5-35
	[5]	Grand Jury Indictment . . . . .	5-36
	[6]	Speedy Trial . . . . .	5-36
	[7]	Jury Trial . . . . .	5-39
	[8]	Right to Counsel . . . . .	5-41
	[9]	Vagueness . . . . .	5-42
	[10]	<i>Ex Post Facto</i> Laws . . . . .	5-43
	[11]	Cruel and Unusual Punishment . . . . .	5-43
	[12]	Double Jeopardy . . . . .	5-44

**CHAPTER 6****Support for a Due Diligence Defense to  
Corporate Criminal Liability Under Federal Law**

§ 6.01		Authority for Due Diligence Defense . . . . .	6-2
	[1]	Why Cases Testing Due Diligence Are Rare . . . . .	6-2
	[2]	Judicial Support for Due Diligence Defense . . . . .	6-3
	[3]	Significance of Due Diligence Under Corporate Criminal Liability Standards . . . . .	6-6
	[a]	Negating Corporate Intent . . . . .	6-6
	[b]	Defining Scope of Employment . . . . .	6-7
	[c]	Identifying Crimes for Corporate Benefit . . . . .	6-7
	[d]	Targeting Incentives for Law Compliance Programs . . . . .	6-8
	[e]	Determining Corporate Liability Based on Managerial Fault . . . . .	6-9
	[4]	An International Comparison: UK Bribery Act Defense for Adequate Procedures to Prevent Bribery . . . . .	6-10.1
§ 6.02		Possible Reasons to Reject a Due Diligence Defense to Corporate Criminal Liability . . . . .	6-11
	[1]	Punitive Arguments Against a Due Diligence Defense . . . . .	6-11
	[2]	Incentive Arguments Against Due Diligence Defense . . . . .	6-13

## TABLE OF CONTENTS

xxxi

§ 6.03	The Corporate Due Care Defense to “Controlling Person” Liability Under Federal Securities Laws . . . . .	6-14
§ 6.04	Measuring Due Diligence in Detecting and Preventing Crimes by Corporate Employees . . . . .	6-19
[1]	Due Diligence in Advance of Offenses . . . . .	6-19
[a]	Avoiding the Encouragement of Employee Offenses . . . . .	6-19
[b]	Implementing Crime Prevention Measures . . . . .	6-20
[2]	Due Diligence in Monitoring to Detect Offenses . . . . .	6-23
[3]	Due Diligence in Reacting to Offenses . . . . .	6-24
§ 6.05	Three Case Studies in Measuring Due Diligence Compliance . . . . .	6-27
[1]	<i>United States v. Kroger Grocery &amp; Baking Co.</i> . . . . .	6-27
[a]	Compliance Direction and Control . . . . .	6-27
[b]	Monitoring . . . . .	6-28
[c]	Post-Offense Responses . . . . .	6-28
[d]	Judicial Evaluation . . . . .	6-28
[2]	<i>In re Holland Furnace Co.</i> . . . . .	6-29
[3]	<i>United States v. Greyhound Corp.</i> . . . . .	6-31
[a]	Compliance Direction and Control . . . . .	6-31
[b]	Monitoring . . . . .	6-32
[c]	Post-Offense Responses . . . . .	6-32
[d]	Judicial Analysis . . . . .	6-32
§ 6.06	Conclusion . . . . .	6-34

## CHAPTER 7

### Corporate Criminal Liability Under State Laws

§ 7.01	Aims and Limitations . . . . .	7-2
§ 7.02	Corporate Criminal Liability Under State Laws Incorporating <i>Respondeat Superior</i> Standards . . . . .	7-8
§ 7.03	Corporate Criminal Liability Under State Standards Based on Kinship of Agent Authority and Offense Conduct . . . . .	7-11
§ 7.04	Corporate Criminal Liability Under State Laws Based on Model Penal Code Standards . . . . .	7-15
[1]	Origins of Model Penal Code Standards for Corporate Criminal Liability . . . . .	7-15
[2]	Code Standards . . . . .	7-16
[3]	Properly Categorizing Offenses Within the Code . . . . .	7-17
[4]	Corporate Liability for Acts of High Managerial Agents Under Model Penal Code . . . . .	7-18

**CORPORATE CRIMINAL LIABILITY**

	[a] The Definition of High Managerial Agents . . . . .	7-18
	[b] Managerial Toleration of Crimes. . . . .	7-19
	[c] Range of Offenses Covered. . . . .	7-20
[5]	Corporate <i>Respondeat Superior</i> Liability Under Model Penal Code. . . . .	7-21
	[a] Narrow Range of Offenses Covered. . . . .	7-21
	[b] Criteria for Applying <i>Respondeat Superior</i> Standards. . . . .	7-22
	[c] Due Diligence Defense . . . . .	7-24
[6]	Corporate Liability Under the Model Penal Code for Failure to Meet Statutory Duties . . . . .	7-25
[7]	Corporate Liability Under the Code for Strict Liability Offenses. . . . .	7-27
[8]	Does the Code Achieve Its Goals? . . . . .	7-28
§ 7.05	Corporate Criminal Liability Based on Managers' Inattention to Concealed Hazard—The California Corporate Criminal Liability Act . . . . .	7-31
§ 7.06	Conclusion. . . . .	7-35

**CHAPTER 8**

**Corporate Sentences for Federal Offenses:  
An Introduction to  
The Organizational Sentencing Guidelines**

§ 8.01	Transformation of Corporate Sentencing Under Federal Sentencing Guidelines. . . . .	8-6
§ 8.02	Historical Patterns of Corporate Sentencing . . . . .	8-6.3
	[1] Pre-Guideline Practices. . . . .	8-6.3
	[2] Changes in Corporate Sentencing Under the Sentencing Reform Act of 1984 . . . . .	8-6.4
	[3] A Precursor to Organizational Sentencing Standards: Sentencing Guidelines for Individuals. . . . .	8-7
	[4] Developing Sentencing Guidelines for Organizations . . . . .	8-8
§ 8.03	Overview of Organizational Sentencing Guidelines . . . . .	8-13
	[1] Underlying Principles . . . . .	8-13
	[2] Sentencing Covered by Guidelines . . . . .	8-13
	[a] Entities Covered . . . . .	8-13
	[b] Offenses Covered . . . . .	8-14
	[3] Federal Sentencing Procedures for Corporate Offenders. . . . .	8-16

**TABLE OF CONTENTS**

§ 8.04 Determining Recommended Corporate Sentences

    Under Guidelines . . . . . 8-21

    [1] Corporate Fines . . . . . 8-21

        [a] General Standards . . . . . 8-21

        [b] Antitrust Offenses . . . . . 8-22

        [c] Bribery Offenses . . . . . 8-23

        [d] Impact of Organizational  
            Culpability on Corporate Fines . . . . . 8-24

            [i] High Culpability  
                Organizational Offender . . . . . 8-24

            [ii] High Culpability  
                Organizational Offender with  
                Post-Offense Cooperation . . . . . 8-25

            [iii] Typical Organizational  
                Offender . . . . . 8-25

            [iv] Organizational Offender with a  
                Weak Compliance Program . . . . . 8-25

            [v] Model Organizational Offender  
                with an Effective  
                Compliance Program . . . . . 8-26

            [vi] Organizational Offender with  
                No Compliance Program,  
                but Effective Post-Offense  
                Response . . . . . 8-26

    [2] Other Corporate Sentences: Restitution,  
        Remedial, and Probation  
        Requirements . . . . . 8-27

§ 8.05 Future Impact of the Guidelines on Corporate  
    Criminal Liability . . . . . 8-28

    [1] Prosecutorial Impact . . . . . 8-29

        [a] More Numerous Prosecutions . . . . . 8-29

        [b] Expanded Prosecutions . . . . . 8-31

        [c] Changing Prosecutorial Discretion  
            Patterns . . . . . 8-32

        [d] Prosecutorial Trends Under  
            Guidelines . . . . . 8-33

        [e] [Reserved] . . . . . 8-45

        [f] Enforcement of Deferred and  
            Non-Prosecution Agreements . . . . . 8-45

        [g] Increasing Use of Deferred and  
            Non-Prosecution Agreements . . . . . 8-46.53

            [i] Corporate Monitors . . . . . 8-46.55

            [ii] Payments . . . . . 8-46.55

            [iii] Compliance Programs . . . . . 8-46.55

            [iv] Agency Assistance . . . . . 8-46.56

            [v] Privilege Waivers . . . . . 8-46.56

            [vi] DOJ Cooperation . . . . . 8-46.56

            [vii] DOJ Termination . . . . . 8-46.57

            [viii] Possible Abuses . . . . . 8-46.57

**CORPORATE CRIMINAL LIABILITY**

[h]	The Aftermath of Deferred Prosecution Agreements: State Regulatory Responses to Admissions in Agreements . . . . .	8-46.61
[i]	Ongoing Fact Finding by Corporate Monitors . . . . .	8-46.62
[j]	Selection and Use of Corporate Monitors . . . . .	8-46.63
[i]	Considerations in Seeking Monitors . . . . .	8-46.64
[ii]	Procedures for Approval of Corporate Monitors . . . . .	8-46.74
[iii]	Continuing Review of Monitors . . . . .	8-46.75
[iv]	Concrete Costs of Monitoring Under DPA and NPA Agreements . . . . .	8-46.76
[v]	Increasingly Extensive Monitors' Powers . . . . .	8-46.78
[vi]	Unanticipated Risks of Corporate Monitors in Practice . . . . .	8-46.83
[vii]	Persons Selected as Corporate Monitors . . . . .	8-46.84
[k]	The Decision to Seek a Monitor . . . . .	8-46.85
[l]	Developing Roles of Corporations in Assisting Prosecutors . . . . .	8-46.87
[m]	Multiple Corporate Monitors in Cases of Systemic Compliance Mismanagement in Specialized Fields: Examples from the BP Plea Agreement . . . . .	8-46.89
[i]	Monitors' Duties . . . . .	8-46.89
[ii]	Resources Provided to the Monitors by BP . . . . .	8-46.90
[iii]	Powers of the Monitors . . . . .	8-46.91
[iv]	Monitors' Reviews and Reports . . . . .	8-46.91
[v]	Implications of Divided Monitoring Arrangements . . . . .	8-46.92
[n]	DOJ Considerations in Using Deferred Prosecution Agreements . . . . .	8-46.93
[i]	Increased Corporate Accountability . . . . .	8-46.93
[ii]	Consequences of Systematic Flaws . . . . .	8-46.94
[iii]	Criminal Justice Impacts of a DPA . . . . .	8-46.95



**TABLE OF CONTENTS**

xxxv

	[iv]	Lack of Individual Liability Reductions . . . . .	8-46.96
	[v]	Increasing Prosecutorial Choices and Corporate Justice Options . . . . .	8-46.96
	[vi]	Changes in Case Resolutions with NPAs and DPAs. . . . .	8-46.97
	[o]	Comparative Guidance on Deferred Prosecution Agreements— The UK Experience. . . . .	8-46.98
	[i]	DPA Consultation . . . . .	8-46.98
	[ii]	DPA Guidelines for Prosecutors . . . . .	8-46.102
	[iii]	UK Criminal Procedure Rules Regarding DPAs. . . . .	8-46.110
	[iv]	UK Serious Fraud Office Updated Provisions on Deferred Prosecution Agreements . . . . .	8-46.112
	[p]	Refining DPA and NPA Practices. . . . .	8-46.114
	[i]	Targeting Agreements . . . . .	8-46.115
	[ii]	Considerations in Negotiating Agreements . . . . .	8-46.117
	[iii]	Adjusting Corporate Leniency to Promote Individual Accountability and Deterrence . . . . .	8-46.119
	[iv]	Targeting Results in DPAs and NPAs . . . . .	8-46.121
	[q]	Shifts in Corporate Crime Policing Under DPAs and NPAs. . . . .	8-46.123
	[r]	Evaluating the Impacts of DPAs and NPAs on Criminal Prosecutions of Individuals. . . . .	8-46.125
	[s]	Assessing the Results of the Era of Deferred Prosecutions . . . . .	8-46.126
	[t]	Limitations on Judicial Review of DPAs. . . . .	8-46.130
	[u]	Reasons Behind DPAs and NPAs Without Individual Prosecutions . . . . .	8-46.135
	[v]	Expanding DPA and NPA Enforcement to Include CEO and CCO Certifications . . . . .	8-46.136
	[2]	Corporate Impact. . . . .	8-46.139
	[3]	Employee Impact. . . . .	8-46.142
§ 8.06		Constitutional and Statutory Restrictions on Organizational Sentencing Guidelines. . . . .	8-46.145
	[1]	Constitutional Restrictions . . . . .	8-46.145

## CORPORATE CRIMINAL LIABILITY

	[a]	Authority to Issue Guidelines . . . . .	8-46.145
	[b]	Jury Trial Limitations. . . . .	8-48
	[c]	Other Constitutional Challenges . . . . .	8-49
	[d]	Remaining Constitutional Issues . . . . .	8-50
	[2]	Statutory Restrictions . . . . .	8-57
§ 8.07		Unresolved Policy Questions Underlying Organizational Sentencing Guidelines. . . . .	8-64
	[1]	Governing Sentencing Rationales. . . . .	8-64
	[a]	Reconciling Divergent Sentencing Principles . . . . .	8-64
	[b]	Just Deserts. . . . .	8-64
	[c]	Utilitarian Deterrence . . . . .	8-64.4
	[d]	Preventive Incentives . . . . .	8-64.5
	[e]	Combining Sentencing Proposals from Multiple Viewpoints . . . . .	8-64.7
	[2]	Real Offense Versus Charged Offense Sentencing. . . . .	8-65
	[3]	Role of Individual Sentencing Patterns . . . . .	8-67
§ 8.08		Effect of Guidelines on Criminal Law Enforcement in Corporate Organizations . . . . .	8-69
	[1]	Corporations as Public Trustees Concerning Prevention and Detection of Internal Crimes. . . . .	8-69
	[2]	Agency Analysis of Criminal Law Enforcement Through Corporate Trustees. . . . .	8-70
	[3]	Demands for Private Policing in Corporate Organizations . . . . .	8-71
	[4]	Altered Managerial Relationships Following Internalization of Corporate Law Enforcement . . . . .	8-73
	[5]	Changes in Corporate Legal Practice. . . . .	8-76
	[6]	Ongoing Impacts of Organizational Sentencing Guidelines . . . . .	8-77
	[a]	Expanded Governmental Criteria for Good Compliance Practices . . . . .	8-77
	[b]	Broadened Impact of Compliance Programs on Corporate Liability. . . . .	8-80
	[i]	Broadened Impact on Criminal Penalties . . . . .	8-80
	[ii]	Consideration in Charging Decisions. . . . .	8-81
	[iii]	Impacts on Regulatory Enforcement Actions and Penalties . . . . .	8-81
	[iv]	Reductions in Corporate Civil Liability . . . . .	8-81
	[v]	Criteria for Civil Liability of Corporate Directors and Officers. . . . .	8-82

## TABLE OF CONTENTS

xxxvii

	[c] Ongoing Involvement of Federal Prosecutors in Corporate Reforms and Crime Prevention . . . . .	8-82
§ 8.09	Risks and Opportunities Concerning Corporate Criminal Liability . . . . .	8-86
§ 8.10	Impacts of the Organizational Sentencing Guidelines: Historical Assessments . . . . .	8-87
	[1] Impacts of the Guidelines: A 20th Anniversary Assessment. . . . .	8-87
	[a] Serving as a Model for Prosecutorial and Regulatory Standards . . . . .	8-88
	[b] International Impacts . . . . .	8-88
	[c] Focusing Attention on Compliance Programs . . . . .	8-88
	[d] Increasing Expertise . . . . .	8-89
	[2] Continuing Challenges After 20 Years . . . . .	8-89
	[3] Sentencing Commission Evaluation of Guidelines Impact: A 30th Anniversary Assessment . . . . .	8-91
§ 8.11	Comparative Sentencing Approaches Outside the United States: International Corporate Sentencing Standards . . . . .	8-92.1
	[1] United Kingdom Guidelines on Corporate Sentencing. . . . .	8-92.1
§ 8.12	Research on Public Perceptions of Organizational Sentencing Factors . . . . .	8-99

## CHAPTER 9

### Offense Severity Characteristics Determining Corporate Fines

§ 9.01	Introduction . . . . .	9-2
§ 9.02	The Impact of Offense Severity Measures on Corporate Fines . . . . .	9-4
§ 9.03	Fines Based on Illegal Gains . . . . .	9-5
	[1] Rationales for Varying Corporate Fines Based on Illegal Gains. . . . .	9-5
	[2] Limits on Gain-Based Deterrents. . . . .	9-6
	[a] Economic Irrationality in Organizational Behavior . . . . .	9-6
	[b] Low Prosecution Rates. . . . .	9-7
	[c] Reduced Multipliers Based on Corporate Culpability Measures . . . . .	9-10
	[3] Measuring Offender Gains . . . . .	9-11
	[a] Realized Gains . . . . .	9-11
	[b] Anticipated but Unrealized Gains . . . . .	9-13
	[c] Strategic Gains . . . . .	9-14

**CORPORATE CRIMINAL LIABILITY**

	[d]	Compliance Cost Savings . . . . .	9-15
	[e]	Agent Monitoring Cost Savings . . . . .	9-17
§ 9.04		Fines Based on Victim Losses . . . . .	9-20
	[1]	Rationales for Varying Corporate Fines Based on Victim Losses. . . . .	9-20
	[2]	Limits on Loss-Based Incentives . . . . .	9-23
	[a]	Separation of Accountability for Compliance Expenses and Corporate Fines . . . . .	9-23
	[b]	Low Prosecution Rates. . . . .	9-24
	[c]	Losses Ignored in Fine Setting . . . . .	9-24
	[3]	Loss Measurement. . . . .	9-27
	[a]	Immediate Loss . . . . .	9-28
	[b]	Consequential Losses . . . . .	9-31
	[c]	Further Intended but Unrealized Losses. . . . .	9-33
	[4]	Special Loss Measures for Specific Offense Categories . . . . .	9-35
	[a]	Stolen or Counterfeit Credit Cards and Access Devices: Purloined Numbers and Codes. . . . .	9-35
	[b]	Government Benefits . . . . .	9-35
	[c]	Davis-Bacon Act Violations . . . . .	9-35
	[d]	Ponzi and Other Fraudulent Investment Schemes . . . . .	9-36
	[e]	Other Unlawful Misrepresentation Schemes . . . . .	9-36
	[f]	Bribery Offenses. . . . .	9-36
	[g]	Antitrust Offenses. . . . .	9-37
	[h]	Tax Offenses. . . . .	9-37
§ 9.05		Fines Based on Offense Levels . . . . .	9-39
	[1]	Translating Offense Levels into Corporate Fines . . . . .	9-39
	[2]	Reconsidering Gains and Losses in Determining Offense Levels . . . . .	9-39
	[3]	Types of Corporate Fines Governed by Offense Levels . . . . .	9-40
	[4]	Determining Offense Levels for Group Conduct. . . . .	9-41
§ 9.06		Incapacitating Fines for Criminal Purpose Organizations . . . . .	9-43
	[1]	Rationale for Incapacitating Fines . . . . .	9-43
	[2]	Grounds for Imposing Incapacitating Fines. . . . .	9-44
	[a]	Repeated Offenses . . . . .	9-44
	[b]	Illegal Conduct with Highly Serious Impacts. . . . .	9-47
§ 9.07		Gaps in Severity Measures: Some Illustrative Cases . . . . .	9-51

## TABLE OF CONTENTS

xxxix

[1]	Statutory Fine Caps as Limits on Corporate Fines . . . . .	9-51
[2]	Estimating Losses from Altered Conduct: The Special Treatment of Antitrust Offenses . . . . .	9-53
[3]	Measuring the Value of Information . . . . .	9-58
[4]	Food and Drug Offenses: Distinguishing Between Economic Fraud and Health and Safety Threats . . . . .	9-61
[5]	Environmental Crimes: Future Challenges in Measuring Harm and Setting Corporate Fines . . . . .	9-65
	[a] Measuring the Seriousness of Environmental Offenses . . . . .	9-65
	[b] Proposed Environmental Offense Sentencing Guidelines for Organizational Offenders. . . . .	9-68
§ 9.08	Conclusion. . . . .	9-76

## CHAPTER 10

### Offender Culpability Characteristics Determining Corporate Fines

§ 10.01	The Role of Corporate Culpability in Federal Sentencing. . . . .	10-2
	[1] Adjusting Corporate Fines to Match Organizational Culpability . . . . .	10-2
	[2] Underlying Test for Organizational Culpability. . . . .	10-3
§ 10.02	Objectives of Varying Corporate Fines Based on Organizational Culpability . . . . .	10-7
§ 10.03	Corporate Culpability Indicators. . . . .	10-10
	[1] Managerial Fault . . . . .	10-10
	[a] Executive Involvement. . . . .	10-10
	[b] Middle Manager Involvement . . . . .	10-12
	[c] Managerial Tolerance. . . . .	10-13
	[d] Multiple Types of Managerial Involvement in a Single Case. . . . .	10-15
	[2] Preventive Fault. . . . .	10-15
	[a] Failure to Implement Preventive Law Compliance Programs . . . . .	10-16
	[i] Compliance Standards . . . . .	10-18
	[ii] Program Leadership. . . . .	10-18
	[iii] Avoiding Irresponsible Delegation of Authority . . . . .	10-19
	[iv] Communicating Standards and Procedures . . . . .	10-19

**CORPORATE CRIMINAL LIABILITY**

	[v] Monitoring, Auditing, and Evaluation . . . . .	10-19
	[vi] Promoting and Enforcing the Program . . . . .	10-20
	[vii] Offense Responses . . . . .	10-20
	[b] Failure to Prevent Repeated Misconduct . . . . .	10-21
	[c] Commission of an Offense in Violation of a Judicial Order or Probation Condition . . . . .	10-23
	[3] Reactive Fault . . . . .	10-25
	[a] Acceptance of Responsibility . . . . .	10-26
	[b] Aid to Public Authorities . . . . .	10-27
	[c] Willful Obstruction of Justice . . . . .	10-30
§ 10.04	Limitations of Fault-Based Corporate Fines . . . . .	10-31
	[1] Criminal Liability Despite Low Corporate Culpability . . . . .	10-31
	[2] Uncertain Organizational Effectiveness in Promoting Compliance . . . . .	10-32
	[3] Adverse Incentives Created by Compliance System Rewards . . . . .	10-34
	[4] Sentencing Process Limitations . . . . .	10-35
§ 10.05	Conclusion: Critical Functions Served by “Carrot and Stick” Sentencing . . . . .	10-38

**CHAPTER 11**

**Adjusting Corporate Fines: Sentencing Discretion,  
Guideline Departures, and Fine Reductions**

§ 11.01	Introduction . . . . .	11-4
§ 11.02	Considerations in Setting Fines Within Recommended Ranges . . . . .	11-5
	[1] Role of Judicial Discretion . . . . .	11-5
	[2] Fine Adjustments Based on Federal Sentencing Goals . . . . .	11-7
	[3] Fine Adjustments Based on an Organization’s Role in an Offense . . . . .	11-8
	[4] Fine Adjustments Based on Collateral Consequences of a Conviction . . . . .	11-9
	[5] Fine Adjustments Based on Nonpecuniary Losses . . . . .	11-9
	[6] Fine Adjustments Based on Involvement of a Vulnerable Victim . . . . .	11-10
	[7] Fine Adjustments Based on the Prior Criminal Record of a High-Level Participant . . . . .	11-10
	[8] Fine Adjustments Based on Prior Civil or Criminal Misconduct . . . . .	11-11

**TABLE OF CONTENTS**

	[9]	Fine Adjustments Based on Exceptionally High or Low Culpability Scores . . . . .	11-13
	[10]	Fine Adjustments Based on the Partial Presence of a Culpability Indicator . . . . .	11-14
	[11]	Fine Adjustments Based on Statutory Factors . . . . .	11-15
		[a] Defendant’s Income, Earning Capacity, and Financial Resources . . . . .	11-15
		[b] Financial Burdens on Defendant . . . . .	11-16
		[c] Financial Burdens on Persons Dependent on Defendant . . . . .	11-17
		[d] Pecuniary Losses . . . . .	11-17
		[e] Restitution . . . . .	11-18
		[f] Need to Deprive Defendant of Illegal Gains . . . . .	11-19
		[g] Ability of Defendant to Pass Expense of a Fine on to Customers or Other Persons . . . . .	11-20
		[h] Organization Size . . . . .	11-21
		[i] Disciplinary and Reformative Measures . . . . .	11-22
	[12]	Fine Adjustments Based on Factors Considered in Determining Recommended Fine Ranges . . . . .	11-23
§ 11.03		Departures from Recommended Fine Ranges . . . . .	11-24
	[1]	General Standards for Guideline Departures . . . . .	11-24
	[2]	Justifying Guideline Departures . . . . .	11-26
	[3]	Factors Supporting Downward Departures . . . . .	11-28
		[a] Substantial Assistance to Authorities . . . . .	11-28
		[b] Public Entities . . . . .	11-28.1
		[c] Members or Beneficiaries of Organization Victimized . . . . .	11-29
		[d] Remedial Costs Greatly Exceeding Corporate Gain . . . . .	11-29
		[e] Exceptionally Low Organizational Culpability . . . . .	11-29
		[f] Wrongful Conduct by Victim . . . . .	11-30
		[g] Avoiding Greater Harm . . . . .	11-31
		[h] Coercion and Duress . . . . .	11-32
		[i] Diminished Capacity . . . . .	11-32
		[j] Voluntary Self-Reporting of Otherwise Undetectable Offenses . . . . .	11-32
	[4]	Factors Supporting Upward Departures . . . . .	11-33
		[a] Death or Bodily Injury . . . . .	11-33
		[b] Threats to National Security . . . . .	11-35
		[c] Threats to the Environment . . . . .	11-35

**CORPORATE CRIMINAL LIABILITY**

	[d]	Threats to a Market . . . . .	11-35
	[e]	Official Corruption . . . . .	11-36
	[f]	Operation of Required Law Compliance Program . . . . .	11-36
	[g]	Exceptionally High Organizational Culpability . . . . .	11-37
	[h]	Extreme Psychological Injury . . . . .	11-38
	[i]	Property Damage or Loss . . . . .	11-39
	[j]	Disruption of Governmental Function . . . . .	11-39
	[k]	Criminal Purpose . . . . .	11-40
	[l]	Endangerment of Public Health or Safety . . . . .	11-40
	[m]	Violent Conduct . . . . .	11-40
[5]		Additional Factors Justifying Departures . . . . .	11-41
	[a]	Unusual Instances of Factors Influencing Court Discretion . . . . .	11-41
	[b]	Factors Influencing Sentencing for Other Types of Offenses . . . . .	11-42
	[c]	Departure Criteria Not Specified in the Guidelines . . . . .	11-42
[6]		Additional Guideline Departures on Constitutional Grounds . . . . .	11-43
	[a]	The Court's Analysis in <i>Booker</i> . . . . .	11-44
		[i] Jury Trial Guarantees and Sentencing Evaluations . . . . .	11-44
		[ii] A Remedy Retaining Portions of the Guideline System . . . . .	11-44.1
	[b]	The Modified Impact of the Sentencing Guidelines After <i>Booker</i> . . . . .	11-44.2
	[c]	Beyond the Guidelines: Additional Considerations in Sentencing . . . . .	11-44.4
	[d]	Results Under Post- <i>Booker</i> Sentencing Standards . . . . .	11-44.6
	[e]	Changes in the Sentencing Guidelines' Impact . . . . .	11-44.6
		[i] Diminished Influence of Prosecutors in Plea Bargaining Negotiations . . . . .	11-44.7
		[ii] Ability of Courts to Reduce Sentences for Cooperation Without Concurrence of Prosecutors . . . . .	11-44.7
		[iii] Expanded Grounds for Sentence Reductions and Increases . . . . .	11-44.8
		[iv] Increased Complexity of Sentencing Proceedings . . . . .	11-44.9



**TABLE OF CONTENTS**

xliii

	[f]	Continuing Importance of the Organizational Sentencing Guidelines . . . . .	11-44.9
		[i] Primary Predictors of Sentencing Results . . . . .	11-44.9
		[ii] Bases for Prosecutorial Discretion . . . . .	11-44.10
		[iii] Incorporation in Charging and Penalty Standards for Civic Offenses. . . . .	11-44.11
	[g]	Compliance Program Evaluations After <i>Booker</i> . . . . .	11-44.12
	[h]	Implementing <i>Booker</i> : The Supreme Court Clarifies the Impact of the Advisory Sentencing Guidelines . . .	11-44.13
		[i] <i>Rita v. United States</i> . . . . .	11-44.13
		[ii] <i>Kimbrough v. United States</i> . . .	11-44.16
		[iii] <i>Gall v. United States</i> . . . . .	11-44.19
§ 11.04		Fine Reductions to Accommodate Limited Corporate Resources. . . . .	11-44.23
	[1]	Lowering Fines to Reduce Impact on Corporate Viability. . . . .	11-44.23
	[2]	Procedures for Fine Reductions . . . . .	11-44.23
		[a] Preliminary Assessment of Defendant’s Ability to Pay a Fine . . . . .	11-44.23
		[b] Additional Assessment of Fine Payment Impact Following Complete Sentencing Analysis . . . .	11-45
		[c] Reassessment of Fine Payment Impact During Term of Deferred Payment Plan . . . . .	11-45
	[3]	Fine Reduction Amounts . . . . .	11-46
		[a] Reductions to Ensure Restitution Payments . . . . .	11-46
		[b] Reductions to Protect Legitimate Businesses . . . . .	11-47
		[c] Threats to Company Existence Justifying Fine Reductions . . . . .	11-47
		[d] Measuring Firm’s Ability to Pay. . . . .	11-48
	[4]	Payment Terms Allowing Deferred Fine Payments. . . . .	11-50
		[a] Measuring Firm’s Ability to Make Immediate Payment of Fine . . . . .	11-50
		[b] Installment Payment Arrangements . . .	11-51
	[5]	DOJ Guidance on Fine Modifications Based on Corporate Inability to Pay. . . . .	11-52
		[a] Information Required . . . . .	11-53
		[b] Factors Considered by Prosecutors . . .	11-54

**CORPORATE CRIMINAL LIABILITY**

	[c] Special Reviews Within the DOJ . . . .	11-55
	[d] Implications for Corporate Fines . . . .	11-55
§ 11.05	Corporate Fine Reductions to Offset Fines Paid by Owners of Closely Held Firms . . . . .	11-57
§ 11.06	Conclusion . . . . .	11-59

**CHAPTER 12****Beyond Fines: Innovative Corporate Sentences**

§ 12.01	Innovative Sentencing Options . . . . .	12-2
	[1] Significance of Nontraditional Corporate Sanctions . . . . .	12-2
	[2] Role of Nontraditional Sanctions in Corporate Sentencing . . . . .	12-4
§ 12.02	Remedial Sanctions . . . . .	12-6
	[1] Immediate Restitution . . . . .	12-6
	[a] Judicial Discretion Concerning Restitution . . . . .	12-9
	[b] Eligible Victims . . . . .	12-12
	[c] Compensable Injuries . . . . .	12-18
	[i] Damage to or Loss of Property . . . . .	12-18
	[ii] Bodily Injury or Death . . . . .	12-19
	[iii] Excluded Damage . . . . .	12-19
	[iv] Judicial Authority to Order Additional Restitution . . . . .	12-20
	[d] Withholding Restitution Due to Complication and Prolongation of the Sentencing Process . . . . .	12-21
	[e] Constitutional Limitations on Restitution Sentences . . . . .	12-21
	[2] Deferred Restitution . . . . .	12-23
	[3] Remedial Orders . . . . .	12-25
	[4] Community Service . . . . .	12-27
	[5] Notices to Crime Victims . . . . .	12-30
§ 12.03	Preventive Sanctions . . . . .	12-33
	[1] Crime Prevention Through Corporate Probation Sentences . . . . .	12-33
	[a] Statutory Standards for Corporate Probation Sentences . . . . .	12-33
	[b] Guideline Provisions Concerning Probation Sentences . . . . .	12-36
	[c] Lessons from Past Corporate Probation Sentences . . . . .	12-37
	[2] Mandatory Offender Reforms . . . . .	12-39
	[a] The Proper Role of Compelled Reforms . . . . .	12-39

## TABLE OF CONTENTS

xlv

	[b] When Reforms Are Required . . . . .	12-40
	[c] Types of Required Reforms . . . . .	12-41
	[i] Mandatory Compliance Program Changes and Monitoring . . . . .	12-41
	[ii] Business Practice Reforms . . . . .	12-42
	[d] A Strategy for Imposing Reform Requirements . . . . .	12-44
	[i] Voluntary Compliance . . . . .	12-45
	[ii] Enforced Self-Regulation . . . . .	12-46
	[iii] Mandated Restrictions with Enforcement Discretion . . . . .	12-48
	[iv] Mandated Restrictions with Defined or Presumed Sanctions . . . . .	12-48
	[e] An Example of Probation-Imposed Reforms . . . . .	12-49
[3]	Enhanced Offense Disclosures . . . . .	12-52
[4]	Adverse Publicity . . . . .	12-53
	[a] Examples of Probation Terms Compelling Adverse Advertising . . . . .	12-56
[5]	Punitive Probation Terms . . . . .	12-58
	[a] Examples of Public Service Requirements in Probation Terms . . . . .	12-59
	[b] Strategies for Imposing Preventative Sanctions . . . . .	12-60
§ 12.04	Conclusion . . . . .	12-62

## CHAPTER 13

### Collateral Consequences of Corporate Crime

§ 13.01	Introduction . . . . .	13-6
	[1] Broad Collateral Consequences of Corporate Criminal Misconduct: Lessons from the BP Oil Well Blowout . . . . .	13-6.1
	[a] SEC-Imposed Penalties . . . . .	13-7
	[b] Additional Civil Liability to the Federal Government . . . . .	13-7
	[c] Private Damage Lawsuits . . . . .	13-8
	[d] Shareholder Derivative Suits . . . . .	13-9
	[e] Private Securities Fraud Actions . . . . .	13-9
	[f] ERISA, RICO, and Contractual Claims . . . . .	13-10
	[g] Miscellaneous Litigation Among Platform Owners, Operators, and Working Interest Holders . . . . .	13-10

**CORPORATE CRIMINAL LIABILITY**

	[h]	Summary of Collateral Consequences of the BP Well Blowout . . . . .	13-11
§ 13.02	Civil	Penalties for Criminal Conduct . . . . .	13-12.1
	[1]	Relationship to Criminal Penalties . . . . .	13-12.1
	[a]	DOJ Policy on Coordination of Penalties in Parallel Investigations and Proceedings . . . . .	13-12.2
	[2]	SEC Penalty Standards . . . . .	13-12.4
	[a]	Harm to Shareholders . . . . .	13-12.4
	[b]	Direct Benefit to Corporation from Offense . . . . .	13-12.5
	[c]	Whether Penalties Will be Used to Compensate Injuries to Shareholders . . . . .	13-12.5
	[d]	Need for Deterrence . . . . .	13-12.5
	[e]	Injuries to Innocent Parties . . . . .	13-12.5
	[f]	Scope of Participation in the Violation Within the Corporation . . . . .	13-12.6
	[g]	Replacement of Corporate Personnel Responsible for the Violation . . . . .	13-12.6
	[h]	Level of Intent Underlying an Offense . . . . .	13-12.7
	[i]	Difficulty of Offense Detection . . . . .	13-12.7
	[j]	Remedial Steps Prior to SEC Enforcement Actions . . . . .	13-12.7
	[k]	Cooperation with Law Enforcement Efforts . . . . .	13-12.8
	[1]	Additional SEC Penalties for Material Misstatements After Major Corporate Misconduct: Investigations and Sanctions Following the BP Well Blowout . . . . .	13-12.9
	[m]	SEC Enforcement Actions Responding to Weak Compliance Programs Prior to Offenses . . . . .	13-12.12
	[n]	SEC Assessment of Compliance Program Quality Indicators . . . . .	13-12.13
	[3]	SEC Whistleblower Incentives . . . . .	13-12.17
	[a]	Building on Past Whistleblower Revelations . . . . .	13-12.17
	[b]	Creating Strong Whistleblower Incentives . . . . .	13-12.18
	[c]	Nature of Information Triggering a Reward . . . . .	13-12.18
	[d]	Determining Amounts for Payments . . . . .	13-12.19
	[e]	SEC Discretion Regarding the Amount of Payments . . . . .	13-12.19
	[f]	Parties Barred from Receiving Bounty Payments . . . . .	13-12.20

**TABLE OF CONTENTS**

xlvii

	[g]	Anti-Retaliation Provisions . . . . .	13-12.20
		[i] Supreme Court Interprets Whistleblower Protections Narrowly . . . . .	13-12.21
	[h]	Problems Raised by the Bounty Provisions . . . . .	13-12.22
		[i] Emphasis on Rapid External Disclosures . . . . .	13-12.22
		[ii] Undercutting Incentives of Corporate Fact Finders. . .	13-12.24
		[iii] Encouraging Conduct that Enhances Corporate Penalties . . . . .	13-12.24
	[i]	Numbers and Impacts of SEC Whistleblower Reports . . . . .	13-12.25
	[j]	Special Ethical Considerations Regarding Whistleblower Reports by Corporate Attorneys . . . . .	13-12.29
	[k]	SEC Whistleblower Changes in 2020 . . . . .	13-12.32
[4]		SEC Use of Prosecution Agreements . . . . .	13-12.34
	[a]	SEC Standards for DPAs and NPAs . . . . .	13-12.34
		[i] Criteria for SEC Leniency in Corporate Cases . . . . .	13-12.35
		[ii] NPA Standards for SEC Agreements . . . . .	13-12.36
		[iii] DPA Standards for SEC Agreements . . . . .	13-12.37
	[b]	Examples of SEC NPAs . . . . .	13-12.37
		[i] Carter’s Inc. . . . .	13-12.37
	[c]	Examples of SEC DPAs . . . . .	13-12.39
		[i] Tenaris S.A. . . . .	13-12.39
[5]		CFTC Whistleblower Incentives . . . . .	13-12.41
	[a]	Procedures for Submitting Information and Claims . . . . .	13-12.42
	[b]	Information Required to be Disclosed by a Whistleblower . . . .	13-12.43
	[c]	Volume of Whistleblower Activity Anticipated by the CFTC . . . . .	13-12.44
§ 13.03		Suspension and Debarment . . . . .	13-12.46
	[1]	Business Impacts of Suspension and Debarment . . . . .	13-12.46
		[a] Characteristics of Suspension and Debarment . . . . .	13-13
		[b] Restrictions on Contracting Opportunities Due to Suspension and Debarment . . . . .	13-14

**CORPORATE CRIMINAL LIABILITY**

	[c]	Additional Consequences of Suspension and Debarment . . . . .	13-14
[2]		Criminal Conduct as a Basis for Suspension and Debarment . . . . .	13-15
	[a]	Crimes Supporting Suspension and Debarment . . . . .	13-15
	[b]	Relationship of Crimes to Contractor Fitness . . . . .	13-16
	[c]	Mitigating Responses to Corporate Crimes . . . . .	13-17
[3]		Standards of Proof Governing Suspension and Debarment Following Criminal Conduct . . . . .	13-18
	[a]	Suspension . . . . .	13-18
	[b]	Debarment . . . . .	13-18
	[c]	Judicial Review . . . . .	13-19
[4]		Suspension and Debarment Under State and Local Standards . . . . .	13-20
	[a]	Variations in State and Local Standards . . . . .	13-20
	[b]	Impact of ABA’s Model Code . . . . .	13-20
[5]		Case Studies of Corporate Suspension and Debarment Based on Criminal Activity . . . . .	13-21
	[a]	Worldcom/MCI . . . . .	13-21
	[b]	Boeing . . . . .	13-22.2
	[c]	Arthur Anderson . . . . .	13-22.3
	[d]	Enron . . . . .	13-23
	[e]	Other Suspension and Debarment Reviews . . . . .	13-24
	[i]	Sprint . . . . .	13-24
	[ii]	Qwest . . . . .	13-24.1
	[f]	BP . . . . .	13-24.1
	[i]	Past BP Incidents Leading to Suspension . . . . .	13-24.2
	[ii]	EPA Suspension of BP . . . . .	13-24.3
	[iii]	BP Efforts to Avoid and Limit Suspension . . . . .	13-24.4
	[iv]	Potential Impacts on BP . . . . .	13-24.5
	[v]	Resolution of BP’s Debarment and Suspension . . . . .	13-24.6
	[vi]	Distributed Culpability Underlying the Deepwater Horizon Blowout . . . . .	13-24.7
§ 13.04		Exclusion from Government Programs . . . . .	13-25
	[1]	Federal “Common Rule” . . . . .	13-25
	[2]	Grounds for Suspension or Debarment from Nonprocurement Programs . . . . .	13-25

## TABLE OF CONTENTS

xlix

	[3] Impact of Suspension or Debarment from Nonprocurement Programs . . . . .	13-26
§ 13.05	Loss of Licenses . . . . .	13-28
§ 13.06	Constitutional Limitations on Civil Penalties for Criminal Misconduct . . . . .	13-29
	[1] Double Jeopardy . . . . .	13-29
	[2] Excessive Punishment . . . . .	13-30
	[3] Due Process . . . . .	13-32
§ 13.07	Coordinating Criminal and Civil Sanctions . . . . .	13-35
	[1] Need for Coordination . . . . .	13-35
	[2] Coordination Approaches . . . . .	13-35
	[3] Federal Sentencing Procedures . . . . .	13-35
§ 13.08	Civil Damage Liability of Corporations Based on Criminal Conduct . . . . .	13-38
	[1] Federal Standards . . . . .	13-38
	[a] Civil Damage Claims Expressly Authorized Under Particular Criminal Statutes . . . . .	13-38
	[b] Damage Claims for Patterns of Offenses—Civil RICO Liability . . . . .	13-38
	[c] Implied Private Rights of Action for Violations of Federal Criminal Laws . . . . .	13-43
	[2] State Standards . . . . .	13-45
	[a] Private Claims Created Under Criminal Statutes . . . . .	13-45
	[b] Civil Damage Recoveries Under State RICO Statutes . . . . .	13-45
	[c] Negligence Liability Based on Illegal Conduct . . . . .	13-47
	[3] Impacts of Shareholder Suits . . . . .	13-52
§ 13.09	Civil Damage Liability of Corporate Officers and Directors Based on or Tolerating Illegal Corporate Activities . . . . .	13-54
	[1] Civil Liability for Knowingly Causing Illegal Corporate Conduct . . . . .	13-54
	[2] Liability of Corporate Officers and Directors for Inadequate Law Compliance Systems . . . . .	13-55
	[a] Required Management Attention to Corporate Law Compliance . . . . .	13-56
	[b] Managerial Due Diligence Concerning Law Compliance . . . . .	13-56
	[c] Director and Officer Liability in Connection with Corporate Compliance Efforts . . . . .	13-59
	[d] Special Liability Standards Under Corporate Charters . . . . .	13-61

## CORPORATE CRIMINAL LIABILITY

[e]	<i>Caremark</i> : A Practical Example of the Risks. . . . .	13-63
[f]	Types of Sustained Inattention to Law Compliance Leading to Officer and Director Liability. . . . .	13-66
[g]	Perils of Poor Reactions to Revealed Misconduct. . . . .	13-69
[h]	Characteristics of Law Compliance Programs Meeting Directors' and Officers' Duties of Care. . . . .	13-76
[i]	Beyond <i>Caremark</i> : Standards for Compliance Due Care in Delaware Corporations. . . . .	13-76.5
[i]	Lower Court Interpretations of the Stone Standards. . . . .	13-76.14
[ii]	Assessing Breaches of the Ongoing Duty to Monitor Compliance Systems. . . . .	13-76.14
[iii]	Assessing Breaches of Duty to React to Evidence of Possible Misconduct. . . . .	13-76.17
[iv]	Sufficient Director Actions. . . . .	13-76.18
[j]	Understanding What <i>Caremark</i> Demands: Further Guidance. . . . .	13-76.20
[i]	Components of the <i>Caremark</i> Test. . . . .	13-76.21
[ii]	Reconciling Enterprise Risk Management and Compliance Management Failures under <i>Caremark</i> . . . . .	13-76.25
[k]	Clarifying Corporate Officers' Duties Concerning Compliance Oversight. . . . .	13-76.28
[3]	Civil Damage Liability of Corporations and Company Officials Based on Inadequate Disclosures of Illegal Corporate Conduct. . . . .	13-76.30
[4]	Compliance Management in Context: Lessons from the Corporate Director's Guidebook. . . . .	13-76.31
[a]	Actions of New Directors. . . . .	13-76.33
[b]	Ongoing Responsibilities. . . . .	13-76.33
[c]	Compliance Information Systems. . . . .	13-76.34
[d]	Oversight of Risk Management Systems. . . . .	13-76.34
[e]	Oversight of Compliance Programs. . . . .	13-76.35



## TABLE OF CONTENTS

li

	[f] Specific Compliance Program Elements . . . . .	13-76.35
	[g] Quality of Information Reviewed by the Board . . . . .	13-76.36
	[h] Interactions with Legal Counsel . . . . .	13-76.36
	[i] Responsibilities of Audit Committees . . . . .	13-76.36
	[j] Impact of the Guidebook’s Standards . . . . .	13-76.37
§ 13.10	Loss of Civil Claims . . . . .	13-77
§ 13.11	Corporate Harm from Adverse Offense Publicity . . . . .	13-78
§ 13.12	Criminal Liability of Individuals in Connection With Corporate Offenses . . . . .	13-81
	[1] Liability of Individuals for Participation in Corporate Offenses . . . . .	13-81
	[2] Liability of Individuals for Aiding or Concealing Offenses . . . . .	13-82
	[a] Accomplice Liability . . . . .	13-82
	[b] Liability of Accessories After the Fact . . . . .	13-83
	[c] Misprision of a Felony . . . . .	13-84
	[d] Witness Tampering . . . . .	13-84
	[e] Obstruction of Justice . . . . .	13-86
	[f] Perjury and False Statements Offenses . . . . .	13-88
	[3] Conspiracy Liability for Offenses by Fellow Corporate Employees . . . . .	13-90
	[4] Liability of Controlling Officers with Responsible Shares in Offenses by Subordinates . . . . .	13-91
	[a] General Standards . . . . .	13-91
	[b] Identifying Managers with Responsible Shares in Employee Offenses . . . . .	13-92
	[c] The Objective Impossibility Defense . . . . .	13-93
	[d] Range of Offenses Subject to Responsible Share Liability . . . . .	13-94
	[5] Liability of Corporate Managers for Failures to Report Detected Offenses . . . . .	13-97
§ 13.13	Regulatory Consequences of Criminal Convictions . . . . .	13-100
	[1] Implications of Criminal Liability Due to Violation of a DPA or NPA . . . . .	13-100
	[a] Potential Exclusion from Regulated Activities . . . . .	13-100
	[b] Restoring Regulators’ Trust . . . . .	13-101

**Preventing Corporate Criminal Liability  
with Law Compliance Programs**

§ 14.01	Liability Reductions Through Law Compliance Programs . . . . .	14-8
	[1] Preventing Illegal Activities . . . . .	14-9
	[2] Avoiding Corporate Liability for Employee Misconduct . . . . .	14-10.3
	[3] Meeting Legal Requirements . . . . .	14-11
	[3A] Statutory Requirements for Health Care Compliance Programs . . . . .	14-13
	[a] Nursing Facilities: Program Requirements and Implementation Timetables . . . . .	14-14
	[b] Requirements for Compliance Programs of Other Health Care Providers . . . . .	14-16
	[4] Influencing Charging Decisions . . . . .	14-17
	[a] Limitations on Revelations of Prosecutorial Consideration of Compliance and Ethics Programs . . . . .	14-20
	[5] Reducing Criminal Penalties . . . . .	14-22
	[6] Minimizing Regulatory Auditing and Oversight . . . . .	14-25
	[7] Additional Advantages of Law Compliance Programs . . . . .	14-27
	[a] Reducing Civil Penalties . . . . .	14-27
	[b] Competitive Gains . . . . .	14-29
	[c] Satisfying Corporate Governance Obligations . . . . .	14-31
	[d] Promoting Ethical Values . . . . .	14-32
	[e] Qualifying for Government Contracts: Compliance Program Standards for Federal Contractors . . . . .	14-33
	[i] Code of Business Ethics and Conduct . . . . .	14-35
	[ii] Practices Promoting Compliance with Code . . . . .	14-35
	[iii] Code Awareness and Compliance Control Systems . . . . .	14-36
	[iv] Display of Hotline Posters . . . . .	14-38
	[v] Contractor Self-Reporting of Evidence of Criminal Violations . . . . .	14-39
	[vi] Implications of the Federal Contracting Standards . . . . .	14-40

## TABLE OF CONTENTS

liii

	[vii] Impacts of Contractor Disclosure Rules on Corporate Value . . . . .	14-40.6
	[viii] Potential Government Uses of Information Submitted by Contractors . . . . .	14-40.8
	[ix] Opportunities to Assess Broader Management Practices . . . . .	14-40.10
	[f] Other Potential Impacts of Compliance Programs on Liability . . . . .	14-40.12
	[g] Operational Advantages of Compliance Programs Beyond Liability and Penalty Reductions . . . . .	14-40.13
§ 14.02	Evaluating Compliance Programs Under the Federal Sentencing Guideline Standards . . . . .	14-40.16
	[1] Importance of the Guidelines' Standards for a Generally Effective Compliance Program . . . . .	14-40.16
	[2] General Criteria for an Effective Program . . . . .	14-40.17
	[3] Due Diligence . . . . .	14-40.19
	[4] Targeting Principles . . . . .	14-40.20
	[a] Organization Size . . . . .	14-40.20
	[b] The Nature of the Organization's Business . . . . .	14-40.21
	[c] History of Offenses or Misconduct Within the Organization . . . . .	14-40.21
	[5] Disqualifying Program Characteristics . . . . .	14-40.22
	[a] Departures from Industry Practice or Governmental Regulations . . . . .	14-40.22
	[b] Patterns of Misconduct . . . . .	14-40.22
	[c] Systematic Failures to Prevent or Detect Violations . . . . .	14-40.22
	[d] Offense Features Indicating Program Weakness . . . . .	14-40.23
	[e] Failures to Self-Report Known Offenses . . . . .	14-40.24
	[6] Required Program Components . . . . .	14-40.24
	[a] Compliance Standards and Procedures . . . . .	14-40.24
	[b] High-Level Management Leadership of a Compliance and Ethics Program . . . . .	14-40.30
	[i] Board Responsibilities Regarding Corporate Compliance and Compliance Programs: Lessons from the NACD Key Agreed Principles . . . . .	14-40.32

**CORPORATE CRIMINAL LIABILITY**

	[c]	Responsible Authority Delegation . . . . .	14-43
	[d]	Steps to Communicate Standards and Procedures . . . . .	14-45
	[e]	Monitoring, Auditing, and Evaluation . . . . .	14-47
	[f]	Discipline, Incentives, and Enforcement Actions . . . . .	14-52.1
	[g]	Active Organizational Responses to Misconduct . . . . .	14-52.2
[7]		Ongoing Risk Assessments . . . . .	14-52.3
	[a]	Additional Considerations Regarding Risk Assessments . . . . .	14-52.5
	[i]	Goals of Risk Assessments in Compliance System Design and Management . . . . .	14-52.5
	[ii]	Advantages of Risk Assessments . . . . .	14-52.5
	[iii]	General Characteristics of Effective Risk Assessments . . . . .	14-52.5
	[iv]	Specific Features of Effective Risk Assessments . . . . .	14-52.7
	[v]	Steps in Implementing a Compliance Risk Assessment . . . . .	14-52.8
	[b]	Criteria for Evaluating Risk Assessments . . . . .	14-52.9
[7A]		Operationalizing Risk Assessments . . . . .	14-52.11
	[a]	Characteristics of Compliance Risk Assessments . . . . .	14-52.12
	[i]	Basic Features . . . . .	14-52.12
	[ii]	Targeting the Timing and Depth of Evaluations . . . . .	14-52.12
	[b]	Goals of Compliance Risk Assessments . . . . .	14-52.13
	[i]	Matching Compliance Risks with Preventive Management . . . . .	14-52.13
	[ii]	Minimizing Sanctions Following Misconduct . . . . .	14-52.14
	[iii]	Outperforming Peers . . . . .	14-52.14
	[iv]	Other Benefits . . . . .	14-52.15
	[c]	How to Characterize Compliance Risks . . . . .	14-52.16
	[i]	Inherent Risks . . . . .	14-52.16
	[ii]	Firm-Specific Risk Adjustments . . . . .	14-52.16
	[iii]	Business Impacts . . . . .	14-52.18

**TABLE OF CONTENTS**

	[d]	How to Identify Compliance Risks . . .	14-52.18
		[i] General Principles . . . . .	14-52.18
		[ii] Risks Dictated by Product Lines and Business Activities . . . . .	14-52.19
		[iii] Risks Dictated by Geographical Scope of Activities . . . . .	14-52.20
		[iv] Risks Dictated by Governmental Law Enforcement Priorities . . . . .	14-52.20
	[e]	Evaluating Compliance Risks Due to Activities of Outside Parties . . . . .	14-52.20
	[f]	Who Should Assess Compliance Risks . . . . .	14-52.21
	[g]	Responding to Compliance Risks in Formulating and Implementing Program Elements . . . . .	14-52.23
	[h]	Evaluating the Completeness of Compliance Risk Assessment . . . . .	14-52.24
	[i]	Elements of Compliance Risk Analysis: Lessons from FBI Techniques . . . . .	14-52.26
		[i] Management of the Risk and Response Process . . . . .	14-52.26
		[ii] Sources Used for Risk Assessments . . . . .	14-52.28
		[iii] Criteria for Prioritizing Risks . . . . .	14-52.28
		[iv] Administrative Follow Up to Identified Risks . . . . .	14-52.29
	[j]	Procedural Steps for Risk Assessments . . . . .	14-52.30
		[i] Background . . . . .	14-52.30
		[ii] Risk Assessment Steps . . . . .	14-52.31
		[iii] Advantages of an ERM-Compatible Process . . . . .	14-52.32
[8]		2010 Amendments to Compliance Program Standards . . . . .	14-52.33
	[a]	Opportunities for Sentence Reductions Despite Senior Management Involvement . . . . .	14-52.33
	[b]	Remedial Steps . . . . .	14-52.34
	[c]	Preventing Further Offenses . . . . .	14-52.35
	[d]	Probation Terms . . . . .	14-52.35
§ 14.03		Evaluating Compliance Programs Under Other Statutory, Regulatory, Judicial, and Industry Standards . . . . .	14-52.38

**CORPORATE CRIMINAL LIABILITY**

[1]	Statutory Tests . . . . .	14-52.38
	[a] Anti-Money Laundering Programs . . . . .	14-52.38
	[b] Insider Trading Prevention Systems . . . . .	14-52.39
[2]	Regulatory Standards . . . . .	14-52.39
	[a] Anti-Money Laundering Systems . . . . .	14-52.39
	[i] Policies, Procedures, and Internal Controls . . . . .	14-52.40
	[ii] Designated Compliance Officer . . . . .	14-52.40
	[iii] Education and Training . . . . .	14-52.41
	[iv] Independent Testing of Program Adequacy . . . . .	14-52.41
	[v] Compliance Program Elements Aimed at Agents . . . . .	14-52.42
	[b] Health Care Compliance Systems . . . . .	14-52.42
	[i] Codes of Conduct . . . . .	14-55
	[ii] Compliance Officers and Committees . . . . .	14-55
	[iii] Compliance Policies and Procedures . . . . .	14-56
	[iv] Open Lines of Communication . . . . .	14-56
	[v] Appropriate Training and Education . . . . .	14-56.1
	[vi] Internal Monitoring and Auditing . . . . .	14-56.2
	[vii] Responses to Detected Compliance Deficiencies . . . . .	14-56.3
	[viii] Enforcement of Disciplinary Standards . . . . .	14-56.3
	[ix] Adequacy of Self-Reporting of Detected Misconduct . . . . .	14-56.4
	[x] HHS Standards for Prescription Drug Providers . . . . .	14-56.5
	[xi] HHS Criteria for Exclusion from Health Care Programs . . . . .	14-56.7
	[xii] HHS General Compliance Program Guidance . . . . .	14-56.12
	[c] Environmental Compliance Systems . . . . .	14-56.13
	[d] Securities Law Compliance Systems . . . . .	14-56.16
	[i] SEC Evaluation of Outsourced Compliance Functions . . . . .	14-57
	[ii] Evaluating Compliance Programs in Multi-Branch Operations . . . . .	14-61
	[e] SEC Standards for Codes of Ethics . . . . .	14-64

## TABLE OF CONTENTS

lvii

	[f]	Occupational Health and Safety Systems . . . . .	14-65
	[g]	Munitions Export Control Systems. . . . .	14-66
	[h]	Commodity Futures Trading Commission’s Enforcement Standards . . . . .	14-68
	[i]	Office of Foreign Assets Control Framework for Compliance Commitments . . . . .	14-70
	[j]	Office of Foreign Assets Control Guidelines on Compliance Programs for the Virtual Currency Industry . . . . .	14-74
	[k]	Commerce Department Standards for Export Compliance Systems. . . . .	14-79
[3]		Prosecutorial Discretion Provisions . . . . .	14-81
	[a]	Federal Guidelines for Corporate Prosecution. . . . .	14-81
	[i]	Disclosures Needed to Gain Favorable Treatment . . . . .	14-86
	[ii]	Extensive Consideration of Past Corporate Misconduct in Leniency Decisions . . . . .	14-91
	[iii]	Insights into DOJ Prosecution Analyses for Corporate Criminal Cases . . . . .	14-96
	[iv]	DOJ Reviews of Compensation Structures. . . . .	14-98.1
	[v]	DOJ Reviews of Personal Devices and Applications. . . . .	14-98.3
	[b]	Corporate Amnesty Standards for Antitrust Offenses . . . . .	14-98.5
	[c]	Compliance Program Standards from the DOJ’s FCPA Resource Guide . . . . .	14-98.7
	[d]	DOJ Resources for Evaluating Compliance Programs . . . . .	14-98.10
	[e]	DOJ Policy on Corporate FCPA Prosecutions and Other Criminal Division Cases. . . . .	14-98.12
	[f]	DOJ Compliance Program Evaluation Criteria. . . . .	14-98.15
	[g]	Standards for Obtaining Cooperation Credit in Federal False Claims Act Cases . . . . .	14-98.29
	[i]	Voluntary Disclosure. . . . .	14-98.29
	[ii]	Other Forms of Cooperation. . . . .	14-98.30
	[iii]	Remedial Measures . . . . .	14-98.31

**CORPORATE CRIMINAL LIABILITY**

	[h]	Prosecutorial Guidelines for Corporate Violations of Export Controls and Sanctions Laws . . . . .	14-98.32
	[i]	Prosecutorial Benefits from Antitrust Compliance Programs . . . . .	14-98.36
	[j]	U.S. Attorneys' Offices Voluntary Self-Disclosure Policy . . . . .	14-98.41
	[k]	DOJ Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks . . . . .	14-98.44
	[l]	DOJ Mergers and Acquisitions Safe Harbor Policy . . . . .	14-98.46
[4]		Judicially Developed Criteria . . . . .	14-99
	[a]	Assessing Good Faith Compliance with Anti-Discrimination Laws . . . . .	14-99
[4A]		Compliance Program Evaluation Criteria Used by Court-Appointed Monitors . . . . .	14-105
	[a]	Evaluation Criteria from Apple Monitor's Reports . . . . .	14-105
[5]		Industry Standards . . . . .	14-110
	[a]	New York Stock Exchange Standards for Corporate Conduct Codes . . . . .	14-110
	[b]	Health Care Compliance Association Standards . . . . .	14-110
	[c]	OCEG Criteria for Diagnosing Compliance and Ethics Program Problems . . . . .	14-114
	[d]	Interpreting Results of Compliance and Ethics Program Performance Measurements . . . . .	14-123
[6]		Privately Developed Standards . . . . .	14-125
	[a]	OCEG Foundation Guidelines . . . . .	14-125
	[b]	ECI Panel Report on Principles and Practices of High-Quality Ethics and Compliance Programs . . . . .	14-128
	[c]	OIG-HCCA Compliance Program Resource Guide . . . . .	14-132
	[d]	Society of Corporate Compliance and Ethics Small Business Compliance Program . . . . .	14-136
[7]		International Standards . . . . .	14-136
	[a]	OECD Guidance on Compliance Program Elements . . . . .	14-136
		[i] Purposes of the Guidelines . . . . .	14-137
		[ii] Program Features Recommended by OECD . . . . .	14-140
		[iii] General Lessons from the OECD Guidelines . . . . .	14-142



**TABLE OF CONTENTS**

lix

[b]	Compliance Program Guidance from the Canadian Competition Bureau .....	14-142
[i]	Aims of a Successful Program .....	14-143
[ii]	Benefits of a Successful Compliance Program .....	14-143
[iii]	Major Requirements for a Credible and Effective Compliance Program .....	14-144
[c]	Compliance Program Templates from the Australian Competition and Consumer Commission .....	14-147
[d]	Competition Commission of India Recommendations on Compliance Programs .....	14-148
[e]	Israel Antitrust Authority Model Compliance Program .....	14-148
[f]	Compliance Program Criteria from the Ministry of Justice of the United Kingdom .....	14-149
[g]	Compliance Program Guidance from the Office of Fair Trading of the United Kingdom .....	14-151
[h]	UK Guidance on Compliance Programs in DPA Code of Practice .....	14-152
[i]	French Anti-Corruption Legislation ..	14-153
[j]	Brazilian Ministry of Justice Guidelines for Competition Programs .....	14-157
[k]	Canadian Competition Bureau Bulletin on Compliance Programs .....	14-158
[l]	UK Serious Fraud Office's Corporate Cooperation Guidance .....	14-158
[m]	UK Serious Fraud Office's Compliance Program Evaluation Criteria .....	14-159
[n]	Brazilian Office of the Comptroller General Guidelines for Integrity Programs .....	14-161
[o]	Colombian Transnational Corruption Act Compliance Guidelines .....	14-162
[p]	Mexican Criteria for Anti-Corruption Programs .....	14-163
[q]	Peruvian Standards for Anti-Bribery Compliance Programs .....	14-163
[r]	Argentine Criteria for Anti-Corruption Programs .....	14-164

**CORPORATE CRIMINAL LIABILITY**

[8]	State Standards .....	14-165
[a]	State Standards for Compliance and Ethics Programs in Health Care Providers .....	14-165
[i]	Connecticut .....	14-165
[ii]	New York .....	14-166
[b]	Regulators' Criteria for Evaluating Programs .....	14-169
[c]	Whistleblower Program Standards from the New York State Department of Financial Services. . .	14-172
[9]	Additional International Standards for Corporate Compliance and Ethics Programs .....	14-174
[a]	Asia-Pacific Economic Cooperation Anti-Corruption Code .....	14-174
[b]	International Chamber of Commerce Rules on Combating Corruption . . .	14-175
[c]	Transparency International's Business Principles for Countering Bribery .....	14-177
[d]	United Nations Global Compact's Ten Principles .....	14-178
[e]	World Bank Group's Integrity Compliance Guidelines .....	14-179
[f]	World Economic Forum's Principles for Countering Bribery .....	14-181
[g]	ISO 37001 Anti-Bribery System Standards .....	14-181
[h]	ICC Antitrust Compliance Toolkit . . .	14-184
[i]	Latin Lawyer Guide to Corporate Compliance .....	14-185
[j]	APEC Guidebook on Monitoring and Supervising Effective Compliance Programs .....	14-185

**CHAPTER 15****Constructing and Operating Compliance Programs**

§ 15.01	Design Principles Governing Compliance Programs .....	15-6
[1]	Treating Compliance Programs as Specialized Performance Quality Control Systems .....	15-6
[2]	The Importance of Agency Process in Law Compliance Programs .....	15-10

## TABLE OF CONTENTS

lxi

[3]	Potential Sources of Compliance System Designs . . . . .	15-10.1
[4]	Goals of Successful Compliance Program Designs . . . . .	15-10.1
	[a] Interpreting and Evaluating Compliance Practices from Impacts, Not Efforts . . . . .	15-10.3
	[b] Indicators of Organizational Cultures Promoting Misconduct . . . . .	15-10.5
[5]	Reacting to Compliance “Hot Spots”: Compliance and Ethics Programs as Solutions to Complex Corporate Constraints . . . . .	15-10.6
[6]	Revised COSO Internal Control Framework: Implications for Compliance Programs . . . . .	15-10.8
	[a] Features of the COSO Framework . . . . .	15-10.8
	[b] Management Advantages of Applying the Framework . . . . .	15-10.11
	[c] Applying the Framework to Compliance Programs . . . . .	15-10.11
	[d] COSO Fraud Risk Management Guide . . . . .	15-10.13
[7]	Selecting Indicators as Compliance Metrics . . . . .	15-10.14
[8]	Data Analytics in Compliance Programs . . . . .	15-10.16
	[a] General Features of Compliance Analytics . . . . .	15-10.16
	[b] Examples of Compliance Analytics Techniques . . . . .	15-10.17
	[i] Frameworks for Misconduct Detection . . . . .	15-10.17
	[ii] Data Mining . . . . .	15-10.18
	[iii] Predictive Analytics . . . . .	15-10.19
	[c] Government Use of Data Analytics to Detect Misconduct . . . . .	15-10.20
	[i] Fraud Detection . . . . .	15-10.21
	[ii] Antitrust Enforcement . . . . .	15-10.23
	[iii] Healthcare Claims Monitoring . . . . .	15-10.23
	[iv] Environmental Offense Detection . . . . .	15-10.24
	[v] Securities Offense Monitoring . . . . .	15-10.25
[d]	Private Use of Data Analytics in Compliance Programs . . . . .	15-10.25
	[i] Examples of Compliance Analytics Applications . . . . .	15-10.26

**CORPORATE CRIMINAL LIABILITY**

	[ii]	Steps for Expanding Use of Compliance Analytics . . . . .	15-10.28
	[iii]	Potential Problems with Compliance Metrics . . . . .	15-10.29
	[iv]	Testing Compliance Metrics . . . . .	15-10.30
	[9]	Interpreting Compliance Effectiveness as a Changing Operational Target . . . . .	15-10.31
	[10]	Constructing Compliance Programs to Produce Behavioral Results . . . . .	15-10.33
	[11]	Constructing Compliance Programs to Ensure Individual Accountability for Organizational Law Compliance . . . . .	15-10.36
§ 15.02		Operational Features of Effective Law Compliance Programs . . . . .	15-11
	[1]	Interpreting Compliance Programs as Management Systems . . . . .	15-11
	[a]	Indicators of a Strong Compliance and Ethics Program . . . . .	15-12
	[b]	Special Challenges in Managing Compliance Systems . . . . .	15-13
	[2]	Organizational Practices Furthering Law Compliance—A General Framework of Alternatives . . . . .	15-14
	[a]	Directing Employees Regarding Steps Needed for Law Compliance . . . . .	15-14.1
	[b]	Ensuring That Legal Issues Are Addressed . . . . .	15-15
	[c]	Planning for Law Compliance Activities . . . . .	15-20
	[d]	Control Processes for Ensuring Law Compliance . . . . .	15-23
	[e]	Personnel Practices Promoting Law Compliance . . . . .	15-29
	[i]	Labor Law Limits on Compliance Program Discipline . . . . .	15-29
	[f]	Measuring the Effectiveness of a Law Compliance Program . . . . .	15-33
	[g]	Positions of Compliance and Ethics Officers in Corporate Management Structures . . . . .	15-34
	[i]	Reporting . . . . .	15-35
	[ii]	Shared Duties . . . . .	15-35
	[h]	Questions for Employees in Compliance Program Assessments . . . . .	15-35
	[i]	Interpreting Corporate Duties Regarding Compliance Programs . . . . .	15-37

## TABLE OF CONTENTS

lxiii

[j]	Recommendations from HHS Workshop on Compliance Programs in Pharmaceutical Companies . . . . .	15-40
	[i] Board Oversight . . . . .	15-41
	[ii] Integrating Programs with Business Activities . . . . .	15-41
[k]	Defining the Compliance Leadership Role of Chief Compliance and Ethics Officers . . . . .	15-42
[l]	Enhancing Compliance Programs with AI Methods . . . . .	15-43
[3]	Trends in Compliance and Ethics Program Implementation . . . . .	15-44.1
	[a] Compliance and Ethics Program Investments Increased Following a Crisis . . . . .	15-44.2
	[b] Companies Suffering Reputational Damage Spent Heavily on Compliance and Ethics Program Activities . . . . .	15-44.2
	[c] Rules Versus Values . . . . .	15-45
	[d] Proactive Versus Reactive . . . . .	15-45
	[e] Setting Program Objectives . . . . .	15-46
[4]	Whistleblower Protections Under the Sarbanes-Oxley Act . . . . .	15-46
	[a] Criminal Whistleblower Protections . . . . .	15-46
	[b] Civil Whistleblower Protections . . . . .	15-47
	[i] Persons Protected . . . . .	15-47
	[ii] Protections Afforded . . . . .	15-48
	[iii] Remedies for Retaliation . . . . .	15-48
	[iv] Procedures for Pursuing a Complaint . . . . .	15-49
	[c] Developing Issues Regarding Whistleblower Protections . . . . .	15-52
	[i] Application to Overseas Employees . . . . .	15-52
	[ii] Relationship Between Fraud and Financial Reporting . . . . .	15-52
	[iii] Subjective Belief in Illegality . . . . .	15-53
	[iv] Materiality of the Reported Misconduct . . . . .	15-53
	[v] Whistleblower Protections for Persons Only Reporting Misconduct Within Companies . . . . .	15-54
[d]	Significant Growth of SEC Whistleblower Program . . . . .	15-56

§ 15.03	Targeting of Law Compliance Programs: The Importance of Risk Assessment . . . . .	15-59
	[1] Components of a Risk-Oriented Approach to Compliance Program Administration . . . . .	15-60
§ 15.04	Commonly Encountered Problems in Compliance Programs . . . . .	15-63
	[1] Balancing Retrospective Compliance Inspections and Forward Looking Compliance Processes . . . . .	15-63
	[2] Program Administration Problems . . . . .	15-64
	[3] Problems in Planning Compliance Efforts . . . . .	15-66
	[4] Agendas for Legal Auditing . . . . .	15-66.1
	[a] Bank Auditing Standards as Templates for Legal Audits . . . . .	15-66.2
	[5] Compliance Records . . . . .	15-66.5
	[6] Change Management . . . . .	15-67
	[7] System Verification Studies . . . . .	15-67
	[8-9] Program Auditing Techniques and Criteria: Lessons from the FBI . . . . .	15-68
	[a] Auditing Goals . . . . .	15-69
	[b] Fact-Finding Methods . . . . .	15-69
	[c] Findings . . . . .	15-78
	[i] Efforts Implemented . . . . .	15-79
	[ii] Risk Reduction Results Achieved . . . . .	15-79
	[iii] Program Weaknesses . . . . .	15-80
	[d] Experience with the Compliance Program at the FBI . . . . .	15-81
	[10] Common Compliance Program Problems to Avoid . . . . .	15-83
	[11] Repeated Misconduct as an Indicator of Ongoing Problems—Lessons from BP Well Blowout Incident . . . . .	15-84
	[12] Corporate Experience with Compliance Metrics . . . . .	15-88
	[13] Critiquing a Compliance Program Design . . . . .	15-88.1
	[14] The “Compliance Trap” of Efforts Without Tested Results . . . . .	15-88.3
	[15] Behavioral Considerations Revealing Compliance Program Weaknesses . . . . .	15-88.4
§ 15.05	A Model Compliance Program . . . . .	15-89
§ 15.06	[Reserved] . . . . .	15-91
§ 15.07	Risks Inherent in Law Compliance Programs . . . . .	15-92
	[1] Disclosure Risks . . . . .	15-92
	[a] Sources of Disclosures . . . . .	15-92
	[b] Limited Applicability of the Attorney-Client Privilege . . . . .	15-94

**TABLE OF CONTENTS**

[c] Narrow Protections of the Attorney Work Product Doctrine . . . . . 15-101

[d] Uncertain Scope of Self-Evaluative Privilege Under Federal Law . . . . . 15-102.3

[e] State Statutes Recognizing Self-Evaluation Privileges . . . . . 15-106

[f] EPA Resistance to Recognition of a Self-Evaluation Privilege . . . . . 15-109

[g] Practical Problems in Retaining the Confidentiality of Compliance Information. . . . . 15-110

    [i] Define and Clarify the Purposes of Fact Finding . . . . . 15-111

    [ii] Avoid Reuse of Regular Auditors for Compliance Assessments . . . . . 15-112

    [iii] Failures to React to Apparent Problem Create New Problems. . . . . 15-113

    [iv] Communications to and from Counsel Must Clearly Relate to Legal Advice . . . . . 15-114

    [v] Importance of Care in Targeting Audit Reports and Other Compliance Evaluations . . . . . 15-115

    [vi] Affirmative Use of Compliance Evaluations May Waive Protections . . . . . 15-116

    [vii] Government Officials May Press for Waiver of Protections . . . . . 15-117

[2] Damage from Defective Compliance Efforts . . . . . 15-117

[3] Harm from Incomplete Responses to Detected Misconduct . . . . . 15-118

[4] Inadequate Compliance Efforts Creating New Grounds for Liability. . . . . 15-118

[5] Possible Overreporting of Offenses . . . . . 15-119

[6] Tort Claims Based on Inaccurate Statements . . . . . 15-119

[7] Waste in Operating Compliance Programs . . . . . 15-119

[8] Promoting Undue Risk Aversion Among Managers. . . . . 15-120

[9] Increasing Employees’ Mistrust of Corporate Managers . . . . . 15-120

**CORPORATE CRIMINAL LIABILITY**

[10]	Potential Unprofessional Conduct by Counsel . . . . .	15-121
	[a] Dual Representation Problems . . . . .	15-121
	[b] Obligations Not to Mislead Public Officials . . . . .	15-123
	[i] Duty to Avoid Making Affirmatively Misleading Statements . . . . .	15-125
	[ii] Duty to Avoid Incomplete Disclosures . . . . .	15-126
	[c] Obligations to Discontinue Representation . . . . .	15-129
	[d] Abusing Counsel’s Roles in Compliance and Ethics Programs . . . . .	15-130
	[i] Activities of Counsel Outside Privilege and Work Product Protections . . . . .	15-131
	[ii] Potential Misconduct by Counsel . . . . .	15-132
[11]	Potential Impacts of Corporate Investigations in Coercing Individual Testimony in Violation of Personal Rights . . . . .	15-133

**CHAPTER 16**

**Reducing Corporate Criminal Liability Through Post-Offense Responses**

§ 16.01	The Importance of Proper Post-Offense Responses to Illegal Corporate Conduct . . . . .	16-3
	[1] Evaluating the Seriousness of Compliance Program Failures . . . . .	16-4
	[a] Indicia of Serious Compliance Program Failures . . . . .	16-4
	[i] Gaps in Program Construction . . . . .	16-4
	[ii] Failures to Follow Up on Past Errors . . . . .	16-5
	[b] Other Indicators of Serious Program Failures . . . . .	16-6
§ 16.02	Types of Post-Offense Responses Affecting Corporate Criminal Liability . . . . .	16-7
	[1] Required Responses . . . . .	16-7
	[a] Response Requirements Under Narrowly Targeted Statutes . . . . .	16-7
	[b] Required Responses to Concealed Hazards . . . . .	16-7



## TABLE OF CONTENTS

Ixvii

[2]	Responses Avoiding or Limiting Corporate Criminal Liability for the Illegal Acts of Employees . . . . .	16-8
[a]	Avoiding Corporate Criminal Liability Through Diligent Responses to Employee Offenses . . . . .	16-8
[b]	Reducing Corporate Criminal Sentences through Post-Offense Responses. . . . .	16-9
[i]	Responses as Part of Law Compliance Programs. . . . .	16-9
[ii]	Responses Outside of Law Compliance Programs. . . . .	16-10
[3]	Responses Expanding Corporate Criminal Liability. . . . .	16-11
[a]	Responses Enhancing Penalties for Present Offenses . . . . .	16-11
[i]	Condoning or Tolerating an Offense . . . . .	16-11
[ii]	Obstruction of Justice . . . . .	16-12
[b]	Responses Constituting Additional Offenses . . . . .	16-13
[c]	Responses Increasing Liability for Subsequent Offenses . . . . .	16-13
[i]	Responses Establishing Willful Misconduct Regarding Subsequent Activities. . . . .	16-13
[ii]	Responses Creating Patterns of Offenses . . . . .	16-14
[4]	Responses Influencing Charging Decisions Under the DOJ's Prosecutorial Standards for Corporations . . . . .	16-15
[a]	Impacts of Investigations, Disclosures and Remedial Actions . . . . .	16-15
[b]	Privilege Waivers and Sufficient Information Disclosures. . . . .	16-19
[c]	Problems in Applying Prosecutorial Discretion Standards . . . . .	16-19
[d]	Prompt Disclosures Encouraged Under DOJ Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy. . . . .	16-23
[5]	Responses Influencing Charging Decisions Under Other Governmental Standards. . . . .	16-28
[a]	Amnesty for Antitrust Offenses. . . . .	16-28
[i]	Standards for Granting Amnesty . . . . .	16-28.1

**CORPORATE CRIMINAL LIABILITY**

	[ii]	Limits on the Protective Impact of Amnesty . . . . .	16-28.3
	[iii]	Amnesty in Action: Some Examples . . . . .	16-28.4
	[b]	Offenses by Defense Contractors . . . . .	16-28.8
	[c]	Environmental Offenses . . . . .	16-28.9
	[i]	Federal Prosecutorial Standards . . . . .	16-28.9
	[ii]	EPA’s Criminal Referral Policy . . . . .	16-28.10
	[d]	Securities Offenses . . . . .	16-28.12
	[e]	Cooperation Standards Under CFTC Self-Reporting Policy . . . . .	16-28.12
§ 16.03		Collateral Consequences of Post-Offense Responses . . . . .	16-29
	[1]	Civil Liability . . . . .	16-29
	[2]	Debarment from Government Contracting . . . . .	16-31
	[3]	Impaired Corporate Reputations . . . . .	16-33
§ 16.04		Crisis Management Techniques for Developing and Implementing Post-Offense Responses . . . . .	16-34
	[1]	Considerations in Responding to Corporate Liability Crises . . . . .	16-36.1
§ 16.05		Strategies for Managing Post-Offense Responses . . . . .	16-37
	[1]	Actions Before an Offense . . . . .	16-37
	[a]	Assessing Offense Threats . . . . .	16-37
	[b]	Selecting an Offense Response Team . . . . .	16-38
	[c]	Identifying Resources . . . . .	16-39
	[d]	Establishing Post-Offense Response Policies . . . . .	16-40
	[e]	Defining Contingency Plans . . . . .	16-41
	[f]	Testing Contingency Plans . . . . .	16-42
	[2]	Actions Comprising the Immediate Reaction to an Offense . . . . .	16-43
	[a]	Conducting Internal Investigations of Detected Misconduct . . . . .	16-43
	[b]	Harnessing Available Resources . . . . .	16-45
	[c]	Defining and Controlling Offense Responses . . . . .	16-45
	[d]	Overseeing Public Disclosures . . . . .	16-47
	[3]	Actions After an Offense . . . . .	16-48
	[a]	Monitoring and Evaluating Offense Responses . . . . .	16-48
	[b]	Improving Corporate Operating Procedures Following an Offense . . . . .	16-48

## TABLE OF CONTENTS

lxix

	[c]	Crafting Enhanced Compliance Programs in Post-Offense Responses: Guidance from the BP Oil Well Blowout and Plea Agreement . . . . .	16-48.1
		[i] Improved Risk Management . . . . .	16-48.1
		[ii] Support for Technology Improvements . . . . .	16-48.2
		[iii] Enhanced Public Transparency . . . . .	16-48.3
		[iv] Agreement Adherence Auditor . . . . .	16-48.3
§ 16.06		Self-Reporting Decisions . . . . .	16-48.4
	[1]	Disclosures Necessary to Obtain Sentence Reductions. . . . .	16-48.4
		[a] Sufficient Disclosures Under Other Governmental Standards . . . . .	16-48.4
		[b] Examples of Past Disclosures Gaining Favorable Results . . . . .	16-52
	[2]	Considerations in Deciding Whether to Disclose Detected Misconduct. . . . .	16-54

## CHAPTER 17

### The Future of Corporate Criminal Law

§ 17.01		Expanded Emphasis on Organizational Culpability. . . . .	17-1
§ 17.02		Clarifying Standards for Organizational Culpability. . . . .	17-7
§ 17.03		Strengthening Prosecutors' Commitments to Rewards for Corporate Self-Policing. . . . .	17-9
§ 17.04		Developing Operating Paradigms for Law Compliance Systems . . . . .	17-13
		[1] New Compliance Practices Based on Proven Control Processes. . . . .	17-13
		[2] Reconceiving Law Compliance as Performance Quality Control. . . . .	17-14
§ 17.05		Creating a New Jurisprudence for an Organizational Age. . . . .	17-16
<b>INDEX</b>		. . . . .	I-1