802:Best Practices in Compliance Programs for Privately Held Companies

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Faculty Biographies

Susan Hallsby

Susan Hallsby is senior counsel at OSI Industries, LLC in Aurora, Illinois. Her responsibilities include counseling finance, tax, accounting, insurance, human resources, as well as negotiating sales contracts.

Prior to joining OSI Industries, LLC, Ms. Hallsby served as vice president, general counsel, and secretary at Mannesmann Rexroth Corporation where she started the in-house legal department. Prior to that she was a staff attorney with Consolidated Papers, Inc. and The Dow Chemical Company.

Ms. Hallsby currently serves as a board member of ACC's Chicago Chapter and a member of the Michigan Bar Association and Illinois Bar Association. She is a board member of AMSA, Inc., a chemical distributor. She is a board member of The Legal Institute of the Great Lakes, which provides a forum for the development and exchange of solutions to the regional problems the Great Lakes states and provinces in three interrelated areas; international relations, economic development, and environmental protection.

Ms. Hallsby earned her BS from Ferris State University in Grand Rapids, Michigan and a MBA and JD from the University of Toledo in Toledo, Ohio.

John V. Howard, Jr.

John V. Howard, Jr. is senior vice president, general counsel, and secretary of the board of Vertis, Inc. in Baltimore. Reporting directly to the CEO and chairman of the board, his responsibilities include management of all internal and external legal matters worldwide as well as coordination of board activities and compliance efforts. Mr. Howard supervises five other in-house lawyers as well as their teams of paralegals and contract administrators.

Previously, Mr. Howard was executive vice president and general counsel for Columbine JDS Systems, Inc. and executive vice president and general counsel for Laser Tech Color, Inc. former divisions of Vertis. Prior to joining Columbine JDS Systems, Inc. and Laser Tech Color, Inc., Mr. Howard was counsel and chief intellectual property counsel for Andersen Worldwide, S.C., the parent entity of Arthur Andersen and Andersen Consulting, in charge of all worldwide intellectual property matters for the Andersen organization. Before leaving for Andersen, he was chief counsel for Quark, Inc., in Denver, developer of Quark XPress, in charge of all worldwide legal matters. Mr. Howard began his career in Evergreen, Colorado in private practice.

Mr. Howard is a member of the Colorado Bar Association and the Maryland State Bar Association and has spoken at ACC's Baltimore Chapter on Sarbanes-Oxley compliance. Additionally, he is a trustee on the board of trustees of the Hammond-Harwood House in Annapolis, Maryland.

Mr. Howard graduated, magna cum laude, from Washington & Lee University and obtained his law degree from the University of Colorado at Boulder. During his time at Washington & Lee he attended Oxford University on an exchange program.

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Ronald L. Polasek

Ronald L. Polasek is general counsel, chief legal officer, and compliance officer for Recon/Optical, Inc. in Barrington, Illinois. Recon/Optical is a privately held company providing high tech, high dollar reconnaissance sensors exclusively to the U.S. and worldwide defense industry. In this position, Mr. Polasek is responsible for providing his company with all legal counsel for its government and international business activities. He created Recon/Optical's compliance program structure and monitors its effectiveness.

Prior to joining Recon/Optical, Mr. Polasek was general counsel at a Reuters subsidiary, worked in legal and contracts at Northrop Corporation, and served as a judge advocate general in the U.S. Marine Corps.

Mr. Polasek is active in ACC. He joined ACC's Chicago Chapter board and is currently serving as president. Mr. Polasek served on ACC's Advisory Committee. He has been a regular attendee of ACC's Annual Meetings and LDI training. Mr. Polasek is active in several non-profit organizations, charities, and business organizations.

Mr. Polasek received his BA and JD from the University of Texas in Austin.

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ACC's 2004 Annual Meeting: The New Face of In-house Counsel October 25-27, Sheraton Chicago

The in-house bar association.℠

Introduction

- What is compliance?
- Why should my company have a compliance program?
- My company is private; Sarbanes-Oxley does not apply to me, right?

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Federal Sentencing Guidelines

- Seven components of an effective compliance program:
  - Written Compliance Standards and Procedures
  - Oversight Responsibility Assigned to Appropriate Personnel
  - Cautious Delegation of Authority

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Federal Sentencing Guidelines, Continued

- Seven components of an effective compliance program (continued):
  - Training and Education
  - Routine Monitoring and Auditing
  - Enforcement and Discipline
  - Response and Prevention

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What Compliance Obligations Apply to My Company?

- Sarbanes-Oxley
- F.C.P.A
- Import/Export
- Anti-Boycott
- ITAR
- FMLA
- Environmental
- Tech. Transfer
- EEA
- Anti-Trust
- Data Protection
- Title VII
- Alien Tort
- Tax
- Labor
- Immigration
- OSHA
- FLSA

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Implementation

- Understand the company's business and its fundamentals
- Effectively communicate the importance of these programs for the company
- Follow the elements of a compliance program as given by the Sentence Guidelines

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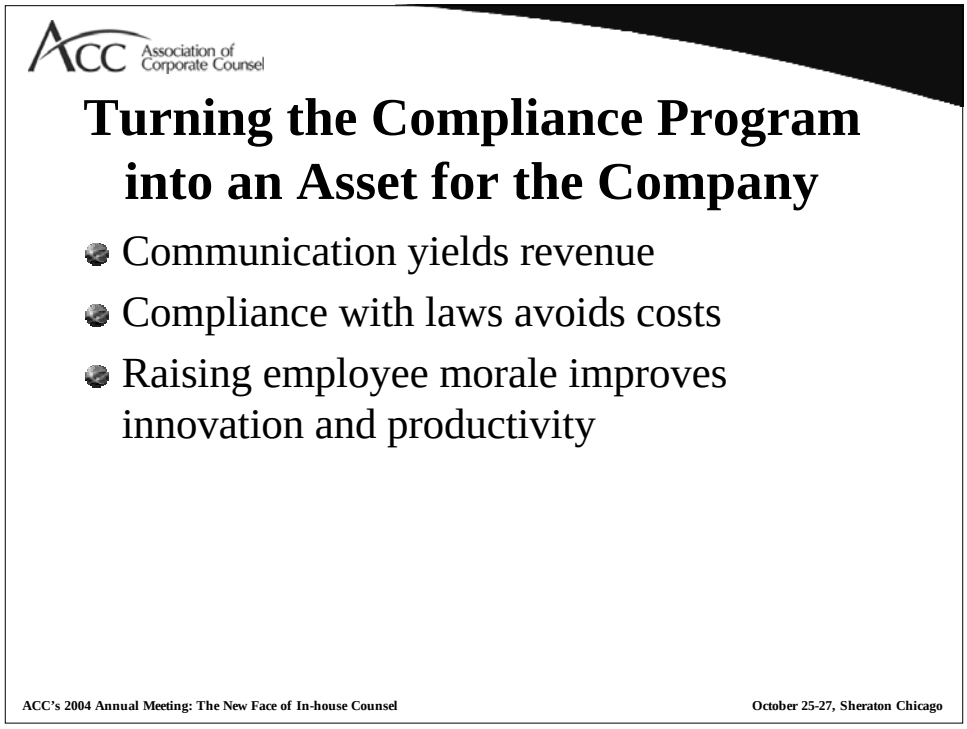

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Compliance Checklist

Susan M. Hallsby
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COMPLIANCE CHECKLIST
Table of Contents

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COMPLIANCE CHECKLIST

I. Privacy Issues and Web Site

A. Post an appropriate privacy policy
   1. Who is collecting information
   2. What and how is it collected
   3. How is it used and disclosed
   4. Access and other data subject rights
   5. Security measures
   6. Enforcement
   7. Contact information
   8. Easy to read
   9. Conspicuous link at the point on each page where information is first collected

B. Limit scope of privacy policy appropriately
   1. Clearly details differences between data collection from on-line and offline data collection
   2. Limited to US residents
   3. Clearly details when the privacy policy applies and when it doesn't – in other words notify visitor when leaving your Web Site.

C. Running banner ads via third party or collecting information or sharing information
   1. Identify issues your site might be doing with third parties such as, outsourcing, partnering and co-branding relationships.
   2. Have those issues been minimized.
   3. Have those issues addressed ownership and control issues
   4. Have you meet your obligations

D. Disclose using cookies, Internet tags/web beacons or other tracking capabilities
   1. Does policy and practice match
   2. Don't forget web bugs placed in email messages that send information back to your site
   3. Talk to IT

E. Are you making security promises? Are they being kept?
   1. "Reasonable" steps to protect personally identifiable information
   2. Identify employees responsible for information security
   3. Identify internal and external risks to security, confidentiality and integrity of information
   4. Designate and implement "reasonable" safeguards (www.ftc.gov/privacy/privacyinitiatives/promises_press.html
   5. Test, monitor and adjust security program on ongoing basis
   6. Refer to HIPPA (www.cms.gov/regulations/hippa/cms0003-5/0049f-econ-ofr-2-12-03.pdf)
   7. Refer to Gramm-Leach-Bliley (GLB)
   8. Refer to Children's Online Privacy Protection Act

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9. Refer to state specific laws such as California Civil Cod 1798.85, effective July 1, 2002 (restricts use and Internet transmission of Social Security Numbers, often a problem at career portions of Web Sites)
10. Refer to global laws, rules, regulations, guidelines such as OECD Guidelines for the Security of Information Systems and Networks (www.oecd.org/pdf/M00033000/M00033182.pdf)

F. Additional Communication (Opt-in, Opt-out or Give-up)
   1. Refer to CAN-SPAM Act of 2003
   2. Refer to state specific laws on unsolicited faxes
   3. Do-Not-Call Registry
   4. Evaluate whether to revise or adopt spam, do not fax, do not call and broader communications policies

G. Children's Online Privacy Protection Act
   1. Does site ask for inappropriate age-indicative information (age, grade, school)
   2. Does site encourage age falsification?
   3. Block information collection from visitors identifying themselves as under the age of 13
   4. Unwittingly have content that could be deemed to be directed to children.
   5. Does the site thoughtlessly reference children
   6. Does site falsely assume inserting "magic" disclaimer in privacy policy fix COPPA problems on site
   7. Easy to read COPPA privacy policy
   8. Easy to find COPPA privacy policy

H. Web Site consistent v. privacy policy
   1. Privacy Policy and legal notice match
   2. Privacy Policy and terms of use match
   3. Privacy Policy and FAQ's match
   4. Privacy Policy and information collection points match
   5. Review all promises and resolve conflicts

I. Overly friendly, misleading statements on Web Site
   1. Never say never to sharing information
   2. Retention of rights match with Privacy policy

J. On-line privacy policy v. actual practice
   1. Stand behind every word in Privacy Policy
   2. Stand behind every conflict between Privacy Policy and privacy practice

II. Fair Labor Standards Act

A. Executive Exemption
   1. Salary at least $455 per week or $100,000 or more per year and at least $455 per week or own at least 20% equity interest
   2. No deductions inconsistent with salary basis requirement
   3. Exempt Duties
      a. Manages department or department subdivision
      b. Managing department is principal, main or major duty
      c. Customarily directs work of 2 or more FTE or equivalents
      d. Authority to hire and fire

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B. Administrative Exemption
    1. Salary at least $455 per week or $100,000 or more per year and at least $455 per week
    2. No deductions inconsistent with salary basis requirement
    3. Exempt Duties
        a. Principal, main or major duties are non-manual work directly related to general business operations
        b. Not a roboton – exercises thinking, judging abilities
C. Professional Exemption
    1. Salary at least $455 per week or $100,00 or more per year and at least $455 per week
    2. No deductions inconsistent with salary basis requirement
    3. Exempt Duties
        a. learned professional
            1) work predominately intellectual requiring consistent exercise of discretion and independent judgment; or
            2) advanced knowledge in field of science or learning; or
            3) specialized degree.
        b. creative professional
            1) Principal, main or major duties include creating inventions, using their imagination, creating original work or using a creative talent
            2) Primarily in fields of music, writing, acting or graphic arts.
D. Computer Exemption
    1. Salary at least $455 per week or $27.63 per hour
    2. No deductions inconsistent with salary basis requirement
    3. Exempt Duties
        a. Principal, main or major duties include consulting with computer users to determine hardware, software or computer system functional specifications; or
        b. Principal, main or major duties include designing, developing, documenting, analyzing, testing or modifying computer systems or programs; or
        c. Both a) and b).
    4. Not engaged in manufacture or repair of computer hardware and related equipment.
    5. Not help-desk employee
E. Outside Sales Exemption
    1. No minimum salary
    2. Exempt Duties
        a. Principal, main or major duties are to generate sales or obtain orders
        b. Such activity is away from employer's place of business
    3. Not engaged in sales via telephone, mail or Internet
F. Deductions inconsistent with salary basis requirement
    1. Poor quality or quantity of work
    2. Plant/office closures due to inclement weather
    3. Less than full day deductions

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4. Less than full week deductions

III. OSHA

A. Compressed Gas Cylinders
   1. All cylinders are properly labeled.
   2. Cylinders are properly secured during storage or use.
   3. Cylinders with flammable gases are kept at least 20' away from oxidizers or are separated by a fire wall.
   4. All stored cylinders have protective caps in place.
   5. Full and empty cylinders are kept separated.
   6. Hand carts or trucks are used when moving cylinders.
   7. Cylinders are maintained and stored in safe condition.
   8. Storage areas are ported to separate cylinders by hazard class or type of gas.
   9. Areas where corrosive or toxic gases are stored or utilized are equipped with emergency showers and eyewashes.
   10. Cylinders are not stored or used near electrical circuits.
   11. Cylinders are not exposed to extreme temperatures.
   12. Training has been provided to employees that store or use cylinders.

B. Electrical Safety
   1. The equipment in plant is properly grounded.
   2. Portable electric hand tools are grounded.
   3. Flexible cords are maintained in good condition or are discarded.
   4. Flexible cords are not in areas where they are walked on, or have water, oil or grease spilled on them.
   5. Flexible cords do not run through walls, holes, ceilings, doorways, or windows.
   6. Flexible cords are not used in place of fixed wiring.
   7. Flexible cords are not spliced or tapped.
   8. Electrical equipment does not have broken or bent plugs, frayed cords, bare wires, or erratic operation.
   9. All junction boxes, control panels, outlets, switches and fittings are covered.
   10. Each power, breaker or disconnect switch is properly labeled or marked.
   11. Sufficient access or working space is provided and maintained around all electric equipment including all electrical panels.
   12. Employees have received training on dangers or electricity.

C. Fall Protection
   1. A survey of the plant was completed
   2. All areas greater than 6 feet in height have been addressed, including platforms, holes, hoist areas, wall openings and walkways.
   3. If necessary, appropriate fall arrest/retrieval systems are available.
   4. If necessary, appropriate barricades or warning line systems are available.
   5. Employees affected by areas governed by fall protection have received appropriate training.

D. Site Emergency Plan
   1. The written Site Emergency Plan has been completed and all plant specific information has been inserted.

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2. Principal Emergency Coordinators and Alternates have been designated and trained to perform required tasks.
3. Evacuation Coordinators and Alternates have been designated and trained to perform required tasks.
4. Headcount Coordinators and Alternates have been designated and trained to perform required tasks.
5. An appropriate procedure has been developed for swift and accurate headcount.
6. Copies of Site Emergency Plans have been placed in all necessary locations.
7. Evacuation Routes and Diagrams have been placed in all necessary locations.
8. All Emergency Phone Numbers are readily available.
9. Emergency procedures for each potential crisis have been reviewed and applicable to the facility.
10. Emergency Response Team Members have been designated and trained to perform required tasks.
11. Evacuation drills have been performed during the last 6 months.
12. Emergency Response drills have been performed during the last 12 months.

E. Process Safety Management Program
1. Written PSM Program has been completed and is maintained and up-to-date.
2. The Employee Participation Section has been reviewed and meets the requirements of the Standard.
3. Information on the hazards of ammonia and any other highly hazardous chemicals is available.
4. A Process Flow or Block Flow Diagram is available.
5. Information on the process chemistry, maximum inventory, safe upper and lower limits, and consequences of deviations is available.
6. Piping and instrument diagrams are readily available and maintained up-to-date.
7. A list of all equipment in the system is readily available
8. Information on the electrical classifications, relief systems, ventilation systems, design codes and standards, and process safety systems is available.
9. The Process Hazard Analysis has been reviewed and meets the requirements of the Standard.
10. The Operating Procedures for initial start-up, normal operations, temporary operations, emergency shutdown and operations, and start-up after shutdown have been reviewed and meet the requirements of the Standard.
11. The Training Section has been reviewed and meets the requirements of the Standard.
12. The Contractor Safety Section has been reviewed and meets the requirements of the Standard.
13. The Mechanical Integrity Section has been reviewed and meets the requirements of the Standard.
14. The Hot Works Permit Section has been reviewed and meets the requirements of the Standard.
15. The Management of Change Section has been reviewed and meets the requirements of the Standard.
16. The Incident Investigation Section has been reviewed and meets the requirements of the Standard.

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17. The Compliance Audit Process has been reviewed and meets the requirements of the Standard.

F. Recordkeeping and Reporting
    1. The required OSHA workplace poster is properly displayed.
    2. The OSHA 300 Log is properly maintained. Recordable injuries are posted on OSHA 300 log within 7 days of occurrence.
    3. The OSHA 301 Reports or appropriate stat forms are properly maintained. The OSHA 301 Reports or appropriate state forms are properly completed and submitted to Corporate within 24 hours of medical treatment.
    4. The OSHA 300 Annual Summary is posted during February through April of each year. The prior years' OSHA 200 Logs and 101 Reports are being retained for 5 years.
    5. OSHA and Company-internal programs are maintained; reviewed, as needed and currently up-to-date.

G. Lockout/Tagout
    1. An itemized list of energy-isolating procedures has been prepared for each piece of equipment in the plant.
    2. All equipment with a potential stored or residual energy or the re-accumulation of energy is required to be locked out during cleaning, servicing, adjusting, tearing down or setting up.
    3. The list of Authorized, Affected and Other Employees has been prepared and is current. Retraining is conducted on annual basis.
    4. Equipment is locked out with an assigned individually-keyed lock identifying the employee performing the lock-out.
    5. If more than one employee is working on equipment, then each places their own lockout device.
    6. Proper procedures are followed for restarting equipment.
    7. Authorized employees are provided with suitable training for lockout. Affected and Other employees are trained in the purpose and use of lockout procedures and devices.
    8. Retraining is conducted for each change in jobs, equipment or energy control procedure.
    9. Formal employee performance inspections are conducted at least every 12 months. Periodic employee performance inspections are performed at least every 3 months.
    10. Employees must keep personal control of their key while lockout device is in use.
    11. Tagout devices are not used in any situation.

H. Hazard Communication
    1. MSDS is obtained for all hazardous chemicals currently in the plant.
    2. A Master List of hazardous chemicals is current and separated into Department-specific lists.
    3. Department-specific list is in appropriate areas readily accessible to employees.
    4. All containers are checked for proper labels.
    5. Posters explaining labeling system are displayed throughout the plant.
    6. Employees are trained in the hazardous chemical in their work area upon initial assignment with appropriate training materials.

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7. Employees are trained on any new hazardous chemicals brought into their area.
8. For non-routing tasks, special training is provided to supervisors and other exposed employees.

I. Personal Protective Equipment
1. A current Hazard Assessment has been completed for each area identifying the needs for Personal Protective Equipment.
2. If changed have occurred in the hazards presented or in the PPE used, the Hazard Assessment has been revised.
3. PPE selected provides the protection necessary to protect the employees.
4. All PPE's are properly inspected, cleaned and maintained.
5. Appropriate eye and face protection is required where there is a risk of eye injuries such as punctures, abrasions, contusions or burns.
6. Appropriate hand protection is required where there is a risk of cuts, corrosive liquids and chemicals.
7. Appropriate hard hats are required where there is a risk of falling objects.
8. Appropriate foot protection is required where there is a risk of foot injuries from hot, hazardous or corrosive substances, falling objects, crushing or penetrating.
9. Each employee is trained in the proper use of each required type of PPE, and are retrained if there are changes in the workplace, changes in the PPE, or as necessary.
10. Special protective equipment is available for particular or special tasks.

J. Machinery and Machine Guarding
1. Guards are provided for hazards created by points of operation, nip points, rotating parts, flying chips and sparks.
2. A system exists for shutting down the machine before guards are removed.
3. The guards are firmly secured to the machine and not easily removed.
4. The guards permit safe, comfortable, and relatively easy operation of the machine.
5. There are regular maintenance and safety inspection programs.
6. There is a system to review and respond to all equipment manufacturer's safety notices.
7. Copy of all safety notices are forwarded to Legal.
8. Sufficient clearance is provided around and between machines to allow for safe operations, set up and servicing, material handling and waste removal.
9. Machinery is securely placed and anchored to prevent tipping or movement.
10. Bench and pedestal grinders are permanently mounted.
11. The power shut-off switch is within reach of operator's position at each machine.
12. Valves and switches controlling the operation of machinery is clearly identified and readily accessible.
13. Protections are present which prevent machines from automatically starting when power is restored after a power failure or shutdown.
14. Fan blades less than 7 feet from floor are protected with a guard with openings less than ½ inch.
15. Portable fans are provided with full guards or screens having openings of ½ inch or less.
16. Saws and similar equipment are provided with appropriate safety guards.

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17. All cord-connected, electrically-operated tools and equipment are effectively grounded or double insulated.
18. Grinding wheel work rest is kept to within 1/8 inch of the wheel.
19. Grinding wheel adjustable tongue is kept adjusted to within ¼ inch of the wheel.
20. Pneumatic and hydraulic hoses on power-operated equipment are checked regularly for deterioration or damage.
21. Goggles or face shields are always worn when grinding.
22. Splash guards are mounted on grinders that use coolant.
23. Employees have been trained in where the guards are located, how they provide protection and what hazards they protect against.
24. Permanently mounted grinders are connected to electrical supply with metallic conduit or other permanent wiring method.
25. Power tools are used with the correct shield, guard or attachment, as recommended by manufacturer.

K. Forklift Safety

1. Floors and ramps are maintained in good condition.
2. Ramps are curbed to prevent trucks from running off edge.
3. Dock-boards are large and strong enough; are marked for maximum weight they can carry.
4. Portable dock-boards
    a. Have hand holds or fork loops
    b. have turned up sides to prevent trucks from running off edge
    c. are secure
5. If employees and trucks use same aisles, adequate waling space is provided (and striped, if necessary).
6. Convex mirrors and traffic control signs are used at blind intersections.
7. Storage of materials
    a. does not create a hazard
    b. are stacked, blocked, interlocked and limited in height
8. Daily inspections are performed and checklist is fully complete
9. Vehicles are not permitted to be used if found to be in need of repair or unsafe in any other way.
10. All operators trained and evaluated by qualified or competent person PRIOR to operating equipment without direct supervision.
11. Each operator's performance is evaluated at least every 3 years.
12. Refresher training conducted when:
    a. Operator is observed in unsafe operation
    b. Operator is involved in an accident or near miss incident
    c. Operator is assigned to a different type of truck
    d. Change in workplace condition that could affect safe operation
13. Brakes set and wheels blocked when loading/unloading.
14. Unattended trucks
    a. Power is shut off
    b. Brakes set
    c. Mast is vertical
    d. Forks in down position

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15. Hand trucks are stored in designated area when not in use.
16. No riders.
17. Industrial trucks operate only in approved areas.
18. Batteries are charged in appropriate areas with eye wash/shower nearby.
19. Adequate protection or prevention equipment is provided and readily accessible.
20. Proper maintenance procedures are followed.

L. Confined Space Entry Requirements
1. A Confined Space Analysis has been completed within the last 12 months and neither equipment or building change requires said analysis to be updated.
2. Permit-required confined space entry safety signs are prominently displayed at or near entrances.
3. Analyze safety and effectiveness of past entries, including review of permits.
4. Proper pre-entry procedures are followed.
5. The confined space entry permit complies with standards.
6. The Safety Coordinator maintains confined space entry standards.
7. All appropriate tools are available – including appropriate monitors, clothing and other equipment.
8. A properly trained attendant, properly trained entrant and properly trained entry supervisor is available at time of entry.
9. If relying on independent rescue services, verification of proper training has been requested and received prior to entry.
10. If relying on independent rescue services, notification prior to entry has been completed.

M. General Work Environment
1. All work areas are clean, sanitary and orderly. All aisles, doors and passageways are kept clear. Work surfaces are kept reasonably slip-resistant.
2. All spilled materials are cleaned up immediately and according to proper procedures.
3. Separate metal cans (with Covers, if necessary) are used for garbage, oily and used rags, waste, etc.
4. Waste receptacles are provided and are emptied regularly.
5. All areas of the facility are sufficiently illuminated.
6. Working areas are kept clear of tripping hazards such as pipes, cords, wires, etc.

N. Bloodborne Pathogens/First-Aid
1. Analysis completed for employees with occupational exposure.
2. Training for employees with occupational exposure completed using materials that meet all requirements of standard.
3. Hepatitis B Vaccination made available to trained employees, and documentation is on file.
4. Procedures are in place for decontaminating exposed equipment.
5. All biohazard waste is placed in appropriate containers.
6. Procedures are in place for handling contaminated laundry.
7. Suitable PPE is available and readily accessible.
8. All incidents are reported to the Safety Coordinator on a timely Basis.
9. All employees are subject to follow-up after "exposure incident" has occurred.
10. Suitable first aid kits are

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a. easily accessible in each work area
b. periodically inspected and
c. replenished as needed.

11. Emergency phone numbers are posted and readily available.
12. Eyewash stations/showers are located in various locations throughout the plant. Employees working with or near hazardous chemicals are within an unimpeded distance of 100' or 10 seconds of eyewash stations/showers.
13. Employees working with or near strong caustics or acids are within an unimpeded distance of 10' of eyewash stations/showers.

O. Fire Protection

1. Portable fire extinguishers are readily available in each area of the plant.
2. Materials are not stored in front or blocking extinguishers.
3. Fire extinguishers are inspected monthly and the date is noted on the inspection tag.
4. Fire extinguishers are recharged regularly with the date properly noted on the inspection tag.
5. The fire alarm system is tested at least annually.
6. Employees are trained and instructed in the use of extinguishers and fire protection procedures.
7. Proper vertical clearances are maintained around sprinkler heads.
8. Access to sprinkler risers is accessible and not blocked.
9. Ceiling tiles/panel should not be removed exposing gaps into the crawlspace above sprinkler heads.
10. Fire doors are in good operating condition and unobstructed. Where required, fusible links are in place.
11. The local fire department is familiar with the plant.
12. Fire lanes are free of obstruction at all times and marked with free standing signs or marked curbs, sidewalks with words "FIRELANE - NO PARKING".
13. Automatic sprinklers –
    a. Control valves are locked open
    b. Water Control valves, air and water pressures are checked weekly
    c. Maintenance of the system is assigned to the properly trained employees or to a sprinkler contractor.
14. Fire extinguisher system and exhaust hoods should be inspected at least annually by qualified person.
15. Sprinkler systems and piping are not exposed to cooler or freezer where there is potential for pipe to freeze.

P. Hearing Conservation

1. Noise levels are being measured using a calibrated sound level meter or an octave band analyzer.
2. Areas of the plant where noise levels exceed 85 dBA have been identified.
3. Noise levels are re-measured following a change in production, process, equipment or control which increases noise exposure.
4. Engineering controls have been used to reduce excessive noise levels.
5. Noisier machinery is isolated from the rest of the operation.

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6. Where engineering controls are not feasible, administrative controls are used to minimize exposure.
7. Where required, approved hearing protection is available, and used by employees.
8. Suitable training is provided on an annual basis and as indicated by circumstances.
9. Employees are provided with audiometric testing on an annual basis by a licensed audiologist, otolaryngologist, or other certified technician.
10. Employees are informed, in writing, of a determination of a STS of 10 dB or more. If an employee experiences a STS of >10 dB, it is recorded on the OSHA 300 log.

Q. Ingress/Egress

1. All exits are marked with an acceptable, illuminated exit.
2. Direction to exits, when not immediately apparent, are marked.
3. Doors, passageways or stairways that are neither exits nor access to exits are appropriately marked.
4. Doors that swing in both directions where there is frequent traffic, are provided with viewing panel in each door.
5. Glass doors are fully tempered and meet the safety requirements for human impact.
6. Minimum width of door is 28 inches wide.
7. Doors to cold storage rooms are provided with an inside release mechanism.
8. All exits are kept unlocked or unfastened so as to enable escape from the inside of the building in the case of fire or other emergency
9. All exits doors are side-hinged, to swing with exit travel when the room is occupied by greater than 50 people.
10. At least two means of egress are provided from areas where the absence of a second exit would increase the risk of injury. There are sufficient exits to permit prompt escape from each floor and from the building itself.
11. Special precautions are taken to protect employees during construction and repair operations.
12. Exit stairways that are required to be separate from other parts of a building, are enclosed by at least 1-hour fire-resistive construction.

R. Respiratory Protection

1. The selection of respirators has been made based on the hazards to which the employees will be exposed.
2. A review of the Program and a monthly inspection has been performed within the last twelve months.
3. All users of respirators must inspect them before and after each use and after cleaning to check condition of the face piece, head bands, valves, hoses, canisters, filters, and cartridge fittings.
4. All respirators are inspected on a monthly basis.
5. Respirators maintained for emergency use are tagged and inspected.
6. Only respirators that pass inspections are permitted to be used in the plant.
7. The only repairs of respirators that are performed by the employees are changing canisters, cartridges, filters, and head straps. All other repairs are performed by experienced and qualified personnel recommendations.

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8. Respirators are
   a. cleaned and disinfected as frequently as necessary.
   b. not stored in lockers or tool boxes.
   c. quickly accessible at all times and
   d. stored in suitable compartments.
9. Respirator wearers
   a. have been trained in accordance with the Standard.
   b. have successfully completed fit-testing in accordance with the Standard.
   c. have undergone annual refresher course or as frequently as needed
   d. have successfully completed the medical evaluation questionnaire in accordance with the Standard.

S. Walking Work Surfaces
1. Every stairway, ladder-way, platform and wall or floor opening is guarded by standard railing.
2. Skylights are guarded by a standard skylight screen or a fixed-standard railing on all exposed sides.
3. Temporary floor openings have standard railings or are constantly attended by someone.
4. Temporary wall opening have adequate guards.
5. Wall openings with a drop of more than 4 feet are guarded by railing, roller, picket fence, half door, or equivalent barrier.
6. Where there is exposure to falling materials, a removal toe-board or the equivalent is provided.
7. Extension platforms onto which materials can be hoisted for handling have side rails or equivalent guards of standard specifications.
8. Every runway, which is 4 feet or more above ground level, or open-sided doors or platform 30" or more above floor is guarded by a standard railing. The post on all railings are no more than 8 feet on center.
9. Standard stair rails or handrails are provided for all stairways having four or more risers.
10. Stairway handrails meet requirements of the Standard and are at least 22 inches wide.
11. Steps on stairs or stairways are designed or provided with a surface that renders them slip resistance.
12. Where stairs or stairways exit directly into any area where vehicles may be operated, adequate barriers and warnings are provided to prevent employees from stepping into the path of traffic.
13. All ladders are
    a. maintained in good condition,
    b. stored properly,
    c. non-slip safety feet are provided on each ladder,
    d. ladder rungs and steps are treated to minimize slipping, and are maintained free of grease or oil.
14. The doors with ladders in front of them open toward the ladder, except when the door is blocked opened, locked or unguarded.
15. Employees are instructed

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a. to face the ladder when ascending or descending,
b. use ladder only for their intended purposes,
c. Not to use the top step of ordinary step-ladders,
d. Not to place ladder on objects to gain additional height
e. To only adjust extension ladders while standing at a base (not while standing on the ladder or from a position above the ladder).

16. When portable rung ladders are used to gain access to elevated platforms, roofs, etc., the ladder always extend at least 3 feet above the elevated surface.
17. Step ladders do not exceed 20 feet in length.
18. Portable metal ladders are legibly marked with signs reading "CAUTION" - Do not Use Around Electrical Equipment" or equivalent wording.

IV. ENVIRONMENTAL AUDIT

A. WASTE WATER

1. If applicable, waste water discharge permit has been obtained and a copy is available.
2. If applicable, NPDES Permit has been obtained and a copy is available.
3. Copy of waste water discharge and fee ordinance is available.
4. If applicable, monitoring is conducted in accordance with applicable ordinance.
5. If applicable, pretreatment is performed.
6. Discharge limits are being met.
7. If applicable, plant complies with any local regulations.

B. Storm Water Pollution

1. No waste/processing materials are stored outside and exposed to storm water.
2. If exposed, a storm water permit has been obtained.
3. If storm water permit has been obtained, a SWPPP has been prepared.
4. If SWPPP exists, it contains the necessary elements with applicable BMPs.
5. If SWPPP exists, plant conducts required monitoring and maintains required records.

C. AIR POLLUTION

1. Review conducted of possible sources of air pollution.
2. Review conducted of possible sources of air contaminants.
3. Plant has determined whether it is located within an attainment or non-attainment area.
4. Industrial heating systems (including boilers, ovens, smokehouses, etc.) above required limit have required permits.
5. If applicable, Fugitive Dust Program has been prepared and is being followed.
6. If applicable, plant complies with other local regulations.

D. WASTE DISPOSAL REGULATIONS

1. Conventional Solid Waste (e.g., cardboard, packing materials, etc.) are disposed of through a licensed commercial hauler.
2. Meat scraps, inedible materials and contaminated meat products have been sold to a licensed renderer.
3. Non-hazardous special wastes are properly disposed of / recycled used in a licensed commercial hauler.
4. Recordkeeping requirements under RCRA are being met.
5. Manifests are properly maintained and retained.

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6. If applicable, plant complies with any other local regulations.

E. SARA TITLE III
   1. List of MSDS's was submitted to Local Fire Department, LEPC, SEPC by March 1st each year.
   2. Tier II's submitted to Local Fire Department, LEPC, SEPC by March 1st each year.
   3. If necessary, Form R Toxic Chemical Release Inventory Report was submitted to USEPA by July 1st.

F. RELEASE REPORTING REQUIREMENTS
   1. The plant maintains a list of all CERCLA hazardous substances and CERCLA extremely hazardous substances.
   2. For reportable releases, a current list of appropriate governmental authorities is maintained with a summary of required information.

G. RISK MANAGEMENT PLAN
   1. Risk Management Plan was submitted by June 21, 1999.
   2. RMP Public Meeting was held prior to February 1, 2000.
   3. RMP Public Meeting Certification was submitted to the FBI prior to June 21, 2000.

H. MISCELLANEOUS
   1. There are no UST's on-site, or if so, they are properly maintained.
   2. The plant contains no asbestos, or if so, it is properly maintained.
   3. The plant contains no PCB's, or if so, it is properly maintained.

V. CORPORATE EMPLOYMENT PRACTICE AND PROCEDURE REVIEW

A. EMPLOYEE HIRING PROCESS
   1. Job description and Job Specification Form is readily available for each position.
   2. Resumes or job applications are screened or reviewed by central person for initial review.
   3. Pre-employment Inquiries – Policy and procedures protect against improper inquiries being made of prospective employees.
   4. Independent Contractors – Any formal/written policy?
   5. Temporary Workers – Certificates of Insurance
   6. Affirmative action logs of name, race, and sex of applicants, and interview lists are properly maintained.
   7. Recruitment files are properly maintained.
   8. Interview guidelines are provided.
   9. Testing – Any testing that is required consists of actual work samples.
   10. Personnel Files are properly and consistently maintained with appropriate information only.
   11. Medical Files are properly and consistently maintained with appropriate information only.
   12. At-will/Change in Schedule Information included. (GM Only)
   13. Employee Handbook – If applicable, handbook contains disclaimer of contractual rights.
   14. Employee Handbook – If applicable, it is followed by all supervisors.

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15. Posting – The federal and state requirements on posters at workplace are being met.

B. IMMIGRATION REFORM AND CONTROL ACT
1. Separate, properly maintained, files are readily available for I-9 Forms.
2. All employees are asked to complete forms at the time of hire- and forms are fully and properly completed within 3 days.
3. Log of expiring work authorizations maintained at the plant or final documentation of work authorization.

C. ORIENTATION PROCESS
1. Salaried Exempt Orientation Checklists are all properly completed
2. Salaried Non-exempt Orientation Checklists all properly competed.
3. Hourly Non-bargaining Orientation Checklists are all properly completed.
4. Hourly Bargaining Unit Checklists are all properly completed.
5. Employees are notified at the time of firing of their normal hours and

D. DURING EMPLOYMENT
1. Anti-Discrimination / EEO -- Policy and procedures are provided to employees and are followed.
2. Freedom from Harassment -- Policy and procedures are provided to employees and followed.
3. Equal Pay – Employees are provided equal pay for equal work regardless of gender.
4. FMLA – If eligible Employee requests time off for family or medical reason, an FMLA Form is properly completed.
5. FMLA – Where state or local law provide additional leave, it is provided.
6. ADA – Construction since 1993 has been designed for accessibility to disabled.
7. ADA -- Written procedures are in place for when employees request reasonable accommodation.
8. Civic Obligation – Federal, State and Local obligations for Voting Time rights are properly followed.
9. Civic Obligation – Federal, State and Local obligations for School Visitation are followed.
10. Civic Obligation – Federal, State and Local obligations for Jury Duty are followed.
11. Civic Obligation – Federal, State and Local obligations for Military Leave are followed.
12. Civic Obligation – Employees subpoenaed to appear as witnesses are provided with required time off. (SC)
13. Personnel Records – State and Local obligations for access to personnel records for current or past employees are followed.
14. One Day Rest in Seven (IL) – Procedures are in place to provide employees with at 24 hours rest each calendar week (i.e., Sunday to Saturday)
15. Rest Periods – Employees are provided with required breaks if work designated amount of time in a day (Illinois only).
16. Holidays – Employees are provided with the information on holidays at time of hire.

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17. Vacation – Employees are provided with the information on vacation at time of hire.
18. Garnishments – Procedures are in place, and followed, for wage assignments, child support orders and garnishments.
19. Drug Testing – If testing is conducted, a written policy that meets statutory requirements is available and followed.
20. Drug Testing – Written notice of drug testing is provided to employees.
21. Drug Testing – Proper testing process and conditions for conducting tests are followed.
22. Electronic Communication – Policy and procedures are in place and employees are notified in writing.
23. Smoking – A written smoking policy is in place and properly enforced.

E. DISCIPLINE AND TERMINATION
1. A written procedure and policy for discipline and termination is maintained and is followed.
2. Employees are aware of the disciplinary decisions that affect them.
3. Decisions for discipline are reviewed for consistency of treatment throughout facility.
4. Decisions for termination are reviewed for consistency of treatment throughout facility.
5. Complaint Procedure exists for employees to contest discipline.

F. POST-EMPLOYMENT
1. References – Requests for references are handled by designated person.
2. COBRA – Procedures are followed to provide past employees with notice of COBRA rights to continue coverage.

G. AFFIRMATIVE ACTION
1. EEO-1 form filed each year
2. Vets 100 form filed each year
3. I-9's completed within 3 days of hire
4. Purchase Order Terms and Conditions contain language from Executive Order 11246
5. All position advertising contains Equal Employment Opportunity/Affirmative Action tagline.
6. Annual letters are sent to sub-contractors notifying them of their responsibility to comply with Executive Order 11246.
7. Requests to applicants of EEO information is separate from the employment application.
8. Maintain applicant flow-logs for all vacancies recruited.
9. Notices for all job openings are sent to state unemployment office.
10. Notices for all job openings are sent to organizations that reach groups of individuals of diverse background.
11. If using recruiters, annual letters are sent notifying them of your affirmative action status.
12. Post, in an area frequented by employees, an Invitation to Self Identify Disabled Veterans and Veterans of the Vietnam Era.
13. Employee handbook, if one exists, references affirmative action policy statement.

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14. Update, distribute and post, annually, affirmative action policy statement.
15. Update, distribute and post, annually, sexual harassment policy statement.
16. Prepare and distribute to all employees drug-free workplace policy.
17. Train supervisors and employees in affirmative action obligations.
18. Train supervisors and employees in sexual harassment policy obligations.
19. Train supervisors and employees in drug-free workplace policy obligations.

VI. Problem Accounting: Identification and Response

A. Risk Assessment

1. Focus on specifics of your company
2. Focus on specifics of your industry
3. Review with a broad approach accounting, finance, corporate governance, culture, leadership and ethics

B. Red Flags

1. Corporate Culture/Environment
    a. High risk industry (intense competition, tight margins)
    b. Dominant, autocratic senior executives
    c. Highly centralized authority
    d. Weak board of directors
    e. Obsession with meeting short-term numbers
    f. Executive compensation tied to short-term results
2. Revenue Recognition
    a. Large end-of-period sales
    b. Unusual sales terms (extended terms, contingencies, financing, resale, rights of return)
    c. Unusually high volume of sales to distributors/resellers (aka “channel stuffing”)
    d. High volume of sales to related parties
    e. Steadily increasing revenue that always meets or beats analysts’ expectations.
    f. Changes in revenue recognition policies
    g. Unusual journal entries and adjustments
3. Miscellaneous Red Flags
    a. Change in auditors over accounting issues
    b. Close relations with auditors
    c. Complex business structure or transactions that are not well understood and appear to serve little practical purpose
    d. Transactions with special purpose entities or related parties
    e. Rapid growth through acquisitions
    f. Existence and use of purchase or restructuring reserves (to smooth earnings)
    g. EBITDA or net income much higher than cash flow

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Compliance for Private Companies

By

John V. Howard

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I. Introduction - Compliance

a. What is it?

i. A compliance program is a set of standards and procedures the board and management establish implement and most importantly support in difficult times to prevent and detect illegal conduct.

ii. A compliance program uses tools such as written policies, education and training, and auditing to "promote an organizational culture that encourages a commitment to compliance with the law."[1]

b. Why should the company have a compliance program?

i. An effective compliance program will act as a deterrent to any wrongful conduct; but should an issue arise, it will also play a critical role as the government evaluates what kind of company a company really is, and whether charges are appropriate. The compliance program is not just important at sentencing.

ii. A compliance program is a pre-requisite for defending the company in a federal or state criminal prosecution.

iii. Sarbanes-Oxley ("SOX") applies in part to a company even though it is privately held. Regardless of whether companies agree with the law, as Herbert M. Allison, Jr., Chairman, President and Chief Executive Officer stated at the ABA/ACC General Counsel Forum stated, "It's the law." It is fast becoming a model for state acts,[2]

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and may become the basis for negligence claims or refinements in the business judgment rule, particularly as the basis for minority shareholder claims.[3]

iv. There are a host of regulatory regimes that may apply to your company.

v. An effective compliance program will assist the company in the defense of consequential and punitive damages in civil actions.

vi. An effective compliance program provides a basis for making a rogue employee defense.

vii. An effective compliance program also acts as an early warning system.

II. Compliance Checklist

a. There are several factors in a compliance program according to the Federal Sentencing Guidelines.

i. Written Compliance Standards and Procedures.

ii. Oversight Responsibility assigned to appropriate personnel.

iii. Cautious delegation of authority.

iv. Training and Education.

v. Routine Monitoring and Auditing.

vi. Enforcement and Discipline Response and Prevention.

b. What laws, regulations or compliance requiring obligations apply to the Company?

i. Sarbanes – Oxley.

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1. Sarbanes – Oxley applies directly to the company in full? The company is an "issuer"[4] and an exchange listed company.[5]
2. Sarbanes – Oxley applies directly to the company in part? The company is an "issuer", but not listed on an exchange such as a company with public debt.
3. A few Sarbanes – Oxley provisions apply to all of us.
    a. Sec. 1107 codified as 18 U.S.C. § 1513 – Criminal whistleblower provisions: "any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense …" Consequences are up to 10 years in prison and fines.
    b. The SEC staff has indicated that PCAOB-registered accounting firms may not perform specified non-audit services to clients regardless of whether they are issuers. This is a complex analysis but perhaps most dramatically impacts IT consulting.
    c. Sec 802(a) codified as 18 § 1512, 1519 – Criminal document destruction provisions. These provisions are somewhat complex, but for purposes of this

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discussion it is enough to note that the prohibit any person from altering, destroying or falsifying documents with the intent to obstruct "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."

ii. U.S. Foreign Corrupt Practices Act [6]

1. This act prohibits companies from giving cash or other gifts to foreign or international officials, regardless of the amount.
2. Issuers have additional accounting and record keeping regulations to ensure compliance with this law. However, even for companies that are not defined as issuers, compliance programs are important to ensure employees are not breaking the substantive portions of the law in addition to any potential mitigation benefits under the sentencing guidelines.

iii. Import/Export Laws [7]

1. Import/Export Law is a confusing hodgepodge of federal laws, agency regulations, and foreign government requirements.
2. Because of the complexity of these regulations, companies may unknowingly breaking the law, requiring analysis of

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their operations to determine which regulatory schemes apply.

iv. FMLA

1. This decade old law requires employers with at least fifty employees to provide up to 12 weeks of unpaid leave to eligible employees for medical and family reasons.[8] Employees typically are eligible if they have one year of service to the employer.
2. The "Compliance Guide to the Family and Medical Leave Act" describes the act and the employer's rights and obligations created by it. [9]

v. Environmental Issues

1. Over the past twenty years, criminal sanctions have increasingly been enforced against polluting companies, both in the U.S. and abroad.[10] In response, many companies have an environmental auditing program that prevents the need for EPA inspections and will often find problems before they are found in inspections. Taking a problem to an agency usually dramatically lowers remedy and penalty costs.
2. An effective program typically will have the following seven characteristics.[11]
    a. Commitment and support of top management.

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b. Environmental auditors independent of audited activities.

c. Adequate staffing and training of auditors.

d. Explicit audit program objectives, scope, resources and frequency.

e. A program that collects, analyzes, interprets, and documents information sufficient to achieve audit objectives.

f. A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.

g. A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.

vi. Technology Transfer Restrictions[12]

1. A combination of federal agencies, including BIS, OFAC, DTC, NRC, and others control what technology can and cannot be sent out of the country.[13] Transfers are defined very broadly. For instance, one of these agencies may deem a transfer the hiring a foreign national to work in the US and granting him access to controlled technology.

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2. The enforcement of these laws and regulations has increased significantly after September 11, 2001.

vii. Anti-Trust Laws

1. At least regarding price fixing and bid rigging, a simple but comprehensive anti-trust training for sales and senior executives is a must.
2. While some attorneys and business people are aware that price fixing and bid rigging are illegal under the Sherman Anti-trust Act, many are unaware of what conduct is illegal in other countries. In Europe, for example, granting exclusive territories to sell your products is often illegal.

viii. Economic Espionage Act of 1996[14]

1. The EEA makes it a federal crime to take, download, receive or possess trade secret information without the owner's authorization.
2. If the information is reasonably protected by the owner, and has economic value from not being known, it is a trade secret.

ix. Data Protection

1. The E.U. has very stringent data protection laws, while the U.S. has generally left these issues to self-regulation. The E.U. has determined that the U.S. is not a country that provides adequate protection for personal privacy. Thus,

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you may not import into the U.S. information on E.U. citizens such as names, addresses, and phone numbers, even for the company's own E.U. nationals.

2. The E.U. has negotiated a safe harbor whereby U.S. firms can avoid legal issues if they comply with the Department of Commerce safe harbor program.[15]

III. Implementation of Compliance Program

a. Understand the company's business and its fundamentals.

i. In what jurisdictions is the company conducting business?

ii. What is the nature of the business in each jurisdiction and across borders?

iii. Who are the company's clients and vendors?

iv. What laws or regulations govern or impact the company's business fundamentals?

v. Prioritize the implementation of the company's compliance programs based upon the relative severity of non-compliance.

b. How do I convince managers that they should take this seriously?

i. Engage managers in a conversation using concise and dramatic presentation materials via in-person meetings, video conferencing, Web-Ex or other tools.[16]

ii. Ask the CFO and CIO to partner with you or to play the lead role, so that the legal group is not seeking to impose a system without allies.

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iii. Publicize successful compliance events.[17]

iv. Reassess frequently and solicit internal feedback on the compliance program.

c. Specifically Respond to the Sentencing Guidelines

i. Writing Compliance Standards and Procedures

1. A few clear and enforceable standards are better than complex, numerous, and unenforceable standards.

2. Some CEOs actually value adding these broad themes to their internal and external presentations.

3. The Company should publish standards that employees can easily access, such as via an Intranet. Wallet cards and posters are inexpensive and valuable tools, which can easily re-enforce broad themes. In the government's evaluation, a compliance program is not effective if employees are unaware of it. [18]

ii. Oversight Responsibility and Delegation of Authority

1. After receiving management and board approval, discuss in a board meeting and insert into the minutes management and board involvement, interest and endorsement. A copy of these minutes can help motivate lower levels of management.

2. The legal department usually has insight into what aspects of the organization and leaders need more assistance or

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guidance. The company can obviously not assign a compliance element to someone who tends to avoid compliance assignments or will never accept its importance. A neglected compliance program is worse than none at all. It becomes a litigation opponent's weapon against the Company.

3. While a separate compliance department is useful for large corporations, smaller companies typically do not have the resources to provide one. Smaller companies need to share these responsibilities amongst a group of departments. For instance, human resources could handle FMLA compliance, operations might handle environmental compliance, and finance and legal might partner on SOX. Under the Sentencing Guidelines a Compliance Officer is optional; however, properly structured existing personnel can assume this role and leverage other departments to achieve compliance. It is important for the compliance officer to have a written plan of the various steps of the compliance program and to gather the compliance information into a single report.

iii. Training and Education

1. Simple training in plain English using a combination of in-person, videoconferencing, WebEx, or distance learning is

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not only effective as a compliance tool but increases the visibility of the legal department and its communication within the organization.[19]

2. Allow employees to challenge the purpose of the training.
    a. This reveals possible areas of non-compliance.
    b. This allows the company to confront and effectively dispel misperceptions about "bureaucracy" or the importance to the board and management of compliance.[20]
3. Create records of attendance or certification information for later use. The company can prove to prosecutors its compliance efforts.
4. The company has valuable proof to fight various defenses in employment litigation – "I did not know" does not work when you have proof of attendance at a training session.

iv. Routine Monitoring and Auditing

1. It is enormously helpful if an internal audit department is available and can add some basic review to the compliance program.
2. Often resources for these activities in a smaller organization are non-existent or overburdened. Creative solutions such as on-line surveys can be effective as a way of measuring whether the training is effective.[21]

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3. Companies should both interview employees and analyze selected records.
4. A whistle blowing process and training to prevent retaliation and promote action is important to avoid giving a litigation opponent a weapon or the government a charge against the company.

v. Enforcement and Discipline

1. Selective enforcement is extremely dangerous, particularly if important rainmakers or managers are allowed to flaunt compliance and average employees are severely disciplined.
2. Consider realistically in every discipline setting regarding compliance the following question: "would the board discipline the CEO with the same level of discipline for the same infraction?"

vi. Response and Prevention

1. Review after any major compliance events whether the compliance system worked or needs improvement.
2. Actively sunset aspects of the compliance system. If the Company is no longer pursuing work in Europe or has sold its subsidiary, the Company no longer needs its Department of Commerce certification and can simplify its privacy policy.

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3. The Company should take steps to ensure any breach or a similar one does not reoccur. Companies will often need to adjust policy, training programs or re-delegate enforcement responsibilities.

IV. Turning Compliance Into a Value Add

a. Communication Yields Revenue

i. The essence of compliance is communicating to employees the views of the board and top management about the company's approach across a host of business topics.

ii. Anti-trust training to sales may reveal that the pricing and selling model top management believes to be in place is not. This can provide an opportunity for revenue enhancement either via training down to the sales force on errors in pricing or sales or provide information up to senior management on where pricing or selling is failing.

iii. Communication to overseas operations on Foreign Corrupt Practices Act issues may reveal various business practices or cultural or operational barriers that the Company has inadvertently placed in the way of the foreign operation's development. These may be inconsistent with company policy and impacting the development of the overseas investment.

b. Compliance with Laws Avoids Costs

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i. Civil or criminal litigation costs (outside counsel, public relations experts, and consultants) impact the bottom line.

ii. Civil or criminal litigation is an enormous burden on management time throughout the trial and IT resources in discovery. While these costs are often hard to quantify, their impact is usually huge in lost opportunity costs.

c. Employee Morale Yields Intangible Value and Innovation

i. Employees appreciate knowing the rules, knowing the reasons behind them, and being empowered to act.

ii. Employees are paralyzed when compliance is seen as retribution for violations of unknown rules and polices.

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BUSINESS LAW NEWSLETTER

Sarbanes-Oxley Act of 2002: Impact on Private Companies and Their Attorneys

by Herrick K. Lidstone, Jr.

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This column is sponsored by the CBA Business Law Section to apprise members of current information concerning substantive law. It focuses on business law topics for the Colorado practitioner, including, but not limited to, issues surrounding anti-trust, bankruptcy, business entities, commercial law, corporate counsel, financial institutions, franchising, nonprofit entities, securities law, and small business entities.

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Congress enacted the Sarbanes-Oxley Act of 2002 in response to corporate scandals among public companies. Sarbanes-Oxley also has impacted private companies, most dramatically by changes affecting the attorney-client relationship. Another potential impact involves proposals to amend the Colorado Rules of Professional Conduct.

The Sarbanes-Oxley Act of 2002 ("Act")[1] was adopted by Congress on July 30, 2002. It has been well documented in the popular press, as well as in professional literature, that the Act has significantly impacted public companies[2] and their counsel.[3] The Act imposed a number of new obligations and prohibitions on public companies. It mandated corporate governance requirements (such as audit committees) for public companies trading on stock exchanges.[4] The Act also established an accounting board that requires registration of accounting firms auditing public companies and impacts the way that these accounting firms do business.[5]

In addition, as required by the Act, the Securities and Exchange Commission ("SEC") has adopted rules of ethics governing lawyers. Some consider portions of these ethical rules inconsistent with the Colorado Rules of Professional Conduct ("Colorado Rules" or "Colo.RPC).[6]

For the most part, there has been little focus on how the corporate governance and financial accounting scandals have impacted and will continue to affect private companies. In some cases, the effects will not be material; in other cases, they will be significant. As discussed in this article, the impact of the Act has affected the areas of: (1) corporate governance; (2) companies' relationships with their auditors; (3) the raising of capital for private companies; (4) interactions between lawyers and their private company clients; and (5) the attorney-client relationship.

Definition of Private Companies

For purposes of this article, "private companies" are any companies that do not have securities registered under the Securities Exchange Act of 1934 ("Exchange Act")[7] and are not otherwise subject to the obligation to file annual, quarterly, or other public reports with the SEC. The definition of "private companies" includes a wide variety of businesses.

Private companies can include mom-and-pop hardware stores, family farms, and large national or multi-national companies that have not gone public through public offerings or other mechanisms. Private companies may be corporations, limited liability companies, partnerships, and other entities formed under state law or the laws of countries throughout the world. Private companies may have only a few equity holders; others may have several hundred equity holders. The equity holders may be family members, friends, or strangers.

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Some private companies may wish they were public. However, most are content avoiding the sometimes intense scrutiny that public markets and regulators impose on the actions, results, and management of public companies. The desire to avoid the issues inherent in being a public company has increased after the adoption of the Act in July 2002.

The fiduciary duties of the directors, managers, general partners, and officers of a private company continue to be governed by state law. For a corporation, these duties include the fiduciary duties of care and loyalty.[8] Because of the recent media attention and regulatory focus on corporate governance, it is doubtful that any director, manager, or general partner of a private company can avoid liability to equity holders for failure to act with due care if they have not installed appropriate measures to detect and prevent financial fraud and unauthorized insider dealing.

Corporate Governance

Although the Act has had an impact on private companies and their lawyers, as will be explained in greater detail later in this article, Congress adopted the Act to address the corporate governance and financial accounting abuses identified or alleged in scandals involving Enron, WorldCom, Global Crossing, Qwest, and other public companies. These abuses resulted in accounting irregularities, corporate theft, over-compensation of under-performing managers, and many other practices that have been described as fraud. In the Act, Congress attempted to legislate corporate morality by:

- Prohibiting any public company from making loans or advances to its directors and executive officers, except in certain limited situations (such as for travel advances);[9]
- Mandating prompt disclosure of material events[10] and independent director approval of related party transactions;[11]
- Prohibiting insider trading of shares during certain black-out periods;[12]
- Requiring quarterly management review of the adequacy of a company's disclosure controls and internal financial controls, and providing a written certification as to their conclusion to the SEC;[13]
- Prohibiting any person from exerting any "improper influence" on the conduct of a public company's audit;[14]
- Requiring that officers forfeit bonuses or profits from stock sales when financial statements are restated;[15] and
- Prohibiting self-regulatory organizations ("SROs")[16] from listing any company's securities for public trading if the company does not have a: (1) properly-functioning audit committee consisting of at least three "financially sophisticated" and "independent" members;[17] (2) "code of conduct" for senior management that meets certain standards;[18] and (3) "whistle-blower procedure" by which employees can report apparent violation of disclosure controls or financial controls without risking their jobs.[19]

The public accounting and reporting scandals, the publicity surrounding the Act and the subsequent rule-making, and the high-profile criminal prosecutions[20] have led many parties dealing with public and private companies to pay greater attention to the companies' corporate governance and financial controls. Consequently, many persons contracting with private companies are requiring the private companies to adopt corporate governance and financial controls provisions, even though that is not required by law. As discussed below, when such obligations are imposed by insurance companies, venture capital investors, banks and other financial institutions, and other significant contractual parties, they often are time-consuming and expensive for private companies.

Insurance Companies

Insurance companies issuing directors and officers liability insurance for private companies are imposing requirements for financial controls and audit committees as a condition of issuing or renewing policies. Corporate governance requirements, especially mandating independent director approval of related-party transactions and financial controls, are viewed as means of reducing their policy risks. Thus, insurance carriers are increasingly likely to require insured private companies to obtain annual audits, whereas a few years ago, unaudited financial statements were generally acceptable.

Venture Capitalists

To protect their investments and help prepare private companies for the rigors of the public market, many venture capitalists now impose corporate governance requirements as a condition of venture financing. In the past, venture capital investors have mandated annual audited financial statements. In addition to that requirement, they are more likely to mandate independent directors, ascertainable financial controls, and periodic financial statements to be reviewed by the private company's auditors.

Financial Institutions

Banks and other financial institutions are imposing corporate governance requirements in connection with loans to business entities. Although the terms of any loan agreement are subject to negotiation, banks believe that imposing corporate governance requirements will make their loans more secure. As a condition of loan approval, banks may require the appointment of independent directors and, perhaps, an audit committee. However, where the loan is fully collateralized or personally guaranteed by a person of sufficient net worth, some of the corporate governance requirements become less important to a lender.

Contractual Parties

Significant contractual parties, such as landlords, purchase-money lenders, merger or acquisition partners receiving equity, and joint venture partners, also may require certain corporate governance compliance as a condition to completing the negotiated transaction. The persons imposing these obligations do so in an effort to protect their rights under contracts, to ensure that the contracts have been properly approved by the private company, and to ensure that the private company makes every effort to meet its contractual commitments.

Relationships with Auditors

The Act and the rules adopted by the SEC that are being implemented by the Public Company Accounting Oversight Board ("PCAOB")[21] have imposed some changes in the auditor-client relationship. Such changes include: (1) the audit partner rotation requirement;[22] (2) deferment of the audit-client relationship to the audit committee of independent directors (removing the relationship from management where it traditionally lay);[23] (3) expanded requirements to ensure auditor independence;[24] (4) redefinition of certain aspects of generally accepted accounting principles ("GAAP") as applied in the United States, such as accounting for off-balance sheet entities, the use of non-GAAP accounting measures of financial performance,[25] and FIN 46 (dealing with consolidation of subsidiaries with their

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parents);[26] and (5) the requirement that auditors review and opine on a client's financial controls.[27]

As a result of the increased work for auditors that results from the Act, PCAOB, and the underlying rules, some auditors predict that their fees for an annual audit of public companies will increase from 25 to 50 percent above the 2002 costs.[28] Many of these matters also will impact the relationships among private companies and their auditors. For example, to the extent the Financial Accounting Standards Board or other accounting bodies redefine GAAP, the redefinitions will apply to private as well as public companies. In addition, it is likely that where auditors adopt certain audit practices for their public clients, they will adopt the same practices for their private company clients.

The Act has placed enormous pressure on auditors for public companies to comment on internal financial controls. Therefore, auditors are likely to impose a similar review requirement for their private company clients, and make the appropriate reports to the audit committee or board of directors where no audit committee is present. Where these reports provide negative information, they become a red flag that directors, exercising their business judgment, would be unwise to ignore. The good news is that the directors will have the information when negative information is found; the bad news is that this review by accountants will significantly increase the costs of the accountants' work and most often will not result in any negative information.

Raising Capital

Efforts by private companies to raise capital have been, and will continue to be, dramatically impacted by the Act. Any private company seeking to raise capital through the offer or sale of a security must do so pursuant to an exemption from the registration requirements of the Securities Act of 1933 ("1933 Act") and applicable state law. The most commonly used federal exemptions are the intrastate exemption and the private placement exemption.[29]

For both exemptions, competent counsel will advise the private company to provide prospective investors with full disclosure. In fact, full disclosure is a condition to the availability of the most commonly-used exemption from registration under the 1933 Act: Rule 506.[30] Rule 506 requires that the private company provide investors with the same kind of disclosure that would be required in a Regulation A offering circular or a registration statement (depending on the amount of the offering).[31] In both cases, the private company is obligated to disclose, among many other things:

- The existence or absence of an audit committee;
- Whether any of the directors or managers are independent;
- Whether the company has adopted a code of conduct or a whistle-blower policy;
- Whether the company has or intends to obtain audited financial statements;
- Whether the company's internal financial controls are adequate; and
- A description of all related party transactions and the approval process for such transactions.[32]

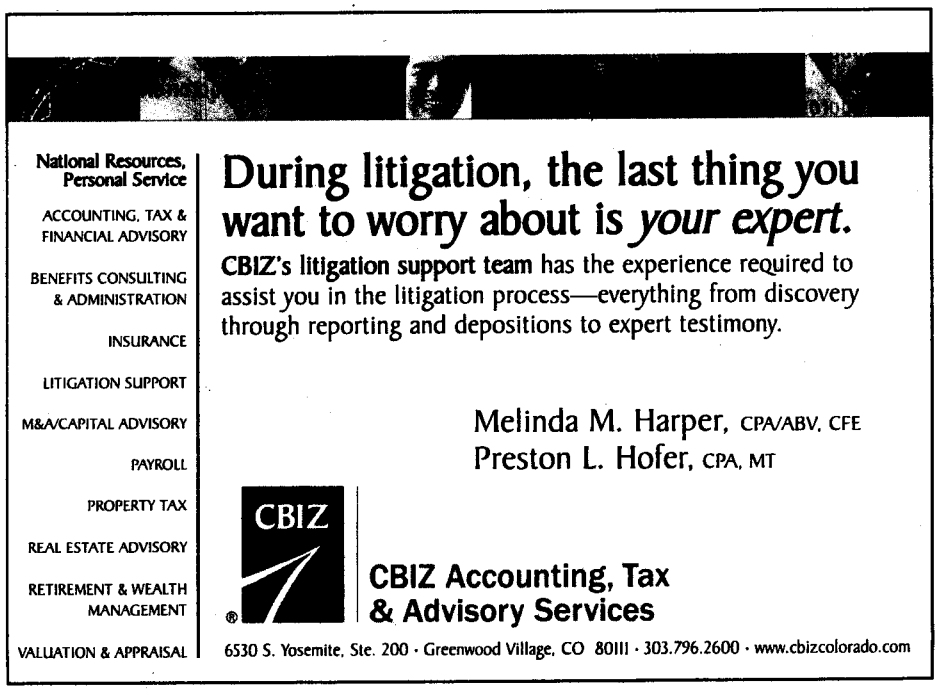
Negative disclosure of any of the foregoing may impact an investor's willingness to invest in a private company. In light of recent events, the investor could see increased risk if there is an absence of independent directors, properly chartered audit committee, or adequate financial controls. Private companies seeking private capital should consider the potential effects of this negative disclosure. Nonetheless, the more sophisticated the investor, the more likely the investor will raise negative disclosure concerns.

Impact on Attorneys and Private Company Clients

Of significant concern to attorneys representing private companies is the potential impact on their relationships with their clients of § 307 of the Act and the rules the SEC has adopted to implement that section ("Part 205 Rules").[33] The Part 205 Rules are the SEC's "Standards of Professional Conduct for Attorneys." In addition, attorneys are affected by amendments to the Model Rules of Professional Conduct ("Model Rules") that were adopted by the American Bar Association ("ABA") House of Delegates in August 2003.[34]

Part 205 Rules

The Part 205 Rules adopted by the SEC have a surprisingly far-reaching impact, even though, by their terms, the rules are limited to attorneys "appearing and practicing before" the SEC.[35] The term "appearing and practicing before" the SEC has a broad definition and includes attorneys who represent private companies in any capital-raising transaction, because the attorney must consider whether to file a Form D (under SEC Regulation D)[36] in connection with any private securities transaction. Even if the attorney concludes that the client is not required to file a Form D, he or she is included within the definition of "appearing and practicing be-



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fore" the SEC, because the attorney was required to consider the issue even though the determination was reached that no filing was required.[37]

Once caught in the web of "appearing and practicing before" the SEC, the attorney becomes subject to the Part 205 Rules. Thus, the attorney has obligations to report actual or potential violations of law, fiduciary duty, and "other similar material violations."[38] The attorney must report up the ladder to the governing body of the private company: the managers, general partner, or board of directors.

Under the Part 205 Rules, where the governing body fails to take action the attorney believes appropriate in the circumstances, he or she must explain the reasons for concluding that appropriate action has not been taken.[39] After such a fundamental disagreement between the attorney and the client, it is likely the attorney would withdraw from the representation as contemplated in Colo.RPC 1.13(c) or would be discharged.

These obligations under the Part 205 Rules are similar to the existing obligations under Colo.RPC 1.13. However, differences occur in the definition of the reportable events and the exhortation (but not as yet a requirement) under the SEC's rules that the attorney make a "noisy" withdrawal from representing the client. The Part 205 Rules specify that attorneys are obligated to act when they have "credible evidence of a material violation."[40] This is defined to be

> a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.[41]

The definition in the Part 205 Rules is much broader than the comparable requirements in Rule 1.13 of the Colorado Rules.[42]

Comparison of the Part 205 Rules and Colorado Rules

There are several principal differences between the Part 205 Rules and Colo.RPC 1.13. A comparison of key differences follows.

Types of Violations: The Part 205 Rules require attorneys to consider not only violations of law, but also breaches of fiduciary duty and "other similar violations."[43] This mandate requires the attorney to substitute his or her business judgment for that of the board of directors, to determine whether, in the attorney's reasonable opinion, the board members exercised their duties of care and loyalty properly. However, under Colo.RPC 1.13, only pending and potential "violations of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization" warrant attorney response.[44]

Injury and Materiality: Colo.RPC 1.13 requires that an attorney response be triggered only where the violation "is likely to result in substantial injury to the entity." However, the Part 205 Rules do not look at the materiality of any injury to the entity, but only at the materiality of the violation.[45]

Proposed "Noisy Withdrawal": The SEC's proposed—but not yet adopted—"noisy withdrawal" requirement would call for attorneys to advise the SEC and the public that, if required to withdraw under the Part 205 Rules, they were withdrawing for "professional reasons."[46] Rule 3(d) of the Part 205 Rules makes this reporting requirement voluntary,[47] stating that an attorney "appearing and practicing before" the SEC may reveal to the SEC "confidential information related to the [attorney's] representation" necessary to:

1) prevent the client from committing a material violation likely to result in "substantial injury to the financial interest or property of the issuer or investors," to prevent the issuer from committing perjury;[48] or
2) "rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors."[49]

This provision goes far beyond the disclosure permissible under existing Rule 1.6 of the Colorado Rules in two principal ways. First, Rule 3(d)(2)(i) of the Part 205 Rules[50] looks at the possibility of "substantial injury" from the perspective of someone other than the client/issuer. However, Colo.RPC 1.6 and 1.13 only look at the attorney's relationship with his or her client.

Second, Rule 3(d)(2)(iii) of the Part 205 Rules[51] permits disclosure to rectify consequences of past acts that caused injury to third parties. Conversely, Colo.RPC 1.6 permits only the disclosure of confidential information necessary to prevent the future occurrence of a crime.[52]

Due to the differences between the Part 205 Rules and the Colorado Rules, attorneys who represent companies raising capital (whether privately or publicly) must be more sensitive to all aspects of the client's operations that are under the attorney's scrutiny, even if it does not relate to the subject matter of the attorney's representation. Future litigation in this area probably will focus on the "reasonable attorney" who has knowledge of similar facts and that attorney's investigation obligation and reporting obligation. Future litigation also may focus on the differences between the state ethical rules governing lawyers and their mandate under the Part 205 Rules.

Modifying Colorado Rules Impacts All Colorado Attorneys

The Act already has had an impact on Colorado attorneys representing public and private companies. However, it will have a greater effect on all Colorado attorneys in the future. At its annual meeting in August 2003, the ABA adopted amendments to its Model Rules, which are being considered by a committee for presentation to the Colorado Supreme Court for adoption. The ABA's amendments were based on prior suggestions in the ABA's *Ethics 2000 Report*[53] and the March 31, 2003 *Report of the American Bar Association Task Force on Corporate Responsibility*[54] ("ABA Task Force"). In 2001, the ABA House of Delegates rejected the suggestions of Ethics 2000. However, the climate following the Act led the ABA to adopt the same changes it previously had rejected.[55]

At the August 2003 meeting, the ABA approved substantial changes to Model Rule 1.6(b). The ABA Task Force previously had stated its belief "that the interest of society and the bar in assuring that a lawyer's services are not used by a client in the furtherance of a crime or fraud justifies an exception to the important principal of confidentiality."[56] As a result of the amendments to the Model Rules in August 2003, Model Rule 1.6(b) now permits (but does not require) an attorney to disclose information "relating to the representation of a client to the extent the lawyer reasonably believes necessary":

- To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;[57] and
- To prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably

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certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[58]

On the one hand, the expansion of the permissible disclosures in Model Rule 1.6(b) is a potentially dangerous undermining of the attorney-client relationship. On the other hand, it may be an appropriate recognition of modern financial fraud and the attorney's role (wittingly or unwittingly) in the perpetration of that fraud.

The Task Force also recommended and, in August 2003, the ABA adopted, a new subsection (c) to Model Rule 1.13 that "permits but does not require the lawyer for the organization to communicate with persons outside the organization in order to prevent substantial injury to the organization." As adopted, Model Rule 1.13(c) now permits an attorney to reveal information relating to the representation of an organization

whether or not Rule 1.6 permits such disclosure but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.[59]

The new Model Rules primarily focus on injury to the organization. However, Model Rule 1.6(c) permits disclosure of client confidences resulting from the client's commission of a crime or fraud for which the client used the attorney's services if disclosure is to "prevent, mitigate or rectify substantial injury to the financial interests or property *of another.*" (*Emphasis added.*)

In addition, the ABA endorsed structural and procedural changes to improve corporate governance. Although many of the changes proposed are directed toward public companies, one of them recommends a change to the Model Business Corporation Act.[60] That modification would include in its scope private as well as public companies and suggests changes to "more clearly delineate the oversight responsibility of directors generally."[61]

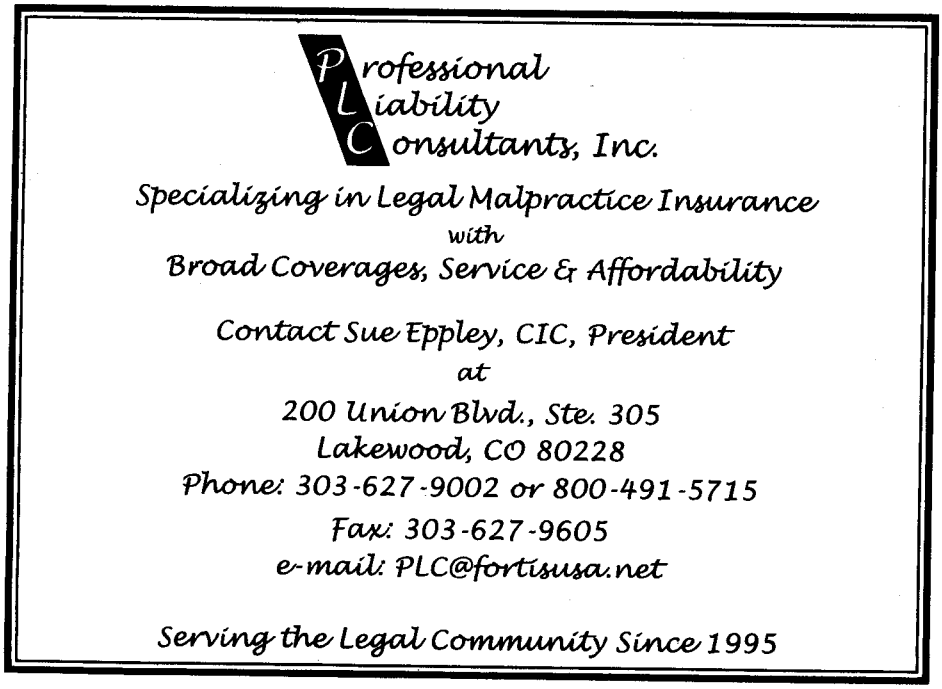
The Part 205 Rules and ABA Model Rules as adopted are permissive. They are not mandatory in that they *permit*, but do not require, attorney disclosure in the situations set forth in the respective rules. By being permissive, however, they impose significantly greater obligations on attorneys than the existing Colorado Rules, which prohibit such disclosure by Colorado attorneys except to the extent necessary to prevent the client's commission of a crime.[62] Furthermore, as noted, the Colorado Supreme Court is considering amending the Colorado Rules to track the ABA's Model Rules. Such a change would impact all attorneys practicing law in Colorado.[63]

The divide that these rules and the current climate may create between attorney and client is a concern. The attorney-client relationship may change to the extent that: (1) any Colorado attorney is (knowingly or not) "appearing and practicing before" the SEC; or (2) the Colorado Supreme Court adopts amendments to the Colorado Rules to implement some or all of the ABA's changes to the Model Rules. If either occurs, attorneys will need to address such matters as whether:

1) clients will share issues and concerns with their attorney in light of the enhanced scrutiny the attorney must give even to directors' exercise of their business judgment;
2) clients will reveal discovery of past wrongs committed by their employees and risk their attorneys reaching a different conclusion on how the clients should "mitigate or rectify substantial injury to the financial interests or property of another";[64]
3) the rules (in effect and proposed) create a more adversarial relationship between attorney and client where they permit the lawyer to disclose client confidences—"whether or not [Model] Rule 1.6 permits such disclosure"[65]—to the extent the lawyer believes necessary to prevent substantial injury to the organization; and
4) the cures that the rules are trying to address cause more harm to the corporate governance structure than the benefits that will be given.

These concerns probably will develop in only the rarest of instances, and lawyers and their clients will be able to discuss their respective concerns in a cooperative environment as they have in the past. However, it is likely that situations will arise where good-faith business judgment by management and the judgment of the attorney for the organization may differ. In that case, the attorney may believe he or she has an obligation to report up the ladder or make disclosure outside the organization when the client believes that the obligation does not exist. Fortunately, disclosure in these circumstances under the Part 205 Rules and the ABA Model Rules is voluntary, not mandatory.[66]

Where an attorney "appearing and practicing before" the SEC fails to comply with the SEC's interpretation of the Part 205 Rules, Rule 6(a) states that such failure "shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the . . . [SEC] in an action brought by the . . . [SEC] thereunder."[67] Among potential sanctions, this includes assessment of monetary penalties,[68] bars from serving



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as an officer or director of a public company,[69] and equitable relief.[70]

The issue is that the SEC now has the power to impose these remedies against attorneys who never believed that they were "appearing and practicing" before the SEC and who may not realize that they are in fact doing so. It also applies to things that were not previously (and, in Colorado, are still not) permissible under the Colorado Rules governing the practice of law.

Conclusion

The press has offered significant comments on the effects of the Act on public companies, their auditors, and attorneys who advise them. The Act will likely have an equally significant impact on private companies, directly and through the collateral effects it has had on private companies and their relationships with insurers, banks, venture capitalists, and others.

The Act and the scandals that precipitated its legislation have brought the entire legal profession into question as potential aiders and abettors of corporate fraud. The cure being proposed will impact all attorneys, regardless of whether they represent public companies or ever considered themselves as "appearing and practicing before" the SEC.

This is important because the expansion of attorneys' responsibilities under the previously strict rules of confidentiality will expand their responsibilities under the SEC's Part 205 Rules. This expansion of responsibility also could result in a potential expansion of an attorney's liability. In extreme cases, this could force the attorney to choose between traditional obligations of confidentiality and what are now voluntary disclosure obligations to the SEC.[71] It will be important for practitioners to understand their responsibilities under the Colorado Rules, the amended Model Rules proposed for adoption in Colorado, and the Act.

NOTES

1. Sarbanes-Oxley Act of 2002 ("Act"), Pub.L. 107-204, 107th Cong., 2nd Sess. (July 30, 2002).

2. As used in this article, "public companies" have a class of securities registered under the Securities Exchange Act of 1934 ("Exchange Act") § 12 (15 U.S.C. § 78*l*) or are obligated to file reports with the Securities and Exchange Commission ("SEC") under the Exchange Act § 15(d) (15 U.S.C. § 78o(d)).

3. *See, e.g.*, Mehringer, Stewart, and Bloomer, "New Corporate Governance Requirements Under Sarbanes-Oxley and the Stock Exchanges," 32 *The Colorado Lawyer* 13 (Jan. 2003); Lidstone, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship," 32 *The Colorado Lawyer* 11 (April 2003). *See also* Fonda, "Revenge of the Bean Counters," *Time Magazine* (March 29, 2004) at 38; Barakat, "Whistleblower Wins Claim Against Atlantic Coast Airlines," *Washington Post* (May 6, 2004) at E04; Sloan, "Celebrate Sarbanes-Oxley with a Little Skepticism," *Washington Post* (July 29, 2003) at E03.

4. *E.g.*, NASDAQ, the New York Stock Exchange ("NYSE"), and other exchanges.

5. Act § 101, 15 U.S.C. § 7211. The Public Company Accounting Oversight Board ("PCAOB") website is http://www.pcaobus.org.

6. Perry, "Tattletale! Rewriting Attorney-Client Privilege," *ABA—Smart Practices in Law Practice* 46 (March 2004); comment letter of the ABA to the SEC regarding SEC File No. S7-45-02 (April 2, 2003); Lidstone, "Am I My Brother's Keeper?" *supra*, note 3.

7. 15 U.S.C. §§ 78a *et seq.*

8. *See generally* Lidstone, "Conflicts of Interest and the Director's Duty of Loyalty," 17 *The Colorado Lawyer* 1969 (Oct. 1988); Lidstone, "The Business Judgment Rule: The Director's Standard of Care," 15 *The Colorado Lawyer* 1809 (Oct. 1986).

9. Act § 402, codified at 15 U.S.C. § 78m(k) (§ 13(k) of the Exchange Act). To address further the need for prompt disclosure by public companies of material events, the SEC has adopted amendments to Form 8-K, which will become effective August 23, 2004. *See* SEC Release 33-8400 (March 16, 2004).

10. Act § 409, codified at 15 U.S.C. § 78m(*l*) (Exchange Act § 13(*l*)).

11. Although this was not mandated by the Act, the stock exchanges and NASDAQ have imposed this requirement as a condition of listing. *See* NASDAQ Marketplace Rule 4350(h), available at http://cchwallstreet.com/NASD (select "NASD Rules," then "Marketplace Rules").

12. Act § 306, codified at 15 U.S.C. § 7244, implemented in SEC Regulation BTR, 17 C.F.R. §§ 245.100 *et seq.*

13. Act § 302, codified at 15 U.S.C. § 7241; Act § 404, codified at 15 U.S.C. § 7262; and Act § 906, codified at 18 U.S.C. § 1350.

14. Act § 303, codified at 15 U.S.C. § 7242.

15. Act § 304, codified at 15 U.S.C. § 7243.

16. *E.g.*, NASDAQ, the NYSE, and other stock exchanges.

17. Act § 301, codified at 15 U.S.C. § 78j-1(m) (Exchange Act § 10A(m)).

18. Act § 406, codified at 15 U.S.C. § 7264.

19. Act § 301, codified at 15 U.S.C. § 78j-1(m)(4) (Exchange Act § 10A(m)(4)). *See* Barakat, "Whistleblower Wins Claim Against Atlantic Coastal Airlines," *Washington Post* (May 6, 2004) at E04.

20. The prosecutions include the Qwest prosecutions and the Tyco prosecutions that resulted in acquittals and hung juries in April 2004 and the conviction of Frank Quattrone in May 2004.

21. Act § 101, 15 U.S.C. § 7211. *See also* the PCAOB website at http://www.pcaobus.org.

22. Act § 203, 15 U.S.C. § 78j-1(j) (Exchange Act § 10A(j)).

23. Act § 204, 15 U.S.C. § 78j-1(k) (Exchange Act § 10A(k)).

24. 15 U.S.C. § 78j-1(g), (h), and (i) (Exchange Act § 10A((g), (h), and (i)).

25. Regulation G, 17 C.F.R. §§ 244.100 *et seq.*

26. Financial Accounting Standards Board Interpretation 46.

27. Act § 404, codified at 15 U.S.C. § 7262(b).

28. These estimates are anecdotal, derived from conversations with and talks given by representatives of public accounting firms. *See also* Loomis, "Sarbanes-Oxley Burdens Small Companies," *New York Lawyer* (Dec. 19, 2002), available at http://www.nylawyer.com/news/02/12/121902d.html (quoting a New York lawyer: "[I]n many cases, compliance costs, coupled with 100 percent increases in directors and officers insurance—which he directly attributes to Sarbanes-Oxley—could easily shave 15 percent or more off a small company's bottom line.").

29. 15 U.S.C. § 77c(a)(11) (the "intrastate exemption" found at § 3(a)(11) of the Securities Act of 1933 ("1933 Act")) and 15 U.S.C. § 77d(2) ("private placement exemption" is found at § 4(2) of the 1933 Act).

30. 17 C.F.R. § 230.506.

31. Regulation A (the "Conditional Small

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Issues Exemption") can be found at 17 C.F.R. §§ 230.251 *et seq.* and provides disclosure requirements for certain offerings not greater than $5,000,000.

32. *See* 17 C.F.R. § 230.502(b)(2) (describing type of information to be furnished to prospective investors in a Rule 506 offering, including "the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use").

33. Also known as the "Standards for Professional Conduct of Attorneys," 17 C.F.R. §§ 205.1 *et seq.* *See* Lidstone, "Am I My Brother's Keeper?" *supra*, note 3, for a general discussion of these rules.

34. *See* Rodgers, "Actions of the ABA House of Delegates at Its Annual Meeting in San Francisco, CA, August 11–12, 2003," 32 *The Colorado Lawyer* 71 (Oct. 2003).

35. 17 C.F.R. § 205.1.

36. Regulation D provides exemptions that allow companies to offer and sell their securities without having to register with the SEC.

37. 17 C.F.R. § 205.2(a)(1)(iv) states: "*Appearing and practicing* before the Commission: (1) Means . . . (iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission." (*Emphasis added.*)

38. 17 C.F.R. § 205.3(b).

39. 17 C.F.R. § 205.3(b)(9).

40. 17 C.F.R. §205.3(b), referring to the definition of "evidence of a material violation" found in 17 C.F.R. § 205.2(e).

41. 17 C.F.R. § 205.2(i). "Evidence of a material violation" is defined in 17 C.F.R. § 205.2(e) ("credible evidence, based on which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur").

42. Colo.RPC 1.13 provides that where counsel to an entity knows that "a person associated with that entity is engaged, intends to act or refuses to act in a manner, related to the representation, that is a violation of a legal obligation to the entity or a violation of law which might reasonably be imputed to the entity, and is likely to result in substantial injury to the entity, the attorney must proceed as reasonably necessary in the best interests of the entity, giving consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility and the motivation of the person involved, and other relevant considerations."

43. 17 C.F.R. § 205.2(i).

44. An attorney acting under Colo.RPC 1.13 probably will look at current and pending violations in light of the historical conduct of the organization and its management. The Part 205 Rules provide that historical conduct can serve as an independent basis for attorney action against the organization, including the option to "report out" found in 17 C.F.R. § 205.3(d).

45. 17 C.F.R. § 205.2(i).

46. According to the SEC's General Counsel, Giovanni Perzioso, speaking to the American Bar Association ("ABA") on April 3, 2004, the SEC's staff is still considering whether to recommend the noisy withdrawal rules to the full SEC for adoption. 34 Securities Regulation & Law Report (BNA) (April 12, 2004).

47. 17 C.F.R. § 205.3(d).

48. 17 C.F.R. § 205.3(d)(2)ii).

49. 17 C.F.R. § 205.3(d)(2)(i).

50. *Id.*

51. 17 C.F.R. § 205.3(d)(2)(iii).

52. Rule 6(c) of the Part 205 Rules gratuitously provides that an attorney who complies with the Part 205 Rules (including the reporting permitted by Rule 3(d)) will not be subject to disciplinary action by any state authority.

53. *See* http://www.abanet.org/cpr/ethics2k.html. *See also* Keatinge, "Ethics 2000 at the 2001 Annual Meeting: Thoughts on a Self-Regulated Profession," 30 *The Colorado Lawyer* 103 (Oct. 2001); Little, "Changes to Model Rules and New Corporate Governance Resolution: A Reaction to Corporate Malfeasance," 32 *The Colorado Lawyer* 73 (Oct. 2003).

54. The "Report of the American Bar Association Task Force on Corporate Responsibility" ("ABA Report") is available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf.

55. In 2001, the ABA's Standing Committee on Ethics and Professional Responsibility considered adoption of amendments to Model Rule 1.6 to permit disclosure by an attorney, explaining that a client's abuse of the attorney-client relationship in such an egregious manner should cause a forfeiture of the confidentiality protection provided by Rule 1.6. Opponents of the proposal expressed concerns about the importance of the obligation of confidentiality and risks attorneys would run in choosing: (1) to disclose in a case where the courts would not agree with them; or (2) not to disclose in a case where perhaps they should have done so. At the August 2001 meeting, the ABA House of Delegates did not approve the proposed rule change. *See, e.g.*, Keatinge, *supra*, note 53.

56. ABA Report, *supra*, note 54 at 52.

57. Model Rule 1.6(b)(2), as amended in August 2003.

58. Model Rule 1.6(b)(3), as amended in August 2003.

59. Model Rule 1.13(c)(2), as amended in August 2003.

60. Adopted by the Committee on Corporate Laws of the ABA's Section of Business Law, with the support of the American Bar Foundation, and found at http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf.

61. Recommendation 8 of the ABA Report, approved by the ABA House of Delegates in August 2003, *supra*, note 54 at 32.

62. Colo.RPC 1.6(b).

63. In the fall of 2002, at the request of Regulation Counsel John S. Gleason, the Colorado Supreme Court Advisory Committee authorized Regulation Counsel to establish an *ad hoc* committee of Colorado lawyers: the ABA Ethics 2000 Colorado Review Committee ("Committee"). The Committee was to study the changes made to the Model Rules and make recommendations regarding the adoption of some or all of these changes in the Colorado Rules. On February 23, 2004, the Committee concluded its review. The Committee will submit its recommended changes and an accompanying Executive Summary to the Colorado Supreme Court's Standing Committee on the Rules of Professional Conduct, which will report on the matter directly to the Colorado Supreme Court.

64. If the attorney reaches a different business judgment from the client, the attorney's reporting obligations "up the ladder" require the attorney to report to the chief executive officer (17 C.F.R. § 205.3(b)(2)), and then to the board of directors or audit committee (17 C.F.R. § 205.3(b)(3)) or the qualified legal compliance committee (17 C.F.R. § 205.3(c)).

65. Colo.RPC 1.13(c).

66. As stated in the October 2003 article, Little, *supra*, note 53. "If adopted in Colorado, attorneys might have a difficult choice when and if it is necessary to divulge a confidential communication in the face of a perceived substantial injury to another. Guidance on this subject has yet to be defined." *Id.* at 74. It is hoped that when the final rules are adopted in Colorado, the Supreme Court will offer guidance. *See also* "Hamermesh, "Up the Ladder and Out the Door? Illegal Activities, New Model Rules and Reporting Obligations," 13(5) *Business Law Today* 11 (ABA, May/June 2004).

67. 17 C.F.R. § 205.6(a).

68. Exchange Act § 21(d)(3), 15 U.S.C. § 78u(d)(3).

69. Exchange Act § 21(d)(2), 15 U.S.C. § 78u(d)(2).

70. Exchange Act § 21(d)(5), 15 U.S.C. § 78u(d)(5).

71. 17 C.F.R. § 205.3(d). *See* notes 47 through 52, *supra*, and accompanying text. ■

Mark Your Calendars Now for the First J.D. Bar Association Golf Tournament
September 24, 2004 • 8:15 A.M. • Fox Hollow
Cost: $90 per participant (includes range balls, green fees, cart, lunch, and beer)
Information: Jerry Vargo, (303) 238-8832 or gvargo@sagevargo.com

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Attachment B

Vertis is more than the sum of its parts.

Vertis is moving quickly to leverage its vast and valuable resources in advertising, direct marketing, digital imaging and media. Where once we were a collection of independent operating entities, each excellent in its own right, today we have joined our individual competencies and talents to create an interdependent organization seamlessly encompassing all phases of advertising, from targeting, to planning, to creating, to delivery, to tracking results. Today, Vertis is far more than the sum of its individual parts.

Vertis is redefining itself.

Vertis is quickly evolving from a diversified holding company to a synergistic operating company. Where once the companies operating under the Vertis umbrella were connected only by their ownership, today we are a united force. Where once we thought within the walls of our separate companies, today we encourage barrier-free thinking. Where once our services were fragmented and sold in silos, today our services are much more complete and seamlessly integrated and marketed. Once a tactical vendor to our clients, we are now a strategic partner. Once a marketer of manufactured products, today we are a creator of marketing solutions.

Vertis is driven by its values.

The work of Vertis' employees is guided and inspired by the values we share as a corporate family. Today, we are actively engaged in defining for every employee the values that matter most to us:

- **We value extraordinary commitment to our clients' success.** We go beyond our clients' expectations because we know it can make a difference in their results. Going the extra mile is simply a way of life at Vertis.
- **We value integrity, doing the right thing and acting ethically.** Honoring our commitments and keeping our promises are critical to our success and to upholding our reputation.
- **We value mutual respect, treating everyone with dignity all the time.** We respect each other's point of view, especially when it is different from our own. We listen to ideas, value unique contributions and acknowledge that each of us deserves the same high level of respect and consideration.
- **We value being results-driven and achieving profitable growth.** We focus on measurable, profitable goals and what it takes to achieve them. We help our clients see the value in what we provide, resulting in profit and growth, and ultimately an investment in our future.
- **We value quantum improvements by setting "stretch" goals for ourselves.** We think boldly and wildly and constantly seek to expand our horizons. We must be able to grow in ways that are fresh, new and beyond what we ever before thought possible. This is the path to breakthrough ideas and quantum improvements.
- **We value diversity, for in diversity we are a stronger company.** We seek to hire, develop, promote and work with people from a variety of ethnic, racial and cultural backgrounds because of what we can learn from them and what they can add to our company.
- **We value teamwork, the synergy that results from our combined efforts, talents and expertise.** By working together as a team, we can overcome obstacles impossible to achieve alone. Part of being a team player means living our core values every day.
- **We value continuous learning.** We believe that learning should be a lifetime process and we strive to make formal and informal learning an integral part of our culture. We learn from others and help others learn by sharing our knowledge and experience.
- **We value a strong work ethic and a passion to be the best.** We value the passion of our people, and a level of feeling and commitment that demands excellence. Nothing less is acceptable.
- **We value a safe and enriching work environment.** Safety is never negotiable, nor is providing a work environment that is free from harassment or abuse. In a safe and supportive environment, Vertis will be a place where dreams can come true.

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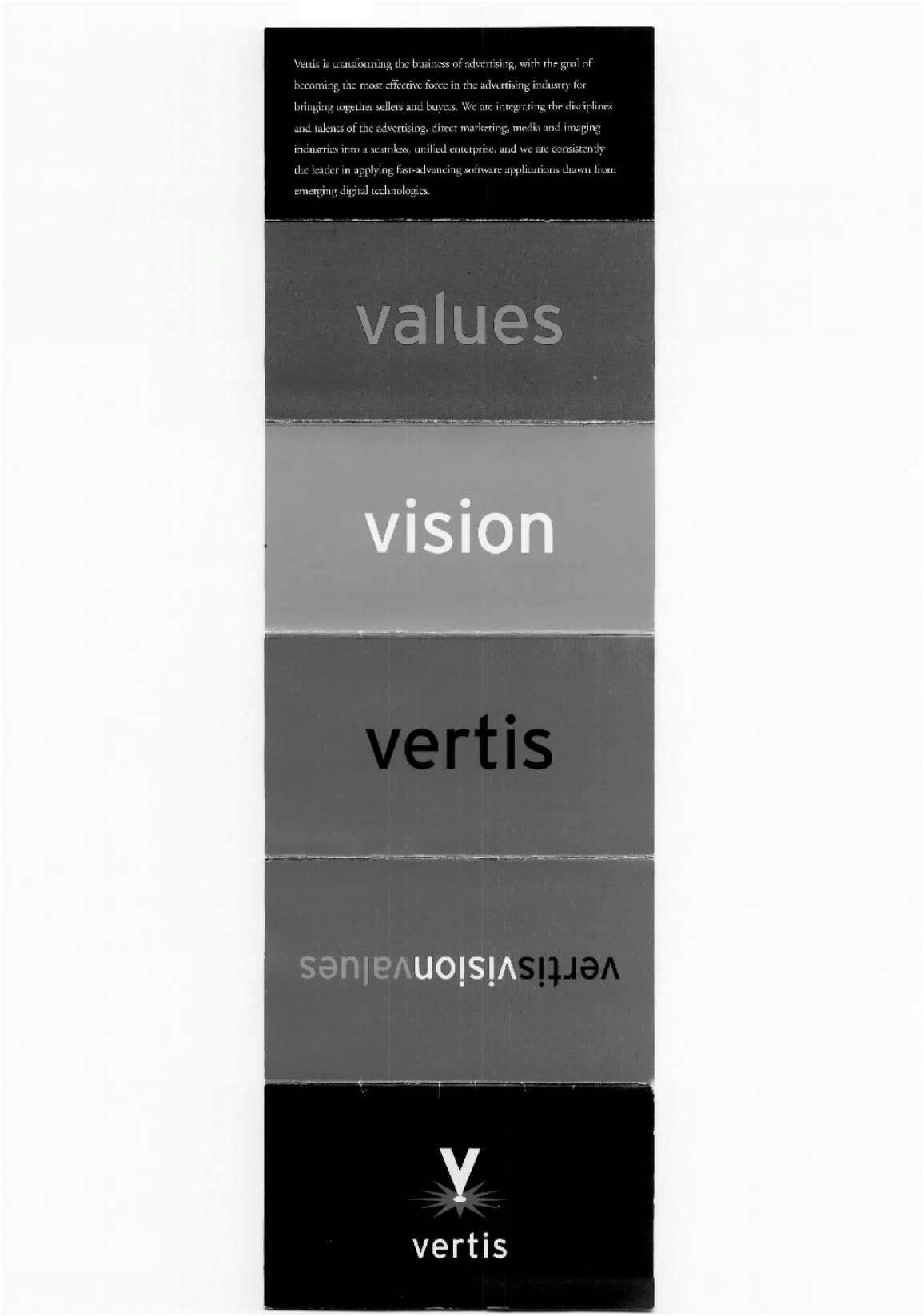

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[1] Sentencing Guidelines for United States Courts, 68 Fed. Reg. 75356 (2003)
[2] N.Y. Senate Bill S4836-b (2003), *found at* http://www.senate.state.ny.us/
[3] For a thought provoking article on Sarbanes-Oxley impacts on private companies *See* Herrick K. Lidstone Jr., *Sarbanes-Oxley Act of 2002: Impact on Private Companies and Their Attorneys*, Colo. Law., July 2004 at 73, appended as Attachment A
[4] The term "issuer" means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. §78c)), the securities of which are registered under section 12 of the Act …, or that is required to file reports under section 15(d) …, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that is has not withdrawn. Text of SOA § 2(a)(&).
[5] An "exchange listed company" means a company that lists its securities on the New York Stock Exchange, American Stock Exchange or NASDAQ.
[6] For an excellent discussion of compliance programs related to this act, *See* Jay G. Martin, *Compliance with the Foreign Corrupt Practices Act in the Post-Sarbanes-Oxley World*, February 2004, *available at* http://winstead.com/articles/articles/Summary%20of%20FCPA%20White%20Paper.pdf
[7] For more information, please consult any of the following websites:
http://www.thecre.com/fedlaw/legal27q.htm - Links to major import/export legislation, regulation, organizations, and agencies
http://www.export.gov/explore_exporting/conmktrsh.html - Government website with country and industry market research
http://www.usitc.gov/Rules.htm - International Trade Commission rules
http://articles.corporate.findlaw.com/articles/file/00014/009350 - Article intended for corporate counsel discussing compliance with import/export legislation
http://www.joc.com/handbook/exportdocuments.shtml - List of necessary documentation in various countries
http://www.businessmatchmaking.com/seminars/TX2003_6Intl_6Tuchon.ppt - Common pitfalls in international trade
http://www.globalsources.com/TNTLIST/TRADE/TRADELAW/COMMAND.HTM - 13 Commandments for import/export compliance
[8] 29 U.S.C. § 2611(4) and 2612(a)
[9] Published by the Department of Labor and found at
http://www.osha.gov/pls/epub/wageindex.download?p_file=F31743/WH1421.pdf
[10] Nancy K. Kubasek, M. Neil Browne, and Carrie Williamson, *The Role of Criminal Enforcement in Attaining Environmental Compliance in the United States and Abroad*, 7 U. Balt. J. Envtl. L. 122 (2000).
[11] Environmental Auditing Policy Statement, 51 Fed. Reg. 25004 (1986).
[12] *See*, Christopher F. Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era*, 25 Hous. J. Int'l L 441 (2003).
[13] These acronyms refer to the Bureau of Industry and Security in the Department of Commerce, the Office of Foreign Asset Control in the Department of the Treasury, the Defense Trade Controls in the State Department and the Nuclear Regulatory Commission.
[14] For a detailed account of an EEA compliance program, *See* Naomi Fine, *The Economic Espionage Act: Turning Fear into Compliance*, *found at* http://www.protecdata.com/articles/EconomicEspionageAct.pdf
[15] For more information, see the Department of Commerce website at http://www.export.gov/safeharbor/ or Jordan M. Blanke, *"Safe Harbor" and the European Union's Directive on Data Protection*, 11 Alb. L.J. Sci. & Tech. 57 (2000).
[16] Many law firms will provide you pre-packaged materials on the Sentencing Guidelines, Sarbanes-Oxley, and the other regulatory regimes for free hoping to gain your business. Often they will provide a presentation to Senior Management without charge, which allows them to play the "black hat" role of demonstrating the dangers of non-compliance and you the "white hat" role of how to become compliant without a large cost.
[17] For example, a drop in Title VII frequency and costs or an increase in overseas revenue from the Safe Harbor registration.
[18] See Attachment B for an example of a cheap and simple vehicle that promotes a compliance culture.
[19] See Association of Corporate Counsel of America, *Training Non-Legal Managers*, pp.13-33, found at http://www.acca.com/protected/infopaks/training_nonlegal/INFOPAK.PDF.

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[20] An effective "bureaucracy" might have prevented Enron, Adelphia, Worldcom and some of the other corporate scandals of the late 1990's.
[21] Zoomerang.com is a free on-line survey tool, which allows you to design a simple survey on topics and generates simple reports.

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ENVIRONMENTAL COMPLIANCE MANUAL

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I. RESOLUTION OF

THE BOARD OF DIRECTORS

Environmental Management and Compliance Program

WHEREAS, it is in the interests of the Corporation to develop and implement an effective Company-wide environmental management and compliance program, be it

RESOLVED, that the Vice-President, Corporate Administration shall have the overall supervisory responsibility for a Company-wide environmental management and compliance program;

RESOLVED, that the Corporate Environmental, Safety & Health Manager shall have the responsibility for developing, implementing and maintaining a Company-wide environmental management and compliance program, auditing its implementation, and reporting performance to the Vice-President, Corporate Administration;

RESOLVED, that at each corporate facility a Facility Environmental Administrator shall be designated and shall have responsibility for implementing the environmental management and compliance program at that facility and reporting performance to the Corporate Environmental Safety & Health Manager;

RESOLVED, that each corporate facility shall establish a Safety Committee which shall assist in maintaining compliance with the environmental program at the facility;

RESOLVED, that the Vice-President, Corporate Administration shall report annually or as required, to the Board of Directors on the effectiveness of the foregoing management structure for the Company-wide environmental management and compliance program and shall provide recommendations for any changes which are deemed appropriate; and

RESOLVED, that the Officers of this Corporation shall take the necessary action to assure that each subsidiary of this Corporation adopts appropriate policies consistent with the spirit and intent of this resolution.

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II. INTRODUCTION

This Environmental Compliance Manual has been prepared by the Company Corporate Environmental, Health & Safety Manager to provide senior managers at the Corporate and facility levels and Facility Environmental Administrators information to implement the Company's corporate environmental policy which also encompasses environmental health and safety issues. This Manual contains important policy statements regarding the Company Environmental Management Program and should be read carefully.

The Manual will be accessible via local area network to appropriate managers and Facility Environmental Administrators. These individuals should use the Manual as a reference for implementing environmental management and compliance activities appropriate to the facilities and the activities they manage. Facility Environmental Administrators may share this Manual, and information in this Manual, with any Company employee. Facility Environmental Administrators are responsible for ensuring that the information and policies in this Manual are communicated to their facility employees as appropriate to each employee's job description and responsibilities.

Section V of the Manual contains an overview of important areas of environmental law relevant to Company facilities. This information is intended to provide a brief introduction to the relevant law; this Manual does not provide a detailed or complete description of any of the laws discussed. Facility Environmental Administrators will need to obtain additional information regarding specific laws and regulations to assure compliance with all appropriate environmental laws at their respective facilities. Even though the laws discussed are U.S. law, the guidelines and principles are appropriate for responsible handling of issues in the worldwide environmental areas. Information on environmental regulations for other countries will be added at a later date, if required.

Please note that each page of this Manual is dated. Because of the rapidly changing nature of environmental laws and regulations, no Manual of this type can possibly be complete or up-to-date.

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III. COMPANY ENVIRONMENTAL POLICY

At the Company, complying with the law and protecting the environment is a high priority.

Our efforts must be directed to continually improving our systems for preventing pollution at its source through the implementation and compliance with our environmental Management Compliance Program. We therefore, must be dedicated to the reduction of emissions: eliminating our use of toxic substances through hazard evaluations and protecting against harmful effects where they must be used. When waste cannot be avoided, we are committed to recycling, and treatment or disposal in ways that minimize undesirable effects on air, water and land. We will continuously seek opportunities to improve our adherence to these principles. The Company will communicate its commitment to environmental responsibility to employees, customers, suppliers, shareholders and the community.

The Policy applies to all facilities owned or operated by the Company and its subsidiaries whether these facilities are located in the United States or in foreign countries. Section VI is a summary of various U.S. laws and regulations that apply only to U.S. facilities. However, the information on the various subjects do provide guidance on handling specific situations. Regulatory information from other countries will be included in the future, as required.

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IV. COMPANY ENVIRONMENTAL MANAGEMENT STRUCTURE

The Company has appointed responsible officials at the Corporate and facility levels to manage the implementation of The Company Environmental Policy. These personnel are available to any employee to respond to questions or concerns about compliance with the Policy and with applicable environmental regulations.

A. Corporate Environmental, Health & Safety

The Corporate Environmental, Health & Safety Manager ("Corporate EH&S Manager") is responsible for implementing the Company-wide environmental program set forth in this Manual and providing guidance to the facilities. Corporate EH&S Manager responsibilities include:

1. reviewing and approving each facility environmental compliance program, each facility emergency response plan, each facility hazardous material purchasing procedures plan and each facility annual report of environmental activities;

2. assisting in the design, implementation, and review of and approving facility environmental training programs;

3. conducting and reviewing facility environmental audits and evaluations;

4. monitoring changes in regulations, ensuring that all facility environmental programs are aware of and consistent with any changes in regulation and approving facility programs for monitoring and implementing changes in state and local laws and regulations;

5. reviewing new or changed business and real estate activities for environmental compliance;

6. with respect to environmental issues, assisting in the development of and reviewing and approving facility EI's and OP's;

7. reviewing and approving all treatment, storage and/or disposal facilities ("TSDFs") that The Company facilities may use;

8. responding to reports of releases of hazardous substances, reports of noncompliance, and reports of agency inspections;

9. assisting in the standardization of environmental records across all Company facilities; and

10. managing all remediation projects.

The Corporate EH&S Manager will report to the Director of Quality Assurance and the Vice President, Corporate Administration. In addition the Corporate

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EH&S Manager will consult regularly with Corporate Counsel on legal issues. The Corporate EH&S Manager assists Facility Environmental Administrators in the development and implementation of facility-specific procedures for environmental compliance. The Corporate EH&S Manager also assists Corporate and facility personnel in evaluating environmental contingencies associated with transactions, such as leases or purchases of real property.

The Corporate EH&S Manager has prepared this Manual to provide a general framework for Company environmental compliance and to provide basic information for the facility managers.

The Corporate EH&S Manager will provide Company Corporate Counsel and senior corporate managers information about regulatory violations, facility inspections, changes in environmental requirements and audit results, as they occur.

Corporate Counsel will report at least annually to the President and Board of Directors, regarding The Company's compliance with environmental laws.

B. Facility Environmental Administrators

A Facility Environmental Administrator is designated for each Company facility (not necessarily with this specific title). The Facility Environmental Administrator is responsible for developing and implementing environmental policies, procedures, and methods at each facility. These environmental policies, procedures, and methods will constitute the facility environmental compliance programs and will be tailored to the specific circumstances at each facility. The Facility Environmental Administrator will develop operational procedures as appropriate. These procedures will provide facility-specific information, information on state and local laws and regulations, and other information and directives to implement corporate policy and this Manual. It is the responsibility of the Facility Environmental Administrator to monitor changes in federal, state and local laws and regulations and to incorporate new requirements into the facility compliance program. It is also the responsibility of the Facility Environmental Administrator to be sufficiently aware of proposed or likely changes in environmental laws and regulations to plan adequately for possible changes in procedures or operations. Each Facility Environmental Administrator will develop the procedures necessary to provide the facility with consistent and continual environmental regulatory information. The Facility Environmental Administrator should also provide environmental awareness communications to appropriate personnel.

The Facility Environmental Administrator is the Company employee who is the primary contact with local government environmental agencies. The Facility Environmental Administrator selects the hazardous waste treatment, storage or

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disposal facility to which hazardous waste are sent for disposal. The Facility Environmental Administrator is also the Company employee responsible for obtaining and ensuring facility compliance with environmental permits. The Facility Environmental Administrator must understand the compliance provisions of all facility permits and ensure administrative and operating personnel understand the provisions in order to achieve systematic and full compliance.

The Facility Environmental Administrator must immediately notify the Corporate EH&S Manager of any reportable spills or releases of any hazardous constituent, any inspections by government agencies, any notice of violation received from any government agency, any serious breakdown or lapse in the environmental management program, and any instance of non-compliance.

The Facility Environmental Administrator is responsible for proper creation and retention of records in compliance with environmental laws and regulations, permits**,** administrative orders, and the Company's own record retention policy.

The Facility Environmental Administrator will report annually to the Corporate EH&S Manager, summarizing all environmental activities including training programs, inspections and any other activities. All applicable environmental operational procedures will be sent to the Corporate EH&S Manager for review and approval.

C. Each Employee's Responsibilities

The Facility Environmental Administrator and senior facility managers are responsible for communicating the following information to every Company employee:

> "Each employee is responsible for compliance with environmental laws and regulations in relation to each employee's job description and specific responsibilities. This requires being properly trained and maintaining one's training. It also requires exercising care and good judgment. Attention to environmental compliance is an essential part of many jobs and is not to be sacrificed in the interest of production or speed of delivery. Employees should expect to receive the appropriate training required in relation to their responsibilities and should contact their supervisor or Human Resources if they feel that they need additional training."

In addition, as discussed in Section IV.B below, each employee is responsible for reporting to the Company incidents or suspected incidents of non-compliance. The Facility Environmental Administrator and/or senior facility management should ensure that each employee is familiar with this responsibility.

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D. Discipline

The Facility Environmental Administrator and senior facility managers are responsible for communicating to every Company employee that failure to comply with the environmental and safety sections of the Company Code of Ethics, the Company Environmental Policy, the procedures in this Manual, or facility Executive Instructions may result in disciplinary action up to and including release, referral for criminal prosecution, and initiation of a civil lawsuit by the Company to recover damages. Disciplinary action may be taken:

* Against employees who authorize, direct or participate directly in actions or omissions which are in violation of the environmental and safety sections of the Code of Ethics, the Environmental Policy, the procedures in this Manual, and operational procedures;

* Against any employee who has deliberately failed to report a violation or deliberately withheld relevant and material information concerning a violation of the environmental and safety sections of the Code of Ethics, the Environmental Policy, the procedures in this Manual, and operational procedures;

* Against the violator's managerial superiors, to the extent that the circumstances of the violation reflect inadequate supervision or a lack of diligence.

* Against any superior who retaliates, directly or indirectly, or encourages others to do so, against any employee for reporting a violation of the environmental and safety sections of the Code of Ethics, the Environmental Policy, the procedures in this Manual, and operational procedures.

Subsequent to an occurrence, Company will actively seek to discover and correct any wrongdoing and discipline the wrongdoers. The Company and its employees will cooperate fully with authorities who may investigate and prosecute violations of the law by the Company or its employees.

E. Other Resources

1. Legal

Attorneys are available at the Corporate Level to provide interpretations of laws and regulations applicable to environmental matters. Advice from outside counsel is also available. Facility Environmental Administrators and other employees should generally first contact the Corporate EH&S Manager with legal questions.

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2. Human Resources

The Division Human Resources Department provides several services important to environmental law compliance. Corporate Human Resources supports the Division Human Resources Departments when requested and an action/matter relates to environmental, health, and safety.

An employee who suspects a violation of environmental law, but does not wish to talk to a supervisor, can contact the Human Resources Department or the Vice President of Administration to discuss the violation, or the Company Compliance Hotline.

In addition, an employee who needs additional training can discuss his/her needs with Human Resources.

Disciplining of employees is also handled by the Human Resources Departments.

3. Corporate and Facility Public Affairs

All requests from the press for information regarding corporate or facility environmental policy or related issues will be directed to the (Chief Executive Officer, Vice Presidents, or Division Managers, as appropriate), the Corporate EH&S Manager, and the Facility Environmental Administrator.

4. Risk Management

Company is a self-insured company; Company does carry comprehensive general liability insurance. All issues regarding potential liability due to an environmental situation (for example, hazardous material spills, on-site or off-site contamination, clean-up orders) should be directed to the Corporate EH&S Manager. Coordination between plant management, EH&S Manager and the Vice President of Finance is necessary to ensure proper assessments, evaluate strategies and reserve funds for future expenses.

5. Business Conduct and Ethics

Any employee may report violations or possible violations of environmental laws and regulations, the Code of Ethics, and the Environmental Policy, or to discuss other environmental issues by contacting any of the following. There is no requirement to contact any of the following first, or any special order; it is totally up to the employee.

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a. Vice President of Corporate Administration
COMPANY, INC.
_____
_____

(___) ___-____ ext. ____.

b. Corporate Compliance Officer
COMPANY, INC.
_____
_____

Hotline Number (answered only by the Corporate Compliance Officer -- and maybe anonymous) (___) ___-____ ext. ____.

c. Corporate Environmental, Safety and Health Manager .

d. Appropriate Facility Environmental Administrator.

V. ENVIRONMENTAL COMPLIANCE PROGRAM

A. Emergency Response

1. Responding to Emergencies

The Facility Environmental Administrator is responsible for the preparation of emergency response plans and procedures which fulfill the requirements of specific environmental laws and regulations (such as the preparation of a contingency plan pursuant to federal and state hazardous waste management laws) and protect the Company and its employees from hazards relating to the use of hazardous materials. The Facility Environmental Administrator will develop operational procedures on this topic. The Corporate EH&S Manager will review and approve all facility emergency response plans. The Facility Environmental Administrator will also coordinate with other employees, including the facility disaster coordinator and/or the Corporate EH&S Manager, about planning for natural and other emergencies such as fires, explosions, earthquakes and civil disorders, in accordance with Corporate Directive _____.

2. Release Reporting

The Facility Environmental Administrator is responsible for making all required reports to government agencies in the event of a spill or release of a hazardous substance and for developing and implementing release

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reporting plans. The Facility Environmental Administrator will develop operational procedures on this topic.

Various federal, state and local environmental laws and regulations prescribe release or spill reporting requirements. In addition, obligations to report certain releases of hazardous materials may also exist in environmental permits.

Typically more than one release reporting requirement applies to any significant, unanticipated release of a hazardous material. Release reporting requirements exist in numerous federal and state environmental laws. Increasingly, local governments are amending local ordinances to include reporting requirements. It is important to understand the satisfaction of one release reporting requirement may not relieve Company of an obligation to comply with other applicable federal, state and local release reporting requirements. Failure to comply may result in civil or criminal enforcement proceedings, particularly if a release results in significant harm to human health or the environment. Many agencies characterize the alleged failure to comply with release reporting requirements as one of the most serious types of violations of environmental law.

Release reporting requirements are broadly drafted and significant penalties exist in the event of noncompliance. Therefore it is often a good idea to report a release even if some uncertainty exists as to whether such a report is required by law.

It is important to develop release reporting protocols or plans prior to the occurrence of an unanticipated release. Many release reporting requirements mandate that immediate, verbal reports be made to environmental agencies. There will not be time to research the applicability of legal requirements after the occurrence of a release. Facility-specific emergency response plans and contingency plans will provide initial directions. These plans should be reviewed and revised, if needed, on a regular basis.

The Corporate EH&S Manager must be immediately notified in the case of a reportable release so that the Manager can assist the Facility Environmental Administrator in ensuring that all release reporting requirements have been satisfied.

The person reporting a release should maintain a record of: all agencies contacted, the time of each contact, the name of each agency person contacted (or a note made that the report was recorded by an answering machine), and the information given to each agency. In some cases, agencies receiving an oral report may assign a report number to the report; this number should be obtained at the time of the oral report and

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maintained in the facility's records. Often oral reports must be followed with written reports. All requirements should be complied with in the required time frames. A copy of any correspondence with any government agency regarding a spill or release, including a report or notification of a release, must be sent to the Corporate EH&S Manager. A summary of any spill or release incident must be included in the Facility Environmental Administration's annual report to the Corporate EH&S Manager.

B. Environmental Communication

1. Reporting non-compliance

The Facility Environmental Administrator and senior facility managers are responsible for communicating the following information to every Company employee:

"An important part of ensuring Company compliance with environmental laws and regulations is each employee's obligation to report to a Company official apparent or actual violations of these laws and regulations or any other actions felt to be a departure from appropriate environmental practices. When such actions are observed, it is each employee's responsibility to report these perceived or actual violations to a Company official. Employees may report such incidents to their supervisor. However, Company recognizes that in certain circumstances it may be more appropriate for an employee to report an incident to someone else. For this reason, all Company employees are also free to contact:

a. Vice President of Corporate Administration
COMPANY, INC.
_____
_____

(___) ___-____ ext. ____.

b. Corporate Compliance Officer
COMPANY, INC.
_____
_____

Hotline Number (answered only by the Corporate Compliance Officer -- and maybe anonymous)
(___) ___-____ ext. ____.

Any contact with the Corporate Compliance Officer or the Vice President of Corporate Administration may be

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anonymous. However, it is preferred that the employee provide his/her name so that follow-up with the employee can be made if necessary. All contacts will be held confidential to the extent possible with fair and appropriate investigative action. Employees may make such reports with the assurance that no adverse action or retribution will occur based upon making such a report."

The Facility Environmental Administrator should consult with the Corporate Environmental, Health and Safety Manager and the Compliance Officer to determine if instances of non-compliance must be reported to government agencies.

2. Crisis Management

In the event of an environmental emergency or release, all requests from the press for information will be directed to the Vice President of Corporate Administration and the Corporate Environmental Health & Safety Manager, who will coordinate responses with the Facility Environmental Administrator and appropriate Company senior management. No press releases will be issued without the prior approval of the Vice President Corporate Administration.

3. Customers and the Environmental Policy

Company is committed to providing outstanding performance and producing quality products and services for our clients. Increasingly, customers are interested in the environmental policies of companies from whom they purchase products. Some of Company customers may now or in the future require certain environmental certifications. Compliance with our Environmental Policy is good for our business.

C. <u>Environmental Training</u>.

The Facility Environmental Administrator or other designated person will develop and implement environmental training programs for all employees in relation to an employee's specific job description and responsibilities. The Facility Environmental Administrator must have on file at the facility EI or OP which describe and implement the training programs. These programs are generally in addition to the training requirements under occupational health and safety laws, such as hazard communication. All in-house training programs must be reviewed and approved by the Corporate EH&S Manager.

The training program may include in-house training, attendance at commercial courses and on-the-job training. Some environmental laws have specific training requirements. For example, a generator of hazardous waste who temporarily stores hazardous waste must provide training to ensure that personnel are able to respond effectively to emergencies. The Facility Environmental Administrator is

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responsible for identifying legally required training requirements and ensuring the requirements are met.

Records must be kept of the content of training and the attendance of individual employees at training sessions. An annual summary of all training activities at the facility must be included in the Facility Environmental Administrator's annual report to the Corporate EH&S Manager.

D. Environmental Auditing

It is Company policy to perform formal and periodic auditing of each Company facility to ensure compliance with environmental laws and regulations and with corporate policies and standards. Audits may be conducted by the Corporate EH&S Manager, a Corporate Internal Auditor**,** or third party consultants. Audits may be announced or unannounced ("surprise") audits. All environmental, health and safety procedures and recordkeeping will be audited at least every two years.

At the conclusion of all audits, a final report including action items will be prepared with recommendations for future corrective actions. Specific responsibility will be delegated for each corrective action, with, if possible, a time estimate for specific actions. A corrective action plan will be developed by the Facility Environmental Administrator with approval by the senior manager at the specific location. Those delegated responsibility for specific actions will report back to the Corporate EH&S Manager in the manner specified in the inspection report or corrective action plan. It is absolutely essential and a matter of significant importance to Company that each instance of noncompliance be corrected within the assigned time and the correction documented.

The Corporate EH&S Manager will review audit reports to determine if any violations of environmental law or environmental permits have been discovered which must be or should be reported to government agencies.

Any "repeat" noncompliance (noncompliance that was corrected but which has reoccurred) will be considered very seriously**.** (Please see Section III. D above regarding Discipline.)

1. EH&S Internal Compliance Audits

The Corporate EH&S Manager is responsible for conducting environmental audits of all Company facilities at time frequencies appropriate for the specific facilities. The audits will include facility walk-through, employee interviews, and document review. Each employee must cooperate fully with the audits and provide accurate and complete information to assist in the completion of the audit. If a deficiency or non-compliance is observed, the auditors will attempt to develop an understanding of the cause(s) of each identified deficiency or non-compliance. This will include an understanding of any management system deficiencies that led to the non-compliance.

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As appropriate for specific facilities, the audit may include an assessment of:

* The environmental management system in place to assure compliance with environmental laws and regulations, permit conditions, consent decrees, enforcement orders, and corporate policies and procedures;

* Pollution prevention and hazardous waste minimization;

* Emergency preparedness, including planning for release reporting; and

* Employee training.

2. Corporate Audits

In addition to EH&S audits, as part of all corporate audits, environmental compliance will be monitored. The environmental components of these audits will specifically assess:

* Compliance with hazardous waste generator requirements;

* Environmental Recordkeeping, including training documentation, manifests, and associated documents;

* Purchasing requirements for hazardous chemicals and Material Safety Data Sheets (MSDSs);

* Environmental Permits;

* Periodic reports to agencies;

* General Housekeeping at the Facility.

3. Self Audits

The Corporate EH&S Manager may require a facility periodically to conduct a self-audit. The Corporate EH&S Manager will supply all audit materials to the Facility Environmental Administrator.

4. Third Party Audits

In order to ensure objectivity regarding environmental compliance at Company, the Corporate EH&S Manager may periodically initiate facility audits by outside consultants. These audit may be announced or "surprise" audits. Audit reports from third party audits will be reviewed and assessed by the Corporate EH&S Manager.

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5. Acquisition Audits

The environmental condition of a property being purchased or leased should be assessed prior to the purchase or lease of the property. This process will help the Company avoid acquiring significant environmental liabilities and will help plan for environmental compliance at the new facility. The Corporate EH&S Manager should be notified as soon as practicable when property is being purchased or leased so that the manager may assist Corporate and facility personnel in evaluating environmental contingencies associated with such transactions.

6. Supplier Audits

Facility Environmental Administrators, who are responsible for the selection of the facility from the approved TSDF list to which hazardous wastes are sent for treatment, storage, or disposal, and for the selection of other environmental suppliers, should conduct reviews of these suppliers before contracting for services. At a minimum, these reviews should include telephone calls to state agencies to confirm permit status and recent compliance record and obtain insurance certificates. Facility Environmental Administrators must develop operational procedures for this activity. This review must be documented and maintained with manifest documents.

E. Waste Minimization/Pollution Prevention

The Company Code of Ethics states:

> "Not only must we properly handle all hazardous materials that we may purchase, use, generate, store, or dispose of, but we must do our best to minimize such materials."

As, a hazardous waste generator who signs hazardous waste manifests for the transportation of hazardous waste, Company must certify that the "generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable". 42 U.S.C. § 6922(b)(1).

The Facility Environmental Administrator at each facility is responsible for implementing policies and procedures for waste minimization (hazardous or non-hazardous).

The Facility Administrator may minimize the purchase and use of hazardous materials in many ways. This may include selecting the least toxic product. It may include purchasing chemicals in only small amounts. It may also include requesting and producing environmentally-friendly packaging.

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Facilities must establish a program whereby the Facility Environmental Administrator reviews purchase order requests for chemicals to ensure that the chemicals requested for purchase are not already available at the facility, that less toxic chemicals could not serve the intended purpose, and that the possible reporting and emergency response implications of the use of the chemical are understood.

Efforts to recycle paper, cardboard, plastic, metals and other recyclables should be included in the facility waste minimization program.

All new and existing processes should be reviewed for pollution prevention and energy conservation opportunities. Waste reduction occurs after a waste is generated. A facility's first priority should be to seek ways to prevent waste from being created and to prevent pollution from occurring.

F. Recordkeeping and Record Retention

The Facility Environmental Administrator must ensure proper creation and retention of records in compliance with environmental laws and regulations, permits and administrative orders, and the Company's record retention policy. Environmental documents including, but not limited to manifests, training and permits will be retained permanently. Hazardous waste manifests and supporting documents and shipping papers for non-hazardous wastes (i.e. oil) will be retained permanently to provide traceability for all chemical disposals.

Records which are relevant to a threatened or actual litigation, or to a government enforcement action or government investigation, are not to be destroyed. The Facility Environmental Administrator should notify the Plant Manager and the Corporate EH&S Manager if the Administrator becomes aware of any litigation, government enforcement action or government investigation to ensure that the destruction of documents which may be affected will not occur.

G. Government Inspections

It is Company policy to cooperate fully with environmental agencies conducting compliance inspections at a specific facility.

The Facility Environmental Administrator should advise employees who would likely be notified by a government agency that an inspection is being considered or has been scheduled immediately to notify the Facility Environmental Administrator upon receiving such information. If the Facility Environmental Administrator is not available, an immediate supervisor should be notified. In addition, the Facility Environmental Administrator should notify the Corporate EH&S Manager of any such potential or actual inspections. Copies of written notices of upcoming inspections should be sent to Corporate EH&S Manager.

The Facility Environmental Administrator (or a person designated by the Administrator) should be the primary government agency contact for the

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inspection. The inspector should be greeted by and accompanied by the Facility Environmental Administrator or the designee at all times. The Facility Environmental Administrator and other employees should respond to all questions, but should not volunteer information. If the inspector asks to take samples, the Facility Environmental Administrator or the designee should ensure that "split" samples are obtained for Company. In addition, the Facility Environmental Administrator should duplicate any photographs and/or videos taken by the inspector and request copies of photographs or videos taken by the inspector.

The Facility Environmental Administrator should notify the Plant Manager regarding upcoming inspections to ensure that no records are routinely destroyed prior to the inspection or during any enforcement period that follows which should not be destroyed.

Prior to an inspection, Company should notify the inspector that trade secrets may become known to or disclosed to the inspector during the inspection and receive appropriate agreements or commitments from the inspector to protect such trade secret information.

At the conclusion of the inspection the Facility Environmental Administrator should meet with the inspector to determine if the inspection covered any equipment or processes or included documents that are trade secrets or if any other company confidential information is involved. The Facility Environmental Administrator should consult with the Corporate EH&S Manager to ensure that proper actions are taken by Company and by the inspector to keep such information confidential.

An internal record of the inspection should be prepared. A copy of this inspection report should be sent to the Corporate EH&S Manager. If a report of the inspection is received from the government agency conducting the inspection, a copy of this report should also be sent to the Corporate EH&S Manager. Each Facility Environmental Administrator must develop and maintain an EI regarding inspections for the specific facility.

H. Consideration of Environmental Issues in the Planning, Design and Implementation of Business Activities

Facilities and processes should be designed and operated so as to minimize their environmental effect, to the extent feasible and cost-effective. All proposals regarding capital investments or the development of new processes or new policies or changes in existing products or processes submitted on the Investment Appropriation Request (“IAR”) shall be approved by Corporate EH&S with respect to environmental issues. Accordingly, the Corporate EH&S Manager will review these IARs to assess environmental impacts and prepare a report, if applicable, itemizing any environmental concerns and further identifying any

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environmental compliance issues. Originators of the IAR will respond to and accommodate Corporate EH&S manager concerns.

I. Real Estate Transactions (sales, leases, plant closures)

Environmental issues should be evaluated in all significant acquisition and divestiture decisions, and in plant closures. The Corporate EH&S Manager will be notified as soon as practicable of all proposed acquisitions, divestitures and plant closures.

1. Acquisitions

Environmental issues relating to any property or operations considered for acquisition should be assessed as part of the due diligence process. As discussed in Section V.D.4 of this Manual, significant liabilities may be acquired under federal and state environmental laws by owners and operators (such as lessees) of contaminated property.

The environmental condition of a property being purchased or leased should be assessed prior to the purchase or lease of the property. This process will help the Company avoid acquiring significant environmental liabilities and will help plan for environmental compliance at the new facility. The Corporate EH&S Manager will assist Corporate and facility personnel in evaluating environmental concerns associated with such transactions.

2. Divestitures

Environmental issues must be identified as part of any divestiture so that environmental responsibilities can be included in agreements with the acquiring company.

3. Plant Closures

The Corporate EH&S Manager is responsible for ensuring that the facility is "closed" in accordance with all applicable environmental laws and regulations. This includes providing appropriate notifications to government agencies, canceling permits, disposing of waste materials, and conducting "closure" activities under applicable regulations. Records and documents should be organized for future reference. In certain situations Company may wish to document the environmental status of the facility at time of shutdown. The Corporate Environmental, Health, and Safety manager will coordinate these activities.

4. Lessees

Lessees of any Company property or space within a Company facility is required to maintain compliance with all applicable environmental

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regulations. Company should retain the right of auditing and/or inspecting the leased property to assure compliance. The Corporate EH&S Manager may participate in the audit/inspection.

J. Hazardous Materials Purchasing

Each Facility Environmental Administrator must establish specific procedures for processing purchase requisitions for any hazardous materials. Those procedures will be designed to:

* Meet all governmental requirements for handling of hazardous materials/waste.

* Reduce the amount of hazardous waste generated by this facility.

* Support supervision in setting up proper procedures for employees who handle chemicals to meet the "RIGHT-TO-KNOW" law and Company policy including receipt of the most current Material Safety Data Sheet.

* Establish an efficient routing, recording and tracking procedure that is simplified by using Repetitive Purchase Requisitions when processing orders.

* Review the toxicity of the material ordered.

* Ensure that appropriate personal protective equipment is available.

General guidelines for ordering any chemical may include the following:

* Do not order a chemical unless it is absolutely necessary. Perhaps a similar chemical in stock can be substituted or the chemical is available in another department.

* Order the smallest quantity possible since disposal costs may be many times greater than the savings that can be realized by ordering in quantity. Only order quantity which can be used within that shelf life period.

* Select the least hazardous chemicals that will satisfy the requirement.

* Samples require the same review.

K. Shipping of Hazardous Materials/Chemicals

Each Facility Environmental Administrator must coordinate with the Purchasing Manager and the Shipping Manager to establish specific procedures for

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transportation requirements of all hazardous/non-hazardous materials. Transportation requirements must be determined not only for the local regulations, but also the regulatory requirements of the final destination. International air or ground transportation regulations may also apply. This may include packaging requirements, Material Safety Data Sheets, shipping papers, labeling, and proper identification of the material shipped. These shipping requirements also apply to shipments between Company plants.

U.S. exports of chemicals are regulated by the U.S. Department of Commerce. The Corporate Legal Department or the International Trade Department should be contacted for assistance in determining export license requirements.

Specific regulations for shipments of hazardous waste must be determined and followed. All hazardous waste shipping documents must be maintained indefinitely. Only approved treatment, storage and disposal facilities (TSDFs) can be used for hazardous waste shipments.

VI. COMPLIANCE WITH SPECIFIC U. S. FEDERAL ENVIRONMENTAL LAWS AND REGULATIONS

This section provides an introduction and overview of key areas of federal environmental law which may be relevant to Company operations and activities. Statutes and regulations are periodically revised. In addition, changes in manufacturing processes may change regulatory compliance duties. Accordingly, regulatory and manufacturing process changes must both be closely monitored in order to keep current on compliance obligations. Although this section refers to U.S. laws, international laws may also exist. It is planned to expand this section of the manual to include international compliance issues as necessary.

The materials in this Section are intended to provide a useful context for addressing environmental law compliance at the facility level. At non-U.S. facilities, the following provides guidance for handling environmental issues.

It is essential that Facility Environmental Administrations carefully review applicable federal, state and local environmental laws and regulations to ensure that they are aware of all relevant laws and develop compliance programs to address these laws. Most of the federal laws discussed in these sections are administered by the states under federally approved state programs. In addition, most states have established other environmental regulatory programs applicable to corporations operating within those states.

Employees should always consult the actual text of laws and regulations when making compliance decisions. Questions regarding specific issues should be directed to the Facility Environmental Administrator or the Corporate EHS Manager.

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A. Air Quality

1. Introduction

The federal Clean Air Act ("CAA") was enacted in 1970 and amended in 1977 and 1990. The CAA provides for the regulation of stationary sources under Title I and the regulation of mobile sources under Title II. The 1990 amendments expanded the CAA to include, among other things, broader regulation of toxic air pollutants, regulation of sources of acid precipitation, the phase out of chlorofluorocarbons, and the development of a strengthened stationary source permitting program.

2. The Federal Air Quality Program

This section briefly reviews the stationary source provisions of the CAA.

a) National Ambient Air Quality Standards

The Clean Air Act requires the EPA to establish national ambient air quality standards ("NAAQS") for specified air contaminants referred to as "criteria pollutants." The criteria pollutants are: ozone; carbon monoxide (CO); sulfur dioxide ($S0_2$); oxides of nitrogen (NO_X); particulate matter (PM); and lead. To monitor compliance with these national standards, the nation is divided into geographical areas commonly referred to as air quality control regions ("AQCR"). A region that fails consistently to meet an NAAQS for a criteria pollutant is designated "non-attainment" for the pollutant, whereas an AQCR that regularly meets that standard is considered to be "in attainment" for that particular pollutant.

b) State Implementation Plans and Permitting

Under the Act, states must develop plans and regulations that identify sources, set emission limitations, establish transportation controls, and provide for monitoring and enforcement of state requirements. CAA § 110, 42 U.S.C. § 7410. The state implementation plans ("SIP") must be reviewed and approved by EPA. Once approved, EPA promulgates the SIP as a federal rule, and the SIP and any permits issued pursuant to it are enforceable by EPA, the state, and private citizens. EPA may initiate enforcement actions for violations of both federal requirements and federally enforceable state requirements. It is important to note, however, that primary enforcement responsibility has been delegated to the states.

The 1990 amendments added a broad new federal permit program to the CAA. The new federal permitting program requires all new and existing "major sources" to obtain permits. CAA § 502, 42

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U.S.C. § 7661a. Major sources include those sources which have the potential to emit 100 tons per year or more of any air pollutant and sources which have the potential to emit 10 tons per year or more of any single hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

c) New Source Performance Standards

New source performance standards ("NSPS") are a set of national emission standards for both criteria and noncriteria pollutants that are applicable to new, modified, or Company constructed stationary sources in specified industrial categories. CAA § 111, 42 U.S.C. § 7411. (A "Company constructed source" is a source for which the fixed capital costs of the new components exceed 50 percent of the federal capital costs that would be required to construct a new facility and for which it is technologically and economically feasible to meet new source performance standards. 40 C.F.R. § 60.15(b).) The local AQCRs typically require new source applicants to demonstrate compliance with any applicable NSPS during the permitting phase of the project. Enforcement actions concerning NSPS frequently arise when a source modifies existing equipment or operations and fails to examine whether the modifications trigger NSPS requirements.

d) Prevention of Significant Deterioration Requirements

Before beginning construction of a "major stationary source" or significantly modifying a major source in an attainment area, a prevention of significant deterioration ("PSD") construction permit must be obtained from EPA or the state air pollution control agency if the state has been authorized by EPA to implement the PSD program. CAA § 161, 165, 42 U.S.C. §§ 7471, 7475. Major stationary sources include any one of 28 listed categories of sources that can potentially emit 100 tons per year (tpy) or more of any regulated pollutant while operating at maximum design capacity. CAA § 169(1), 42 U.S.C. § 7479(1). *See also* 40 C.F.R. § 51.166(b)(1)(i)(*a*). Also included in the definition of major stationary sources is any noncategorized facility that can potentially emit 250 tpy or more of any air pollutant subject to regulation under the Act. 40 C.F.R. § 51.166(b)(1)(i)(*b*)

Modifications to existing major stationary sources require PSD construction permits if the increase in potential emissions is "significant." The threshold amounts for significant emissions increases for major modifications are 100 tpy for carbon monoxide, 40 tpy for nitrogen oxides, sulfur dioxide, and ozone

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(measured as volatile organic compounds, (VOCs)); and 15 tpy for particulates.

e) New Source Review Requirements

New source review ("NSR") is a construction permit program that applies to new major stationary sources and to significant modifications to existing major sources in both PSD (attainment and unclassified) and nonattainment areas. NSR is designed to provide a net air quality improvement after the proposed source begins operation in nonattainment areas and to prevent the deterioration of air quality in PSD areas. CAA §§ 160, 173(a); 42 U.S.C. §§ 7470, 7503(a). All nonattainment and some PSD/NSR programs are conducted at the state or local level under EPA-approved permit programs that are at least as stringent as the federal programs.

In nonattainment areas, NSR requirements that must be met in order to construct a new major source or major modification include compliance with the lowest achievable emission rate ("LAER") for the source, certification that all of the owner's other sources in the state are complying with all applicable regulations, achievement of emission reductions from other sources within the nonattainment area that offset the increase from new emissions, and a demonstration that emission offsets produce a positive net air quality improvement resulting in "reasonable further progress" toward attainment of the NAAQS. CAA §§ 172, 173; 42 U.S.C. §§ 7502, 7503. New source review requirements in PSD areas include air quality monitoring, computer modeling to demonstrate compliance with increment allotments, and a determination of best available control technology ("BACT") for the source.

f) Hazardous Air Pollutants

The hazardous air pollutant (air toxics) provisions were significantly revised by the 1990 amendments. Under prior law, EPA had established national emission standards for hazardous air pollutants ("NESHAPs") for only eight of the approximately thirty pollutants listed as "hazardous." However, the amended Act lists 189 substances and compounds now considered hazardous air pollutants. CAA § 112(b), 42 U.S.C. § 7412(b).

The amendments require EPA to publish a list of all categories and subcategories of major sources of hazardous air pollutants. EPA must then devise and promulgate within ten years technology-based emission reduction standards that constitute maximum achievable control technology ("MACT") for all categories and

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subcategories of sources, although regulations for the first 40 categories and subcategories were required to be promulgated within two years of enactment of the Act. CAA § 112(e), 42 U.S.C. § 7412(e). MACT is defined as the average emission limitation achieved by the best-performing 12 percent of sources in a similar category or subcategory. The MACT standard will apply to both new and existing sources.

Until supplanted by MACT NESHAPs, the current NESHAPs remain as possible grounds for EPA enforcement actions. The asbestos NESHAP is probably most familiar because it applies to all structural renovations and demolitions.

g) Enforcement

EPA is authorized under Section 114 of the Act to require any source of emissions to establish and maintain emission records, install emission monitoring equipment, and make periodic reports of emissions to appropriate local, state, or federal officials. CAA § 114, 42 U.S.C. § 7414. EPA's information-gathering authority was broadened under the 1990 amendments by a provision requiring that all permits issued pursuant to the Act set forth monitoring compliance certification and reporting requirements to assure compliance with permit conditions. CAA § 504(a), 42 U.S.C. § 7661c(a).

EPA is authorized to enforce the provisions of the Act by issuing administrative orders or filing civil judicial actions seeking maximum civil penalties of $25,000 per day and/or injunctive relief. CAA §§ 113, 120; 42 U.S.C. §§ 7413, 7420. Whenever EPA finds a source violating a SIP requirement, it must notify the violating source and the state in which the source is located. Action may be taken any time after the expiration of the thirty-day period following the date on which the notice of violation was issued.

Sources failing to comply with an administrative order or violating any SIP, NSPS, NESHAP, NSR/PSD, or acid rain requirement, or any permit requirement including failure to pay any fee, are subject to both injunctive relief and civil penalties of up to $25,000 per day per violation. CAA § 113, 42 U.S.C. § 7413. However, EPA does not automatically seek the maximum daily penalty for every violation. In determining penalty amounts, section 113(e) of the Clean Air Act directs the courts to take several factors into consideration, including the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration

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of the violation, the economic benefit of noncompliance, and the seriousness of the violation. 42 U.S.C. § 7413(e).

The CAA also provides for the imposition of criminal liability for knowing violations of the Act. CAA § 113(c); 42 U.S.C. § 7413(c).

B. Asbestos In Buildings

1. Introduction

Both the federal and state governments regulate building owners and the construction industry to ensure that asbestos encountered during the renovation and demolition of buildings does not pose a health hazard.

Because exposure to asbestos presents serious health risks, the government may enforce these laws aggressively against owners including local governments, sometimes seeking criminal penalties. Building owners are responsible for the safe handling of asbestos, even if they hire outside contractors to perform renovation or demolition work. In some cases, employees are held individually responsible for decisions regarding asbestos.

Many buildings built before 1979 contain asbestos in floor tiles, pipe insulation, corrugated insulation, fireproofing, acoustical tiles, and other construction materials. Asbestos was commonly used in boiler or furnace rooms as insulation for the boiler, furnace, and related piping, ceilings, and walls.

Principal federal regulations regarding asbestos in buildings include:

(a) Federal National Emission Standards for Hazardous Air Pollutants ("NESHAP"), applicable to demolition and renovation of buildings containing asbestos, 40 C.F.R. Part 61; and

(b) Federal OSHA worker safety standards for airborne asbestos. 29 C.F.R. Parts 1910 and 1926.

The federal NESHAP regulations are briefly discussed below. Federal OSHA worker safety standards and requirements are discussed in the Company OSHA Manual.

2. Federal NESHAP

EPA has concluded that asbestos may present a serious health risk when asbestos fibers become airborne and are inhaled. The agency therefore established a National Emission Standard for Hazardous Air Pollutants

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("NESHAP") for asbestos. Some states and local air districts have been delegated authority by EPA to implement the asbestos NESHAP. It is very important to check the regulations of the individual states or local air districts which may differ from and be stricter than the federal regulations.

The federal asbestos NESHAP has two basic requirements that apply when buildings are renovated or demolished:

- Notification to EPA, and
- *Work practice standards* to control asbestos emissions during renovation or demolition activities.

a) Who Is Responsible?

Federal law imposes responsibility - and liability - on the "owner or operator of a demolition or renovation activity." 40 C.F.R. § 61.141. The building owner is always responsible even if it hired an outside contractor to renovate or demolish a building. In addition, a person or company that owns, leases, controls, or supervises a demolition or renovation operation is also responsible. The general contractor hired to do the construction work or a subcontractor that actually controls or supervises a building demolition or renovation usually is included in the "supervisory" category. *See* 49 Fed. Reg. 13,659 (April 5, 1984).

In sum, a building owner, a tenant who operates in a building, and a construction contractor or subcontractor can *all* be held responsible for providing the notice required by the NESHAP and for making sure that the required work practice standards are met when a building is renovated or demolished.

b) Duty to Inspect

Before any building is demolished or renovated, the owner, tenant, and/or contractor must thoroughly inspect the building for asbestos. 40 C.F.R. § 61.145(a); 55 Fed. Reg. 48,409 (Nov. 20, 1990). EPA recommends, but does not mandate, the use of an accredited asbestos inspector for such a survey. *Id.* Inspecting for asbestos before a building is renovated is imperative; if asbestos is disturbed during renovation, the owner, tenant, and operator may be strictly liable for violating regulatory requirements.

c) Duty to Notify EPA or the Appropriate Air District

In general, the owner and tenant of a building to be demolished or renovated, as well as the contractor who controls or supervises those activities, have a legal duty to notify EPA in writing before

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any activity begins. The notice requirements differ for demolition as opposed to renovation projects. And there are special provisions for emergency demolitions and renovations.

The owner or operator must certify to EPA that at least one person with EPA-approved training will supervise any stripping or removal of regulated asbestos-containing material ("RACM"). 40 C.F.R. § 61.145(b)(4)(xiii). Thus, if a building owner hires a state-certified contractor to remove asbestos, the owner needs to ensure that the contractor meets this requirement for an on-site trained individual. If a building owner carries out its own work on structures containing RACM, it must employ a properly trained individual.

d) Work Practice Standards to be Met

The NESHAP regulation establishes detailed work practice requirements for the stripping and removal of RACM to prevent exposure to airborne asbestos. 40 C.F.R. § 61.145(c). The owner, tenant, and operator of the renovation activity are all legally responsible to see that these requirements are met. If the owner retains a contractor to renovate a building and the contractor or sub-contractor makes mistakes in the handling of asbestos in the building, the owner may nonetheless be held accountable. In some cases the government may seek criminal penalties against an owner and/or against its employees. Because of this liability, it is imperative that the owner, tenant, and operator ensure that persons trained to identify and remove asbestos are involved in any renovation or demolition project.

The work practice standards are detailed and highly technical. They include requirements such as the removal of all RACM before any construction activity that would disturb asbestos, the wetting of exposed RACM and debris, and waste handling specifications.

A building owner should hire only reputable state-certified asbestos abatement contractors to perform work involving asbestos. The contract with the abatement contractor should include a specific requirement that the federal EPA and state or local work practice standards be met.

One important feature of the work practice standards is the requirement that no RACM be disturbed unless at least one on-site representative trained in EPA standards is present. This individual could be a foreman or management-level person. The trained on-site individual must update his training every two years. The

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regulation lays out minimum training requirements. Evidence of the training must be posted at a demolition or renovation site.

e) Proper Abatement and Disposal Procedures

The building owner should require the asbestos contractor to follow applicable abatement and disposal procedures. As discussed above, the federal NESHAPS impose work practice requirements for the safe handling of asbestos during building renovation and demolition. Many states have similar requirements. Local air district regulations may also specify certain work practice procedures.

The state and federal practice standards are designed to prevent human exposure to asbestos during handling and disposal of construction materials. For example, asbestos waste must be wetted and properly containerized during handling and transport *See* 40 C.F.R. §§ 61.145(c), 61.150(a) Containers must be properly labeled. *See* 40 C.F.R. §§ 61.145(c), 61.150(a).

Friable asbestos is not a Resource Conservation and Recovery Act ("RCRA") waste. Nonetheless, its handling and disposal is regulated by EPA as a hazardous air pollutant. 40 C.F.R. §§ 61.145, 61.150. EPA requires the use of waste shipment records to track asbestos waste taken from a facility site.

A disposal site where asbestos is sent must meet certain federal standards. 40 C.F.R. § 61.154. States may also have special requirements.

Typically, the contractor, rather than the owner of the building from which the asbestos is being removed, contracts with the disposal site (and includes the cost of disposal in his price for removing the asbestos). This generally results in the owner having no control over the conditions under which the landfill accepts the asbestos waste. The owner should either require the contractor to obtain an indemnity running to the owner, plus financial assurances, or obtain such provisions from the landfill directly, if possible.

f) Retain Documentation

Company should retain documentation demonstrating that the asbestos removal operation was conducted in a proper and safe manner.

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3. What To Do In A Potential Enforcement Situation

Federal, state, and local authorities are becoming increasingly aggressive in seeking civil and criminal penalties for violation of requirements governing the use, handling, and disposal of asbestos materials. Failure to comply with the federal NESHAP requirements can result in fines of up to $25,000 per day and/or criminal enforcement. 42 U.S.C. § 7413. An owner may be held liable by EPA for its contractor's failure to comply with EPA regulations.

If faced with a potential enforcement situation, a building owner should take the following steps *immediately*:

a) Stop Work. Terminate ongoing activity that may provide the basis for allegations of regulatory violations -- this is essential to avoid compounding possible penalty amounts.

b) Get Legal Help. Contact Corporate Counsel and, under her/his direction, conduct a factual investigation and communicate, as appropriate, with government agencies and prosecutors.

c) Protect Public Health. Take all necessary actions to prevent exposure to the public. This may involve taking immediate action to secure an area where there is asbestos debris, posting warning signs, and initiating a proper cleanup.

d) Get a Certified Contractor. Retain a qualified asbestos abatement contractor to assess the situation and initiate cleanup and/or completion of an unfinished removal operation. This assessment may be done under the direction of counsel. See section 3(b) above.

e) Give Notice. Provide appropriate notification to EPA, and local air districts (activity reporting) and other appropriate federal, state, and local agencies.

If there is a release of asbestos to the environment, an owner must provide the required notifications. For example, asbestos (in friable form only) is a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") hazardous substance. 40 C.F.R. § 302.4. The reportable quantity for asbestos, i.e., the minimum quantity involved in a release that must be reported, is one pound. Releases should be reported to the National Response Center at (800) 424-8802.

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C. Emergency Planning and Community Right-To-Know Act ("EPCRA")

There are four major sections to EPCRA: emergency planning (Section 301-303), emergency release notification (Section 304), community right-to-know reporting (Section 311-312) and toxic chemical release inventory reporting (Section 313).

1. Emergency Planning (Sections 301, 302)

EPCRA requires local and state organizations to respond to releases of hazardous substances.

a) State and Local Emergency Planning Organizations

(1) State Emergency Response Commissions

State emergency response commissions have been established in each state. These commissions oversee the emergency planning process. 42 U.S.C. § 11001(a)

(2) Local Emergency Planning Committees

Local emergency planning committees oversee the emergency planning process for each planning district. They collect information from regulated facilities and prepare and implement emergency response plans. 42 U.S.C. §§ 11001(b), (c)

b) EPCRA Emergency Planning Requirements for Facilities

(1) When an extremely hazardous substance is present at a facility equal to or in excess of a threshold planning quantity, facilities must comply with EPCRA emergency planning requirements. 42 U.S.C. § 11002

(2) Extremely hazardous substances are defined by regulation. A list of these substances and their threshold planning quantities is found at 40 C.F.R. § 355, Appendix A. A threshold planning quantity is exceeded, when the total quantity of an extremely hazardous substance that is present at the facility exceeds the regulatory standard.

(3) Facility owners or operators must comply with the following threshold planning requirements:

(a) Owners or operators must notify the appropriate state emergency response committee within sixty days of the date that their facilities become subject

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to EPCRA threshold planning requirements. 40 C.F.R. § 355.30(b)

(b) Owners or operators must designate a facility representative, who will participate in the local emergency planning process as an emergency response coordinator, and notify the local emergency planning committee of the designation. 40 C.F.R. § 355.30(c)

(c) Owners or operators must inform the local emergency planning committee of any changes occurring at the facility which may be relevant to emergency planning. In addition, owners or operators must provide to the local emergency planning committee any information necessary for development or implementation of the local emergency plan. 40 C.F.R. §§ 355.40(d)(1), (2)

2. Emergency Release Notification (Section 304)

a) Emergency release notification requirements apply to owners or operators of facilities that produce, store, or use hazardous chemicals and at which there is release of a reportable quantity (RQ) of any extremely hazardous substance or of a CERCLA hazardous substance. 40 C.F.R. § 355.40(a)

b) The term "release" means: any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment of any hazardous chemical, extremely hazardous substance or CERCLA hazardous substance. 40 C.F.R. § 355.20.

c) Reportable quantities for extremely hazardous substances are found at 40 C.F.R. § 355, Appendix A. Reportable quantities for CERCLA hazardous substances are found at 40 C.F.R. Table 302.4.

d) The owner or operator of a facility must immediately notify the local emergency planning committee of any area likely to be affected, and the state emergency response commission of any state likely to be affected. 40 C.F.R. § 355.40(b)

3. Hazardous Chemical Reporting (Sections 311, 312)

a) The requirements apply to an owner or operator of a facility that is required to prepare or have available a material safety data sheet

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("MSDS") under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act. 40 C.F.R. § 370.20(a)

b) Within three months of becoming subject to these requirements, the owner or operator must submit to appropriate state emergency response commissions, local emergency planning committees, and fire departments an MSDS for all hazardous chemicals present at the facility at any one time in amounts equal to or greater than 10,000 pounds and for all extremely hazardous substances present at the facility in an amount greater than or equal to 500 pounds, or the TPQ, whichever is lower. 40 C.F.R. § 370.20(b)(1).

c) Owners or operators of facilities must submit a copy of an MSDS for each hazardous chemical present at the minimum threshold levels to appropriate state emergency response commissions, local emergency planning committees, and fire departments for each hazardous chemical. 40 C.F.R. § 370.21(a)

d) Owners or operators must also submit annual hazardous chemical inventory forms (Tier I and Tier II forms) covering all hazardous chemicals present at the facility at any one time during the preceding calendar year in amounts equal to or greater than 10,000 pounds and extremely hazardous substances present at the facility in an amount greater than or equal to 500 pounds on the TPQ, whichever is lower. 40 C.F.R. § 370.21(b)(2)

e) Specific reporting requirements are provided for mixtures. 40 C.F.R. § 370.28

f) Any person may request an MSDS or Tier II information with respect to a specific facility by submitting a written request to the local emergency planning committee. See 40 C.F.R. § 370.30

4. Toxic Chemical Release Reporting (Section 313)

a) Manufacturing facilities that have ten or more full-time employees and are classified under standard Industrial Classification Codes (Nos. 20 through 39) must report to EPA and state agencies information concerning each toxic chemical they manufacture, process, or otherwise use in excess of a threshold quantity. 40 C.F.R. §§ 372.22, 372.30. Owner or operators must comply with these reporting requirements if they manufacture or process 25,000 pounds of a toxic chemical or otherwise use 10,000 pounds of a toxic chemical in a calendar year. 40 C.F.R. §§ 372.25(a), (b). A list of toxic chemicals is found at 40 C.F.R. § 372.65.

b) The owner or operator of a facility must report on a toxic chemical that the owner or operator knows is present as a component of

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mixture or trade name product, which is received from another person, if that chemical is imported, processed, or otherwise used in excess of a threshold quantity at the facility as part of that mixture or trade-name product. 40 C.F.R. § 372.30(b)(1).

c) Exemptions include:

(1) toxic chemicals that are present at a concentration of less than 1 percent of a mixture (or 0.1 percent if carcinogenic);

(2) toxic chemicals that are present in an article;

(3) toxic chemicals that are used in the following way: used as a structural component of the facility; used for routine janitorial or facility grounds maintenance; used for the purpose of maintaining motor vehicles; use of chemicals present in process water and non-contact cooling water;

(4) activities in laboratories; and

(5) certain owners of leased property. 40 C.F.R. § 372.38.

d) EPCRA mandates specific record keeping requirements regarding toxic chemical release reporting. 40 C.F.R. § 372.10

5. Trade Secrets

An owner or operator may invoke trade secret protection. 40 C.F.R. § 350.13. If an owner or operator files a trade secrecy claim, the specific identity of a chemical is treated as confidential until the agency determines that the claim is not valid. 40 C.F.R. § 350.9(a). Special requirements for disclosure apply to health professionals in specific circumstances and in emergencies. See 40 C.F.R. § 350.40.

6. Enforcement

a) Civil Actions

Any person who does not comply with the emergency planning requirements, the emergency release notification requirements, the Tier I/Tier II hazardous chemical inventory reporting requirements, or the toxic chemical release reporting requirements is subject to civil penalties of up to $25,000 for each violation. 42 U.S.C. § 11045(c)(1), 40 C.F.R. § 355.50(a).

Any person who does not comply with the MSDS reporting requirements is subject to civil penalties of up to $10,000 for each day of violation. 42 U.S.C. § 11045(c)(2).

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b) Criminal Enforcement.

A person may be criminally prosecuted if he knowingly violates the emergency release reporting requirements. If convicted, violators face up to $25,000 in criminal fines and up to two years in prison 42 U.S.C. § 11045(b)(4), 42 U.S.C. § 11045(d)(2).

D. Contaminated Properties and Federal Superfund (Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"))

1. Introduction

Owners and managers of real property are increasingly faced with liabilities, and often unexpected liabilities, arising from environmental conditions on their properties. For example, property which was once considered a valuable asset may become a liability due to the presence of hazardous substances such as PCBs or toxic solvents. The possibility of these liabilities gives rise to a whole host of special considerations in transactions involving the purchase, sale and lease of real property.

The basis for liability under federal and state environmental laws has expanded rapidly over the past decade — far beyond traditional notions of "fault" or "negligence." Merely owning real property, even without any involvement in a tenant's operations or in the operations of a former owner, is a basis for costly liability.

Government environmental agencies at the federal, state and local levels have the authority to require the investigation and cleanup of contaminated properties. In addition, the federal Superfund law discussed below and similar state laws establish broad liability for the cleanup of contaminated sites, including allowing parties conducting the cleanup to seek reimbursement from other parties who are associated with the property.

The federal Superfund is discussed here in detail because of its broad impact on owners of real property and operators of facilities. Most states also have cleanup laws for contaminated sites which are based on and are similar to the federal Superfund process. In addition, liability can exist under other federal laws and well as under contract and tort (common) law.

2. The Federal Superfund Statute

a) Background

In 1980, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act, referred to as "CERCLA" or "Superfund." 42 U.S.C. § 9601, *et seq*. "Superfund" refers to the $1.6 billion fund established by the

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statute (generated mainly from a tax on the chemical and petroleum industries) to pay for EPA's cleanups of abandoned hazardous waste sites. The law was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA). Because of the liability system imposed by this law, and the very high costs of cleaning up contaminated sites, this law has had far-reaching impacts on businesses.

Superfund imposes strict and joint and several liability for the cleanup of contaminated property upon the current owner or operator of the property and upon the owner or operator of the property at the time of the release, spill or disposal of a hazardous substance. Thus the current owner or operator of a property, who may have had no involvement at all in the use of a chemical which has caused the contamination, may be responsible for cleaning up the site. A company which had waste transported to a treatment facility is also jointly and severably liable for cleanup costs which may occur if a hazardous substance is released from the treatment facility, even though the company which had the waste transported to the site may have complied with all applicable laws. The Superfund law seeks deep pockets, and even banks which foreclose on property, parent corporations, shareholders and directors, insurance companies, bankruptcy trustees, and trusts may fall under the Superfund net. Although the Superfund itself, which is maintained by taxes on chemical use, funds Superfund activities conducted by EPA for which no deep pockets can be found, in reality most Superfund cleanups will eventually be paid for by current or former owners or operators of contaminated sites or companies that had waste transported for disposal or treatment to various sites.

The Superfund law passed in 1980 required EPA to compile a list of suspected contaminated properties and to rank the sites to find the worst sites, which would be placed on the National Priorities List (the NPL) for cleanup under Superfund. The sites which ranked highest and were placed on the NPL are called Superfund sites. There are over 1,000 Superfund sites. Superfund sites include sites where chemicals were disposed in barrels, such as Love Canal, but also include barrel and drum recycling facilities, wood preserving facilities, mines, and municipal landfills. Many states, including California, have passed comparable state Superfund laws. Under these laws, state Superfund sites are identified.

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b) The Superfund Liability System

(1) What Triggers Liability?

Superfund liability is triggered by the "release" from a "facility" of a "hazardous substance" into the "environment" which release causes the incurrence of "response costs."

- A "release" includes almost any mechanism by which a hazardous substance enters the environment, such as spilling, leaking, pumping, pouring, emitting, discharging, or escaping.
- "Facility" includes any site where a hazardous substance has been deposited, stored, disposed of, or placed, or has otherwise come to be located.
- "Hazardous substance" means any substance, compound, or mixture listed by EPA pursuant to the Superfund statute, or listed or otherwise defined under other federal environmental statutes (such as hazardous wastes listed by EPA under the Resource Conservation and Recovery Act). Thus, the term "hazardous substance" is very broad; "hazardous wastes" and "toxic pollutants" listed under other statutes are subsets of the broader category of "hazardous substances."
- Significantly, petroleum and crude oil or any fraction thereof not specifically listed are specifically *excluded* from the definition of hazardous substances. Thus, under this "petroleum exclusion," releases or oil or gasoline are not covered by Superfund. (However, the cleanup of sites contaminated by petroleum is addressed by other environmental laws.)

(2) Who Can Be Liable?

The statute imposes liability on four categories of "potentially responsible parties" (or "PRPs"):

- The owner or operator of a facility;
- Any person who at the time of disposal of any hazardous substance owned or operated any facility

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at which such hazardous substances were disposed of;

- Any person who arranged for treatment or disposal or arranged with a transporter for treatment or disposal of hazardous substances at any facility owned or operated by another party and containing such hazardous substances; and

- Any person who accepted any hazardous substances for transport to disposal or treatment facilities selected by that person from which there is a release or threatened release.

42 U.S.C. § 9607(a).

(3) What Is the Standard of Liability?

Superfund liability is "strict" and "joint and several."

- Under the strict liability doctrine, PRPs can be held liable without regard to fault.

- Under the joint and several liability doctrine, each liable PRP can be held fully liable for *all* costs to remedy the contamination, regardless of how many other parties may have contributed to the problem. This is sometimes referred to as "deep pocket" liability.

(4) Examples of Liability Decisions

The following examples of judicial decisions demonstrate the breadth of potential liability under Superfund.

- "Owner or operator" may include an absentee landlord who may be held liable for contamination caused by a tenant. Mere ownership of contaminated property is all it takes for liability to attach.

- "Owner or operator" may include corporate shareholders, officers, or employees.

(5) Defenses to Liability

There are very few defenses to Superfund liability. To avoid liability, the potentially responsible party must show

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that the release of hazardous substances was caused *solely* by:

- an act of war;
- an act of God; or
- the act or omission of a third party, provided certain other requirements are met.

This last defense, referred to as the "third-party defense" or the "innocent purchaser defense" has several elements.

The third party must not have been an employee or agent of the PRP, nor have had any direct or indirect contractual relationship with the PRP. In addition, the PRP must establish that the PRP exercised due care with respect to the hazardous substances at issue and took precautions against foreseeable acts or omissions of the third party.

For purposes of the third party defense, the term "contractual relationship" includes land contracts, deeds, or other instruments transferring title or possession *except* where the facility was acquired after the hazardous substances were disposed of on the property, and

- the PRP did not know and had no reason to know about hazardous substances on the property; or
- the PRP is a government agency and acquired the property by escheat, involuntary transfer, or by exercise of eminent domain; or
- the PRP acquired the property by inheritance or bequest.

In order to establish that the PRP "did not know and had no reason to know" that hazardous substances had been disposed of on the property prior to that PRP's purchase of the property, the PRP must have undertaken "all appropriate inquiry" into the previous ownership and uses of the property consistent with good commercial practice to minimize liability.

To determine whether the PRP made "all appropriate inquiry", the courts must consider:

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- The specialized knowledge or expertise, if any, of the PRP.
- The relationship of the purchase price to the value of uncontaminated property.
- Commonly known or ascertainable information about the property.
- The appearance of the property and the ability to detect contamination by appropriate inspection.
- Failure to disclose on resale. (If an otherwise innocent buyer later learns about a hazardous substance release on the property and then resells the property without disclosing this to the new buyer, he will be treated as a liable PRP.)

In summary, a purchaser of property which later turns out to be contaminated can be held liable. The only way for purchasers to avoid this harsh result is to perform "all appropriate inquiry" prior to the transaction. This usually consists of a pre-acquisition "due diligence" investigation, often called a "preacquisition environmental audit."

c) The Superfund Site Cleanup System

As was mentioned at the outset of this section, Superfund was designed to provide the means for EPA to clean up hazardous waste sites. The act of cleaning up a particular site, however, is easier said than done.

Indeed, the cleanup process is both long and complicated. It is governed by a comprehensive set of procedures established by EPA. The following is a brief description of the principal elements of that process.

(1) The National Contingency Plan

The National Contingency Plan, or "NCP," sets forth a rather elaborate set of procedures for cleaning up a hazardous waste site. The process begins with the discovery and evaluation of a site, proceeds to studies of the threats posed by the site and the alternatives available for remediating that threat, and concludes with the selection and implementation of a remedy. Some of the key steps in this process are described below.

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(2) The Remedial Investigation/Feasibility Study

In order to determine how to clean up a site, the nature of the site and the hazards it presents must first be determined. This is accomplished by a Remedial Investigation ("RI").

- The RI characterizes the conditions at the site, the source and extent of contamination, the pathways of possible migration or releases to the environment, and the potential for human or other environmental exposure to the contamination.

  With this information in hand, the possible alternatives for remediating the site are evaluated in the Feasibility Study ("FS").

- The FS describes and compares a series of specific engineering or construction options in terms of cost, effects, engineering feasibility, and environmental impact.

The two studies are usually performed together. As a result, they are commonly referred to singly as an "RI/FS."

- The RI/FS process is a major undertaking. It is not unusual for an RI/FS to cost $2 or $3 million or much more. Remember, this is the cost for analyzing the problem and deciding how to fix it. The cost of implementing the chosen solution is additional.

Since RI/FSs have become such enormous projects, EPA now requires preparation of a "work plan" before the RI/FS begins. Generally speaking, the work plan sets forth the degree to which the site will be studied and how alternatives will be developed.

(3) The Record of Decision

After the RI/FS is completed, EPA will select the appropriate remedy from among those studied. EPA must make its selection in light of several considerations in the statute, such as the persistence and toxicity of the hazardous substance(s) at the site, the potential for adverse health effects, long-term maintenance costs, etc. *See* 42 U.S.C. § 9621.

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EPA documents its preferred remedy in a "Proposed Plan." EPA will then solicit public comments and consider the public comments it receives on the Proposed Plan, and issue a Record of Decision ("ROD") which formally selects the remedy for the site.

(4) Implementing the Selected Remedy

The process then moves to the design and construction phase, where the detailed engineering specifications are created and then implemented to accomplish the remedy selected by EPA.

Many remediations include a long-term operation and maintenance component, which may specify how the remediation is to occur over the course of perhaps 20 or 30 years.

3. Cleanup Of Contaminated Sites In Various States

In the various states, the cleanup of contaminated sites may be directed or overseen by a number of different state and/or local agencies. The regulatory process will be different depending upon the particular state and which agency is the "lead agency" for the site.

Regardless of which agency assumes oversight of a site, the Superfund liability scheme discussed above is potentially relevant. In general, state law, like the federal Superfund law, places broad liability upon those associated with contaminated properties, and provides the oversight agency with broad discretion regarding its ability to "order" current or past owners or past operators to investigate and remediate the site. Investigation and remediation of non-federal Superfund sites can be just as costly as the investigation of federal Superfund sites.

4. Responsibilities Of Company Facility Environmental Administrators Regarding Contaminated Sites

Notify Corporate re claims from agencies or PRPs.

Comply with consent decrees, orders, etc.

5. Conclusion

The Superfund liability system for contaminated property, and the very high cost of investigating and remediating sites, has important impacts on owners and lessees of real property. Government environmental agencies at federal, state and local levels have authority to compel the investigation and remediation of contaminated sites. Although the exact procedures

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vary from state to state and from agency to agency, the basic liability for site cleanup is similar under federal, state, and locally-delegated programs.

E. Hazardous Waste

1. Introduction

The federal Resource Conservation and Recovery Act ("RCRA") was enacted in 1976 to control the disposal of solid waste and the management and disposal of hazardous waste, and to promote resource recovery and waste recycling. 42 U.S.C. § 6901, *et seq*. RCRA has been amended several times since 1976. Most notably, the 1984 Hazardous and Solid Waste Amendments Act substantially strengthened RCRA's hazardous waste control provisions.

As is true with many other environmental statutes, EPA may authorize a state to administer and enforce a state's hazardous waste program in lieu of the federal program if the state's laws and regulations are at least as stringent as EPA's hazardous waste regulations. For example, both California and Utah have been "authorized" by EPA to implement most elements of the hazardous waste program. However, new federal laws, regulations and interpretations are still enforceable by EPA. State regulations may be more stringent or broader in scope than federal regulations. This is, for example, often the case in California.

RCRA is best known for its "cradle to grave" regulation of hazardous waste. EPA regulations place requirements on the generation, transport, storage, and treatment and disposal of hazardous waste and provide for a system of tracking hazardous waste from its generation to ultimate disposal. To ensure compliance with hazardous waste regulations, RCRA provides EPA with a broad spectrum of enforcement remedies, including civil and criminal penalties and the authority to require corrective action.

This section provides a general overview of the federal RCRA regulations for hazardous waste generators. The federal regulations are very complex. The regulations themselves should be consulted for compliance purposes.

Company facilities currently are only generators of hazardous waste and do not transport hazardous waste, store hazardous waste for longer than 90 days, or conduct activities that constitute "treatment" or "storage" or "disposal" of hazardous waste. No Company facility should apply for a permit to become a hazardous waste treatment, storage or disposal ("TSD") facility without prior consultation with the Corporate EH&S Manager. To ensure that Company is not considered a TSD facility, no Company facility shall store hazardous wastes on-site for longer than 90 days.

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2. Summary Of RCRA Regulation Of Hazardous Waste

RCRA establishes a complex program for management of hazardous waste which seeks to ensure that hazardous waste will be handled, treated, stored, and disposed of so as to minimize the threat to human health and the environment.

Persons who first create a solid waste - the generator - are required to determine if the waste is hazardous based on criteria EPA has established. Persons generating hazardous wastes are required, among other things, to handle wastes properly and to prepare manifests to track the shipment of the waste to a facility which is authorized to treat or dispose of the waste. Transporters must comply with manifesting and labeling requirements under RCRA as well as federal Department of Transportation regulations relating to the shipment of hazardous substances. Treatment, storage, and disposal facilities are generally required to obtain operating permits and to take corrective action for all releases of hazardous waste or constituents.

a) Identification of Hazardous Waste

RCRA hazardous waste regulations apply to those wastes which are within the jurisdiction of the RCRA program because they are "solid wastes" *and* which have been identified by EPA as "hazardous wastes." Thus "hazardous wastes" are a subset of "solid wastes."

"Solid wastes" include wastes which are not "solid" in the common sense of the word. "Solid wastes" include liquids, semisolids, and contained gases; the statute applies potentially to any waste regardless of its physical form. 42 U.S.C. § 6903(27).

RCRA defines "hazardous waste" as a solid waste which because of its quantity, concentration, or characteristics may: (1) cause or significantly contribute to an increase in mortality, or an increase in serious irreversible or incapacitating reversible illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. 42 U.S.C. § 6903.

EPA is responsible for promulgating regulations which identify specific hazardous wastes and which identify characteristics that render a waste hazardous. Thus, under EPA regulations, a "solid waste" can be classified as a "hazardous waste" in one of two ways: if it is specifically listed by EPA as a hazardous waste; or if it exhibits a characteristic of hazardous waste.

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(1) Listed Waste

EPA lists specific wastes which are deemed to be hazardous wastes. EPA has established three lists of hazardous wastes: a list of wastes from non-specific sources (for example, spent halogenated solvents used in degreasing); a list of wastes from specific sources (for example, wastewater treatment storage from the production of chlordane); and discarded chemical products, including off-specification species, container residues, and spill residues. A hazardous waste number has been assigned to each listed waste for tracking purposes. 40 C.F.R. § 261.30-.33.

(2) Characteristic Waste

EPA has identified four characteristics which can render a waste hazardous:

- ignitability;
- corrosivity;
- reactivity; and
- toxicity.

EPA has established criteria for determining whether a waste exhibits a hazardous characteristic.

b) Responsibilities of Hazardous Waste Generators

A "generator" is "any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation." 40 C.F.R. § 260.10.

Certain small generators (i.e., those producing less than 100 kg. of hazardous waste or less than 1 kg. of acute hazardous wastes per month) are conditionally exempt from most federal RCRA hazardous waste regulations. Some states, like California, have no small-quantity generator exemption.

(1) Identification of Waste

It is a generator's responsibility to determine correctly whether its waste is hazardous by determining if it is a

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listed waste or possesses a characteristic of a hazardous waste. 40 C.F.R. § 262.11.

(2) Notification

A generator must file a notification form and obtain an EPA ID Number before transporting, treating, storing, or disposing of hazardous waste. The notification and EPA ID Number are required for each separate location where hazardous waste is generated.

(3) Manifest

A generator who transports hazardous waste off-site for treatment, storage or disposal must complete a Uniform Hazardous Waste Manifest. The manifest is a multi-copy document designed to facilitate the cradle-to-grave tracking of waste. The generator is required to sign a certification on the manifest stating that it has a program in place to reduce the volume or quantity and toxicity of hazardous wastes to the degree determined to be economically practicable and that the chosen method of the treatment, storage or disposal is that practicable method available to the generator that minimizes the present and future threat to human health and the environment. The manifest must also identify the wastes and certify that the waste is packaged and labeled in accordance with Department of Transportation ("DOT") regulations, and provide the names and EPA ID Numbers of each transporter and the treatment, storage, or disposal facility ("TSD") which will receive the waste.

Each manifest contains a unique number. A generator must use an original manifest for each waste shipment. The returned copy will verify that the hazardous waste has been received at its TSD destination. The final copy of the manifest will be maintained permanently in the files. If a generator of greater than 1000 kilograms of hazardous waste does not receive a final copy of the manifest from the TSD within 35 days of the date of shipping, the generator is responsible for contacting the transporter and/or TSD to inquire about the status of the hazardous waste. If the generator has not received a final copy of the manifest within 45 days from the date of shipping the waste, the generator must file an "exception report" with EPA which explains its efforts to locate the hazardous waste and attaches a copy of the unconfirmed manifest.

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(4) Packaging and Labeling

EPA has adopted the DOT regulations issued under the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1802, *et seq*., which regulate the packaging, labeling, marking, and placarding of hazardous waste shipments.

(5) Storage/Accumulation/Management

A generator may accumulate hazardous waste for up to 90 days on site in tanks or containers, subject to certain storage standards.

If a generator stores hazardous waste beyond these accumulation periods, it will be considered to be an operator of a storage facility subject to permitting requirements. Company facilities must have programs in place to ensure that hazardous waste is not stored for longer than 90 days.

The regulations also prescribe detailed standards for the management of hazardous waste, including requirements relating to management of containers, labeling requirements, preparedness and prevention, contingency plan and emergency procedures, security, and personnel training. The regulations are incorporated into the generator regulation by reference to requirements for TSD facilities.

(6) Recordkeeping and Reporting

A generator must maintain copies of all manifests, documentation supporting its hazardous waste identification, and copies of exception letters for a period of three years.

A biennial report must be submitted which provides information on the transporters and TSD facilities used, and the wastes shipped in the previous calendar year. The report also must include information on waste minimization efforts and progress.

Bonus policy is to retain these records permanently.

(7) Land Disposal Restrictions

The land disposal of certain untreated hazardous waste is prohibited. The regulations relating to the land disposal of

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untreated waste should be carefully reviewed if any Company wastes are being considered for land disposal. These land disposal regulations are complex. Company policy is that these land disposal restriction forms shall be retained with the relevant manifests.

(8) Export Notification

Regulations include specific provisions concerning the export of hazardous waste shipments to foreign countries. The generator must notify EPA in writing at least 60 days prior to the planned shipment in each calendar year. EPA then verifies the consent of the importing country to accept the waste. These rules also include requirements for verification of delivery by the consignee. 40 C.F.R. § 262.50.

3. Hazardous Waste Enforcement

EPA has a variety of enforcement tools to identify and address hazardous waste violations. EPA may inspect the premises and records of any person who generates, transports, stores, treats, or disposes of hazardous wastes, or who did so in the past. EPA may copy documents and take samples.

Upon finding a violation, EPA can issue compliance orders establishing deadlines for compliance and requiring corrective action. Any person who violates any hazardous waste regulation is liable for civil penalties of up to $25,000 per day per violation.

F. Polychlorinated Biphenyls (PCBs) Regulation Under the Toxic Substances Control Act

1. Introduction

In enacting the Toxic Substances Control Act ("TSCA") in 1976, Congress mandated restrictions on the manufacture, processing, distribution in commerce, use, storage, and disposal of polychlorinated biphenyls ("PCBs"). TSCA § 6(e), 15 U.S.C. § 2605(e).

PCBs are highly stable organic compounds with low water solubility, low flammability, high heat capacity, and low electrical conductivity. Because of these characteristics, PCBs were widely used from the early 1900s to the 1970s in electrical equipment, in pigments and dyes, and as road oils for dust suppression. The very same characteristics of PCBs which led to their widespread use led in the mid-1970s to significant concern about the impact of PCBs on human health and the environment. EPA has issued regulations that generally prohibit the manufacture and processing of

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PCBs, prohibit or restrict most uses of PCBs, place strict controls on their storage and disposal, require recordkeeping and manifesting, and provide for the cleanup of spills.

This section summarizes the requirements applicable to the use, storage, and disposal of PCBs in electrical equipment. More information can be found in the PCB regulations at 40 C.F.R. Part 761.

2. Summary of Regulations Concerning PCBs in Electrical Equipment

EPA strictly controls, prohibits, or requires the phase out of electrical equipment containing PCBs at concentrations of 50 parts per million ("ppm") or greater. PCB regulations also address the servicing, storage, marking, inspection, and disposal of certain PCB-containing electrical equipment.

In addition to the requirements discussed below, it should be noted that the manufacture of electrical equipment containing any detectable quantity of PCBs has been prohibited since 1979, and that PCBs or items containing PCBs at concentrations of 50 ppm or more may not be imported or exported without an exemption.

a) Transformers

PCBs are generally found in electrical transformers which originally contained PCB dielectric fluid manufactured with PCB concentrations exceeding 600,000 ppm, and in transformers with mineral oil or other dielectric fluids that became contaminated with PCBs through servicing and retrofilling activities.

EPA's regulations place the strictest controls on transformers containing 500 ppm or greater concentrations of PCBs ("PCB Transformers"). Mineral oil transformers may contain high enough concentrations of PCBs to be classified as PCB Transformers. Transformers containing 50-500 ppm PCBs ("PCB-Contaminated Electrical Equipment") are subject to somewhat less stringent regulations. Transformers containing less than 50 ppm PCBs are called "Non-PCB" transformers and are not regulated. Transformers may be reclassified to a lower PCB status under certain conditions. 40 C.F.R. § 761.30(a)(2)(v).

Transformers containing PCBs that were originally sold for uses other than resale before July 1, 1979 and are intact and non-leaking may be used and distributed in commerce until the end of their useful lives, subject to certain prohibitions, phase out requirements, and use conditions. 40 C.F.R. § 761.30(a).

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(1) Use Prohibitions

EPA regulations currently prohibit certain uses of transformers containing PCBs. These prohibitions generally apply to PCB Transformers. 40 C.F.R. §§ 761.30(a)(1)(i), (ii); 761.30(b).

(2) Phase-out Requirements

In addition to the use prohibitions discussed above, certain PCB Transformers must be phased out under the regulations. 40 C.F.R. § 761.30(a)(1)(iv)(B), (D)

(3) Use Restrictions

The PCB regulations place certain restrictions on the continued use and distribution in commerce (i.e., sale) of transformers containing PCBs.

a) Reinstallation. 40 C.F.R. § 761.30(a)(1)(iii).

b) Fire Protection. 40 C.F.R. § 761.30(a)(1)(iv).

c) Inspection. 40 C.F.R. § 761.30(a)(1)(ix).

d) Marking. 40 C.F.R. § 761.40.

e) Servicing. 40 C.F.R. § 761.30(a)(2).

f) Storage and Disposal. (See discussion below.)

b) PCB Capacitors

PCB capacitors are capacitors containing 50 ppm or more PCBs. Large PCB capacitors contain 3 pounds or more of dielectric fluid. Small PCB capacitors contain less than 3 pounds of dielectric fluid.

(1) Large Capacitors

Large capacitors which contain PCBs in concentrations of 50 ppm or greater may generally be sold and used provided they were originally sold for use before July 1, 1979 and they are intact and non-leaking. However, certain prohibitions and conditions apply to the use of large PCB capacitors. See 40 C.F.R. §§ 761.30(l); 761.40

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(2) Small Capacitors

Small PCB capacitors which are intact and non-leaking and which were originally sold for use before July 1, 1979 may generally be used and distributed in commerce until the end of their useful lives. 40 C.F.R. §§ 761.30(l); See 40 C.F.R. § 761.40.

c) Other Electrical Equipment

EPA's PCB regulations also address the use of other electrical equipment containing PCBs.

(1) Heat Transfer and Hydraulic Systems. 40 C.F.R. § 761.30(d).

(2) Electromagnets, Switches, and Voltage Regulators. 40 C.F.R. § 761.30(h).

(3) Circuit Breakers, Reclosers, and Cable. 40 C.F.R. § 761.30(m).

(4) Use in Compressors and Natural Gas Pipelines. 40 C.F.R. § 761.30(i).

(5) Used Oil. 40 C.F.R. §§ 261.6, 266.

d) Marking

Certain items must be marked as specified in the regulations in accordance with their PCB concentration. 40 C.F.R. §§ 761.40, 761.45. These items include:

- PCB Transformers and PCB Transformer locations;
- PCB Large Capacitors;
- PCB fluids containing 50 ppm or greater PCBs;
- Natural gas pipelines and compressors containing PCBs at any detectable level;
- PCB Containers and PCB Article Containers; and
- Storage areas used to store PCB destined for disposal.

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e) Storage

EPA regulates the storage of PCBs and PCB-containing equipment at concentrations of 50 ppm or greater.

(1) Storage for Reuse

PCB and PCB-Contaminated Equipment may generally be stored for reuse without meeting the storage facility and time of storage conditions discussed below. Equipment stored for reuse is considered to be in service for purposes of the regulations. 40 C.F.R. § 761.60.

(2) Storage for Disposal

Except for small capacitors and certain hydraulic machinery, any PCBs or PCB Items with PCB concentrations of 50 ppm or greater must be stored prior to disposal in accordance with the "storage for disposal" requirements in 40 C.F.R. § 761.65. PCB-contaminated equipment that has been drained of free-flowing dielectric fluid is not subject to the storage for disposal provisions. 40 C.F.R. § 761.65(c)(2).

In general, the "storage for disposal" provisions require a PCB storage facility, proper containers, marking, inspections, recordkeeping, notification, and removal from storage and disposal within the one-year disposal time limitation.

f) Disposal

The PCB provisions generally regulate the disposal of any PCBs and any PCB items or containers containing PCBs. 40 C.F.R. § 761.60.

Regulated PCB wastes such as liquids, transformers, capacitors and other equipment, may be sent off-site only for disposal under an EPA Form 8700-22 manifest, completed as specified in 40 C.F.R. §§ 761.207, 761.208. Authorized locations and methods of disposal for each type of PCB waste are specified in 40 C.F.R. § 761.60.

g) Recordkeeping

Each owner or operator of a facility using or storing at any one time at least (1) 99.4 pounds of PCBs in PCB Containers, (2) one or more PCB Transformers, or (3) 50 or more PCB Large

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Capacitors, must develop and maintain specified "annual records" and an "annual document log" of the disposition of PCBs and PCB items. 40 C.F.R. § 761.180(a).

"Annual records" consist of all signed PCB waste manifests generated by the facility during the calendar year and all certificates of disposal received by the facility during the year. 40 C.F.R. § 761.180(a)(1). An "annual document log" summarizes the manifest information and provides summary reports on the amount of PCBs handled by the facilities. Specific information must be provided about PCBs contained in PCB Transformers and large PCB capacitors.

The annual document logs must be generated until the facility no longer uses or stores PCBs or PCB items in the specified quantities. All records must be maintained at the facility for at least three years after that date. 40 C.F.R. § 761.180(a).

Inspection records for PCB Transformers and PCB storage areas must also be maintained.

h) Spill Cleanup

EPA's "PCB Spill Cleanup Policy" addresses the response required when PCBs at concentrations of 50 ppm or greater are spilled. 40 C.F.R. § 761.120. Under the regulations, a spill or leak of PCBs constitutes improper disposal of PCBs. The spill cleanup policy is an enforcement policy; EPA will exercise its discretion by not taking enforcement action if the policy's requirements are met.

The policy applies to releases of PCBs which occur after May 4, 1987, and provides for the following:

- Notification of the EPA Regional Office within 24 hours of the spill;
- Immediate actions to control access to the spill area;
- Cleanup requirements linked to the nature of the area in which the spill occurs (e.g., residential vs. restricted access industrial areas);
- Appropriate procedures for sampling to verify spill cleanup requirements have been met; and
- Recordkeeping.

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Spills occurring in high risk areas such as sewers, vegetable gardens, and grazing lands must also be reported to EPA's Regional Office within 24 hours. The cleanup standards for such spills are to be determined on a case-by-case basis.

Spills which occurred prior to May 4, 1987 require site-specific evaluation and must be cleaned up to the requirements established by EPA for the specific spill.

3. Penalties

In accordance with EPA's enforcement authority under TSCA, EPA may assess a civil penalty of up to $25,000 per violation per day. In addition, the criminal penalties provided under TSCA may be and have been assessed for willful violations of the PCB regulations.

The PCB Penalty Policy issued by EPA on April 9, 1990, contains criteria for determining the amount of civil penalty to be assessed for violations of the regulations applicable to the use, storage, and disposal of PCBs and PCB Items.

The penalty will be determined on the basis of the quantity of PCBs involved and the nature of the violation. The Penalty Policy provides for the adjustment of a penalty upwards by 50 percent for the first repeat violation of the PCB regulations and by 100 percent for the second repetition. The penalty may also be adjusted downwards for factors such as good faith efforts to comply, self-reporting of the violation, or an agreement to expend resources on environmentally beneficial projects.

G. Toxic Substances Control Act

1. Introduction

In 1976, the United States Congress enacted the Toxic Substances Control Act ("TSCA"). 15 U.S.C.A. § 2601, *et seq*. TSCA is a law that gives the Environmental Protection Agency ("EPA") the authority to screen new chemicals, gather information on the risks posed by chemicals, and regulate chemicals which pose an unreasonable risk of injury to human health or the environment.

TSCA provides EPA with a broad range of authorities. Unlike most other environmental statutes which regulate substances in specific environmental media or in process wastes, TSCA provides for the regulation of chemical substances and mixtures of chemicals from initial manufacture through ultimate disposal. EPA imposes a broad spectrum of regulations on manufacturers, importers, and processors of chemicals under TSCA.

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To ensure compliance with TSCA regulations, EPA has actively enforced them and has penalized those who fail to comply. EPA has levied fines ranging from thousands of dollars to several million dollars for violations of TSCA regulations. While EPA's TSCA enforcement activities have focused on chemical manufacturers, processors, and distributors, EPA has also taken enforcement actions against local governments.

The following is a brief overview of TSCA regulations.

2. Summary of the Law

TSCA establishes an ambitious program which directs EPA to screen all new chemicals for potential hazards before they are commercially produced or imported. TSCA also seeks to control existing chemical substances at all stages in the life cycle of a chemical product, from manufacture through processing, distribution, use, and disposal. TSCA authorizes EPA to:

- **Screen New Chemicals**: Manufacturers and importers of new chemicals must provide information about those chemicals to EPA 90 days prior to manufacture or import. EPA screens the chemicals and can seek additional data or take regulatory action. 15 U.S.C. § 2604.

- **Regulate Existing Chemicals**: EPA can prohibit or limit the manufacture, processing, distribution in commerce, use, and disposal of chemicals. 15 U.S.C. § 2605.

- **Gather Information**: EPA can require manufacturers, processors and, in some cases, distributors to gather, maintain, and submit information on chemical substances and mixtures. 15 U.S.C. § 2607.

- **Require Testing**: EPA can require industry to test chemicals for possible adverse health and environmental effects. 15 U.S.C. §§ 2603, 2604.

- **Require Certification of Import**: Importers must certify that all shipments of chemicals into U.S. customs territory are in compliance with TSCA. 15 U.S.C. § 2612.

- **Require Notification of Export**: Exporters are required to notify EPA before exporting chemicals subject to test rules or regulatory action. EPA notifies the importing government. 15 U.S.C. § 2611.

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a) Toxic Substances

The term "toxic substances" in the title of the Act is somewhat misleading; TSCA gives EPA authority to screen all chemical substances or mixtures. In addition, EPA may ban or impose restrictions on any chemical substance or mixture that presents an "unreasonable risk of injury to human health or the environment" and not just those we ordinarily think of as "toxic." Thus, for example, EPA has placed controls on chlorofluoroalkanes from aerosol cans, substances not in themselves toxic but which may have long-term detrimental effects on the earth's atmosphere.

TSCA applies to "chemical substances" and "mixtures". The Act contains specific definitions of these terms. Briefly, a "chemical substance" is any organic or inorganic substance that has a particular molecular identity, including any combination of such substances that occurs in nature or is the result of a chemical reaction. Elements and uncombined radicals are also chemical substances. 40 C.F.R. § 710.2(h). A "mixture" is any combination of chemical substances that does not occur in nature and is not the result of a chemical reaction. 40 C.F.R. § 710.2(q). A simple example of a "mixture" is salt water which contains two separate chemical substances: salt (NaCl) and water (H_20). Many products, such as paints, are mixtures.

Certain materials are not subject to TSCA. These materials include:

- Pesticides, as defined in the Federal Insecticide, Fungicide, and Rodenticide Act;
- Tobacco and tobacco products (but not derivative products);
- Nuclear source material, special nuclear material, or nuclear byproduct material as defined by the Atomic Energy Act;
- Firearms and ammunition; and
- Food, food additives, drugs, cosmetics, or devices as defined by the Federal Food Drug and Cosmetic Act.

b) TSCA Inventory

EPA has inventoried all existing chemical substances in commercial use in the United States and maintains a list of these chemicals, which is known as the TSCA Chemical Substances

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Inventory ("the TSCA Inventory"). Most chemicals on the TSCA Inventory are listed publicly, but certain chemicals are listed on the confidential portion of the inventory to maintain trade secrets. A special request must be made to search the confidential portion of the TSCA Inventory.

Any chemical that is on the TSCA Inventory is an "existing chemical." Any chemical that is not on the TSCA Inventory is a "new chemical" that is subject to EPA screening before it can be manufactured or imported.

c) Premanufacture Notice

A primary purpose of TSCA is to review "new" chemicals before they are manufactured or imported into the United States for commercial purposes. Anyone who wishes to manufacture or import a new chemical substance, whether or not the chemical is part of a mixture, must submit a premanufacture notice ("PMN") to EPA 90 days in advance of the planned manufacture or import. 15 U.S.C. § 2604.

If EPA learns of potential risks associated with certain uses of an existing chemical substance, the Agency may require similar advance notice before the existing chemical may be manufactured or imported for that use. To do so, EPA must issue a "significant new use rule" ("SNUR"). 15 U.S.C. § 2604(a)(2).

There are limited exemptions to the 90-day PMN rule. Certain types of imports are categorically exempt and do not require a PMN or an application for exemption:

- Chemicals imported in small quantities for research and development;
- Impurities; and
- Certain byproducts. 40 C.F.R. §§ 720.30, 720.36, 721.45

Certain imports may be exempted upon application to EPA:

- Imports for test marketing; and
- Chemicals imported in low volumes (less than 1000 kg.). 40 C.F.R. §§ 723.50, 720.38.

Companies which manufacture or import new chemicals or SNUR chemicals under these exemptions must comply with certain conditions, including recordkeeping requirements.

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d) Regulation of Hazardous Chemical Substances and Mixtures

EPA has the authority to ban or restrict the manufacture, processing, distribution in commerce, use, or disposal of hazardous chemical substances and mixtures. 15 U.S.C. § 2605(a). These are substances which EPA determines actually do present or will present an unreasonable risk of injury to human health or the environment. Before taking any of these actions, EPA must analyze the risks and benefits of the chemical involved and the economic impacts of potential regulation. 15 U.S.C. § 2601. Thus far, EPA has regulated asbestos and certain chlorofluorocarbons under this authority.

TSCA requires EPA to issue restrictive regulations on polychlorinated biphenyls. 15 U.S.C. § 2605(e). These regulations are discussed in greater detail in a separate section of these materials.

e) Reports and Recordkeeping

TSCA gives EPA general authority to require manufacturers, importers, processors, and, in some cases, distributors to keep records and reports on chemical production and use as well as on the potential health and environmental effects of the chemical substances and mixtures that they handle. The principal reporting and recordkeeping requirements under TSCA include:

(1) Preliminary Assessment Information Rule ("PAIR")

Importers and manufacturers must submit to EPA Preliminary Assessment Information Rule forms for certain chemical substances or mixtures. This form calls for information on quantities imported or manufactured, activities at manufacturing sites, and intended industrial and consumer uses of the designated chemical substance or mixture. The PAIR reporting requirements are being phased out and replaced by the CAIR reporting requirements. 40 C.F.R. Part 712.

(2) Comprehensive Assessment Information Rule ("CAIR")

The Comprehensive Assessment Information Rule ("CAIR") requirements are similar to the PAIR requirements. Importers and manufacturers must submit to EPA a CAIR form for certain chemical substances or mixtures they handle which EPA has designated in a regulation. The CAIR requirements however, are more comprehensive than the PAIR requirements and will

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eventually replace them. This rule establishes uniform reporting and recordkeeping requirements and a list of questions from which EPA will assemble specific information on a case-by-case basis. 40 C.F.R. Part 704.

(3) Records of Adverse Reactions

Importers and manufacturers must also keep records of any allegations they receive that a chemical substance or mixture which they handle causes significant adverse health or environmental effects. The company does not have to send these records to EPA unless EPA requests them. However, the company must keep such information regarding effects on the health of employees for 30 years, and other environmental and health effects information for 5 years. 40 C.F.R. § 717.

(4) Unpublished Health and Safety Studies

Under certain circumstances, manufacturers and importers must submit to EPA certain unpublished health and safety studies or lists of studies on chemical substances and mixtures which EPA has designated in a regulation. Health and safety studies include occupational exposure studies, epidemiological studies, tests for ecological and environmental effects on plants and animals, assessments of human and environmental exposure, and analyses of physical and chemical properties. 40 C.F.R. Part 716.

(5) Risk Notification

Manufacturers, importers, processors, and distributors must report immediately to EPA any information that reasonably supports the conclusion that any substance or mixture which they handle presents a substantial risk of injury to human health or the environment. 15 U.S.C. § 2607(e).

(6) Inventory Updating Reports

Every four years, manufacturers and importers must report to EPA production volume and site information for chemicals they handle that are listed on the TSCA Inventory.

f) Industry Testing of Chemical Substances and Mixtures

EPA has authority to require manufacturers, importers, and processors to perform scientific tests of chemical substances and

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mixtures which they handle. To require such tests, EPA must determine that there is insufficient information to evaluate the chemical, the chemical may present unreasonable risks to health or the environment, or that it may be manufactured or imported in large quantities with substantial potential for human exposure or environmental release. 15 U.S.C. § 2603(a).

EPA has implemented the TSCA testing requirements in two different ways, by negotiation and rule making. The Agency has favored negotiating voluntary test agreements with individual companies. The statute itself, however, provides for testing to be implemented by formal rule making. 15 U.S.C. § 2603(b).

Under the rule making approach, EPA must publish a proposed rule requiring testing of a certain chemical, solicit public comment, revise the rule in response to comments if necessary, and then issue a final rule. Typically one company will perform the required testing and other companies that manufacture, process, or import the chemical will share the costs under TSCA data reimbursement regulations. 40 C.F.R. Part 791.

Companies subject to a test rule must either submit a test plan or apply to EPA for an exemption from testing. However, companies that make or import less than 500 kg of a test chemical per year or who make or import test chemicals in small quantities solely for research and development do not have to submit a test plan or exemption request unless no other company agrees to conduct the necessary testing. 55 Fed. Reg. 18,881 (May 7, 1990). If EPA negotiates a testing agreement, only the specific companies that are parties to the agreement are required to pay for testing. 40 C.F.R. Part 790.

g) Import Certification

As noted above, importers must comply with all TSCA requirements for manufacturers, including premanufacture notification, testing, and reporting and recordkeeping requirements. In addition, importers must certify all shipments of chemicals imported into the U.S. in one of two ways:

(1) Positive Certification

For shipments of chemicals subject to TSCA, the importer must certify that all chemical substances in the shipment comply with all applicable rules or orders under TSCA.

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(2) Negative Certification

For shipments which are not subject to TSCA, the importer must certify that all chemicals in the shipment are not subject to TSCA. 19 C.F.R. § 12.121.

h) Export Notification

EPA requires notification for exports of all chemicals which:

- are subject to a final test rule;
- are subject to a proposed or final control action under TSCA Sections 5 or 6; or
- have been determined to pose an imminent hazard under TSCA Section 7.

The exporter must notify EPA of the first export of such a chemical to a particular country in each calendar year. The export notification must be postmarked within seven days of forming the intent to export or on the date of export, whichever is earlier. EPA then notifies the importing country.

3. Enforcement

TSCA contains provisions for the assessment of both civil and criminal penalties for violation of any rule or order issued by EPA under TSCA, or for failure to permit an inspection if one is requested by EPA. EPA may assess civil penalties of up to $25,000 for each day of each violation, the exact amount to be determined on a case-by-case basis. 15 U.S.C. § 2615(a). EPA may assess such civil penalties for failure or refusal to comply with rules or orders issued under TSCA. Should an importer unknowingly import a shipment of a chemical substance that is in violation of TSCA, the importer may be liable for a civil penalty, even if the violation is self-reported.

EPA has adopted a specific enforcement policy for PMN and SNUR violations. EPA will reduce civil penalties substantially for companies which voluntarily inform EPA of their violations. Such voluntary disclosure will reduce the penalty by 25 percent; if the disclosure is made to EPA within 30 days of the violation, the penalty will be reduced by an additional 25 percent. The Agency may also reduce the penalty another 15 percent if the company takes all steps reasonably expected or requested to mitigate the violation. In addition, EPA can reduce a penalty by 15 percent for violators who exhibit a “good attitude” by halting unlawful activity, taking steps to rectify a situation, and not being “culpable.” Thus, voluntary disclosure of violations and a “good attitude” may result in an

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80 percent reduction of the potentially large civil penalties. TSCA Section 5 Enforcement Response Policy Supplement, EPA Office of Pesticides and Toxic Substances (August 5, 1988, as amended on June 8, 1989).

Similar adjustments are made for violation of TSCA reporting and recordkeeping regulations and violation of the import certification and export notice rules. *See* Recordkeeping and Reporting Rules TSCA Sections 8, 12, and 13, Enforcement Response Policy, EPA Office of Pesticides and Toxic Substances (May 15, 1986).

Willful or knowing violations of TSCA are punishable by a criminal penalty. 15 U.S.C. § 2615(b). EPA may impose a fine of up to $25,000 per day for each violation or require imprisonment for up to one year, or both, in addition, to, or instead of, any civil penalty that may be assessed.

H. Underground and Aboveground Storage Tanks

1. Introduction to UST Regulation

Leaking underground storage tanks ("USTs") are a significant environmental problem in the United States. To address this problem, Congress adopted Subtitle I of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991 *et seq.*, which required EPA to develop a comprehensive regulatory program for underground storage tank systems. EPA has adopted regulations imposing technical standards for tank performance and management, including closure, site cleanup, and financial responsibility standards for tank owners. States may be authorized by EPA to implement the UST program if the state regulations are at least as stringent as the federal regulations.

At the present time no Company facility has an underground tank. It is Company policy not to install any underground storage tanks without specific approval of the Corporate EH&S Manager. If a previously unknown UST is discovered at a Company facility, the Corporate EH&S Manager shall be notified. If any properties or facilities being considered for acquisition have USTs, the Corporate Environmental, EH&S Manager shall be consulted.

The following is a brief overview of the federal UST regulations.

2. Summary Of Federal UST Regulations

a) Systems and Substances Regulated

The statute defines an underground storage tank as follows:

- Any one or combination of tanks (including underground pipes connected thereto) which is used to contain an

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accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground.

42 U.S.C. § 6991(1).

A "regulated substance" is:

- Any substance defined in Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. 9601(14), except for substances regulated as hazardous waste under RCRA; and
- Petroleum, including crude oil or any fraction thereof, that is liquid at standard conditions of temperature and pressure. [NOTE: Used oil is covered also.]

Several different types of underground tank systems are specifically excluded from regulation. These include the following:

- Septic tanks,
- Storm water or wastewater collection systems,
- Wastewater treatment tanks that are part of a wastewater treatment facility regulated under the Clean Water Act,
- UST systems with capacities of 110 gallons or less, and
- UST systems holding hazardous wastes listed or identified under Subtitle C of RCRA, or a mixture of such hazardous wastes and other regulated substances. (Such UST systems are subject to the hazardous waste requirements of RCRA Subtitle C.)

42 U.S.C. § 6991; 40 C.F.R. § 280.10(b).

b) New Tanks

Owners must give designated state or local agencies at least 30 days' notice prior to operating a new tank. As part of the notification process, new UST owners must certify that the installation was performed in accordance with the regulations, that the tank meets leak detection requirements, and that the owner

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meets the financial responsibility requirements. 40 C.F.R. § 280.22(e).

New tanks must meet extensive new tank performance standards. *See id*. at § 280.20.

c) Upgrading Existing UST Systems

By 1998, all existing systems must meet either the new tank performance standards, or specific upgrade requirements, or they must be closed down. 40 C.F.R. § 280.21(a). Upgrading may consist of an internal lining, cathodic protection, or a combination of both.

In addition, all tanks must be equipped with release detection systems.

d) Operating Requirements and Leak Detection

The regulations impose general operation and maintenance requirements pertaining principally to four areas:

- Spill and overfill control,
- Corrosion protection,
- Tank repair, and
- Recordkeeping.

There are also requirements for detecting leaks in tanks which depend on the age of the tank. There are general leak detection standards, as well as specific requirements based upon whether the system contains petroleum or hazardous substances.

For instance, tanks containing petroleum must be monitored at least every 30 days using a method such as inventory control, vapor monitoring tank tightness testing, or groundwater monitoring.

e) Release Reporting

Owners and operators of UST systems must report to the implementing agency *within 24 hours* if any of the following conditions are found:

- The discovery of released regulated substances at the site or in the surrounding areas;

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- Unusual operating conditions (such as sudden loss of product from the UST system, or an unexplained presence of water in the tank); and
- Monitoring results from a release detection method that indicate that a release may have occurred.

40 C.F.R. § 280.50.

Following the initial report, owners and operators must immediately investigate and confirm all suspected releases within seven days.

f) Corrective Action

Upon confirming that a release occurred, tank owners and operators must perform certain actions immediately, such as confirming the release to the applicable agency and taking action to prevent any further release.

Next, the owners and operators must perform abatement measures. These may consist of removing as much of the regulated substance from the system as is necessary to prevent further releases to the environment; preventing further migration of the product into soils and groundwater, mitigating any remaining fire and safety hazards, etc. 40 C.F.R. § 280.62.

g) System Closure

Both temporary and permanent closures are regulated. During temporary closures, the owners and operators must continue operation of corrosion protection and any release detection methods employed.

To close a tank permanently, the tank must be emptied and cleaned by removing all liquids and accumulated sludges. The tank must be either removed from the ground or filled with an inert solid material. The implementing agency must be given 30 days' advance notice of an owner's intent to permanently close a tank.

h) Financial Responsibility Requirements

Owners and operators of USTs which are used to contain petroleum must demonstrate financial responsibility capability.

Owners and operators must demonstrate financial responsibility both on a per-occurrence and an annual aggregate basis. The

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amount of coverage required depends on the number of tanks owned and operated.

Several mechanisms are available to demonstrate financial responsibility. These include a guarantee or surety, letter of credit, trust fund, or a state-required mechanism. It should be noted that the regulations contain very detailed requirements applicable to each of these mechanisms. *See* 40 C.F.R. §§ 280.94 - .103.

i) Enforcement

RCRA authorizes EPA to issue administrative orders to any person in violation of any UST requirement, or to commence a civil action against the owner or operator in federal court. 42 U.S.C. § 6991e(a). Failure to comply with an administrative order is subject to a fine of $25,000 per day. A person may challenge an order by requesting a public hearing.

3. Aboveground Tanks

There are no specific federal laws or regulations that address aboveground tanks.

RCRA regulates hazardous waste which is stored in aboveground tanks.

Facilities with aboveground storage of oil of 1,320 gallons or more, or a single container of 660 gallons or more, are required under the federal Clean Water Act to prepare and implement of Spill Prevention Control and Countermeasure (SPCC) plans. The plan must contain a description of the facility, materials handling practices and spill control systems; instruction for inspection, testing, operation, and training, spill notification procedures, and record-keeping requirements.

I. Water Quality (Including Wetlands]

1. Introduction

In 1972, Congress enacted the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA" or "the Act"). The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a).

In pursuit of this purpose, Congress established several regulatory mechanisms. These include the National Pollutant Discharge Elimination System ("NPDES") permit program, which includes a program for the pretreatment of industrial wastes, a program to protect wetlands from the disposal of dredge and fill materials, a program to control and prevent

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spills of oil and hazardous substances, and a program to provide financial assistance for construction of publicly owned wastewater treatment facilities. This section will focus on the first two items.

Each of these programs is administered by the U.S. Environmental Protection Agency ("EPA"), except for the wetlands program which is administered by the U.S. Army Corps of Engineers (with significant participation by EPA).

2. The NPDES Permit Program

The Act regulates and controls discharges of pollutants into waters of the United States. The mechanism for regulating such discharges is a nationwide permit program, called the National Pollutant Discharge Elimination System, or "NPDES." Dischargers subject to the Act are required to obtain an NPDES permit, either from EPA, or from the state if EPA has delegated implementation of the program. The NPDES permit will contain limits on the quantities and concentrations of pollutants that the discharger is allowed to discharge.

a) Who Is Subject to the Permit Requirement?

The permit requirement applies to:

- Any "point source",
- which "discharges",
- any "pollutant",
- into a "water of the United States."

See 33 U.S.C. §§ 1342(a) [permit program], 1362 [definitions].

Each of these terms is defined very broadly. For instance, the term "pollutant" includes not only obviously harmful materials such as garbage and chemical wastes, but also other materials not commonly thought of as being harmful, such as heat, rocks, and sand. "Point source" includes any discernible, confined, and discrete conveyance from which pollutants are or may be discharged, such as a pipe, ditch, tunnel, or container. 33 U.S.C. § 1362. "Waters of the United States" includes virtually every body of water imaginable, including minor tributaries and wetlands. *Id.*; *see also* EPA definition at 40 C.F.R. § 122.2.

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In summary:

- The scope of the NPDES permit program is extremely broad.
- Almost any facility which discharges any type of pollutant into any body of water in the U.S. will require an NPDES permit.

b) What Do NPDES Permits Do?

An NPDES permit serves two important functions in the Clean Water Act scheme:

- It imposes enforceable limits on the amounts and concentrations of pollutants which can be discharged. These are referred to as "effluent limits" or "discharge limits."
- It requires the discharger to monitor the quality of its discharge, and to report periodically the monitoring results (which includes reporting exceedances of permitted limits if they occur) to the appropriate regulatory agency.

(1) Effluent Limits: Industries and POTWs

The effluent limits imposed in any particular permit will depend on several factors, including the pollution control capability of the source, the characteristics of the industry or facility which produces the discharge, the characteristics of the receiving water, etc.

Effluent limits may be established for three categories of pollutants:

- "Conventional Pollutants", which consist of biochemical oxygen demand ("BOD"), total suspended solids ("TSS"), pH, fecal coliform, and oil and grease.
- "Toxic Pollutants", which consist of 126 specific toxic substances.
- "Nonconventional Pollutants", which are all other pollutants.

For industrial dischargers, EPA has created categories of industries and established effluent limits for certain

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pollutants for each category. *See* 40 C.F.R. Parts 401 - 471. Those limits are based on different levels of technology available to control pollution for each of those categories. New sources within such categories must meet similar, but more rigorous, effluent limits.

The effluent limits are also applicable to sewage treatment plants, referred to in the Act as "publicly owned treatment works" or "POTWs."

For both industrial dischargers and POTWs, effluent limits more stringent than those specified in EPA regulations may be imposed if necessary to achieve water quality standards. Such standards are normally established by the states and are designed to protect the quality of waters which receive pollution discharges. If the normally applicable effluent limits will result in the failure of the receiving water to meet the water quality standards, more rigorous effluent limits will be required.

(2) Discharge Limitations: Individual and General Permits NPDES Permits

(3) Monitoring and Reporting Requirements

NPDES permits require that the discharger take samples of its effluent on a regular schedule, analyze the effluent to determine the concentration of pollutants being discharged, and report those results to EPA or the state on standard forms (called “discharge monitoring reports”, or “DMRs”).

- NOTE: It is a crime to falsify monitoring data submitted pursuant to an NPDES permit.

This self-monitoring and self-reporting system is an extremely important aspect of the Act.

- It requires dischargers to discover and then to report their own permit violations.
- Reports of violations can trigger enforcement actions by the state or by EPA.
- Since the reports are also available to the public, they can be used against the discharger in a “citizen suit.”

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c) Permit Issuance

The Act authorized the individual states to propose their own permit programs for EPA's review and approval. State programs must meet or exceed the standards established by Congress and EPA.

3. Pretreatment — Industries that Discharge to POTWs

Many industrial facilities which produce wastewater do not discharge that wastewater directly to a "water of the United States." Instead, they discharge it to a POTW by being connected to a municipal sewer system. Nevertheless, those facilities do not escape regulation under the Act. In addition, the municipality which operates the POTW incurs significant new responsibilities if it has industrial customers.

Instead of being regulated as a direct discharger, industrial facilities which contribute their wastewater to a POTW are subject to comparable treatment standards, referred to as "pretreatment standards." Such facilities are required to treat their wastewater *before* discharging it to the sewer system. The main purposes of pretreatment are to protect the POTW from pollutants which will interfere with its operations, and to prevent industries from contributing pollutants to the sewer system which will simply pass through the POTW without receiving adequate treatment. *See* 40 C.F.R. Part 403.

Thus, industrial contributors to POTWs are subject to:

- Generally applicable regulations prohibiting the introduction into any POTW of, for example, pollutants which create an explosion hazard, or conventional pollutants in such volume and cause a permit violation.

- "Categorical" pretreatment regulations applicable to particular industrial categories. The intent of these regulations is to produce the same level of treatment prior to discharge to the POTW as would be required for a discharge directly to a body of water.

Any POTW (or combination of POTWs operated by the same authority) with a design flow of greater than 5 million gallons per day ("mgd") and receiving from industrial users pollutants which pass through or interfere with the operation of the POTW or are otherwise subject to pretreatment standards must establish a pretreatment program. 40 C.F.R. § 403.8(a). The pretreatment program must meet certain funding, personnel, and procedural criteria. *See id*. at (f). The centerpiece of a pretreatment program is that the POTW will be responsible for enforcing the appropriate pretreatment standards against the industrial facilities which contribute to the POTW's influent.

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In other words, municipalities subject to the pretreatment program must take on the role of a water pollution control agency in dealing with the industries that contribute wastewater to its sewer system.

EPA has been aggressive about pursuing industrial facilities that fail to comply with their pretreatment obligations.

4. Stormwater Discharges

The Act also regulates discharges of stormwater (i.e., surface runoff that enters a collection system such as a storm drain, and is discharged to the water of the United States). Urban runoff contributes more pollutants to surface waters than industrial point sources, and has been identified by EPA as a major cause of surface water pollution.

To combat this problem, Congress and EPA have created an extensive regulatory program which is separate from the program applicable to POTWs. Both municipal storm water systems and industries are affected by the stormwater program. The stormwater program is similar to the pretreatment program in that operators of municipal storm water systems are required to take on enforcement responsibilities to prevent such things as "illicit discharges" to the municipal stormwater collection system.

a) What Stormwater Discharges Are Regulated?

Under 1987 amendments to the Act, and regulations promulgated by EPA (40 C.F.R. § 122.26), the following stormwater discharges (among others) require NPDES permits:

- Discharges from large or medium municipal separate storm sewer system; and
- Discharges associated with industrial activity.

See 40 C.F.R. § 122.26(a).

(1) Discharges from a Municipal Separate Storm Sewer System

A municipal stormwater permit regulates the municipality's stormwater discharge system and obligates the municipality to regulate the activities of those who might contribute pollutants to that stormwater.

(2) Discharges Associated with Industrial Activity

EPA regulations identify eleven broad categories of industries (manufacturing, mining, recycling, public

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transportation, etc.) which were required to submit applications for permits no later than October 1, 1992. 40 C.F.R. 122.26(b)(14) The dischargers were required to apply for an individual permit, apply for a permit through a group application, or seek coverage under a general permit. Many of these facilities are identified in the regulations by Standard Industrial Classification (SIC) codes.

Most states have been authorized by EPA to manage the stormwater program.

5. Wetlands Protection — The Section 404 Program

The Clean Water Act establishes a separate permit program managed by the U.S. Army Corps of Engineers under Section 404 of the Act, 33 U.S.C. § 1344 governing the discharge of "dredged or fill material into waters of the United States."

The extent of Section 404 jurisdiction is vast. It includes coastal waters, tidal waters, freshwater lakes and streams, and tributaries of any of these. What is most notable, however, and has caused the most controversy, is that 404 jurisdiction also extends to "wetlands."

a) What Is a "Wetland"?

By definition wetlands are:

Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 328.3(c).

Defining wetlands, and identifying marginal wetlands and defining wetlands boundaries, requires special technical training and expertise.

b) What Activities Does the Corp Regulate?

The Corp of Engineers' basic authority is over the placing of "dredged" and "fill" material into waters of the U.S., including wetlands. 33 C.F.R. § 323.3.

The Corp also has been held to have jurisdiction over mechanized land-clearing activities, and the draining of or substantial alteration of wetlands. The Corp does *not* regulate such activities as normal

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farming, maintenance of drainage ditches, or construction of farm roads or forest roads. 33 U.S.C. § 1344(f); 33 C.F.R. § 323.4.

c) The Section 404 Permitting Process

The Corps issues both "Individual" and "General" permits.

- Individual permits are for specific activities following review of an individual application.
- General permits are for specified categories of activities.

(1) Nationwide Permits

"Nationwide" permits are one kind of general permit. They are intended to allow dredging or filling to occur with little or no delay or paperwork. They have been issued by the Corp for twenty-six different activities, such as:

- Survey activities, including soil core sampling;
- Outfall structures and associated intake structures where the discharge is authorized by an NPDES permit;
- Minor road-crossing fills; and
- Minor embankment stabilization activities.

See 33 C.F.R. §§ 330.5(a)(1) - (26).

The most significant nationwide permit is No. 26, because it allows the filling of up to ten acres of waters of the U.S. However, if more than one acre of wetland is to be filled, the applicant must give the Corps prior notice. Unlike the other nationwide permits, few No. 26 nationwide permits are granted easily or without extensive consultation.

(2) Individual Permits

Individual permits are required for discharges of dredged or fill material not covered by a general permit. Unlike general permits, individual permits will involve public notice and comment and will require compliance with the environmental impact statement requirements of the National Environmental Policy Act ("NEPA").

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(3) EPA's Role in the Permitting Process

Although the Corps issues Section 404 permits, EPA is very heavily involved in the process. For instance, EPA has veto power over all permits.

Generally, the Corps is more likely to allow fill in waters of the U.S. than is EPA. As a result, EPA often seeks to control the permit process by either threatening to invoke its veto power, or by asking the Corps to prepare an environmental impact statement.

d) Summary

- In most areas, any large project (100 acres or more) will have some lands or waters which qualify as "waters of the United States", and which may therefore involve the 404 process. Many small projects will also be affected due to the presence of intermittent streams or wetlands.
- The focus of the 404 program is on avoiding adverse impacts to wetlands. The Corps will seek to determine whether the project could be achieved without filling any wetlands.
- The 404 process can be burdensome, costly, and time consuming, even where the acreages of wetlands involved are small. Wetlands investigations should be performed early in the project development process.
- Violations of the 404 permit requirement can lead to enforcement actions and very large fines.

J. Transportation of Hazardous Materials

1. Hazardous Materials Transportation Act

The Hazardous Materials Transportation Act of 1974 ("HMTA") authorizes the Department of Transportation ("DOT") to regulate the movement of materials that may pose a threat to health, safety, property, or the environment when transported by air, highway, rail, or water. 49 U.S.C. § 1811 *et seq*. DOT regulations implementing this law are known as the Hazardous Materials Regulations ("HMR"). They govern the classification, packaging, labeling, placarding, marking, documentation, transportation, and handling of hazardous materials in commerce.

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Federal DOT regulations preempt any state regulations which are inconsistent with the federal requirements. 49 U.S.C. § 1811. States can issue additional regulations and have primary authority to regulate the transport of hazardous materials by motor vehicle carriers that operate only within the state.

Under DOT regulations, hazardous material can not be offered or accepted for transportation in commerce unless the material is properly classified, described, packaged, marked, labeled, and in condition for shipment in accordance with DOT requirements. 49 C.F.R. § 171.2(a).

2. Applicability of the DOT Regulations

The DOT regulations apply to the transportation of hazardous materials by, and their offering to:

Carriers by rail car, aircraft, and vessel;

Interstate and foreign carriers by motor vehicle; and

Interstate carriers by motor vehicle of: hazardous wastes, hazardous substances, flammable cryogenic liquids in portable tanks and cargo tanks, and marine pollutants.

49 C.F.R. § 171.1.

a) Hazardous Materials

"hazardous material" is defined as: "a substance or material, including a hazardous substance, which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and which has been so designated." The term includes hazardous substances, hazardous wastes, and marine pollutants and materials that meet the defining criteria for hazardous classes and divisions identified in 49 C.F.R. Pt. 173. 49 C.F.R. § 171.8.

(1) The Hazardous Materials Table

DOT has designated specific substances that it considers to be hazardous materials. These materials are listed in the Hazardous Materials Table (the "Table") at 49 C.F.R. § 172.101. The Table identifies the hazard class/division of each material, the appropriate hazard description, and the identification number of the material (in most cases a U.N. Guidelines number), and references labeling, packaging, and other HMR requirements applicable to the material.

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Material that is not listed on the Hazardous Materials Table may be a hazardous material subject to the HMR if it falls within one of the hazard divisions. See 49 C.F.R. § 171.8 definition of hazardous material.

(2) Hazardous Substances

Hazardous substances subject to the HMR are those substances which:

(a) Are listed in the DOT list of Hazardous Substances and Reportable Quantities published in the appendix to 49 C.F.R. § 172.101;

(b) Are in a quantity, in one package, that is equal to or more than the reportable quantity ("RQ") listed in the DOT Hazardous Substances and Reportable Quantities list; and

(c) When in a mixture or solution, are in concentrations by weight that are equal to or exceed the concentrations specified in the regulatory definition.

49 C.F.R. § 171.8

(3) Small Quantities Exemptions

Small quantities of specified classes of hazardous materials are exempt from the HMR requirements, subject to certain packaging conditions. 49 C.F.R. § 173.4

b) Hazardous Wastes

Hazardous wastes are those wastes which are subject to the manifesting requirements under the Environmental Protection Agency ("EPA") hazardous waste regulations specified in 40 C.F.R. § 262 , 49 C.F.R. § 171.8. Hazardous wastes are subject to specific labeling and manifesting requirements under the HMR which complement the EPA hazardous waste regulations. 49 C.F.R. § 172.205.

3. Classifying and Describing Hazardous Materials

Importers, and shippers, must determine whether the shipment is a hazardous material, identify the hazard class, and select the proper shipping name.

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a) Hazard Classification

DOT has identified categories ("classes" and "divisions") of substances it considers to be hazardous materials.

Class 1 - Explosives

Class 2 - Gas

Class 3 - Flammable and combustible liquid

Class 4 - Flammable solids, spontaneously combustible material, dangerous-when-wet materials

Class 5 - Oxidizers and organic peroxide

Class 6 - Poisonous material and etiologic agents

Class 7 - Radioactive material

Class 8 - Corrosive material

Class 9 - Miscellaneous hazardous material

Other regulated material (ORM-D)

49 C.F.R. 173.2

b) Selecting a Shipping Name

If the substance is a hazardous material, importers must select and use the appropriate shipping name for the hazardous material being transported. 49 C.F.R. § 172.101(c). See the Hazardous Materials at 49 C.F.R. § 172.101 for hazardous materials descriptions and proper shipping names.

4. Shipping Paper

The importer or shipper must describe the hazardous materials on a shipping paper in accordance with the regulations. 49 C.F.R. §§ 172.200, 172.201. Although a standard form need not be used, the shipping paper must meet the specific requirements regarding the shipping name, hazardous class, identification number, weight, volume emergency response information, and a shipper's certification. 49 C.F.R §§ 172.200, 172.204; see also 172.602.

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5. Marking, Labeling, and Placarding Requirements

a) Marking

Shippers are required to mark all packagings containing hazardous material in accordance with the regulations. 49 C.F.R. § 172.300 et seq. The HMR specifies marking requirements for "non-bulk" and "bulk" packaging.

(1) Non-Bulk Packagings

Non-bulk packagings are those which have an internal volume of 119 gallons (450 liters) or less, or a weight capacity of 882 pounds (400 kilograms) or less. 49 C.F.R. § 171.8.

Marking for non-bulk packagings must include:

(a) The proper shipping name and identification number;

(b) Any technical name that must be included on the shipping paper in parentheses; and

(c) The name and address of the consignee.

49 C.F.R. § 172.301.

(2) Bulk Packagings

Bulk packagings are packagings, other than vessels or barges, including a transport vehicle or freight container, in which hazardous materials are loaded with no intermediate form of containment, and which have a water capacity greater than 454 kg (1001 lbs). 49 C.F.R. § 171.8.

(3) General Marking Requirements

HMR-required markings must be:

(a) Durable;

(b) In English;

(c) Clearly visible on the surface of a packaging by being displayed on a background of sharply contrasting color;

(d) Not obscured by other attachments or labels; and

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(e) Not located near other markings such as advertising marks that could substantially reduce the effectiveness of the HMR-required markings.

49 C.F.R. § 172.304.

b) Labeling Requirements

Unless otherwise excluded, labels specified by DOT must be affixed to each package, overpack, portable tank or freight container containing hazardous material. 49 C.F.R. § 172.400. Labeling is required for certain packagings, including non-bulk packagings and certain bulk packagings. A specific label is required for each hazard division. 49 C.F.R. § 172.400. Certain materials are exempt from the labeling requirements. *See* 49 C.F.R. § 172.400(a).

c) Placarding Requirements

Unless otherwise excluded, all transport vehicles and freight containers containing any quantity of hazardous materials must be placarded on each end and on each side. 49 C.F.R. § 172.500.

6. Packaging Requirements

The HMR includes both general requirements for all packaging, and specific standards for various categories of packaging.

Under the DOT regulations, shippers are responsible for ensuring that the packaging is appropriate for the material.

a) General Requirements

All packages must meet general requirements regarding design, construction, maintenance, filling, closure, permeability and compatibility. 49 C.F.R. § 173.24.

b) Additional General Requirements for Non-Bulk Packages

Non-bulk packages must meet additional requirements regarding liquids, the nature and thickness of the outer packaging, and inner packagings. 49 C.F.R. § 173.24a(a).

c) Specific Packaging Requirements

The HMR specifies performance standards that packagings for each hazard class must meet. *See* 49 C.F.R. §§ 173 *et seq.*

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7. Forbidden Materials

The HMR prohibits the transport of materials, such as forbidden explosives, identified at 49 C.F.R. § 173.21, and specifies certain other materials that may be transported only in controlled temperature conditions.

8. Training

a) A hazmat employer as defined in 49 C.F.R. § 171.8 must ensure that each hazmat employee as defined in 49 C.F.R. § 171.8 is trained in accordance with regulatory requirements. 49 C.F.R. § 172.702.

(b) "Hazmat employee" can include an individual who loads, unloads or handles hazardous materials, prepares hazardous materials for transportation, or operates a vehicle used to transport hazardous materials. See 49 C.F.R. § 171.8.

(c) Training means a systematic program whereby hazmat employee has general familiarity with regulatory requirements, has specific familiarity with requirements applicable to his function, can recognize and identify hazardous materials, and has knowledge of emergency response information, self protection measures and accident prevention measures. 49 C.F.R. §§ 172.700, 172.704.

9. Requirements for Carriers

Carriers may not accept hazardous materials for transport unless they comply with the HMR requirements. 49 C.F.R. § 171.2(b). Carriers are also responsible for complying with HMR requirements for:

a) Placarding.

b) Loading and unloading. The regulations specify loading and unloading procedures for hazardous materials. Separate procedures are specified for shipments by air, rail, marine vessel, and motor vehicle.

c) Operating. The HMR specifies safe operating procedures for transporting hazardous materials by each mode of transport.

d) Accident response and notification. The HMR requires transporters to train their employees in emergency response and specifies emergency notification and response procedures.

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10. Enforcement

A person who knowingly commits an act which violates the DOT hazardous material regulations is subject to a civil penalty of not more than $25,000 for each violation. Each day of a continuing violation is a separate offense. 49 U.S.C. § 5123(a)(1).

Willful violation of the HMR can give rise to fines and up to five years imprisonment, or both. 49 U.S.C. § 5124.

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REPORT TO THE BOARD

TO: Board of Directors

FROM: Compliance Officer

SUBJECT: Ethical Business Practices Compliance

DATE:

A. Policy. That all employees conduct business activities within the limits of the highest ethical standards.

B. Compliance Program Activities – 2001/2002

1. Environmental Compliance. See separate report.

2. Foreign Corrupt Practices Act (FCPA) See separate report.

3. U.S. Government Procurement Statutes and Regulations. (Truth in Negotiations Act, Procurement Integrity Act, Byrd Amendment [lobbying], False Claims Act, Federal Acquisition Regulations, etc.).

a. Management Priority. All business activities are structured around compliance with this body of law. Management at all levels places very high priority on knowledge, understanding and compliance with these laws.

b. Training. Employees undergo regular off-site training, internal training, and self-study in their specific areas of involvement.

c. Monitoring.

- Compliance, monitoring, and internal audit are built into policies and procedures for conducting business.
- The U.S. Government audits all major proposals, contracts, claims, processes and procedures. Virtually all payment requests are similarly audited. Special function audits are conducted routinely by the U. S. Government and foreign customers.
- The Company conducts constant and regular internal audits for compliance with procurement regulations and laws.

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To: Board of Directors
From: Compliance Officer
Subject: Ethical Business Practices Compliance
Date:

4. Economic Espionage Act of 1996. (The "don't ask for, receive, possess, or steal a competitor's trade secrets" law). This statute is briefed, trained, and monitored alongside the FCPA in every instance.

5. Antitrust Laws. The focus is on senior management, business development, and contracts. Every business deal entered is reviewed for compliance with these laws.

6. Export Control. The focus is in contracts and legal, where sole authority to authorize foreign shipments lies. Contracts and legal personnel received regular formal training in this area. Legal and interpretive issues related to ITAR are addressed on a daily basis. This statute is briefed, trained, and monitored alongside the FCPA in every instance.

7. Anti-boycott Laws. Employees who interface with customers and foreign business contacts are briefed on the requirements of anti-boycott. All potential concerns are reported to the Legal Department. The Legal Department submits annual reports on anti-boycott compliance.

8. Intellectual Property Law. Every brochure, paper, presentation, and controlled document is reviewed for compliance by legal prior to release. All patent law (including patent marking) issues are resolved with close coordination with in-house and outside counsel. The Company's patent program is active and produces results.

9. Employment Law. Corporate Directives dealing with this area are voluminous. The Company changes its practices and policies frequently based upon this ever-changing body of law. HR and Legal receive regular formal training in this area. As necessary, training is further given to other employees. For example, a new sexual harassment training program has been developed and is being given to all employees.

10. Federal Firearm Regulations, Dept. of Treasury Regulations, Bureau of Alcohol Tobacco and Firearms (BATF) Regulations. The Company has a type 10 License. Compliance is closely monitored by Legal.

C. Ombudsperson Program. The ombudsperson receives matters on a regular basis. All such matters have been resolved. To date, no ombudsman issue has disclosed a legal compliance issue.

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To: Board of Directors
From: Compliance Officer
Subject: Ethical Business Practices Compliance
Date:

D. Status of Compliance

There have been no instances where illegal or unethical actions have been found or confirmed.

E. Compliance Officer Opinion.

It is my opinion and belief that

- The Company's business activities are being conducted in accordance with the highest ethical standards and in full compliance with applicable laws, and
- The Company's compliance programs are effective.

Compliance Officer

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REPORT TO THE BOARD

TO: Board of Directors

FROM: Compliance Officer

SUBJECT: FCPA Compliance Program

DATE:

A. Policy. The Company will conduct every international business transaction with ethics and integrity regardless of differing local practices and traditions. The Company will comply with all U.S. and local laws in every business transaction.

B. Compliance Program Activities.

1. Keeping current with the law. The Legal Department maintains currency on legal developments through:

- Specialized periodicals.
- West Law Corporate All Primary Law database.
- Continuing legal education seminars, programs, and self-study including the topics of FCPA, compliance program developments, and international business ethics.

2. Training. FCPA training has been provided to:

- Senior management.
- Employees with customer contact or interface. (Business Development, Program Management, Contracts, Engineering management)
- Foreign representatives, consultants, and vendors.

3. Supervision and Monitoring.

- Foreign invoices undergo four levels of internal review.
- Foreign invoices must include a certification of legal and ethical compliance.
- Internal spot check audits are conducted.
- Ernst & Young financial audits include an FCPA compliance check.

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To: Board of Directors
From: Compliance Officer
Subject: FCPA Compliance Report
Date:

4. Contractual Reinforcement.

- All commissioned representatives, consultants, technical services, distributor, and other foreign business agreements include:
  - A description of the FCPA
  - The express requirement to comply with the FCPA
  - Severe remedies for non-compliance with FCPA
  - FCPA certification requirements
- All commissioned representatives, consultants, and other foreign business related entities contracted to the Company undergo extensive due diligence investigations prior to being offered a contract.

C. Status of Compliance.

1. There have been no reported instances of violations of the FCPA.

2. The Company is following its FCPA compliance procedures.

D. Compliance Officer Opinion.

It is my opinion and belief that
- The Company is compliant with the FCPA and
- The Company's FCPA Compliance Program is effective.

Compliance Officer

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May 24, 2004
Compliance Training

MANAGEMENT COMPLIANCE TRAINING

SCOPE

Laws of particular concern for Company operations and sales activities:

- **FCPA** Foreign Corrupt Practices Act
- **ITAR** U.S. International Traffic in Arms Regulations
- **EEA** Economic Espionage Act of 1996
- **Anti-boycott** SEC Laws
- **Intellectual Property** Patents and Trade Secrets
- **Antitrust** Federal, state, and foreign laws

This is a very brief description of the law. It is intended for use only by the Legal Department as a training aid to familiarize employees with laws applicable to their employment. Employees undergoing training may keep a copy for future review and reference. **Contact the Legal Department immediately if you believe that anyone working for the benefit of the Company may have violated any of these laws.**

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May 24, 2004
Compliance Training

FCPA
(Foreign Corrupt Practices Act)

Main Thrust

Don't Bribe foreign government officials

Specific Prohibitions/Obligations

- **Don't pay bribes** to foreign government officials.
- **Don't pay money if you 'know"** the payment will be used to pay a bribe.
- **Expense reimbursements must be correct.** (Corporate books must be accurate.)

Can you avoid "knowledge" by looking the other way?

- **NO.**
- "Corrupt intent" to avoid knowing is the same as knowing.
- Corrupt intent includes:
  - Conscious intent to avoid learning the truth.
  - Conscious disregard.
  - Deliberate (intentional) ignorance.
  - Willful blindness.

Standards

You have "knowledge" or "corrupt intent" if you:

- **Have a "firm belief**" that an improper payment **is being made**.
- **Have a "firm belief**" that an improper payment is "**substantially certain to be made".**
- **Are aware of a "high probability"** that a bribe will be made, **unless you do not believe that a bribe will be made.**

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What do our rep agreements say regarding FCPA compliance?

The following is taken verbatim out of our standard rep agreement:

> **COMPLIANCE WITH U.S. FOREIGN CORRUPT PRACTICES ACT.** **REPRESENTATIVE** understands and will comply with the provisions of the U.S. Foreign Corrupt Practices Act in performing this Agreement and any other agreement or understanding between the PARTIES. REPRESENTATIVE warrants and represents that it understands the Foreign Corrupt Practices Act and that **REPRESENTATIVE**, its officers, directors, stockholders, employees, and agents, have not and will not pay, offer or promise to pay, or authorize the payment, directly or indirectly, of money or anything of value to (a) any government, official, agent, employee of any government department or agency, whether or not acting in an official capacity; (b) any political party or official thereof or any candidate for political office; (c) any person knowing that all or any portion of such money or thing of value will be given or promised, directly or indirectly, to persons described in (a) or (b), for purposes of:
>
> 1. Influencing any act or decision of such entities or persons in their official capacity, including a decision to do or omit to do any act; or
>
> 2. Inducing such entities or persons to use their influence with any government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> in order to obtain or retain business with, or directing business to, the Company or to any person or entity.

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ITAR

International Traffic in Arms Regulations (22 CFR 120-130)

What is an Export?

- **Sending or taking** a defense article out of the U.S.
- **Disclosing or transferring** technical data to a foreign person.
- **Performing a defense service** for a foreign person.
- An export can take place inside the US.

Who is a foreign person for ITAR purposes?

- Anyone who is neither a U.S. citizen or permanent resident alien of the US.

What is a Defense Article?

- Anything on the **munitions list** (See ITAR Part 121.)

- **Any item that it is specifically designed, developed, configured, adapted, or modified for a military application**.

- **The intended use of the item is not relevant to its status as a defense article.**

What is Technical Data? (ITAR Section 120.10)

- Information required for the **design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification** of defense articles.
- Software directly related to defense articles.

What is not Technical Data?

- General scientific, mathematical or engineering principles commonly taught in schools, colleges, and universities.
- Information in the public domain.
- Basic marketing information on function or purpose or general system descriptions.

Whose neck is on the line? _____ YOURS !!!!!!

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EEA

Economic Espionage Act of 1996
(18 U.S.C. 1831-1839)

Main Thrust

Don't steal trade secrets.

Specific prohibitions regarding the trade secrets of others

Without authorization of the owner:

- **Don't steal.**
- **Don't improperly solicit.**
- **Don't obtain.**
- **Don't copy, transmit, or disclose.**
- **Don't have in your possession.**

Remember:

If you think it may be wrong - then it probably is.

Protect the Company and yourself.

Perform your job legally.

Call the Legal Department.

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ANTI-BOYCOTT LAWS

Main Thrust

Do not participate in ILLEGAL boycotts.

Specific Prohibitions/Obligations

- Don't participate in "illegal" boycotts.
- **The Company is required by law to report** (to the U.S. Government) **any and every time we receive a request to comply with an ILLEGAL boycott**.

It's the law.

Who decides if a boycott is illegal?

- If you are asked to comply with any boycott, contact the Legal Department.
- The determination of whether a boycott is illegal is a complex legal question. You should not try to make the determination yourself.
- **The Legal Department will determine whether the boycott is "illegal".**

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INTELLECTUAL PROPERTY

Trade Secret and Proprietary Information Protection

- See Corporate Directive _____, Company Proprietary Information.
- Trade secrets, proprietary information, competition sensitive information, etc. are all the same.
- Use the same care to protect the proprietary information of others as used to protect Company proprietary information.
- Non-Disclosure Agreements (NDAs).
    - Know haw to get NDAs reviewed, negotiated, and signed.
    - When is an NDA required?
        - Before disclosing proprietary info to others.
        - Before others share their proprietary info with you.
    - NDA Request Forms – Located on the network under Public Folders –
        - Fill it out and send to Diane Lubow.
        - If you receive another company's form, please send it to Diane with the completed NDA Request Form.
        - Communicate urgency.
        - **We will work with last minute requests when they are unavoidable.**
        - NDAs can be turned around very quickly if thee are no problems.
- Contracts, Subcontracts, and Legal are responsible for negotiating and executing NDAs.
- What major terms are included in our standard NDA

    - **Disclosure Restrictions**
    - **Use Restrictions**
    - **Term of Agreement** -- How long the parties may exchange information under the agreement. You could have a 5-year agreement, and never disclose information under it. No problem. We have lots of file cabinets.
    - **Term of Restrictions** -- How long the information must be kept confidential. Technology is valuable even if obsolete or replaced by newer technology. We have had 35-year-old cameras returned for repair. That is profitable business that we want to keep.
    - **Limit to specific programs and/or technologies.** Many companies do – we do not.

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Compliance Training

Patents and Trade Secrets

Patent: The right to prevent others from practicing your invention.

- US patents can be maintained for 20 years.

- **Patent Prosecution.** The process of getting the patent.
- **Infringement.** Practicing someone else's patent.
  - Is someone else infringing our patent?
  - Are we infringing someone else's patent?
- **Infringement is a legal question.** Only patent lawyers are qualified or licensed to determine whether an item does or does not infringe a patent.
- **Be diligent.** Bring suspected infringement (either direction) to the attention of the Legal Department.

Marking (Patents and Trade Secrets.)

Any writing is a "document" letter, emails, sales presentations, etc.

- **Patent Markings**
  - A patent holder must put others on notice – mark the item and the literature.
  - It is illegal to mark an item as patented, if it is not.
  - A patent holder loses rights (possibly an entire patent) if we fail to mark our patented items.

- **Trade Secrets (Proprietary Info)**
  - **Don't overdo it.** If you mark everything, then nothing is protected.
  - **Don't underdo it.** If it is not marked, it is not protected.
  - **Do it just right.**
  - **If oral, state that info is proprietary and follow up with a writing.**

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ANTI-TRUST LAWS – RESTRAINTS OF TRADE

(Federal, State, and Foreign Laws Apply)

This is primarily an issue for the Legal Department. However, many of our employees (senior management, business development, contracts, subcontracts, etc.) should be familiar with the basic concepts of antitrust law.

Monopolies (A hotel on all three properties.)

- Do not create them.
- Do not try to create them.
- If you have one (remember Microsoft), do not use illegal monopolistic powers, such as:
    - The power to control prices.
    - The power to exclude competition.

Horizontal Restraints (Agreements between competitors that restrain trade.)

- Competitors cannot exchange price information.
- No bid rigging.
- No allocation of territories and customers.
- No boycotts.
- No ancillary agreements not to compete.

Vertical Restraints (e.g. Agreements between manufacturer and distributor or between distributor and retailer.)

- Beware of exclusive dealings.
- No vertical price fixing.
- No tying arrangements.

Predatory Pricing

- Just don't do it.
- Example – Lowball pricing intended to drive the competition out of business.

Bottom Line

- If there is even the possibility that any of this is going on, **call the Legal Dept.**

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CD 8000

CORPORATE DIRECTIVE TYPE OF INSTRUCTION	TITLE: **ETHICAL BUSINESS PRACTICES AND COMPLIANCE PROGRAM**	
	EFFECTIVE DATE: 8/21/97	DISTRIBUTION:
President's Office DIRECTIVE ORGANIZATION TITLE AND LOCATION	SUPERSEDES: NEW	IMPLEMENTS:
SCOPE OF ORGANIZATIONAL APPLICATION	President & CEO APPROVAL SIGNATURE, TYPED NAME AND POSITION TITLE	

I. OBJECTIVE

To establish Company policy and programs regarding:

1. Commitment to ethical business practices; and

2. Compliance with laws, regulations, and requirements applicable to the business of the Company.

II. BACKGROUND

2.1 Many United States laws and regulations are applicable to the activities of the Company. These laws and regulations can exist at federal, state, or local levels of government within the United States. Under the standards of conduct, we and our parent corporation have chosen to abide by, as well as these laws and regulations, there are minimum standards of conduct applicable to every employee's role in the business of the Company. The purpose of this policy is to provide the management framework by which each employee will understand his or her obligations and by which the Company will monitor and enforce our standards of conduct and business practices.

2.2 Many foreign laws, regulations, and practices are applicable to the activities of the Company and can create additional, potential liability to the Company, its officers, and employees.

2.3 The parent corporation of the Company has implemented a Code of Business Conduct and Ethics applicable to the business activities of every employee of the Company. It is the duty and responsibility of every employee to perform their tasks in accordance with this Code.

2.4 The Board of Directors of the Company and the Senior Management of the Company demand that the business activities of the Company be conducted within the limits and controls of the highest ethical standards.

Distribution: All Supervisory and Executive Personnel: Group Managers and Above

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CD 8000

CORPORATE DIRECTIVE TYPE OF INSTRUCTION	TITLE: ETHICAL BUSINESS PRACTICES AND COMPLIANCE PROGRAM

2.5 This Corporate Directive on Ethical Business Practices recognizes the many ethical, legal, and even criminal sanctions which may result from a violation of applicable laws, regulations, and ethical standards. The Company and its directors, officers, employees, and agents may be subject to criminal and regulatory sanctions, civil liabilities, and/or Company disciplinary actions for acts and omissions which do not meet the standards of conduct stated above.

III. POLICY OF THE COMPANY

The Company is committed to conducting its business within the highest ethical standards and in compliance with all laws and regulations applicable to its business in all government and commercial markets worldwide.

IV. COMPLIANCE PROGRAM

4.1 **Each person responsible.** Every Company officer, employee, and agent is individually responsible to ensure that his or her conduct in furtherance of Company business is in accordance with the high ethical standards of the Company. The Directors and officers of the Company fully support the Compliance Program and shall have the responsibility to ensure that it is implemented and enforced.

4.2 **Compliance Officer.** The Company President and Chief Executive Officer shall request the Board of Directors to appoint an employee of the Company as the Compliance Officer. Such appointee shall be an officer of the Company and shall be responsible to the Board of Directors with respect to the responsibilities as the Compliance Officer.

4.3 **Compliance Officer Responsibilities.** The Compliance Officer shall be responsible for the effective implementation of the Compliance Program. Such Program consists of the following:

4.3.1 **Inform the Company**. The Compliance Officer shall ensure that all employees and agents of the Company are informed of and periodically reminded of the Company policy regarding Ethical Business Practices and Compliance with applicable laws and regulations.

4.3.2 **Identification of Substantial Risk.** The Compliance Officer shall identify areas of law or ethics which are applicable to significant activities of the Company and which create substantial risk that certain types of unlawful activities may occur. Such areas shall be set forth in Attachment 1 to this CD 8000.

4.3.3 **Compliance Procedures.** The Compliance Officer shall ensure that the Company establishes and maintains compliance standards, policies, and procedures which are

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reasonable considered capable of reducing the prospect of unlawful or unethical conduct for each of the areas of substantial risk identified in Attachment 1.

4.3.3.1 Compliance Procedures may be stand-alone, comprehensive documents detailing all aspects of compliance in a specific area or may consist of many corporate directives, policies, instructions, and written practices. They shall include such management and financial controls as are necessary to reasonably ensure that the Company can prevent and detect unlawful or unethical conduct.

4.3.3.2 Compliance Procedures must include provisions to effectively communicate the standards and procedures to the employees and agents of the Company. Such communication may consist of one or more of the following: (a) dissemination of written materials, (b) group or formal training, (c) individual training or counseling, (d) on-the-job training, (e) self-study, (f) follow-up or refresher training, (g) displaying posters and signs, and (h) such other professional or work related education as may be deemed appropriate.

4.3.3.3 Compliance Procedures must task supervisory and management level personnel with responsibility for ensuring compliance with and enforcement of the standards and procedures.

4.3.3.4 Compliance Procedures must include establishment of monitoring and auditing systems reasonable designed to assure that the activities of the Company comply with applicable laws and regulations.

4.3.3.5 Compliance Procedures must include a specific mechanism, involving appropriate human resources, legal and other company resources to: (a) investigate allegations of violations of law, regulation, or standards of conduct, and (b) recommend to Senior Management and/or the Board of Directors, as appropriate, disciplinary action commensurate with the infraction.

4.3.3.6 It shall be the responsibility of the Compliance Officer to recommend to Senior Management and/or the Board of Directors, as appropriate, whether a voluntary disclosure of possible misconduct need be made to Federal or State government officials.

4.3.4 **Oversight.** The Compliance Officer shall have overall oversight authority over the Compliance Program and may task, as appropriate, corporate resources reasonably required to ensure compliance with applicable law and regulations.

4.3.5 **Ethics Hotline.** The Compliance Officer shall establish and maintain an Ethics Hotline which will allow abuses of Company policy, including suspected unlawful

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conduct, to be reported and acted upon by executives with sufficient authority to deal with matters which are reported.

4.3.5.1 The Ethics Hotline will be answered by the Compliance Officer or, with approval of the President and CEO, a person assigned by the Compliance Officer. Such assigned person need not be an employee of the Company.

4.3.5.2 Calls to the Ethics Hotline may be anonymous.

4.3.5.3 Reports to the Ethics Hotline may also be submitted in writing to the Company addressed to "Ethics Hotline".

4.3.5.4 It shall be a violation of Company policy to intimidate r to impose any form of retaliation on any employee or agent who utilizes such reporting system for the purpose for which it is intended.

4.4 **Disciplinary Actions.** The Company will consistently enforce its standards through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for failure to detect an offense or for failure to report personal knowledge or other direct evidence of misconduct.

4.5 **Appropriate Response.** If an unlawful activity is suspected or detected, the Company must take all reasonable steps to respond appropriately to the offense and to prevent similar offenses. It is the duty of every employee and officer of the Company to assist in this effort.

4.6 **Control Delegation of Authority.** The Company will not delegate substantial discretionary authority to any individual it knows, or, through the exercise of due diligence, should have known had a propensity to engage in unlawful activities.

4.7 **Investigation and Self-Disclosure.** The Company will investigate possible occurrences of unlawful conduct. When required by law, or, when otherwise deemed in the best interests of the Company, the company will notify Federal, State, or local authorities of such possible violation.

V. Attachments to this CD:

5.1 List of Areas of Substantial risk (Ref. Para. 4.3.2).

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CD 8000

CORPORATE DIRECTIVE TYPE OF INSTRUCTION	TITLE: ETHICAL BUSINESS PRACTICES AND COMPLIANCE PROGRAM

ATTACHMENT 1

Areas of Substantial Legal Compliance Risk

Pursuant to Paragraph 4.3.2, the following areas are identified:

1. Federal and State Environmental Laws

2. US Government Procurement, including:

    a. The Truth in Negotiations Act (TINA) requirement that cost and pricing data are current, accurate, and complete (10 U.S.C. §2306a; 48 C.F.R. §15-804-4).

    b. The Procurement Integrity Act (PIA) which prohibits misuse of government source selection information and company proprietary information in competing for federal contracts (41 U.S.C. §423; 48 C.F.R. §52.203-8).

    c. The Byrd Amendment which prohibits use of appropriated funds for lobbying for or against specific contract actions (31 U.S.C. §1352(b)(2)(c)).

    d. The civil and criminal False Claims Acts, which prohibit fraud and other acts which intentionally deprive the government of the benefit of its public contracts (18 U.S.C. §287.31 U.S.C. §3729).

3. Federal and State Bribery laws and the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§78dd-1 and 78dd-2).

4. Economic Espionage Act of 1996 ("EEA", 18 U.S.C. §1831 et seq).

5. Antitrust Laws.

6. The Export Control Act (22 U.S.C. §2778) and the International Traffic in Arms Regulations (ITAR) of the US Department of State.

7. U.S. Antiboycott Laws.

    a. Department of commerce (50 U.S.C. App §2410; 15 C.F.R. §769).

    b. Internal Revenue Code (IRC §999).

8. Intellectual Property Law.

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CORPORATE DIRECTIVE TYPE OF INSTRUCTION	TITLE: **COMPLIANCE WITH THE FOREIGN CORRUPT PRACTICES ACT**	
	EFFECTIVE DATE: **05/15/98**	DISTRIBUTION:
President's Office DIRECTIVE ORGANIZATION TITLE AND LOCATION	SUPERSEDES: **New**	IMPLEMENTS:
SCOPE OF ORGANIZATIONAL APPLICATION	President & CEO APPROVAL SIGNATURE, TYPED NAME AND POSITION TITLE	

I. OBJECTIVE

To establish Company policy and procedures regarding compliance with the Foreign Corrupt Practices Act (FCPA).

II. BACKGROUND

2.1 **Ethics**. Good ethics is good business. Good ethics requires compliance with the law. All Company employees know that the Company expects them to conduct themselves in accordance with the highest ethical standards. Corporate Directive 8000, Ethical Business Practices and Compliance Program, requires employee conduct themselves in accordance with the highest ethical standards and adopts the Company Code of Business Conduct and Ethics as the standard to which every Company employee will perform his or her job.

2.2 **FCPA.** The Company's market is international. Our products and services are sold to customers worldwide. The FCPA applies to international business conduct and, as such, has been identified as a law applicable to significant activities of the Company. This Corporate Directive is implemented to ensure that Company activities are conducted in complete compliance with the FCPA.

2.3 **Compliance Officer.** The company Board of Directors has appointed a Compliance Officer (Compliance Officer). The Compliance Officer is an officer of the Company and reports directly to the Board of Directors with respect to his or her responsibilities as Compliance Officer.

2.4 **Duties of Compliance Officer.** The duties and responsibilities of the Compliance Officer include.

2.4.1 Ensuring that Company employees have adequate training in their legal and ethical responsibilities;

2.4.2 Advising the Company and employees on compliance and ethics issues;

Distribution: All Supervisory and Executive Personnel: Group Managers and Above

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2.4.3 Receiving, evaluating, and, investigating allegations of misconduct;

2.4.4 Managing the Company's cooperation and participation in any investigation of the Company by law enforcement or other government agencies.

2.4.5 Ensuring full and fair enforcement of the Company's ethics policies and legal and regulatory obligations;

2.4.6 Determining and implementing the Company's reporting obligation to government agencies and law enforcement agencies;

2.4.7 Determining whether to refer investigations to outside counsel; and

2.4.8 Ensuring that information and records are properly preserved to protect the Company's interests.

2.4.9 Protecting employees from retaliation for properly reporting suspected improper or illegal acts.

2.5 **ETHICS AND COMPLIANCE HOTLINE (EXT. 3333).** A HOTLINE telephone has been established by the Compliance Officer – telephone number **(___) ___-____**, **extension ____**. This HOTLINE (ext. ____) can be called by any employee to report or raise ethics or compliance issues. Calls can be confidential and/or anonymous. The HOTLINE will be answered only by the Compliance Officer or his or her specific designee.

2.6 Ethics and compliance issues may also be raised.

(a) To the Compliance Officer personally or in writing (Compliance Officer, The Company, Address, USA);

(b) To any supervisor or manager in the Company; or

(c) To the President & CEO, or to any Vice President, or Director of the Company.

2.7 **EMPLOYEE DUTY.**

2.7.1 It is the responsibility of every Company employee to report suspected violations of the FCPA as described in paragraph 2.6 above.

2.7.2 It is the duty of every Company employee to cooperate with and support the Compliance Officer in investigation of possible improper or illegal activities.

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III. POLICY

The Company will conduct every international business transaction with integrity, regardless of differing local manners and traditions, and will comply with: (a) the laws and regulations of each foreign country in which it operates (except to the extent inconsistent with U.S. law); and (b) the laws and regulations of the U.S., particularly the provisions of the Foreign Corrupt Practices Act (FCPA).

IV. GENERAL

4.1 The provisions of this CD will apply to all officers and employees of the Company and its wholly-owned subsidiaries, both within and outside the U.S., and, by written agreement, flowing down all appropriate provisions, to all distributors, and to all agents, consultants, representatives, brokers or other persons or firms of U.S. or any other nationality who have or are likely to have contact with a foreign customer and are hired or otherwise retained by the Company to provide services directly related to obtaining, retaining, or facilitating business or business opportunities, including offsets/counter trade.

V. IMPLEMENTATION

5.1 **Attachment A, Description of the Foreign Corrupt Practices Act,** is a brief description of the FCPA.

Attachment B, Operational Directions, are instructions designed to ensure that the Company and its personnel comply fully with both the spirit and the letter of the FCPA.

Attachment C, Financial and Accounting Directions, is designed to ensure compliance with the accounting standards provisions of the FCPA.

Attachment D, Internal Certification Compliance with the Foreign Corrupt Practices Act, provides a certification to be signed annually by the President and CEO and each Vice President and each Officer of the Company.

Attachment E, Hospitality Guidelines, provides direction with respect to activities involving foreign officials in all countries.

5.2 It is the individual responsibility of each officers and employee of the Company by action, supervision, and continuous review, to ensure strict compliance with this CD. The Company may take severe disciplinary action, up to and including, dismissal of any officer or employee who violates this directive.

5.3 Any officer or employee who is aware of any violation of this CD must report the infraction to the Compliance Officer (anonymously, if desired), who will immediately

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cause an investigation of the reported manner to be conducted. A consultant who is aware of any such violation must immediately inform the Agreement Monitor, who will report the infraction to the Compliance Officer. In the alternative, any officer, employee or consultant who is aware of any violation of this CD may report it directly to the Vice President Corporate Administration, the Chief Financial Officer, or the President and CEO.

5.4 The Vice President and General Counsel shall be responsible for furnishing or obtaining advice with respect to the interpretation and application of the FCPA and of this CD, as necessary.

5.5 Each Director, Vice President, and Department Head shall be responsible for ensuring that all affected personnel are fully informed as to the prohibitions of the FCPA and the requirements of the CD.

In addition, they shall be responsible for adopting and enforcing appropriate controls and taking the steps necessary to effect compliance with this CD by all officers, employees, distributors and consultants of the Corporation.

5.6 Exceptions to this CD must have prior written approval of the Vice President and General Counsel or his or her designee, and the approval of the appropriate Vice President of Business Development. Exceptions shall not be granted unless legal opinion has been obtained from outside or in-house counsel that the conduct for which approval is sought does not violate applicable foreign or U.S. law.

VI. Attachments to this CD:

Attachment A - Description of the Foreign Corrupt Practices Act.

Attachment B - Operational Directions

Attachment C - Financial and Accounting Directions

Attachment D - Internal Certification – Compliance with the Foreign Corrupt Practices Act

Attachment E - Hospitality Guidelines

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Attachment A

Description of the Foreign Corrupt Practices Act

1.0 ACCOUNTING AND RECORDKEEPING CONTROLS REQUIREMENTS

The FCPA requires certain U.S. companies to establish accounting and recordkeeping controls that will prevent the use of "slush funds" and "off-the-books" accounts which have been used in the past by some companies as a means of facilitating and concealing questionable foreign payments. In particular, the FCPA requires companies to establish and keep books, records, accounts, and controls which accurately and fairly reflect their transactions and disposition of their assets. The Board of Directors has directed that such requirements will be applicable to the Company.

2.0 ANTI-BRIBERY PROVISIONS (PROHIBITIONS)

The FCPA makes it illegal for a U.S. company to corruptly offer or give money or anything of value, directly or indirectly through agents or intermediaries, to foreign officials to assist the U.S. company in obtaining or retaining business. Specifically, the FCPA prohibits any use of the mails or means of interstate commerce "corruptly in furtherance of any offer, payment, promise to pay, or authorization of the giving of anything of value" to:

2.1 Any foreign official, which means any officer of employee of a foreign government or member of its armed forces or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality; or

2.2 Any foreign political party or official thereof or any candidate for foreign political office; or

2.3 Any person (including any consultant), while knowing (or being aware of a high probability) that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official, any foreign political party or official thereof, or any candidate for foreign political office for purposes of:

- Influencing any act or decision in his, her or its official capacity (or in the case of a foreign official, inducing him or her to do or omit to do any act in violation of that official's lawful duty); or

- Inducing him, her, or it to use his, her, or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality;

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in order to assist in obtaining or retaining business for or with, or directing business to, any person.

3.0 LIMITED EXCEPTIONS

The FCPA contains certain limited exceptions to the prohibitions set forth in section 2.0 above. These limited exceptions may *not* be utilized or relied upon except in accordance with the Operational Directions set forth in **Attachment B** of this CD.

3.1 *Facilitating Payments*

3.1.1 The FCPA provides that the prohibitions referred to in section 2.0 above do not apply to any facilitating or expediting payment to any foreign official, political party, or party official, "the purpose of which is to expedite or secure performance of a routine governmental action."

3.1.2 Examples of such "routine governmental action" include actions ordinarily and commonly performed by a foreign official in:

◊ Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

◊ Processing governmental papers such as visas and work orders;

◊ Providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

◊ Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

◊ Actions of similar nature.

3.1.3 The term "routing governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business or to continue business with a particular party.

3.2 *Affirmative Defenses*

The FCPA also contains two affirmative defenses for: (a) "reasonable and bonafide" expenditures, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate that are directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of

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a contract with a foreign government or agency thereof; or (b) payments to foreign officials that are lawful under the written laws and regulations of the foreign official's country.

4.0 PENALTIES – FINES AND IMPRISONMENT

The FCPA's penalties relating to the anti-bribery provisions include fines of up to $2,000,000 per violation for companies and fines of up to $100,000 and/or imprisonment for up to five years per violation for individuals. The FCPA prohibits a company from reimbursing an officer, director, employee, or consultant for the amount of the fine involved. Individuals are subject to criminal liability under the FCPA regardless of whether the company has been found guilty or prosecuted for a violation.

5.0 APPLICABILITY

U.S. companies and their domestic subsidiaries are subject to the FCPA's anti-bribery provisions. The FCPA does not by its terms apply to payments made by foreign nationals not subject to the jurisdiction of the U.S. on behalf of foreign companies controlled by a U.S. company. In practice, however, this exception makes little difference. The FCPA applies to U.S. citizens and national living or working abroad, and to U.S. citizens, nationals and companies and their directors, officers, employees and consultants who authorize such U.S.-controlled foreign companies to make payments proscribed under the FCPA, or who know or are aware of a high probability that such foreign companies will offer, give, or promise illegal payments to any foreign official.

6.0 KEY TERMS

6.1 As used in this CD, *foreign official* means any officer or employee of a foreign government, its armed forces, or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality.

6.2 The prohibition against payments to foreign officials extends to the offering or giving of *anything of value* where the requisite criminal intent and business purpose are present. The *thing of value* given can be of any kind, nor just money, and there is no minimum amount or threshold of value which must be exceeded before the gift becomes illegal.

6.3 The FCPA's former *reason to know* standard for vicarious liability was repealed by the Foreign Corrupt Practices Act Amendments of 1988 and was replaced with a defined *knowing* standard. *Knowing* requires awareness or a firm belief that the agent, representative, or the other third party is making a corrupt payment, or a substantial certainty that this will occur. The knowledge standard is also met where there is awareness of a high probability that the corrupt payment will be made, unless there is actual belief to the contrary. Willful ignorance (sticking one's head in the sand" is not excused. There may be circumstances in which an officer, director, employee or consultant of the Company becomes aware of facts which, while not of themselves

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causing the individual either to know or believe that a foreign official will be the ultimate recipient of a bribe, should cause suspicion. In these circumstances, if the individual fails to take steps to allay suspicion, he or she risks prosecution under the FCPA since the officer, director, employee, or consultant could be alleged to have had the requisite knowledge for a violation.

6.4 Although the FCPA does not define *government instrumentality*, the term should be construed to include entities wholly, or partially, owned by foreign governments and specially chartered private corporations entrusted with quasi-governmental functions, as well as organizations such as INTELSAT and ARABSAT, because the majority of the membership of those organizations is composed of foreign governments and quasi-governmental entitles.

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Attachment B

Operational Directions

1.0 APPLICATION

1.1 These Operational Directions apply to The Company and its wholly-owned subsidiaries, both within and outside the U.S. The directions will control even though local law or custom may permit business standards that are less exacting than the directions.

1.2 At times, observance of the directions may place the Company in a non-competitive position. However, strict compliance with the directions and their underlying policies and goals is of greater value to the Company than any business which may be lost.

2.0 SPECIFIC PROHIBITIONS AND REQUIREMENTS

2.1 Except as provided herein, no offers, payments, promises to pay or authorizations to pay any money, make gifts, or provide anything of value will be made by or on behalf of the Company to:

- Any foreign official, including members of the armed forces;
- Any foreign political party or official thereof or any candidate for foreign political office; or
- Any person, while knowing that all or a portion of any payment will be offered, given or promised, directly or indirectly, to any of the above.

2.2 No facilitating or expediting payment shall be made without the prior approval of the Vice President and General Counsel or his or her designed.

2.3 Except for hospitality provided in accordance with paragraph 2.6 of this Attachment, no officer, employee, or consultant of the Company may rely on either of the FCPA's affirmative defenses, as described in **Attachment A, Description of the Foreign Corrupt Practices Act**, without the prior *written* approval of the Vice President and General Counsel or his or her designee.

2.4 No action in furtherance of any of the activities prohibited in paragraphs 2.1 through 2.3 above will be taken by or on behalf of the Company.

2.5 The above prohibitions apply to payments and gifts on behalf of the Company whether or not they involve the use of Company resources.

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2.6 Provision of hospitality, transportation, meals, models, or mementos of reasonable value will be in accordance with guidelines issued by the President and CEO in coordination with the Vice President and General Counsel. The guidelines are set forth in **Attachment E, Hospitality Guidelines**. Where the hospitality to be given by the Company is *clearly* within the guidelines, no prior written approval is required. Otherwise, the prior written approval of the Legal department must be obtained.

2.7 Questions as to whether government-owned or controlled commercial enterprises are government instrumentalities for purposes of this CD will be referred to the Vice President and General Counsel or his or her designee, for resolution.

3.0 TRAINING

3.1 The Compliance Officer will ensure that all corporate employees interfacing with foreign customers, vendors, or sales representatives receive annual training on the prohibitions of the FCPA. At a minimum, such training will be given to all employees in the Contract, Purchasing, Finance, and Marketing departments of both Divisions, and all Vice Presidents and Officers.

3.2 The Compliance Officer will ensure that every Foreign Sales Representative will receive training from the Legal department on FCPA prohibitions. Such training must include face to face, private meeting with a member of the Legal department to discuss contract obligations and responsibilities of the Representative.

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Attachment C

Financial and Accounting Directions

The Chief Financial Officer (CFO) ensures that the accounting and recordkeeping activities of the Company adhere to the highest standards and confirm to this CD. Yet, with regard to ethics, legality and propriety, each officer and employee involved with financial and accounting functions has an obligation which transcends normal reporting requirements. Each such individual must be alert to possible violation of the following financial and accounting directions and will report suspected violations to the CFO and the Legal department:

1.0 All cash, bank accounts, investments and other assets of the Company must always be recorded accurately on the official books of the Company. In accordance with corporate policy regarding the Company's internal control structure and the Company's accounting policies and procedures, personnel responsible for the Company's financial books, records, and internal accounting controls will periodically review such books, records, and controls to ensure their compliance with the requirements of the FCPA. Bank accounts should be opened or closed only upon the prior written approval of the CFO. Anonymous ("numbered") accounts will not be maintained.

2.0 Payments will not be made into anonymous bank accounts or other accounts not in the name of the payee or of an entity publicly known to be controlled by the payee.

3.0 Except for regular, approved cash payroll payments and normal disbursements from petty cash supported by signed receipts or other appropriate documentation, payments will not be made in cash. Checks will not be drawn to the order of "cash", "bearer", or similar designations.

4.0 Fictitious invoices, over-invoices, or other misleading documentation will not be used.

5.0 Fictitious entitles, sales, purchases, services, loans, or financial arrangements will not be used.

6.0 Check requests will be in writing and contain a complete explanation of the purpose and authority for the payment. The explanation will accompany all documents submitted in the course of the issuing process. The explanation must be kept on file.

7.0 No expenses relating to foreign business will be reimbursed to persons or companies assisting the Company in obtaining or retaining such business unless such expenses are supported by reasonable written documentation.

8.0 No payment to any Foreign Sales Representative, International Consultant, or International Services Provider will be made outside of either the country where a substantial portion of the related services are performed or the country from which the person performing such services normally conducts business.

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9.0 Payments for any services rendered to the Company by a foreign official or an officer or official of a foreign government-owned or -controlled commercial enterprise, including honorarium payments and reimbursement of expenses, will be made solely to the foreign government agency or instrumentality employing the individual. Such payments will be made by check directly to the foreign government agency or instrumentality, or by wire to its named bank account within the foreign government agency's or instrumentality's country, or by wire through its duly authorized correspondent bank within the U.S. No such payment shall be made without the prior written approval of the Vice President and General Counsel, or his or her designee.

10.0 Receipts, whether in cash or checks, will be deposited promptly in a bank account of the Company. Any officer or employee who suspects the possibility that a bribe, kickback or over-invoice is associated with a particular receipt or that an understanding exists that all or a portion of a receipt will b rebated, refunded or otherwise paid in contravention of the laws of any jurisdiction, will immediately report that suspicion to the Compliance Officer, the Chief Financial Officer, and the Legal department. Foreign Sales Representatives, International Consultants, and International Service Providers will report such suspicions to the applicable Agreement Monitor who will immediately refer the matter to the Compliance officer, the Chief Financial Officer, and the Legal department.

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Attachment D

Internal Certification Compliance with the Foreign Corrupt Practices Act

Key Responsibilities

It is the individual responsibility of each officer and employee of the Company and its wholly-owned subsidiaries, by action and supervision, as well as continuous review, to ensure strict compliance with CD 8003, Compliance with the Foreign Corrupt Practices Act (FCPA). The Company may take severe disciplinary action against any officer or employee who violates this directive. In summary, the FCPA specifically prohibits: (1) payments or offers of anything of value to corruptly influence foreign officials to obtain or retain business for the Company; (2) maintaining undisclosed/unrecorded funds or assets; and (3) making entries in the books and records of the Company for anything other than the purpose described.

Any officer or employee who becomes aware of any violation of CD 8003 must report the infraction immediately to the Compliance Officer who will cause an investigation of the ported matter to be conducted.

Any officer or employee who suspects the possibility that a bribe, kickback, over-invoice is associated with a particular receipt or payment or that an understanding exists that all or a p0rtion of a receipt or payment will be rebated, refunded, or otherwise paid in contravention of the laws of any jurisdiction, will immediately report that suspicion to the Compliance Officer, the Chief Financial Officer of the Company, and the Legal department.

Certification

I, the undersigned, do hereby affirm, to the best of my knowledge and belief, that the operations for which I am assigned responsibility: (1) are in compliance with CD 8003 and the FCPA; (2) have not made any unlawful or irregular payments; (3) have no undisclosed/unrecorded funds or assets; and (4) have no entries in the books or records for other than the purpose described.

Signed:_____

Date:_____
[Name of Certifying Vice President or Officer]

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Attachment E

Hospitality Guidelines

(To be followed for Activities Involving Foreign Government Officials or Employees in all Countries)

1.0 All hospitality (including entertainment) must be directly related to Company business, i.e. products and services. Hospitality, in all cases, must be reasonable and bonafide, must be offered only in connection with the promotion, demonstration or explanation of company products or services or the execution or performance of a contract with a foreign government or agency thereof, and must be allowable under applicable local law. Expenses for hospitality meals should not exceed the following U.S. dollar amount per person. ***Breakfast - $25.00; Lunch - $50.00; Dinner - $75.00***. Refreshments should not exceed $20.00 per person. These dollar amounts are based on U.S. prices. Higher amounts may be appropriate in certain countries and may be approved by the President and CEO after determination that such higher amounts are in accordance with such countries' laws and regulations and are not unreasonable or excessive.

> *Note*: Frequency of hospitality must be carefully monitored, as the cumulative effect of frequent hospitality may give rise to the appearance of improper conduct. Hospitality for an individual should not exceed six events in any calendar year. Where more hospitality is anticipated, Company Legal Counsel shall be consulted and prior written approval shall be obtained.

2.0 In the case of plant visits or similar activities by foreign government officials or employees which will involve the Company paying airfare or lodging expenses for such officials, send invitations or itineraries, or both, to the foreign officials to inform them, to enable consultation with superiors, and to give them the option to decline. Also obtain prior written approval or confirmation from the invitee's superior or other authorized official or prepare a file memorandum of relevant conversations in this regard. If this is not practicable in connection with very senior invitees, obtain a written legal opinion that specifically addresses the particular circumstances of the visit. In the case of plant visits that are specifically required by the terms of a contract with a foreign government customer, prior written approval or confirmation from the invitee's superior or other authorized official shall not be required, but all hospitality expenses related to any such visit shall be subject to these guidelines. In no case will payment or reimbursement be made directly to the individual. Such payment or reimbursement shall be made to the foreign government or agency involved.

3.0 Refreshments, meals, or mementos of reasonable value and otherwise in accordance with these Guidelines which are furnished in connection with trade shows, association meetings, official governmental functions or ceremonial functions such as ship launchings, airplane rollouts,

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deliveries, or demonstrations are permissible. For events or occasions to which foreign government officials or employees from three or more countries are invited, legal opinion will not be required with respect to the foreign government officials' or employees' participation, provided the refreshments, meals or mementos to be offered are of reasonable value and otherwise strictly in accordance with these Guidelines and are not offered to improperly influence any official decision. However, description of such events shall be made in writing and attached to the Expense Report. The description shall generally describe the event, the per person value of the refreshments, meals, and mementos offered, and any other relevant aspects of the event.

4.0 Cash gifts or per diem payments are not permitted under any circumstances.

5.0 Product models or pictures of little or no intrinsic value bearing the Company logo or other items of small dollar value (less than U.S. $50) that are distributed for advertising or commemorative purposes are permitted. In addition, in no event shall an item having a cost in excess of $500 (regardless of intrinsic value) be given. Whenever it is appropriate, gifts should be made to the customer organization, and not to an individual.

6.0 Prior written approval by Company Legal Counsel is required for any hospitality offered to spouses and/or children of foreign officials.

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Company

CODE OF

Business Conduct & Ethics

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Company Vision	*To be the international world-class leader focused in passive electronic components, modules, sensors and sensor system technology; providing innovative solutions and relationships in a global marketplace.*

Company Mission	*The Company strives to perfect total customer satisfaction on a global basis while achieving sound growth with technological products of innovative design, superior quality, and exceptional value. We commit ourselves to excellence; to the continuous improvement of our people, technologies, systems, products and services; to industry leadership; and to the highest level of integrity.*

CEO / Chairman of the Board

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Introduction

This document sets forth the Company code of business conduct and ethics. Our business success and reputation for integrity depend upon the actions of each employee. We have an obligation to behave at all times with honesty and propriety in carrying out our responsibilities in a moral and legal manner. This code is a working document; a basic guideline. It is not a set of all-inclusive rules. For this code to have meaning, it must be understood and practiced by all employees in accordance with the spirit, integrity, and ethical behavior for which The Company has stood since its inception.

Each employee is expected to observe the following guidelines, as part of his/her commitment to act ethically within the Company, realizing that no single document can prescribe proper conduct in all situations. Neither written rules and procedures nor the fear of being caught will ever be a substitute for personal integrity.

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Statement of Commitments and Obligations

1. Regarding our customers, we are committed to providing outstanding performance and producing quality products and services that meet or exceed requirements and specifications.

2. Regarding our suppliers, we will emphasize fair competition, cooperative relationships, and a sense of responsibility that will enable us to be a good customer. We will protect all proprietary information belonging to any organization that has entrusted it to us.

3. Regarding our employees, we will treat one another with mutual respect. We will implement personnel practices and programs related to staffing, compensation, promotion, education, benefits, training, recreation and health on the basis of respect and equal opportunity for all employees. We will provide safe and healthy working conditions and maintain formal programs intended to prevent work-related injuries and accidents. We will protect each other's privacy and conduct ourselves with the dignity and respect due all human beings.

4. Regarding our shareholders and Board of Directors, we will pursue our growth and earnings objectives, keep ethical standards at the forefront of our activities, and exercise prudence in the use of the Corporation's assets and resources.

5. Regarding the many communities in which we reside, and to society as a whole, we are committed to responsive corporate citizenship. We will conduct ourselves in a moral, ethical and mutually beneficial manner in all aspects of our business. We are committed to complying with federal, state, and local environmental protection regulations, statutes and laws.

Employees also have responsibilities and commitments to their fellow employees. We must be committed to promoting a climate of mutual respect, integrity, and professional relationships, characterized by open and honest communications within and across all levels of the organization. Such a climate will promote attainment of the Company's goals and objectives, while leaving room for individual initiative within a competitive environment.

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Ombudsman

An important part of ethical behavior is the responsibility for reporting apparent violations of this CODE or any other actions felt to be a departure from appropriate standards of ethical conduct. When such actions are observed, it is each employee's responsibility to report all perceived violations or departures from sound ethical business practice to the Company. Employees are encouraged to make these reports through their supervisors and, as needed, obtain guidance and interpretation of a suspected violation as it relates to the CODE or other acceptable business practices. However, it is understood that circumstances might make other reporting channels more appropriate. In such cases, all employees should feel free to contact their respective Human Resources functions or the Corporate Ombudsman of Business Conduct and Ethics, either by phoning (___) ___-____ (may call collect) or by writing:

Corporate Ombudsman,
Business Conduct and Ethics
The Company
_____
_____

Any contact with the Corporate Ombudsman may be anonymous or, if requested, will be held confidential to the extent possible with fair and appropriate investigative action. Employees may make such reports with the assurance that no adverse action or retribution will occur based upon making such a report.

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Our Customers

We are committed to offering products and services of value that meet or exceed requirements. The Company is also committed to offering products and services that represent the lowest installed cost and, therefore, the highest value to the customer. As a market-driven Company, the Company recognizes that knowledge and support of customer needs are of great importance in the fulfillment of this objective. In this respect, it is imperative that we help our customers define their requirements and work to achieve them. In the gathering of this information and its subsequent use, the Company is committed to doing so in a legal and ethical manner.

When an employee is representing the Company, the individual must act within his or her position. The employee may not represent themselves as having authority if it has not be authorized. If an employee has a question regarding individual authority, it should be verified by a direct supervisor.

Quoting, Negotiation and Performance on Contracts

In all business cycles, it is Company policy that all employees who represent the Company by quoting products, or being involved in negotiations or any after-sales activities, will act with the utmost integrity and truthfulness. In short, all activities of the Company employees are expected to be conducted in an accurate, ethical, and legal manner.

Our customers can be assured that they will receive quality products at a fair value, as well as be supported by excellent service throughout the Company. In all aspects of the business cycle, it is Company policy that all employees representing the Company will act with the utmost integrity and truthfulness.

While not normally governed by Company policy, responsible employees will ensure that cost and/or pricing data that is required for a Government prime contract or subcontract is current, complete and accurate. In addition, the Company will comply with any applicable legal regulatory requirements.

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Design, Manufacturing, Quality, Testing and Product Safety

While VALUE starts with an understanding of specific application needs, the resultant quality of the Company product is fundamentally a function of its design and manufacture. Product safety and effectiveness are also to be given full consideration in the design process, as they relate to common customer usage or specified application requirements.

Manufacturing utilizes quality materials and statistical process control as it strives to provide a superior product. Inspection and testing verifies compliance with applicable specifications, customer requirements and contractual obligations. The inspection, testing documentation, and reporting must be complete, accurate and truthful.

In the case of MIL SPEC devices or specific customer instructions, no substitutions, changes or deviations will be allowed without the specific authorization of the customer or appropriate government agency.

The Company is committed to continuous improvement in its goal to achieve six sigma quality.

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Our Suppliers

We are committed to being a good customer. The Company emphasizes fair competition, cooperative relationships, and a sense of responsibility that will enable us to be a good customer and establish long-lasting business relationships. We will conduct ourselves in a moral and ethical manner in all aspects of our business. We will protect all proprietary information that has been entrusted to us.

Purchasing Charter

With the exception of banking, legal, utilities and insurance, Purchasing is the only organization that has the responsibility and authority to deal with and execute purchase agreements with the supplier community. Purchasing will comply with Company policy, Government guidelines and generally accepted commercial practices.

Purchasing personnel or other employees shall not place themselves in a position where a conflict of interest might arise or might justifiably be suspected, since impressions can be as misleading as the actual participation.

Gifts and Gratuities

Employees are not to accept gifts, gratuities, accommodations, loans, entertainment, or anything that could improperly obligate or influence purchasing decisions in dealing with suppliers. Purchases of a personal nature will not be made through the Purchasing Department by Buyers or Company employees.

All business with suppliers is to be conducted in a fair and impartial manner. All qualified and interested suppliers are to be given an opportunity to submit a quote/proposal to fill Company requirements.

Supplier Information

Price and documentation data submitted by suppliers is to be handled as sensitive information and is not to be freely distributed. Technical or other product information may be requested by personnel outside of Purchasing. However, no other employee is to negotiate or compromise the Company or supplier trust by any expressed or implied action that would indicate that the individual has the authority to obligate the Company or influence the Company's decision in supplier selection.

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Supplier Purchase Agreement	Company Purchasing has the sole authority to contract goods and services for the Company. Exposing supplier(s) or the Company to financial risk by making unauthorized commitments is a violation of business ethics and may subject the Company and the employee to substantial liability. All purchasing actions including purchasing files are to pass the test of "objective evidence." Purchasing employees are to be aware of domestic and international customs, laws, and regulations of the government and commercial field in which they are contracting. Employees who knowingly violate any laws or regulations or direct others to do so, may be subject to disciplinary action, as well as possible civil and criminal liability.
Consultants	Consultants are not to perform Company work until a consultant agreement and purchase order have been duly executed.
Supplier Affirmative Action	The Company, as a commercial and government contractor, pledges that both the intent and the spirit of federal and state laws regarding purchases from small, minority, women-owned and disadvantaged businesses as defined in Public Law 95-507 and the applicable laws, are embodied in its procurement policies and practices.

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Our Employees

We are committed to being a good employer. The Company is committed to providing employment, compensation, benefits, training, promotions, and other conditions of employment based on personal ability and without regard to race, color, creed, sex, age, disability or national origin. We are committed to treating one another with dignity and respect. We will provide safe and healthy working conditions and maintain formal programs intended to prevent work-related injuries and accidents. We will protect each other's privacy.

Conflicts of Interest

Each Company employee is in a position of trust regarding the situations where our personal interests could conflict or appear to conflict with the interests of the Company. Where a conflict exists, it must be resolved to the satisfaction of the Company in order for the employer/employee relationship to continue.

Company policy requires the disclosure of any situation that is or could become a conflict. A written disclosure should be made initially to the employee's supervisor who, along with the employee, will report the conflict or potential conflict to the President or Ombudsman.

Circumstances that actually or potentially involve conflicts of interest and which should be avoided include:

- Personal or family financial interests in a competitor, supplier or customer (except for moderate holdings of publicly traded securities).
- Employment by a competitor in any capacity.
- Acceptance of entertainment, gifts, payments or services that have more than a nominal value given by those seeking to do business with the Company.
- Placement of business with a firm owned or controlled by an employee or a family member.
- Acting as a consultant to a customer or supplier.

Further information concerning conflict of interest may be obtained from your supervisor and/or Company policy.

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Political Contributions and Activities

The Company believes strongly in the democratic political process and encourages employees to participate personally, on their own time and at their own expense, in that process. A corporation's activities, however, are limited significantly by law. For this reason, no political contribution of Company funds or use of Company-paid employee's time, Company property, services or other assets may be made available directly or indirectly to any political party or to the campaign of any candidate for federal, state, or local office except to the extent permitted by law and authorized as set forth by Company policy.

Indirect expenditures on behalf of a candidate or elected official, such as use of telephones or other Company equipment, may be considered as contributions. Furthermore, when an employee speaks on public issues, it must be made clear that comments or statements made are those of the individual and not of the Company. Any questions should be referred to the Legal Department. In no event may an employee be reimbursed by the Company in any manner for political activities.

Employee Records

Records containing personal data on employees are confidential. As such, they are to be carefully safeguarded and kept current, relevant, and accurate. They should be disclosed only to authorized personnel having a "need to know," or pursuant to lawful process in accordance with Company procedures governing the permissibility and means of disclosure.

Such information should not be disclosed to third parties except as expressly permitted in Company procedures or if the Company becomes legally obligated to do so. Medical records are even more restricted and may be disclosed or used only in accordance with applicable laws and regulations. Should you have any questions about disclosure, consult with the Corporate legal counsel before disclosing.

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Technology, Information and Security

The Company is a market leader in the design, manufacture and sale of a variety of proprietary technology-based components and subsystems requiring significant research, development, engineering and processing expertise. The backbone of the Company is our ability to develop and use high technology in our day-to-day operations. Failure to maintain control over our technology could result in irreparable harm to the Company.

Accordingly, each of us is responsible for guarding the Company technology against unauthorized disclosure. This applies to proprietary data developed or purchased by the Company and information entrusted to us by suppliers and customers. These restrictions apply regardless of how the information exists - whether in written form, electronic form or simply known to us.

Proprietary or Confidential Information

Do not disclose to any outside party, except as specifically authorized by management, pursuant to established policy and procedures, any non-public business, financial, personnel or technological information, plans or data that you have acquired during your employment with the Company. Upon termination of employment, you may not copy, take or retain any documents or electronic media containing proprietary or confidential information.

Any electronic media including electronic communications that is the property of the Company should be used for business purposes only.

The prohibition against using or disclosing such information extends indefinitely beyond your period of employment until such information is no longer confidential. The obligations also apply to proprietary and confidential information of others where the Company has agreed to hold such information in confidence.

Your agreement to protect the confidentiality of such information is considered an important condition of your employment with the Company.

Government-Classified and Proprietary Information

The Company recognizes it has special obligations to comply with laws and regulations that protect classified information including the internal protection and dissemination only to specifically designated employees.

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Technology, Information and Security

Employees with valid security clearances who have access to classified information must ensure that such information is handled in accordance with pertinent federal procedures. These restrictions apply to any form of information whether in written or electronic form. The Company must comply with appropriate laws which protect all classified information within its possession.

Employees shall neither solicit nor receive sensitive proprietary internal or government information, including budgetary or program information, before it is available through normal processes. Information not needed in the course of work assignments shall not be solicited, received nor passed on to anyone not required to have the information.

Employment Practices

The fundamental principle followed by the Company in all of its employment practices is the principle of equitable treatment.

This is a commitment to deal equitably with each and every employee in every way possible. Sound, successful personnel relations depend upon maintaining the dignity of each employee.

Equal Opportunity

The Company recognizes that its continued success depends on the development and utilization of the full range of human resources. At the foundation of this precept is Equal Employment Opportunity.

Harassment

It is the continuing policy of this Company to afford Equal Employment Opportunity to qualified individuals regardless of their race, color, religion, sex, national origin, age, or disability, and to conform to applicable laws and regulations.

The policy of Equal Opportunity pertains to all aspects of the employment relationship.

It is the intention of the Company to provide employees a workplace that is free from any form of harassment. Harassment, in any of its many forms or in any manner, is expressly prohibited. The Company will not permit any conduct that interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

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Safety and Hazardous Materials Management

The Company will provide a work and physical environment for each employee that is free from potential job-related hazards to safety and health. The Company will adhere to all rules, regulations and applicable laws governing work safety and hazardous materials management; cooperate fully with the designated federal and/or state and local compliance inspectors who are assigned the duty of investigating the adequacy of the safety and/or hazardous materials management programs at any Company facility; impress upon all employees that accident prevention and lost-time control related to safety are essential parts of the job and are not to be sacrificed in the interest of production or speed of delivery.

Environment

Being a good environmental citizen, the Company or its employees will not obtain or dispose of any chemical or toxic material without following Company procedures which are in compliance with federal, state, county and city laws and regulations. In operations outside the United States, the laws and regulations of the country of operation will also govern.

It is a significant responsibility and one shared with each and every employee, because we all play an important part in this priority. Together, we are required to keep our environment and our place of work safe.

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Our Shareholders and Board of Directors

We are committed to keeping ethical standards at the forefront of our activities and exercising prudence in the use of Company assets and resources. We will pursue growth and earnings objectives without compromising integrity and ethical standards.

Maintaining Accurate Company Records

1. Company policy requires full compliance with the spirit and letter of the applicable laws and regulations which require that its books of account and records be accurately maintained such that they fully disclose the nature of transactions reflected in them. Accordingly, employees are reminded of the following record-keeping requirements:

   - All books, records, and accounts must be kept in reasonable detail and accurately and fairly reflect the transactions and dispositions of the Company's assets.
   - All disbursements of funds and all receipts must be properly and promptly recorded.
   - No undisclosed or unrecorded fund may be established for any purpose.
   - A system of internal accounting controls shall be maintained that is sufficient to provide reasonable assurances that transactions:
     - Are recorded in a manner that permits preparation of financial statements in conformity with generally accepted accounting principles and other applicable criteria;
     - Are recorded so as to maintain accountability for the Company's assets.

   We should all be aware that penalties for violating the laws and regulations in this area can be severe for the Company and the employees involved. Additional information dealing with this subject is contained in published Corporate and financial policies.

2. All records will be safeguarded and maintained in a complete, accurate manner in compliance with government requirements and Company policy.

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Maintaining Accurate Company Records

3. Employees who file time cards or the equivalent must be careful to do so in a complete, accurate, and timely manner. Employees performing on U.S. Government contracts must be particularly careful to ensure that hours worked and costs are applied to the account for which they were in fact incurred. No cost may be charged or allocated to a Government contract if the cost is unallowable by regulation or contract provision or is otherwise improper.

Preservation of Assets

1. The Company provides a vast quantity of resources for its employees to carry out their work assignments, and it is imperative these resources be used in an ethical and responsible manner.

2. It is the responsibility of each of us to preserve the Company's assets, including its intellectual and personal property, facilities, and equipment. It is also our responsibility to safeguard and efficiently utilize government or customer-owned equipment which has been entrusted to us. No employee shall make improper use of Company or customer resources or permit others to do so.

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Legal and Regulatory Compliance

It is the responsibility of the Company and of all employees to assure that all Company business activities are in full compliance with applicable laws and regulations, whether they be national, federal, state, or local. We all know that ignorance of the law is no defense. Moreover, it is not good business conduct and certainly is not a satisfactory excuse. Therefore, activities which are outside of our normal expertise or are questionable from a legal standpoint, should be referred to the Corporate legal counsel or others in the Company who have such expertise.

Further, compliance with the law should mean to each of us not only observing the law, but conducting our business practices in such a way that the Company will deserve and achieve appropriate recognition as a law-abiding organization.

Compliance with Antitrust Law

The antitrust laws of the United States and other countries affect the way we deal with our competitors, customers, and suppliers, and, therefore, are very important. We should compete vigorously and independently at all times and in every ethical way avoiding any agreements or understanding with competitors regarding prices, customers and other matters that tend to restrain trade; avoiding any tactics which could be construed as being designed to exclude all competitors or to destroy particular competitors, avoiding anti-competitive restrictions on our customers regarding such matters as resale price or reciprocity, and avoiding unlawful discrimination regarding the pricing of our products and related matters. The Company Antitrust Compliance policy manual provides further guidance on this subject.

Environmental Compliance

We must exercise care and good judgment in regard to the environmental aspects of our use of our real property interests, our manufacturing processes, and our products themselves. Not only must we properly handle all hazardous materials that we may purchase, use, generate, store, or dispose of, but we must do our best to minimize such materials. Any violation or potential violation of any applicable environmental laws or regulations must immediately be brought to the attention of the person at your facility having responsibility for that matter.

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Entertainment, Gifts, Gratuities, and Other Payments

The Federal Anti-Kickback Enforcement Act of 1986, Foreign Corrupt Practices Act, Robinson-Patman Act, commercial bribery laws and other laws and regulations, as well as proper business conduct and ethics, prohibit Company employees or representatives from offering, extending, soliciting, or receiving any entertainment, gift, gratuity, or other payment in order to improperly influence a business transaction with another party, regardless of whether we may be the supplier or the purchaser. In some cases, where customary and legally permissible, items of nominal value may be given or received. However, in many instances, such as dealings with Governmental personnel and a number of companies, The Company employees or representatives must not offer or give anything of any value whatsoever because of laws or specific policies prohibiting such conduct.

Compliance with Intellectual Property Law

Many laws in both the United States and foreign countries - such as laws regarding patents, copyrights, trademarks, mask works, trade secrets, etc. - protect the very valuable intellectual property rights of companies and individuals. In the same way we would like others to respect our rights in our very valuable intellectual property assets relating to products, processes, software, business information and the like, we must exercise care to avoid infringing on the intellectual property rights of suppliers, competitors, and others. Where any question exists as to the proper respect of such rights, the Corporate legal counsel, supervisor or outside counsel, where appropriate, should be contacted as soon as possible.

Acceptance and Use of Commercial Software Products

With the extensive usage of personal computers (PCs) in nearly every element of business, the proper usage of PC software must be assured by each of us to avoid violations of copyright law that could result in criminal penalties to the Company, individual employees or both. Specifically, each employee must assure that all software being utilized by them has been properly purchased and that no copies (except for back-up) be made or used by the employee or anyone else. If questions exist regarding the proper use of any software, they should be brought to the attention of the Vice President Corporate MIS.

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Relationships with Governments

The Company is committed to fostering and maintaining good, long-lasting relationships with the governments of the countries in which the Company operates. While ethical conduct is expected regardless of the customer, it is incumbent upon our employees when working with government customers at all levels of the organization, to adhere strictly to, and be knowledgeable of, the Government's requirements.

United States Government

1. The Company considers the United States Government a very important customer. Each employee bears individual responsibility to deal with the government fairly and honestly and to comply with disclosure requirements when pricing and negotiating contracts and sub-contracts. Doing business with the Government requires adherence to a number of specific laws and regulations that have been developed to protect the public interest. They include but are not limited to:

   - Truth in Negotiation Act
   - Federal Acquisition Regulations (FAR)
   - Cost Accounting Standards (CAS)
   - Classified Information

2. Federal, state, and local government departments and agencies have regulations prohibiting acceptance by their employees of entertainment, meals, gifts and the like from firms and persons with whom the departments do business or over whom they have regulatory authority. Company employees may not give, or offer to give, such government employees any entertainment, meal, gift or the like, regardless of value.

3. While not normally Company policy, where such data are required under appropriate law or regulation in contracts with the Federal Government, the Company is required to disclose current, accurate, and complete cost and pricing data and to prepare and keep the appropriate records in accordance with the Government Cost Accounting Standards and the Government regulations.

4. False oral or written statements to U.S. Government representatives, or statements that are subject to U.S. Government review, including false certifications, false records, and false claims, expose the responsible employee and the Company to possible criminal and civil liability and will not be tolerated.

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Other Governments

1. The Company is committed to obeying the laws of the lands in which it does business, as well as the laws of the United States which relate to doing business in foreign countries.

2. The Company will comply with the Foreign Corrupt Practices Act which prohibits, for the purpose of obtaining or retaining business, the giving of money or things of value to any foreign official to influence any of his official acts or decisions, or to induce him to use his influence to affect any act or decision of his government or one of its agencies. This Act further prohibits giving money or items of value to any person or firm where there is reason to believe that it will be passed on to a government official for this purpose.

3. Employees will not enter into agreements that are in violation of international trade practices and/or U.S. antiboycott laws. The advice of Company counsel should be sought when any contact is made that appears to request the Company to participate in a boycott or restrictive trade practice.

4. Employees will comply with the applicable laws and regulations regarding the exporting or importing of technology and products. It is the responsibility of each employee engaged in the exporting of technology and products to become familiar with the regulations and gain the appropriate licenses prior to leaving the U.S.

   Employees with questions regarding export license requirements should refer them to the Company legal counsel.

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Compliance and Discipline

Failure to comply with this Code may result in disciplinary action up to and including release, referral for criminal prosecution, and initiation of a civil lawsuit by the Company to recover damages. As with all matters involving investigations of violations and discipline, principles of respect and dignity will be applied. Any employee charged with a violation of this Code will be afforded an opportunity to explain his or her actions before final disciplinary action is taken.

Disciplinary action may be taken:

- Against employees who authorize, direct or participate directly in actions or omissions which are in violation of this Code.
- Against any employee who may have deliberately failed to report a violation or deliberately withheld relevant and material information concerning a violation of this Code.
- Against the violator's managerial superiors, to the extent that the circumstances of the violation reflect inadequate supervision or a lack of diligence.
- Against any superior who retaliates, directly or indirectly, or encourages others to do so, against an employee for reporting a violation of this Code.

The Company will actively seek to discover and correct any wrongdoing and discipline the wrongdoers. The Company and its employees will cooperate fully with authorities who may investigate and prosecute violations of the law within this organization.

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Employee Acknowledgement

After reading the Company Code of Business Conduct & Ethics, you are required to print, complete, sign and date the Employee Acknowledgment form below. This form should be submitted to your Supervisor for placement in your employee file.

_____
Social Security Number

_____
Employee Number

_____
Employee Name

_____
Location

_____
Department

I have received and read the the Company Code of Business Conduct & Ethics. I understand that these Standards represent the policies of the Company.

_____
Employee's Signature

_____
Date

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