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YEAR END REVIEW

CURRENT REGULATORY AND ENFORCEMENT CLIMATE

By: Lawrence B. Pedowitz, John F. Savarese, Ralph M. Levene,
Wayne M. Carlin, Theodore A. Levine, David B. Anders and Carol Miller

In the regulatory enforcement arena, the year 2006 will be remembered for introducing the phrase "stock options backdating" to the general public. The options backdating scandals have affected close to 200 public companies to date and have cost many senior officers their jobs. At the same time, the year also saw increasing push-back against some of the more aggressive policies that prosecutors and regulators have used in their efforts to investigate corporate crime. This culminated in the Justice Department's issuance in December of new guidance on the prosecution of corporations that retreated in important ways from DOJ's prior guidance issued shortly after the Enron and Worldcom scandals broke.

Below we review those and other significant developments that have defined the enforcement landscape in 2006, and we also take a forward look at key events we expect to see in 2007. We conclude with some thoughts about affirmative steps that directors and corporate management can take to safely navigate this rapidly changing enforcement terrain.

I. KEY DEVELOPMENTS IN 2006

1. Options Backdating Investigations. During 2006, options backdating was the most widespread and highly publicized corporate fraud issue. Beginning with a series of Wall Street Journal articles in March, virtually every week brought another headline on this topic. To date, over 190 companies have announced some combination of an internal review, SEC inquiry, or DOJ subpoena related to their stock option granting practices. DOJ and the SEC have brought criminal and civil actions, respectively, stemming from the practices at two companies: Brocade Communications Systems, Inc. and Comverse Technology, Inc. In each of those cases, the government alleged that the defendants manipulated option grant dates to create the false appearance that options had been granted when the company's stock was trading at lower prices. To date, two defendants in the Comverse matter, the company's former CFO and former General Counsel, have entered guilty pleas and acknowledged that they participated in a scheme to backdate stock option grants. As we explain in more detail below, we expect the government to continue to focus its resources in this area and it seems likely that additional criminal cases will be brought in 2007.

2. Push-Back Against Government Policies. Although the options backdating investigations have received greater publicity, there has been an equally or perhaps more important development this year: the beginning of a true push-back against what have come to be perceived as overly aggressive government enforcement policies and practices. The public outcry over the Thompson Memo – the 2003 DOJ document identifying the factors to be

considered in determining whether to indict a corporation – reached new heights this past year. In an apparent response, as described in more detail below, DOJ announced on December 12 a significant retreat from some of the most aggressive policies in the now superseded Thompson Memo.

As we have noted in past memoranda, corporations under investigation have felt increasing pressure to waive attorney-client privilege to avoid being labeled uncooperative – a label that could result in the bringing of an indictment, a potential death sentence for many licensed and/or heavily regulated companies. In an early indication that the push-back against this pressure to waive privilege was having some impact, the U.S. Sentencing Commission voted in April to delete language from the Organizational Sentencing Guidelines that had required companies to waive privilege in some instances to obtain cooperation credit. That amendment took effect on November 1 and should remove consideration of privilege waivers from the determination of whether an organization has cooperated sufficiently to earn a sentence reduction.

A recent judicial decision, U.S. v. Stein, may also have a significant impact on the course of future corporate criminal investigations. In June, Judge Lewis A. Kaplan of the Southern District of New York held, in a case against former KPMG partners and employees, that the Thompson Memo's provision on advancing counsel fees, and the actions of the U.S. Attorney's Office in implementing those provisions, violated Fifth and Sixth Amendment rights of the defendants. A month later, Judge Kaplan found that the proffer statements of two former KPMG employees had been obtained in violation of their Fifth Amendment right against self-incrimination due to KPMG's use of economic threats, deliberately precipitated by the government, to coerce the proffer statements in question.

Then, in September, the Senate Judiciary Committee held hearings on Attorney-Client Privilege and Corporate Waivers. At that hearing, Deputy Attorney General Paul H. McNulty signaled that DOJ was considering revisions to the Thompson Memo. Subsequent to the hearing, Senator Arlen Spector introduced a bill, the Attorney-Client Privilege Protection Act of 2006 (http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf), which would forbid federal prosecutors and civil enforcement lawyers from requesting any communications protected by attorney-client privilege or any attorney work product. The proposed legislation would also prohibit prosecutors from considering a corporation's decision to: (i) waive privilege; (ii) advance fees to its employees; or (iii) enter into a joint defense agreement, in determining whether to bring criminal charges against a corporation. Finally, on December 12, DOJ issued new guidelines, described in more detail below, that may result in reduced pressure on companies to waive privilege and perhaps render the Specter bill unnecessary.

3. The Government Didn't Always Win. Another unheralded but important development was that when individual defendants chose to go to trial in white collar cases, an increasing number of them were acquitted or had their convictions reversed on appeal in 2006. For example, in November, two former McKesson Corp. executives were acquitted of a conspiracy charge by a San Francisco jury (and a mistrial declared on six other securities fraud counts). Similarly, in the cases brought against fifteen former NYSE specialists accused of making improper trades at the Exchange, two specialists were acquitted, and the government recently dropped charges against another five. (There were two earlier dismissals, three guilty

verdicts and two guilty pleas.) In August, the Fifth Circuit Court of Appeals vacated the 2004 conspiracy and wire fraud convictions of four former Merrill Lynch executives involved in the Enron-related case focusing on the financing of Nigerian barges. The Second Circuit Court of Appeals reversed the highly publicized conviction of Frank Quattrone for obstruction of justice and witness tampering. And three former executives of Symbol Technologies, Inc. saw their securities fraud trial end in a mistrial.

4. Continued Use of Deferred Prosecution Agreements. The government's use of deferred prosecution agreements to resolve corporate investigations continued to proliferate. Significant deferred prosecution agreements reached in 2006 included an agreement between Bayerische Hypo-Und Vereinsbank AG ("HVB") and the U.S. Attorney's Office for the Southern District of New York to resolve an investigation in connection with the bank's participation in the implementation of fraudulent tax shelters allegedly devised by the accounting firm KPMG and others. As part of the agreement, HVB issued a statement of facts admitting to criminal conduct and agreed to pay $29.6 million in fines, restitution, and penalties. HVB also agreed to permanent restrictions and controls on its banking practices, including, among other things, (i) prohibitions on its participation in any transaction or strategy that has a significant tax component, unless such transaction or strategy is accompanied by an opinion that the transaction "should" be upheld if litigated and HVB independently concurs with that opinion; (ii) a requirement that HVB adopt a "transaction approval" process for loan officers for transactions that have a significant tax component; and (iii) operational controls designed to prevent account officers from controlling banking transactions after the formal closing of such transactions.

Another noteworthy agreement was reached in August between Prudential Equity Group, LLC, ("PEG") a broker-dealer subsidiary of Prudential Financial, Inc. ("Prudential") and the U.S. Attorney's Office for the District of Massachusetts. In that agreement, PEG resolved a criminal investigation in connection with deceptive market timing trading in mutual funds by, among other things, agreeing to a statement of facts and agreeing to pay $600 million in fines, restitution, and penalties. Interestingly, the agreement also required Prudential's General Counsel to make periodic reports to the company's board of directors about the appropriateness and effectiveness of the compliance plan and to provide such reports to the U.S. Attorney. This provision marked a departure from the more common practice in deferred prosecution agreements of requiring a company to install an outside monitor.

One company in 2006 saw the practical consequences of the required presence of an outside monitor. In June 2005, Bristol-Myers Squibb Company ("BMS") entered into a deferred prosecution agreement with the U.S. Attorney's Office for the District of New Jersey. Under the terms of that agreement, BMS had agreed to the imposition of an outside monitor, who would report quarterly to the U.S. Attorney's Office. After the Antitrust Division of DOJ began a criminal investigation of BMS in July 2006, BMS's outside monitor, along with the U.S. Attorney, relying on the deferred prosecution agreement with BMS, began their own inquiry. According to press reports, in September the outside monitor and the U.S. Attorney attended a special session of BMS's board of directors, after which BMS's CEO and General Counsel were terminated.

5. The Benefits of Corporate Cooperation. Throughout the year, regulators and prosecutors continued to signal that extraordinary cooperation by companies under

investigation would be rewarded. The non-prosecution agreement between Royal Ahold and the U.S. Attorney's Office for the Southern District of New York (http://www.ahold.com/_media/4210.pdf) is a good example. The agreement noted that the government's decision not to prosecute was based in large part on Ahold's full cooperation, including that it (i) self-reported the misconduct; (ii) conducted an extensive internal investigation; (iii) made its personnel available for interviews by the government, including bringing witnesses to the United States from abroad; (iv) gave factual results of its internal investigation to the government; and (v) terminated the employees responsible for the wrongdoing. In another example of the benefits of cooperation, the SEC settled financial fraud charges against Delphi Corporation without imposing a financial penalty. In explaining its decision, the SEC expressly noted the significant remedial steps taken by Delphi and its extensive cooperation. (http://www.sec.gov/litigation/litreleases/2006/lr19891.htm).

The government has also made clear, however, that when a company agrees to full disclosure and cooperation in exchange for leniency, it had better be prepared to live up to its pledge. When the government determined that Stolt-Nielsen S.A., a shipping company initially granted immunity from prosecution by the Antitrust Division, had failed to fulfill its obligations under the leniency agreement, it terminated the agreement and indicted the company and several of its executives. (The indictment can be found at http://www.usdoj.gov/atr/cases/f218200/218212.htm).

II. TRENDS TO WATCH IN 2007

1. Expected Impact of the McNulty Memo. As noted above, on December 12, 2006, in a memo from Deputy Attorney General McNulty (http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf), DOJ issued new guidance on the prosecution of corporations that superseded the Thompson Memo. The new policy continues to require prosecutors to consider a corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate" in determining whether to seek an indictment. However, the new principles state that corporate waiver of attorney-client and work-product protections "is not a prerequisite to a finding that a company has cooperated" and directs that such waivers may be requested only "when there is a legitimate need for the privileged information to fulfill . . . law enforcement obligations" and not when "merely desirable or convenient." Prosecutors may seek "purely factual information," such as attorney notes of witness statements or attorney-prepared chronologies or summaries of key events, from a corporation, but only after obtaining written approval by the United States Attorney, who is required to consult with the Assistant Attorney General for the Criminal Division. The McNulty Memo imposes additional restrictions when prosecutors seek legal advice or attorney work product from a corporation. Such privileged information may only be sought in "rare circumstances" and after obtaining written authorization from the Deputy Attorney General. Moreover, if a corporation declines to provide such a waiver, "prosecutors must not consider this declination against the corporation in making a charging decision."

Regarding advancement of legal fees, the McNulty Memo adopts a new position that effectively codifies the June 2006 decision in U.S. v. Stein, discussed above. The McNulty Memo states that, in weighing a company's cooperation, "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."

Going forward in 2007, these new principles will have immediate significance for any corporation responding to a federal criminal investigation. In the past, because of the Thompson Memo's now-superseded language, many corporations assumed that waiver of the attorney-client privilege was virtually mandatory. Not surprisingly, corporate waivers have become increasingly common in recent years. That assumption no longer applies. Corporations also are now free to advance legal fees to employees in compliance with their charters, by-laws, and policies without fear of being deemed uncooperative. This policy change opens a broader range of strategies and tactical choices for corporations.

It may still make sense in some cases for a company voluntarily to waive privilege. Indeed, the McNulty Memo provides that "prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation." Moreover, nothing in the McNulty Memo changes the fundamental principle that corporations are liable, in virtually all cases, for criminal misconduct by their employees. Thus, prosecutors will continue to have leverage over corporations, and corporations will, in turn, continue to have incentives be cooperative. But, over time, this tactical retreat by DOJ may also lead corporations in appropriate cases to choose to defend employee conduct more aggressively than in the recent past.

2. Options Backdating Cases Will Continue. The Comverse and Brocade cases plainly represent the beginning, rather than the culmination, of government action in response to allegations of improper options backdating. In July 2006, the U.S. Attorney in San Francisco announced the formation of a task force dedicated to stock options backdating investigations. Similarly, in September, Deputy Attorney General McNulty reported that "United States Attorneys' Offices throughout the country, assisted by agents of the Federal Bureau of Investigation" were pursuing options backdating matters. Both Christopher Cox, Chairman of the SEC, and Linda Thomsen, Director of Enforcement of the SEC, have also made clear that more cases are on the horizon. In October, Ms. Thomsen noted that, while the SEC does not expect to bring enforcement actions in all of the more than 100 pending SEC investigations in this area, it does expect to bring more cases.

In addition to criminal and civil fraud charges, questions about companies' options granting practices have given rise to a host of other legal and corporate issues, including civil suits in the form of securities class actions, derivative actions, and ERISA class actions; restated financial statements; loss of key executives; delisting of publicly traded securities; and expensive internal investigations.

Given the large number of government investigations that are currently ongoing, it is likely that the government will make decisions on how to proceed in many of these matters during 2007. At the same time, not all option-related practices that come under governmental scrutiny are necessarily problematic. Each of the option investigations will turn on its unique facts. Careful analysis of both the facts and the law will be required to reach conclusions about each company's practices.

3. Lawyers As Targets. The SEC is continuing to focus on the conduct of lawyers, both in the options backdating investigations and elsewhere. Enforcement Director Linda Thomsen recently made clear that the agency is scrutinizing with a broad lens the activity of participants, including lawyers, in the options backdating investigations. She noted that: "If you're willing to lie and carry on about options, you're willing to do it in other areas as well." She stressed, moreover, that the SEC "will still look at lawyers."

Last year saw in-house lawyers in particular being targeted by both the SEC and DOJ. The General Counsel of Comverse Technology Inc. was indicted for his role in issuing options grants, drafting written consents and communicating with the compensation committee to obtain approval. As noted above, he pled guilty to one count of conspiracy to commit wire, mail and securities fraud. The SEC's civil injunctive action remains pending.

Even in the absence of governmental action, several general counsel have lost their jobs in connection with internal investigations. Monster Worldwide Inc. recently terminated its General Counsel in connection with its investigation into past stock options grant practices announcing that he was fired "for cause." McAfee Inc. similarly fired its General Counsel, stating publicly that it was aware of one episode involving the general counsel that was improper. McAfee recently reported that it received a grand jury subpoena from the U.S. Attorney's Office for the Northern District of California regarding the firing, the lawyer's activities related to options, and the company's internal investigation concerning the option grants. We will likely learn over the next year to what extent those steps, which resulted from internal investigations, presage governmental enforcement actions.

4. Continued Focus on Earnings Management Revenue Recognition. It has been over five years since the collapse of Enron, and in that time we have seen DOJ and the SEC pursue several high-profile investigations and prosecutions of accounting fraud and earnings management, including WorldCom, Adelphia, and Royal Ahold. While the pace of announcements of new such investigations or prosecutions has slowed from its peak, the government remains sensitive in this post-Enron era to the adequacy and accuracy of financial information disclosed by public companies. Indeed, Section I of the McNulty Memo emphasizes that DOJ "plays an important role in protecting investors and ensuring confidence in business entities and in the investment markets in which those entities participate" and makes particular note that "[d]irectors and officers . . . owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements." The McNulty Memo thus reaffirms that continuing enforcement efforts will focus on the adequacy of corporate financial disclosure and questionable revenue recognition or earnings management practices.

5. Increased Focus on Antitrust and FCPA Enforcement. In early 2006, antitrust authorities in the U.S. and Europe launched a global investigation into potential price-fixing by the cargo divisions of some of the world's largest airlines. The probe reportedly focuses on whether air cargo carriers colluded in setting the level of various surcharges, including fuel, security, war risk, and custom clearance surcharges, that are added on top of the rate charged to cargo customers to cover various elements of the airlines' operational costs. In February 2006, the Antitrust Division and the European Commission, in concert with national authorities in Europe and Asia, kicked off the investigation by conducting raids and serving subpoenas on numerous airlines across several continents. A second round of subpoenas was

served in mid-summer 2006 and still others were served in the fall of 2006. Reportedly, investigators have subpoenaed or otherwise requested information from almost all of the world's major air cargo carriers, though not all are targets of the criminal investigation. In the wake of the criminal investigation, dozens of civil class action lawsuits were filed by shippers that purchased air cargo services. In September 2006, Lufthansa, United, and American reached settlements with class action plaintiffs whereby Lufthansa agreed to pay $85 million and United and American did not have to make any payments.

DOJ also made clear last year that criminal enforcement of the Foreign Corrupt Practices Act continues to be a high priority. The FCPA's anti-bribery provisions prohibit the payment of anything of value to a foreign official for the purpose of influencing that official to assist in obtaining or retaining business. In addition, the accounting provisions require companies with U.S. listed securities to keep accurate books and records and to maintain an adequate system of internal accounting controls. The head of DOJ's Criminal Division, Alice S. Fisher, confirmed in an October speech that the FCPA is relevant in today's global business climate and that the Department is committed to "enforcing the FCPA to root out global corruption and preserve the integrity of the world's markets."

Two recent cases demonstrate the Department's increased focus on FCPA issues. The first involved Statoil ASA, a Norwegian company listed on the New York Stock Exchange. The SEC and DOJ settled cases arising out of the company's indirect payments to an Iranian official to induce him to direct oil and gas contracts to the company. As a result of these payments, the Company obtained access to nonpublic government information and competitor bid documents and succeeded in obtaining a significant contract to develop an oil and gas field. Statoil agreed to pay a $10.5 million penalty and enter into a three-year deferred prosecution agreement. It also agreed to pay an additional $10.5 million in disgorgement to resolve SEC charges and to retain an independent compliance monitor. Significantly, the case represents the first time DOJ has criminally enforced the FCPA against a foreign issuer. The second case was settled by Schnitzer Steel Industries, Inc., a U.S. issuer and its wholly owned Korean subsidiary. Schnitzer was alleged to have paid kickbacks to government-owned and private customers in South Korea and China to induce them to buy scrap metal from Schnitzer. Schnitzer's Korean subsidiary pled guilty to violations of both the anti-bribery and accounting provisions of the FCPA while the U.S. parent company entered into a deferred prosecution agreement. DOJ emphasized that Schnitzer's "exceptional" cooperation with the investigation – including voluntary disclosure, replacement of senior management, significant remedial steps, and bringing in foreign witnesses at the company's expense – was largely responsible for the beneficial deferred prosecution package offered by the government.

These cases serve as a reminder to U.S. companies, and foreign companies that do business here or whose shares are traded on U.S. exchanges, to make sure that their FCPA compliance policies and training are up-to-date and apply to their subsidiaries. DOJ and the SEC have demonstrated that they will pursue violations of the FCPA by foreign as well as U.S. companies. Moreover, as noted above, the government continues to emphasize the importance of early and complete cooperation in both regulatory and criminal investigations.

6. Insider Trading. While the SEC has indicated that the Enforcement Division intends to "cover the landscape" of enforcement topics in 2007, Director Linda Thomsen

has also made clear that insider trading will continue to be an enforcement priority, noting that "investigating and prosecuting insider trading violations has remained a steady component" of the SEC's "enforcement mission." Most recently, insider trading by hedge funds has become an area of particular concern. Lawsuits involving hedge funds made up 11% of the SEC's insider trading cases in fiscal 2006, and the SEC has said it plans to file more cases against the industry in 2007 alleging illegal trading. Moreover, the Commission plans to have in place a new electronic case tracking system by mid-2007 that it believes will help it crack down on hedge fund insider trading. In light of the recent uptick in mergers and acquisition activity, we can expect to see continued SEC focus on insider trading by hedge funds as well as other parties. In addition, in 2007, we expect the SEC to focus not only on classic insider trading, but also on the use of credit derivatives as alternatives to trading in the underlying common stock, as well as on possible misuse of market-sensitive information gathered by consultants and other experts.

7. Decline in SEC Enforcement Activity. Despite the continuing SEC enforcement initiatives in the areas noted above, the overall number of enforcement actions brought by the SEC in fiscal 2006 actually declined from the prior year by about 9%. This decline reflects a three year downturn in the number of cases brought by the agency. However, the slowdown was limited to the first half of the year. In the April to September period, the pace of enforcement actions had picked up, with the agency bringing 308 actions compared to 266 in the prior six months. Moreover, the total number of cases brought in fiscal 2006 -- 574 -- is about 20% higher than the number brought in the years preceding Enron. (In contrast, the number of securities fraud class actions in the first half of the year showed a significant decrease of approximately 31% compared to 2005 levels. This represents the lowest level for any six month period since 1996.)

According to Chairman Cox, the SEC plans to increase its enforcement activity in 2007. However, if the recommendations of the Committee on Capital Markets Regulation (the "Paulson Committee"), an independent, bipartisan committee charged with exploring issues related to maintaining and improving the competitiveness of the U.S. capital markets, carry any weight, there will be a continuing downward trend in the level of SEC enforcement activity. In its Interim Report issued on November 30 (http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf), the Paulson Committee concluded that the marked increase in the level of regulatory intensity (in the form of new laws, private and government litigation and the behavior of securities regulators) in recent years has competitively disadvantaged the U.S. financial markets. The Paulson Committee specifically suggested numerous reforms to the regulatory process, including, among other things, (i) improved cost-benefit analysis by the SEC and SROs of their proposed rules and regulations; (ii) more principle-based rules, and better articulated guidelines to firms about what is expected; (iii) more bank-like prudential regulations for securities firms, in an effort to increase cooperation between the regulators and the regulated, and to encourage increased self-reporting by firms; and (iv) resisting the trend to use enforcement actions as the basis for ad hoc rule-making. The Paulson Committee viewed this latter trend "with concern" and admonished the SEC that when rules are found to be deficient, they should be changed by the accepted regulatory process which should not be "short-circuited" by enforcement actions.

8. Consolidation of NYSE and NASD Regulatory Roles. On November 28, 2006, the NASD and NYSE announced the signing of a letter of intent to consolidate their

member regulation operations into a new self-regulatory organization that is intended to be the private sector regulator for all securities brokers and dealers doing business with the public in the United States. If approved by member firms and the SEC, there will be one set of rules, one set of examiners and a single enforcement staff.

The new organization would consist of the current 2400-person NASD organization and about 470-staff in NYSE Regulation's member regulation, arbitration and related enforcement units. The regulator is expected to be based in Washington, D.C., with a supplementary office in New York and eighteen dispute resolution branches across the country. The new SRO will be responsible for all member examinations, enforcement, arbitration and mediation functions, as well as all other current NASD responsibilities. NYSE Regulation will continue to oversee NYSE market surveillance and compliance for companies listed on that exchange. SEC Chairman Cox has already indicated that he fully supports the plan to consolidate the regulators, as have the Paulson Committee and the Securities Industry and Financial Markets Association.

Although the announcement stated that the new SRO expects to begin operations in second quarter 2007, recent news reports suggest that the timeframe may be somewhat optimistic. A definitive agreement has not yet been reached and not all important details have been resolved.

9. Changes in Congress/New Legislative Agenda. The November 2006 mid-term election results signal key changes in Congressional leadership and the potential for new priorities and initiatives. A new Democratic lineup of committee chairs may result in policy changes. For example, Barney Frank, incoming Chairman of the House Financial Services Committee, has indicated that he intends to schedule hearings on hedge funds, stock options, and issues concerning the Sarbanes-Oxley Act and its effect on U.S. competitiveness. Incoming Chairman of the Senate Banking Committee Christopher Dodd has said his main goals will be to boost investor confidence and ensure safety and soundness of the U.S. financial system. The House Judiciary Committee, to be chaired by John Conyers, Jr., is likely to spend less time on divisive social issues and focus on more aggressive oversight of DOJ and the FBI. Expectations are that there will be a surge in Congressional hearings as the Democratic leadership pursues its new agenda.

III. CONCLUSION

Our experience over many years of representing major corporations and leading financial institutions in a wide variety of white-collar criminal and regulatory enforcement proceedings has convinced us that prudent investment by boards and senior management in strengthening their firm's compliance systems can make a profound difference in preventing serious problems and in mitigating fall-out if problems do arise. There is, however, no one-size-fits-all approach. Different companies face different regulatory and reputational risks. But some general observations about affirmative steps boards and management can take are possible:

- On at least an annual basis, management should review for the board the state of the company's compliance infrastructure. This review, among other things, should consider whether the company has in place an effective corporate ethics and compliance program under the U.S. Sentencing Guidelines;

- The board, with input and advice from management and outside advisors, should periodically evaluate whether the company has adequate staffing, resources and expertise in critical areas such as financial controls, internal audit, legal and compliance;

- The board should satisfy itself that management has a full and complete understanding of the regulatory framework in which the company operates its various businesses, and the attendant legal and reputational risks; and

- Finally, the board should also examine whether: the proper tone is being set at the top of the organization to encourage ethical conduct, integrity, candor and compliance with legal and regulatory requirements; supervisors within the company get appropriate guidance, training and support to ensure that the business is being run in accordance with the company's code of conduct and policies; and that those compliance policies and codes of conduct are state of the art.

When these preventive measures do not succeed and an unanticipated issue does arise, boards and management should consider the following:

- Take careful measure of the crisis and put in place the right structures and procedures to manage through it, avoiding the often reflexive tendency in current times to treat every crisis as requiring independent committee investigation except when the circumstances are truly appropriate;

- Designate a small, qualified team -- typically including the CEO and General Counsel -- to manage all aspects of the crisis; keep the entire board well engaged and informed as appropriate to permit the board to maintain ultimate control over management of the crisis;

- Have a flexible plan of action and keep an open mind about revisiting strategy as facts and circumstances change (as they inevitably will);

- Take prompt, affirmative steps to correct any underlying problems;

- When appropriate, be willing to advance legal fees to executives and employees who need competent counsel to assist them during the investigation;

- Avoid the temptation to offer to waive privilege - only do so if it genuinely will further the company's interest in achieving the best possible resolution;

- Enhance policies, procedures, systems and personnel in order to be sure the problem will not recur; and

- Use the occasion to reexamine similar existing practices elsewhere in the firm.