

March 2009

# Government & White Collar Investigations

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## Corporation Held Criminally Responsible for Misconduct of Low-Level Employees

BY CHARLES E. JAMES, JR.  
& BRENDAN D. O'TOOLE

Should a corporation be held criminally liable for illegal acts of its employees, even where wrongful conduct is contrary to the corporation's express instructions and/or policies? For directors, managers and shareholders alike, the answer is a scary one: the company can be held criminally responsible anytime its employees are committing illegal acts in the scope of their employment. This precise question was recently addressed by the U.S. Court of Appeals for the Second Circuit in *United States v. Ionia Mgmt. S.A.*, No. 07-5801-cr (2d Cir. Jan. 20, 2009). The facts were not good. Greek shipping company Ionia managed (but did not own) a 600-foot oil tanker. The tanker delivered oil to ports along the eastern seaboard of the U.S. During these deliveries, Ionia's engine room crew, at the direction of their supervisors, regularly dumped oily waste water into the

ocean. To make matters worse, the tanker's crew falsified entries in its oil record book to conceal the dumping, and lied to coast guard officials when an investigation ensued.

Ionia's corporate policy dictated that its ships would not discharge untreated waste and it had in

place a robust compliance program to ensure that its employees adhere to that policy. Senior Ionia officials did not know that employees aboard the ship were refusing to comply with that policy and were falsifying ship records to cover up their non-compliance. Nonetheless, the government brought indictments against Ionia based on its tanker-employees' conduct, and a jury convicted Ionia of conspiracy, pollution, and obstruction of justice. The company was fined \$4.9 million in addition to probation and assessments. The federal appeals court upheld the jury's verdict.

### The Ins-and-Outs of Corporate Compliance Programs

- Compliance plans help corporations deter employee misconduct by educating employees to avoid wrongdoing, thereby minimizing the severe consequences that come with criminal charges.
- Even where misconduct occurs, such programs may prove important to corporate defendants under the "Filip Memorandum,"<sup>1</sup> which makes the existence of compliance programs a factor in the government's decision whether to charge a corporation. In other words, an effective compliance program can be used to persuade the government not to seek an indictment. The U.S. Sentencing Guidelines also call for reduced corporate penalties where effective compliance programs are in place.
- Compliance programs can be used to show that the employee acted outside the scope of his work duties, thereby shielding the corporation from criminal liability even under the respondeat superior doctrine.
- Compliance programs can be used to demonstrate the company's lack of intent to commit a violation.

<sup>1</sup> See U.S. Department of Justice revised "Principles of Federal Prosecution of Business Organizations" announced by Deputy Attorney General Mark R. Filip on Aug. 28, 2008

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## What this means for you

*Ionia* is a significant white collar and criminal investigation decision. The corporation was found criminally liable for the illegal actions of several lower-level employees. Nothing has had a greater impact on enforcement of federal criminal laws against corporations than the doctrine known as *respondeat superior*, which imputes to employers the criminal acts of employees acting in the course of their employment. In light of the appeals court's decision, one might reasonably conclude that *respondeat superior* makes it too easy to impute criminal liability to corporations. In fact, *Ionia* urged the court to adopt a heightened standard under which a corporation would be vicariously liable only for the acts of its "managerial" employees, and only where the company lacked effective compliance policies. But the appeals court disagreed, ruling that imposing vicarious criminal liability on a corporation is permissible so long as the corporation's employees were acting within the scope of their employment.

As *Ionia* makes patently clear, organizations will continue to face liability for nearly all criminal acts of employees — even those low-level personnel who act against specific instructions and in the face of explicit corporate policies. However, corporate clients should continue to update and enforce their compliance programs, even where such programs are not required by law. Although the *Ionia* court declined to erect a new barrier to corporate criminal liability, the decision does not detract from the recognized benefits of corporate compliance programs. Such programs remain an essential tool for avoiding and mitigating the consequences of corporate criminal liability.

*For more information on matters pertaining to government and white collar investigations, please contact: Charles E. James, Jr. at 804.783.6415 or cjames@williamsmullen.com.*

### Williams Mullen Government and White Collar Investigations Team

Whether in response to a grand jury subpoena or as the result of a self-initiated inquiry, an internal investigation can be a valuable tool in determining what, if any, exposure our client may face. Should there be wrongdoing by the corporation or an individual employee, our team is uniquely positioned to counsel the client and to tailor a plan for remedial action while defending the client in any administrative or criminal proceeding that may result. Focused, discrete, and strategic intervention by our experienced team, early in an investigation, may preclude or limit costly civil liability and criminal exposure for our clients. At Williams Mullen, we call upon our attorneys' government experience at the investigative, trial and appellate levels to advise clients on how to effectively respond to all forms of investigations. In some cases, cooperating with the investigative agency is appropriate. In other cases, a vigorous defense is appropriate. Our White Collar Investigations and Litigation attorneys assist clients in determining the best course of action based on the unique facts of the case.

Moreover, our team assists clients in the development and implementation of both curative and forward-looking compliance programs designed to respond to all phases of an investigation and prevent costly criminal or civil violations. A uniquely tailored compliance program may assist in the successful resolution of a federal investigation and limit the client corporation's civil fines under the U.S. Sentencing Guidelines. A key part of our team's practice is to provide preventative assistance, helping clients avoid costly exposure to criminal and civil liability before any wrongdoing occurs.

We hope you find this alert helpful and informative. As always, we welcome your questions and comments, and stand ready to assist with your advocacy and investigatory needs.

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