# Chapter 2
# Corporate Criminal Liability in the United States: Is a New Approach Warranted?

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## Contents



## 2.1 Introduction

Corporations as well as individuals may be held criminally liable for wrongful acts under both federal and state law in the United States. The number of federal crimes is estimated to exceed 4 000 and some states have also statutorily expanded the reach of corporate criminal liability.[1] Professor Sara Sun Beale explains the over breadth of federal criminal law:

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[1]Beale 2007, 1504 et seq. The United States Sentencing Commission's *Guidelines Manual* includes a detailed list of the offenses for which criminal liability can be imposed under federal law: USSC 2009. Those crimes that can only be committed by a natural person are, of course, excluded from the reach of corporate criminal liability.

M. Pieth, R. Ivory (eds.), *Corporate Criminal Liability*, Ius Gentium: Comparative Perspectives on Law and Justice 9, DOI 10.1007/978-94-007-0674-3_2,

> Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses. In many instances, federal law overlaps almost completely with state law…[2]

Notwithstanding this dual jurisdiction, the focus of this chapter is on federal criminal law.

The following examples of penalties on corporations between December 2008 and September 2009 illustrate the imposition of such liability. In September 2009, the pharmaceutical company Pfizer was fined $1.3 billion as a criminal penalty for having illegally marketed its painkiller "Bextra", which the company later withdrew.[3] In February 2009, the Swiss bank UBS AG entered into a deferred prosecution agreement with the US Department of Justice (USDOJ), paying $780 million in fines, penalties, and interest for aiding US citizens to avoid paying taxes on undeclared accounts at that bank.[4] In January 2009, Eli Lilly and Company entered a plea agreement, admitting guilt to a criminal charge of distributing misbranded drugs with inadequate directions for use and agreeing to pay a $515 million fine and forfeit $100 million in assets.[5] And, in December 2008, the multinational German corporation, Siemens AG, entered a guilty plea to violating the Foreign Corrupt Practices Act, while agreeing to pay a criminal fine amounting to $450 million.[6] And these are only a few selected cases of serious corporate misconduct, which has especially been on the rise since the 1990s.[7]

Corporate scandals, such as Enron and Worldcom, eventually led to increasing public demand for holding corporations accountable for illegal acts and resulted, in 2002, in the establishment of the Corporate Fraud Task Force by then-President George W. Bush. The purpose was to "strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes."[8] The US Congress also took action by enacting the Sarbanes-Oxley Act in 2002, which mandates stricter corporate

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[2]Beale 1995, 979, 997 et seq.

[3]USDOJ 2009c.

[4]USDOJ 2009a.

[5]USDOJ, Office of Consumer Litigation 2009.

[6]USDOJ 2008.

[7]Beale 2007, see above n. 1.

[8]Executive Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), amended by Executive Order No. 13,286, 68 Fed. Reg. 10,619 (February 28, 2003) (hereafter Executive Order 2002).

oversight and compliance.[9] Federal prosecutions became aggressive and, as a result, there were more than 1 100 convictions in corporate fraud cases.[10]

Created by courts through the common law, the doctrine of corporate criminal liability is based on the civil law system's doctrine of *respondeat superior*.[11] The principle of vicarious criminal liability applies, under which the *actus reus* – the performance of a legally prohibited act – and the *mens rea* – criminal intent – of an individual who acts on behalf of the corporation are automatically imputed to the corporation. Thus, if an employee or agent of the corporation commits an offense by an act, commission, or failure, while acting within the scope and nature of his/her employment, and acting, at least in part, to benefit the corporation, the corporation is criminally liable.[12] However, both these conditions – that the employee must be acting within the scope of his/her actual or apparent authority and the employee's act must benefit the company – have been expansively interpreted by courts. Consequently, in federal courts, a low-level employee's act can be imputed to a corporation and, no matter how genuine and effective the corporation's compliance program may have been otherwise in deterring the criminal conduct, the corporation is still liable. In this respect the US law is relatively unique.

The doctrine of corporate criminal liability, however, has its critics. Their main ground is that, because corporations cannot act on their own or form criminal intent, there is no theoretical justification for the doctrine.[13] Instead, they argue, civil regulatory enforcement is the appropriate sanction for corporate wrongful actions.[14] Among the various documents calling for reform of the doctrine, is a 2008 white paper issued by the US Chamber Institute for Legal Reform and co-authored by the former Director of the US Department of Justice Enron Task Force, Andrew Weissmann.[15]

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[9] Sarbanes-Oxley Act (2002); Egan 2005, 305 (discussing the act's general rules).

[10] Browning 2006.

[11] This doctrine holds "an employer or principal liable for the employee's or agent's wrongful acts conducted within the scope of the employment or agency": Black's Law Dictionary 2004. In an 1892 case, *Lake Shore & Michigan SR Co.* v. *Prentice,* 147 US 109, 110 (1892), the US Supreme Court said, "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal."

[12] *United States* v. *One Parcel of Land,* 965 F.2d 311 (7th Cir. 1992) holding that if the agent was "acting as authorized and motivated at least in part by an intent to benefit the corporation", the agent's knowledge and culpability is imputable to the corporation, citing *US* v. *Cincotta,* 689 F.2d 238, 241–242 (1st Cir. 1982), cert. denied *sub nom. Zero* v. *United States,* 459 US 991 (1982).

[13] Fischel/Sykes 1996, 320.

[14] Parker 1996, 381; Baker 2004, 350.

[15] Weissmann/Ziegler/McLoughlin/McFadden 2008, 1.

The paper asserts that, if the need for vicarious criminal liability ever existed, it "has been severely undermined by the growth of the regulatory state."[16] The authors call upon "legislators, academics, and practitioners to press the case for a greater recognition of the harmful and counterproductive consequences of the current system and to seize the opportunities for reform" they outline in their paper.[17]

Before discussing the nature of the reforms suggested by critics of the current doctrine, I consider it essential to describe the current US practice. Thus, a brief historical review will be followed by a description of the current state of the US doctrine. Next will be a section on alternative approaches suggested. The final section will be an appraisal, with some recommendations and conclusions.

## 2.2 Historical Perspective

Under English common law, a corporate entity could not commit a crime and, hence, could not be indicted for any wrongful act of its constituents. However, as corporations began to play an important role in society, and were seen as capable of doing significant harm, their regulation and punishment by courts for public nuisances began.[18] In a 1635 case, the King's Bench held a corporation liable for nonfeasance – the failure to prevent a bad act.[19] Subsequently, the courts continued to distinguish between nonfeasance and misfeasance – the commission of a bad act – for determining criminal liability of corporations. The rationale for the distinction, and for not imputing criminal liability to a corporation for misfeasance, was derived from the prevailing view that the corporation lacked the capacity to form the requisite criminal intent to commit an illegal act. Courts held corporations criminally liable for acts of employees within the scope of their employment as they applied the theory of vicarious liability, which they had borrowed from tort law.[20]

In determining the issue of corporate liability, until the mid-nineteenth century, US courts generally followed the earlier practice of English courts.[21] The distinction between criminal nonfeasance and misfeasance,

[16] Weissmann/Ziegler/McLoughlin/McFadden 2008, 16.

[17] Weissmann/Ziegler/McLoughlin/McFadden 2008, 20.

[18] Brickey 1982, 406, suggests that the theory of these cases is that "since the corporation had the power to abate the nuisance, there could be no question that it had a duty to exercise that power."

[19] *Case of Langforth Bridge*, 79 ER 919 (KB 1635), cited in Brickey, 1982, 401.

[20] Brickey 1982, 402 et seq.

[21] *State* v. *Great Works Milling & Mfg. Co*., 20 Me. 41, 43 (1841) not extending corporate criminal liability to acts of misfeasance because a corporation "can neither commit a

however, did not have much traction in the US, as state courts began rejecting the distinction and applying the doctrine of corporate criminal liability, initially limiting the imposition of such liability to strict liability offenses.[22]

A century ago, the landmark Supreme Court decision in the 1909 case *NY Central & Hudson River RR Co.* v. *United States*[23] marks the beginning of the current US practice of imposing criminal liability on corporations for crimes committed even by low level employees. The court extended the application of agency principles under which a corporation is subjected to civil liability for acts of its agents.[24] It determined that a corporation was capable of forming a criminal intent and thus "may be liable criminally for certain offenses of which specific intent may be a necessary element."[25]

The case involved the violation of a federal statute, the Elkins Act, under which vicarious criminal liability was imposed on common carriers for illegal rebates granted by their agents and officers.[26] Enforcing the legislation adopted by congress, the court affirmed the common carrier's conviction, stating that, to give immunity to corporations "from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[27] The policy rationale was that, since "the great majority of business transactions in modern times are conducted through [corporations]", they should be held accountable.[28] The Court stated emphatically, "We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through agents and officers, shall be held punishable…"[29] It did, however, observe that "there are some crimes, which in their nature cannot be committed by corporations."[30]

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crime or misdemeanor by any positive or affirmative act, or incite others to do so, as a corporation."

[22] Weissmann/Ziegler/McLoughlin/McFadden 2008, 14 et seq.

[23] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481 (1909).

[24] *Old Monastery Co.* v. *United States*, 147 F.2d 905, 908 (4th Cir. 1945).

[25] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 493 (1909).

[26] The Elkins Act, Pub. L. No. 57-103, Ch. 708, 32 Stat. 847 (1903), specifically provided that in "construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person."

[27] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 496 (1909).

[28] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 495 (1909).

[29] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 494 (1909).

[30] 212 US 494.

## 2.3 The Current US Practice

### *2.3.1 General Overview*

By the mid-twentieth century, the US law had sufficiently developed to impose liability on a corporation for the criminal act of an employee within the scope of his/her employment.[31] The courts held corporations criminally liable even if the statute at issue was silent as to whether liability may be imposed on a company for the actions of its employees under the rationale that the term "person" is broadly defined to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[32]

The Supreme Court stated, in a 1958 case, that, just because the owner of a business entity does not personally participate in a criminal act, does not mean that "[t]he business entity [can] be left free to break the law."[33] The established principle is that a corporation may be held criminally responsible for the "acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation."[34] To illustrate, the Court held in *United States* v. *Cincotta*[35] that "within the scope of employment" meant that the agent had been "performing acts of the kind which he is authorized to perform", and that the agent, in part, had the intent to benefit the employer.[36] However, the corporation need not even necessarily benefit from its agent's actions for it to be held liable, as the Fourth Circuit stated in *United States* v. *Automated Medical Laboratories*:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which

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[31] *US* v. *Armour & Co.,* 168 F.2d 342, 343 (3rd Cir. 1948); *US* v. *George F. Fish Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) (*per curiam*).

[32] 1 USC 1.

[33] *United States* v. *A&P Trucking Co.*, 358 US 121, 126 (1958).

[34] *United States* v. *Richmond*, 700 F.2d 1183, 1195 n. 7 (8th Cir. 1983), citing *United States* v. *DeMauro,* 581 F.2d 50, 53 (2d Cir. 1978), abrogated on other grounds, *United States* v. *Raether,* 82 F.3d 192 (8th Cir. 1996). *United States* v. *Jorgenson*, 144 F.3d 550, 560 (1998).

[35] *United States* v. *Cincotta*, 689 F.2d 238, 241 (1st Cir. 1982), cert. denied *sub nom. Zero* v. *United States,* 459 US 991 (1982).

[36] *United States* v. *Cincotta*, 689 F.2d 238, 241 et seq. (1st Cir. 1982). *United States* v. *Potter,* 463 F.3d 9, 25 (1st Cir. 2006) stating that an agent acts within the scope of employment if "the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation."

> may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.[37]

If a criminal act benefits only the employee, officer, or director, such as the employee accepting a bribe that does not benefit the shareholders of the corporation, vicarious liability would not apply.[38]

Other cases have held that, for imputing criminal liability to the corporation, it is not only the high-level corporate officer or director who must have acted.[39] And, even if the illegal actions of the agents were contrary to company policies, explicitly expressed, and, even if those actions were contrary to clear instructions, vicarious criminal liability may be imputed to the corporation because the particular agents may be difficult to identify and their conviction may be ineffective as a deterrent to others within the organization.[40] On the other hand, punishment of the organization as a whole is "likely to be both appropriate and effective."[41]

In a 2009 case, *US* v. *Ionia Mgmt. SA*,[42] the Second Circuit Court of Appeals affirmed a judgment of conviction on a jury verdict, finding the company guilty for the criminal acts of some non-management employees. The company was indicted on the charge that its agents and employees had illegally dumped the oil-contaminated bilge waste from a ship Ionia was operating and managing and then had doctored the ship's oil record book to conceal the dumping. Thus, the company was charged with violating the Act to Prevent Pollution from Ships.[43]

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[37] *United States* v. *Automated Medical Laboratories, Inc.,* 770 F.2d 399, 407 (4th Cir. 1985), quoting *Old Monastery Co.* v. *United States,* 147 F.2d 905, 908 (4th Cir. 1945) (internal citation omitted).

[38] *United States* v. *Cincotta*, 689 F.2d 238, 242 (1st Cir. 1982).

[39] *United States* v. *Basic Construction Co*., 711 F.2d 570, 573 (4th Cir. 1983) rejecting the contention that the government must prove that "the corporation, presumably as represented by its upper level officers and managers, had an intent separate from that of its lower level employees to violate the… laws"; *Standard Oil Co.* v. *United States,* 307 F.2d 120, 127 (5th Cir. 1962): "[T]he corporation may be criminally bound by the acts of subordinate, even menial, employees."

[40] *United States* v. *Hilton Hotels Corp*., 467 F.2d 1000, 1004 et seq. (9th Cir. 1972), cert. denied 409 US 1125 (1973). *United States* v. *Beusch*, 596 F.2d 871, 878 (9th Cir. 1979): "[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but… the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation"; USDOJ, US Attorneys (1997), *USAM*, as revised and amended, <www.justice.gov/usao/eousa/foia_reading_room/usam/index.html>, § 9-28.800.B. Comment 2008: "The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior.*"

[41] *United States* v. *Hilton Hotels Corp*., 467 F.2d 1000, 1006 (9th Cir. 1972).

[42] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303 (2d Cir. 2009).

[43] 33 USC 1901.

Notwithstanding the arguments put forward by the company and several *amici curiae*, including the US Chamber of Commerce and the Association of Corporate Counsel, that the court should revisit the precedent set by *NY Central*, the court held that "there was ample evidence for a jury to have reasonably found that the [ship's] crew" had acted within the scope of their employment,[44] and thus followed the *NY Central* precedent to affirm the jury's finding. It did not accept the *amicis*' suggestions that "the prosecution, in order to establish vicarious liability, should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees."[45] It held that "a corporate compliance program may be relevant to whether an employee was acting within the scope of his employment, but it is not a separate element", and that adding such an element "is contrary to the precedent of our Circuit on this issue."[46]

In a 1987 case, *United States* v. *Bank of New England*, *NA*,[47] a federal appellate court applied what is known as the "collective knowledge" theory of corporate criminal liability. The case concerned the Currency Transaction Reporting Act and its regulations, under which banks are required to file currency transaction reports within 15 days of any customer currency transaction in an amount of more than $10 000.[48] If banks fail to file the required report, they can be held criminally liable.[49] The court held that the knowledge of individual employees acting within the scope of his/her employment can be imputed to his/her employer,[50] which meant that what the employees collectively knew equaled the employer's knowledge and satisfied the *mens rea* element of the offense. And, even though employees may not know that they are involved in wrongdoing, "the aggregate of those components constitutes the corporation's knowledge of a particular operation."[51]

It is also worth noting that, after several years of deliberations on the topic of corporate criminal liability, in 1962, the American Law Institute presented its proposed official draft of the Model Penal Code (MPC),[52] which adopts the *respondeat superior* standard. Under its s. 2.07(1)(a), an offense by an agent acting within the scope of his/her employment, and on

[44] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303, 309 (2d Cir. 2009).
[45] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303, 310 (2d Cir. 2009).
[46] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303, 309 (2d Cir. 2009).
[47] *United States* v. *Bank of New Eng.*, 820 F.2d 844 (1st Cir. 1987).
[48] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 847 (1st Cir. 1987).
[49] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 847 (1st Cir. 1987).
[50] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 855 (1st Cir. 1987).
[51] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 856 (1st Cir. 1987).
[52] ALI (1962). The ALI had discussed its Tentative Draft No. 5 in 1956. A thorough and insightful analysis of the Code may be found in Brickey 1988, 593.

behalf of a corporation, is imputed to the corporation when a legislative purpose to impose such liability "plainly appears."[53] However, the corporation is exonerated from liability if "the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."[54] In the absence of a statutory provision, s. 2.07(1)(c) provides that a corporation is liable only if "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his/her office or employment."[55] States have selectively adopted the MPC, having developed similar requirements either through common law doctrine or through legislation.

Courts generally follow the *NY Central* precedent and juries are routinely instructed that, notwithstanding a company's explicit policies and procedures to prevent and deter illegal action, a company should be held criminally liable for the acts of even a low-level employee.

### *2.3.2 The US Department of Justice's Sentencing and Charging Guidelines and Prosecutors' Role in Charging Corporations*

In 1991 the US Department of Justice added a new chapter, "Sentencing of Organizations", to the United States Sentencing Guidelines Manual.[56] It enumerated four factors to be considered toward increasing the punishment of corporations: (1) the tolerance of, or involvement in, criminal activity; (2) the corporation's prior history; (3) the corporation's violation of an order; and (4) the corporation's obstruction of justice.[57] Corporate punishment could be mitigated by reliance on two factors: (1) the existence of an effective compliance and ethics program; and (2) self-reporting, cooperation, or acceptance of responsibility.[58]

Eight years later, in June 1999, the then-US Deputy Attorney General Eric Holder released a memorandum to all Component Heads and

[53] Section 2.07(1)(b) provides that a corporation is accountable if it fails to discharge specific duties imposed on corporations by law.

[54] Section 2.07(5). But in cases of strict liability or if the defense is "plainly inconsistent with the legislative purpose in defining the particular offense", the corporation will be liable.

[55] Section 2.07(1)(c). Brickey 1982, 593, studies the Model Penal Code's practical application in the US.

[56] USSC 2009.

[57] USSC 2009, Introductory comment.

[58] USSC 2009, Introductory comment.

United States Attorneys entitled "Bringing Criminal Charges Against Corporations" (Holder Memo).[59] Although the memorandum was not binding on prosecutors, they were told they should consider the following factors in all cases that involved a decision whether to charge a corporation: (1) the nature and seriousness of the crime; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's past history of similar misconduct; (4) the corporation's cooperation and voluntary disclosure; (5) the corporation's corporate compliance programs; (6) the corporation's efforts at restitution and remediation; (7) the collateral consequences of the indictment; and (8) the non-criminal alternatives to indictment.[60]

Under the comment to the factor "Cooperation and Voluntary Disclosure", the prosecutor is to consider corporate waivers of the attorney-client and work product privileges when deciding whether the corporation has cooperated with the Department of Justice's investigation.[61] Although a waiver of privileges is not an absolute requirement for a finding of a corporation's cooperation with the government, critics assert that the Holder Memo encouraged aggressive tactics by prosecutors to pressure corporations to conduct investigatory work on their behalf. Illustrative is the comment that "[t]he sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations."[62]

In 2001, Enron and several other corporations faced criminal prosecutions. Enron's auditor, Arthur Andersen, LLP, was convicted on June 15, 2002, by a federal jury of obstructing justice in an official proceeding of the Securities and Exchange Commission, in conjunction with instructions to its employees to destroy documents relating to its accounting work for Enron.[63] An Andersen partner, Michael Odom, had urged Andersen's employees to comply with the firm's retention policy. He added, "If it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great… we've followed our own policy, and whatever there was

[59] USDOJ, Office of the Deputy Attorney General 1999.

[60] USDOJ, Office of the Deputy Attorney General 1999, I.A-VI.B.

[61] USDOJ, Office of the Deputy Attorney General 1999, VI.A, General Principles.

[62] Zorno/Krakaur 2000, 147.

[63] *United States* v. *Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004). The conviction was under the "corrupt persuasion" prong of § 18 USC 1512(b)(2)(A) and (B), which provides: "Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to… cause or induce any person to (A)… withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding… shall be fined under this title or imprisoned not more than ten years, or both."

that might have been of interest to somebody is gone and irretrievable."[64] The Court of Appeals for the Fifth Circuit affirmed, finding no reversible error.[65]

On May 31, 2005, a unanimous US Supreme Court overturned the judgment of the Court of Appeals, remanding the case for further proceedings, as it found the jury instructions on which the verdict was based, flawed. However, long before that time, in August 2002, the firm had already agreed to stop auditing public companies and the outcome was that, by the end of 2002, the firm, which employed 85 000 people, was left with only 3 000 employees.[66] Eventually it dissolved. As one commentator observed, there was "a clear causal connection between the firm's felony conviction and its consequent inability to audit public companies, an inability that, for a public accounting firm, amounted to death."[67] The story of Arthur Andersen, LLP, a giant accounting firm, is a telling case study of how devastating an indictment against a corporation can be.[68]

As mentioned earlier, President George W. Bush authorized the establishment of a corporate fraud task force within the Department of Justice in 2002.[69] In January 2003, then-Deputy Attorney General Larry D. Thompson issued a memo entitled "Principles of Federal Prosecution of Business Organizations" (Thompson Memo), which revised the 1999 Holder Memo.[70] In the revisions, the main focus was on an "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[71] The memo was binding on all federal prosecutors,[72] who were thus required to consider, "in evaluating the corporation's cooperation", the corporation's response to a request for privilege waivers and its advancing of legal fees to its employees.[73]

As part of its purpose to encourage corporate cooperation, the memo stated that prosecutors may enter into "a non prosecution agreement in exchange for cooperation when a corporation's 'timely cooperation appears

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[64] *Arthur Andersen, LLP* v. *United States*, 544 US 696, 700 (2005), quoting *United States* v. *Arthur Andersen,* 374 F.3d 281, 286 (5th Cir. 2004).

[65] *United States* v. *Arthur Andersen*, 374 F.3d 281, 284 (5th Cir. 2004).

[66] Ainslie 2006, 107, provides an analysis of the Arthur Andersen saga.

[67] Ainslie 2006, 108.

[68] Ainslie notes that "the indictment, the conviction, and the consequent prohibition against appearing before the Securities and Exchange Commission were sufficient to kill the company…" Ainslie 2006, 109.

[69] Executive Order 2002.

[70] USDOJ, Office of the Deputy Attorney General 2003.

[71] USDOJ, Office of the Deputy Attorney General 2003, Introduction.

[72] USDOJ, US Attorneys 1997, Criminal Resource Manual, Title 9, § 163.

[73] USDOJ, Office of the Deputy Attorney General 2003, § VI.B.

to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.'"[74]

The message in the memo's introductory note was a cause of concern for corporations, as it stated:

> Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.[75]

The General Principle and the Comment on the section "Cooperation and Voluntary Disclosure" elaborated on this message. The former stated that,

> [i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.[76]

Among the factors included in the Comment, the prosecutor was authorized to consider,

> a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement.[77]

The Comment provided the examples of a corporation's conduct in impeding the government's investigation to include:

> overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation, including, for example, the direction to decline to be interviewed; making representations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.[78]

Finally, the Comment stated that "a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution", as it is to be considered along with other factors, especially those relating

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[74] USDOJ, Office of the Deputy Attorney General 2003, § VI.B.

[75] USDOJ, Office of the Deputy Attorney General 2003, Introduction.

[76] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

[77] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

[78] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

to the corporation's past history and the role of its management in the wrongdoing.[79]

The Thompson Memo generated further criticism.[80] As one such critic argued,

> under authority of the Thompson Memo, federal prosecutors were able to force corporations to hand over privileged information and do the government's investigatory work, all in hopes that the government hammer would not swing the way of the corporation itself.[81]

In response to the criticism from the corporate legal community, on December 12, 2006, Deputy Attorney General Paul J. McNulty issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations" (McNulty Memo). The memo acknowledged concerns that the Department's "practices may be discouraging full and candid communications between corporate employees and legal counsel."[82] It added that "it was never the intention of the Department for our corporate charging principles to cause such a result."[83]

The McNulty Memo superseded the prior memos. Recognizing that the "attorney-client and work product protections serve an extremely important function in the US legal system", it announced that their waiver would not be a prerequisite to a finding of the company's cooperation in the government's investigation and that prosecutors would only request the waiver "when there is a legitimate need for the privileged information to fulfill their law enforcement obligations."[84] The memo instructed prosecutors that, after finding a legitimate need, they "should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct (Category I)."[85]

A prerequisite for a prosecutor's request that a corporation waive the attorney-client or work product protections for Category I information was a written authorization from the US Attorney, who must consult with the Assistant Attorney General for the Criminal Division before either granting or denying such a request.[86] Prosecutors could request the corporation to provide attorney-client communications or non-factual attorney work product (Category II) "[o]nly if the purely factual information provides an

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[79] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

[80] According to Ball/Boleia 2009, 246 et seq.; Bharara 2007, 73: "[C]orporate defendants, subject as they are to market pressures, may not be able to survive indictment, much less conviction and sentencing."

[81] Ball/Boleia 2009, 248.

[82] USDOJ, Office of the Deputy Attorney General 2006, Introduction.

[83] USDOJ, Office of the Deputy Attorney General 2006.

[84] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

[85] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

[86] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

incomplete basis to conduct a thorough investigation", and such information "should only be sought in rare circumstances."[87] A prerequisite for Category II information requests was the approval of the Deputy Attorney General.

On the issue of advancing attorneys' fees to employees or agents under investigation or indictment, the guidelines stated that prosecutors should not generally take this factor into account.[88] However, the guidelines provided that, in extremely rare cases, "when the totality of the circumstances show that [the advancement of attorneys' fees] was intended to impede a criminal investigation", this may be taken into account.[89] The rest of the McNulty Memo generally followed the Thompson Memo provisions.

A case involving the indictment of employees of accounting firm, KPMG, on charges of accounting fraud, *United States* v. *Stein*,[90] presents a pertinent case study of the Department of Justice's pressure on a company to cooperate with the government on the government's terms. The charge was related to the company's advancing of attorneys' fees to employees indicted for activities undertaken in the course of their employment. The District Court ruled that the government deprived the defendants of their right to counsel under the Sixth Amendment of the US Constitution as it had caused KPMG to impose conditions on advancing legal fees to defendants and subsequently to cap the fees and eventually to end payment.[91] Subsequently, the court ruled that dismissal of the indictment was the appropriate remedy for the constitutional violations.[92] On appeal, the Second Circuit Court of Appeals ruled that KPMG had acted under the government's pressure and that the government had,

> unjustifiably interfered with the defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants.[93]

Notwithstanding the McNulty Memo revisions, corporations' concerns remained unabated. Thus, on August 28, 2008, Deputy Attorney General Mark Filip revised the McNulty principles in a memo (Filip Memo), setting forth the revised principles in the United States Attorney's Manual (USAM) for the first time and made it binding on all federal prosecutors within the

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[87] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

[88] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.3, n. 3.

[89] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.3, n. 3.

[90] *United States* v. *Stein,* 435 F.Supp.2d 330 (SDNY 2006), aff'd 541 F.3d 130 (2d Cir. 2008).

[91] *United States* v. *Stein,* 435 F.Supp.2d 330, 367 (SDNY 2006).

[92] *United States* v. *Stein,* 495 F.Supp.2d 390 (SDNY 2007).

[93] *United States* v. *Stein,* 541 F.3d 130, 136 (2nd Cir. 2008) (footnote in the text omitted).

Department of Justice.[94] The principal revisions were to the "'cooperation' mitigating factor, as well as how payment of attorneys' fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement, will be considered in the prosecutive analysis."[95] The memo states that "the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law."[96] According to the memo, "[c]ooperation is a potential mitigating factor, by which a corporation… can gain credit in a case that otherwise is appropriate for indictment and prosecution."[97] Noting that a corporation's decision not to cooperate "is not itself evidence of misconduct", the memo states that failure to cooperate does not support or require the filing of charges against it.[98]

On attorney-client and work product protections, the memo acknowledged the wide criticism that the Department of Justice's policies "have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work product protection", and that the Department's position on these issues "has promoted an environment in which those protections are being unfairly eroded to the detriment of all."[99] The memo directs prosecutors not to ask for such waivers. However, the corporation under investigation may voluntarily disclose the relevant facts and receive credit from the government for such disclosures.[100] In a footnote, the memo includes other dimensions of cooperation beyond the disclosure of facts, such as providing non-privileged documents and other evidence, assisting in the interpretation of complex business records, and the making available of witnesses for interviews.[101]

The memo notes that the government cannot compel the disclosure of facts and the corporation has no obligation to make such disclosures.[102] Thus, if a corporation fails to provide relevant information, this does not mean that it will be indicted; the only outcome will be that the corporation will not be entitled to mitigating credit for that cooperation.[103] However, as a "relevant potential mitigating factor", cooperation alone does not determine whether or not to charge a corporation: the government may charge even the most cooperative corporation pursuant to the principles

[94] USDOJ, Office of the Deputy Attorney General 2008b, Introduction.
[95] USDOJ, Office of the Deputy Attorney General 2008b, Introduction.
[96] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.300.B.
[97] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.700.A.
[98] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.700.A.
[99] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.710.
[100] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.720.
[101] USDOJ, Office of the Deputy Attorney General 2008b, n. 2.
[102] USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(a).
[103] USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(a).

enumerated in the guidelines, "if, in weighing and balancing the factors described [in the guidelines] the prosecutor determines that a charge is required in the interests of justice."[104] The memo also states that a corporation need not disclose legal advice given by a corporate counsel, and prosecutors may not request such communications' disclosure as a condition for the corporation's eligibility to receive cooperation credit. The same applies to non-factual or core attorney work product.[105]

The guidelines prohibit prosecutors from telling a corporation not to advance or reimburse attorneys' fees or provide counsel to employees, officers, or directors under investigation or indictment, nor should prosecutors take into account whether a corporation is taking such action.[106] The guidelines similarly prohibit prosecutors from requesting a corporation to refrain from entering into a joint defense agreement and provide that the mere participation of a corporation in such an agreement "does not render the corporation ineligible to receive cooperation credit."[107] The memo also states that counsel who believe that prosecutors are violating these guidelines are encouraged to raise their concerns with the United States Attorney or Assistant Attorney General.[108]

It is, however, worth noting that, according to the memo, the guidelines "provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice."[109]

The concern with preserving the attorney-client privilege and attorney work product protections available to corporations led to a legislative initiative. Senator Arlen Specter (R-PA) introduced a bill in the US Senate, the Attorney-Client Privilege Protection Act, in 2006, and reintroduced it in 2008 and again in 2009.[110] On November 12, 2007, a similar bill was passed in the House of Representatives as HR 3013.[111] In the latest – 2009 – version of the act, the US Congress states, after finding, inter alia, that "[a]n indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to

[104]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(a).

[105]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(b).

[106]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.730.

[107]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.730.

[108]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.760.

[109]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.1300.

[110]The latest version is S. 445: Attorney-Client Privilege Protection Act of 2009, introduced in the US Senate on February 13, 2009, <www.govtrack.us/congress/billtext.xpd?bill=s111-445> (hereafter S. 445).

[111]HR 3013: Attorney-Client Privilege Protection Act of 2007, introduced in the US House of Representatives on July 12, 2007 by Rep. Robert Scott (D-VA), <www.govtrack.us/congress/bill.xpd?bill=h110-3013> (hereafter HR 3013).

survive post-indictment or to dispute the charges against it at trial",[112] it would prohibit any US agent or attorney in any federal investigation, or criminal or civil enforcement matter, from: demanding or requesting any organization, employee, or agent to waive the protection of the attorney-client privilege or attorney work product doctrine;[113] offering to reward, or actually rewarding, an organization, employee, or agent for waiving these protections;[114] or threatening adverse treatment or penalizing an organization, employee, or agent for declining to waive these protections.[115]

The Act also prohibits an agent or attorney of the United States from considering the following facts in making a civil or criminal charging or enforcement decision or determining whether an organization or its employees, officers, directors, or agents are cooperating with the government: a good faith assertion of the protection of the attorney-client privilege or attorney work product doctrine; the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee, officer, director, or agent of an organization; and the preparation of a bona fide joint defense, or conclusion of an information sharing or common interest agreement between an organization and its employees, officers, directors, or agents.[116]

In introducing the bill, Senator Specter acknowledged that the Filip Memo's guidelines prohibit prosecutors from asking for privilege waivers "in nearly all circumstances", but asserted that, "as evidenced by the numerous versions of the Justice Department's Corporate Prosecution Guidelines over the past decade, the Filip reforms cannot be trusted to remain static", as they "are subject to unilateral executive branch modification", and thus, "to avoid a recurrence of prosecutorial abuses and attorney-client privilege waiver demands, legislation is necessary."[117]

In response to a written question on the issue of the impact of the 1999 Holder Memo, Eric Holder, now Attorney General, said:

> When the so-called Holder Memo was issued on June 16, 1999, we did not contemplate nor envision what the practice in the field appears to have become in certain jurisdictions or by certain prosecutors, namely the blanket demand that corporations waive their attorney-client privilege as a litmus test of the corporation's good citizenship. . . The disparity between our practice and what has developed over the ensuing nine years in the field is significant."[118]

The bill has yet to be acted on by Congress.

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[112] HR 3013, § 2(8).

[113] HR 3013, § 3, amending 18 USC, Ch. 201, by inserting § 3014(b)(1)(A).

[114] S. 445, above n. 110, § 3, amending 18 USC Ch. 201, by inserting § 3014(b)(1)(B).

[115] S. 445, above n. 110, § 3, amending 18 USC Ch. 201, by inserting § 3014(b)(1)(C).

[116] S. 445, above n. 110, § 3, amending 18 USC Ch. 201, by inserting § 3014(b)(2)(A) and (B).

[117] Coyle 2009.

[118] Attorney General Eric Holder, quoted in Coyle 2009.

### 2.3.3 *Deferred Prosecution Agreements and Non-prosecution Agreements*[119]

While corporate criminal investigation by the Department of Justice may result in a corporation's indictment and prosecution, the Speedy Trial Act of 1974[120] authorizes the prosecutor to defer prosecution, as it provides that time limits under the Act are suspended during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."[121]

Beginning with the 1999 Holder Memo,[122] and continuing through the Thompson Memo,[123] the McNulty Memo,[124] and finally the Filip Memo,[125] the DOJ has authorized pre-trial diversion (deferred prosecution) by prosecutors as they enter non-prosecution agreements in exchange for corporate cooperation. The Filip Memo is more detailed. In the guidelines, "Principles of Federal Prosecution of Business Organizations", which are now set forth in the USAM, prosecutors are explicitly instructed to "consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases."[126] Thus,

> where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims. Ultimately, the appropriateness

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[119] There is voluminous literature on such agreements. For illustrative purposes see Zierdt/Podgor 2008, 1; Spivack/Raman 2008, 159.

[120] 18 USC § 3161.

[121] 18 USC § 3161(h)(2).

[122] USDOJ, Office of the Deputy Attorney General 1999, § VI.B.

[123] USDOJ, Office of the Deputy Attorney General 2003, § VI.B.

[124] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.1.

[125] USDOJ, Office of the Deputy Attorney General 2008b; USAM § 9–28.1000.

[126] USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9–28.1000(A), General Principle.

> of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.[127]

The difference between Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) is that while criminal charges are filed in the former, with prosecution deferred and charges to be subsequently dismissed (provided the company successfully complies with certain specified terms in the DPA for a period of time), no criminal charges are filed in the latter but the investigation remains pending until the company fulfills the conditions set in the NPA.

These agreements have proliferated since 2003. According to a Washington Legal Foundation study, "Federal Erosion of Business Civil Liberties",[128] there were eighteen such agreements through 2002.[129] Subsequently, the number increased to forty-seven between 2003 and 2006; there were forty such agreements in 2007 alone and sixteen in 2008.[130] A combination of reasons led to this growth. These include: the establishment of the Corporate Fraud Task Force in 2002 following the Enron debacle; the indictment of Arthur Andersen and its dissolution following the firm's decision not to accept the terms of a DPA offered by the US Attorney; and the issuance of the Thompson Memo in January 2003. As a result of these developments, prosecutors began aggressively investigating corporations.

Although the terms and conditions in these agreements vary according to the individual prosecution, there are several common elements in both DPAs and NPAs. Four specific agreements will be considered for illustrative purposes – two in 2005, one by KPMG and the other by Bristol Myers Squibb Co. (BMS), and two in 2009 – one by Beazer Homes, USA, Inc. (Beazer) and the other by UBS AG, Switzerland's largest bank.

#### 2.3.3.1 Examples

KPMG

In the KPMG agreement,[131] which the company entered into after the government's tax shelter investigation, fines, restitution, and penalties amounted to $456 million. The firm agreed to cease its private client and

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[127] USDOJ, Office of the Deputy Attorney General 2008, USAM § 9–28.1000(B), Comment.

[128] Washington Legal Foundation 2008.

[129] Washington Legal Foundation 2008, 6–2, Ch. 6, Deferred Prosecution and Non-Prosecution Agreements.

[130] Finder/McConnell/Mitchell 2009, 15.

[131] USDOJ 2005.

compensation and benefits tax practice, and agreed to cooperate with the government to provide complete and truthful disclosure of all relevant documents and records. KPMG agreed to make available its employees, officers, and directors to provide information and testimony; and accepted and acknowledged responsibility for its wrongful conduct in committing tax evasion in preparing false and fraudulent tax returns. The US Attorney's office retained discretion to determine if KPMG violated any provision of the agreement and to recommence prosecution, and KPMG established a permanent education and training program to promote compliance and ethics in its work. It also agreed to oversight and monitoring by an individual selected by the US Attorney's office, with the monitor having extensive power.

### BMS

BMS entered into an agreement[132] after it was charged with securities fraud for inflating its sales and earnings. It admitted guilt and promised full cooperation with the government. The company had already undertaken a long list of arduous remedial steps. Nonetheless, the prospective reform and remedial measures included: the appointment of a non-executive chairman of the board and another board member approved by the US Attorney; the making of significant personnel changes; the replacement of many officers, including the Chief Financial Officer; and, in addition to more than $500 million it had already agreed to pay to its shareholders, the paying of $300 million more in restitution. An independent monitor with extensive powers was appointed. The company also endowed a chair in business ethics at Seton Hall University Law School, the *alma mater* of the US Attorney.

### Beazer

The company entered into a DPA,[133] acknowledging fraudulent mortgage origination practices and also admitted to having engaged in a scheme to commit securities and accounting fraud. It waived its right to indictment on these charges. The company ceased the business activities of Beazer Mortgage Company. It terminated executives and employees who had been identified as responsible for the misconduct and agreed to cooperate with the US in its ongoing investigation. The company paid restitution of $10 million to homebuyer-victims of its fraudulent scheme to increase its profit margin and promised to pay up to an additional $50 million as it recovered financially.

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[132] Deferred Prosecution Agreement Between BMS and the United States Attorney's office for the District of New Jersey, June 13, 2005, <www.justice.gov/usao/nj/press/files/pdffiles/deferredpros.pdf>.

[133] USDOJ 2009b.

UBS

The charge was that UBS conspired to defraud the US by impeding the Internal Revenue Service with secret banking accounts. UBS agreed to provide the government with the "identities of, and account information for, certain United States customers of UBS' cross-border business." In the DPA[134] it agreed to exit the business of providing banking services to US clients with undeclared accounts and agreed to pay $780 million in fines, penalties, interest, and restitution. It acknowledged responsibility for its actions and omissions, and promised continued cooperation and remedial actions.

As illustrated by these cases, the terms and conditions of such agreements generally include a company's:

- admission of the wrongful act as it admits to the "statement of facts" in the DPA;
- commitment to cooperate with the government's ongoing investigation, which may require making its employees and documents available and providing evidence of wrongdoing by its employees;
- payment of restitution;
- restrictions on its business activities;
- governance reforms;
- commitment to future compliance;[135] and
- appointment of a monitor to oversee compliance with the terms of a DPA or NPA.

Major concerns with these agreements relate to the wide discretion of prosecutors (i.e., that companies are at their mercy and accept onerous terms and conditions and provide many concessions to avoid the stigma of indictment and its other disastrous consequences); the lack of set standards, which could result in abusive use of DPAs and NPAs; and the lack of judicial review of such agreements.

In response to these concerns, recent developments include:

- the announcement of new DOJ policies regarding restitution and the selection and role of monitors; and
- a congressional initiative aimed at regulating DPAs and NPAs.

#### 2.3.3.2 New DOJ Policies

As to restitution, in 2008, the DOJ announced a new policy that would prohibit extraordinary restitution, such as that paid by BMS to Seton Hall to establish a chair. Under the new policy,

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[134] USDOJ 2009a.

[135] On compliance programs: Finder/McConnell/Mitchell 2009, 16 et seq.; Podgor 2009.

> [p]lea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to charitable, educational, community, or other organization or other individual that is not a victim of the criminal activity or it not providing services to redress the harm caused by the defendant's criminal conduct.[136]

As to the selection and role of corporate monitors in DPAs and NPAs in reviewing compliance, Acting Deputy Attorney General Craig Morford issued a memorandum on March 7, 2008, entitled "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations",[137] clarifying the monitor's role as being

> to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct. A well-designed ethics and compliance program that is not effectively implemented will fail to lower the risk of recidivism.[138]

To select monitors, DOJ components are to establish a selection committee and review a panel of qualified candidates, with the Deputy Attorney General having the final say.[139] As to the duration of the monitorship, the memo provides a list of factors and the duration depends upon the agreement.[140]

#### 2.3.3.3 Congressional Initiative

A congressional initiative aimed at regulating DPAs and NPAs, HR 1947, "Accountability in Deferred Prosecution Act of 2009", was introduced in the US House of Representatives on April 4, 2009.[141] This bill, which is identical to the one introduced in the prior congress, HR 6492, would require the Attorney General to "issue public written guidelines for deferred prosecution agreements (DPA) and non-prosecution agreements (NPA)." Thus, the guidelines would: identify the circumstances in which an independent monitor is warranted to oversee the operations of a corporation being investigated and the monitor's duties; define the means of establishing the terms and conditions of such agreements, including penalties; describe the process for ensuring compliance with, and identifying breaches of, the guidelines; set the duration of such agreements; describe "what constitutes the cooperation... required by the agreement from the organization and its employees with respect to any ongoing criminal investigations"; and define

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[136] USDOJ, Office of the Deputy Attorney General 2008b, incorporated in USAM § 9-16.325 (2008).

[137] USDOJ, Office of the Deputy Attorney General 2008a.

[138] USDOJ, Office of the Deputy Attorney General 2008a.

[139] USDOJ, Office of the Deputy Attorney General 2008a.

[140] USDOJ, Office of the Deputy Attorney General 2008a.

[141] <thomas.loc.gov/home/gpoxmlc111/h1947_ih.xml>.

when and why it would be appropriate to use an NPA rather than a DPA. Under the bill, the Attorney General would be required to establish rules for the selection of independent monitors under DPAs that require monitors to be drawn from a national list of possible monitors. The bill would also require increased public disclosure of NPAs and DPAs.

## 2.4 Appraisal and Recommendations

Critics of the current US practice on corporate criminal liability argue that the current doctrine – application of a strict *respondeat superior* doctrine in the criminal context – created through common law by courts, lacks, not only congressional action, but also Supreme Court precedent.[142] They assert that *NY Central* was a mistake[143] and that, as it has been misread and misapplied by courts, it is contrary to the goals of criminal law.[144]

Critics also contend that the current doctrine under which the corporation can be held criminally liable for the act of a lowly employee,[145] and even when the employee has acted in violation of a corporate policy explicitly forbidding such action,[146] makes no sense and indeed serves no useful function. Similarly, finding corporations criminally liable based upon the "collective knowledge" of the corporation's employees as the sum of the knowledge of all the corporation's employees,[147] places enormous undue burden on the corporate actor.

Hence, various reform measures have been offered. Professor Ellen Podgor suggests a "good faith" affirmative defense be incorporated into the US legal system and thus made available to corporations that exert themselves "to achieve compliance with the law as demonstrated in their corporate compliance program."[148] Professor Peter Henning offers rehabilitation as the proper goal of applying criminal law to corporations.[149] Andrew Weissman and David Newman would like the burden to be placed "on the government to prove that a company's program was inadequate as

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[142] Weissmann/Ziegler/McLoughlin/McFadden 2008, 2.

[143] Hasnas 2009.

[144] Weissmann/Ziegler/McLoughlin/McFadden 2008, 2 et seq.; Khanna 1996, 1477, arguing that corporate criminal liability serves no valid legal purpose.

[145] See above n. 39.

[146] See above n. 40 and accompanying text.

[147] See above nn. 47–51 and accompanying text.

[148] Podgor 2007, 1538.

[149] Henning 2009; Meeks 2006, 77.

a prerequisite to criminal corporate liability."[150] Similarly, it is proposed that civil remedies should suffice to meet the goal of deterrence.[151]

Professor Beale aptly argues for retaining corporate criminal liability:

> The frequency of corporate misconduct, the extraordinarily serious consequences of such conduct, and the difficulty of proving many corporate and white collar offenses should make us cautious about restricting the legal tools that are available to combat corporate misconduct. Criminal liability should not be the only remedy, but the hammer of corporate criminal liability should remain in the toolkit of responses to serious corporate misconduct, particularly since many other tools have been eliminated or restricted.[152]

The US Department of Justice provides the following rationale for corporate criminality:

> Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.[153]

The public benefits the DOJ details include "a unique opportunity for deterrence on a broad scale", when a corporation is indicted for criminal misconduct that is widespread in its industry. Also, there may be specific deterrence of a corporate indictment by changing the culture of the corporation and the behavior of its employees. Furthermore, in some specific crimes, such as environmental crimes or sweeping financial frauds, there is a substantial federal interest to indict because such crimes carry a major risk of great public harm.[154]

Does corporate criminal liability accomplish a useful function for law enforcement purposes? Undoubtedly it does, as it reflects society's need to ensure that corporations tow the line by scrupulously adhering to the rule of law. After all, corporations currently play such a central role in everyday life, they wield such enormous powers, and so many of them have been recently involved in serious misconduct.

The strict *respondeat superior* approach to corporate behavior in a criminal context is currently entrenched in the US legal system. As alternatives, the reforms discussed earlier are indeed worthy of consideration. However, the alternative approach suggested by the American Law Institute

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[150] Weissman/Newman 2007, 451. In *US* v. *Ionia Mgmt. SA,* 555 F.3d 303 (2nd Cir. 2009), discussed above nn. 42–46 and accompanying text, the court rejected this argument.

[151] Rischel/Sykes 1996, 310; Hamdani/Klement 2008, 217.

[152] Beale 2007, 1505 et seq.

[153] USAM, see above n. 40, § 9-28.200.A, General Principle.

[154] USAM, see above n. 40, § 9-28.200.B, Comment.

in the MPC seems well-suited both to meeting the societal need for effective corporate regulation and to allaying corporations' concerns with the current doctrine.

The MPC adopts the *respondeat superior* standard when a legislative purpose to impose such liability "plainly appears."[155] However, it adopts the "due diligence" standard, under which no liability would attach if "the high managerial agent having supervisory responsibility over the subject matter of the offense" used due diligence to prevent the commission of the wrongdoing.[156] Furthermore, where there is no applicable statutory provision, criminal liability would not be imputed to the corporation by the wrongful act of any employee but only of the board of directors or high managerial agent acting on behalf of the corporation within the scope of his/her (or its) office or employment.[157] As to DPAs and NPAs, the current developments mentioned earlier, coupled with the adoption of reforms suggested in the congressional initiative, will provide the necessary protection against what is perceived as potential prosecutorial abuse because of the excessive discretion prosecutors currently enjoy.

Although the new approach endorsed here is not likely to be adopted immediately, it certainly is warranted.

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[155] ALI 1962, § 2.07(1)(b).

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