

Introduction

Emerging Trends in Corporate White Collar Criminal and Regulatory Law—An Overview

A generation ago, corporations, even in regulated industries, allocated scant resources to legal compliance. There were few treatises or seminars to guide an attorney whose corporate client suspected wrongdoing by an officer or employee. There were no U.S. Department of Justice policy statements or amnesty programs from which to judge the risks and benefits of voluntary disclosure of a company's violation of law. The Organizational Sentencing Guidelines lay in the future, an unheralded and unforeseen revolution in organizational sentencing philosophy.

As a general rule in those days, organizations got off lightly in criminal cases. From the corporation's perspective, a corporate guilty plea was a bargaining chip to exchange for dropping or reducing charges against the corporation's officers or employees. After all, in the 1980s, many prosecutors thought "RICO" was the name of a character played by Edward G. Robinson in *Little Caesar*. The Resource Conservation and Recovery Act was enacted in 1976, but a decade passed before its draconian penalties were wielded systematically against organizations that violated environmental laws. Antitrust fines were a fraction of the up to \$100 million penalty now prescribed by statute for corporations. The False Claims and Foreign Corrupt Practices Acts were not robustly enforced. And, of course, Sarbanes-Oxley was decades away.

Today, the landscape is dramatically different. In such areas as securities fraud, antitrust, healthcare fraud and environmental law, corporate exposure to criminal and civil liability has increased geometrically. The travails of major corporations gain increasing public attention. In particular, the Enron, WorldCom, and other highly publicized company scandals in the early 2000s, and then the financial crisis of 2008, generated substantial pressure on Congress, the DOJ, the U.S. Sentencing Commission, state and local prosecutors, and judges to impose heavier corporate sentences. Corporations have paid billions to resolve FCA cases, and find themselves in the crosshairs of the SEC and DOJ regarding foreign subsidiaries' payments to foreign officials.

New theories of criminal liability proliferate. Under the “responsible corporate officer” doctrine, for example, prosecutors in some jurisdictions have succeeded in obtaining convictions under regulatory statutes, such as the Resource Conservation and Recovery Act, of organizational officials who had no actual knowledge of or causal relationship to violations, but whose positions of responsibility gave them the power to prevent the violations. A similar doctrine has developed in federal criminal antitrust prosecutions and in prosecutions of pharmaceutical executives.¹ Lately, governments have invoked state nuisance laws against companies alleged to have sold products that resulted in the nation’s epidemic of opioid addiction.²

Likewise, some jurisdictions have adopted the “collective knowledge” doctrine in corporate prosecutions, under which the requisite knowledge need not be imputed to the corporation from a single individual, but may be established by imputing to the corporation the aggregate or collective knowledge of the employees or agents as a group. In effect, under this doctrine, a corporation can be found guilty of a crime even though no single employee has been or could have been guilty of the crime.³

In addition to increasing the scope of corporate liability, the trend of white collar criminal law has enhanced the power of prosecutors to punish corporate offenders or, in lieu of criminal punishment in the traditional sense, to impose onerous deferred prosecution agreements.

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1. See, e.g., *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990); see also discussion *infra*, chapter 12.
 2. *State of Oklahoma ex rel. Hunter v. Purdue Pharma L.P.*, Case No. CJ-2017-816, Judgment After Non-Jury Trial (Dist. Ct. Okla. Cleveland Cty. Aug. 26, 2019).
 3. See, e.g., *United States v. Bank of New Eng., N.A.*, 821 F.2d 844, 856 (1st Cir. 1987); see also *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005) (“[C]ase law abounds with discussions of securities fraud by accounting firms that concentrate on the firm’s collective state of mind, not that of individual partners or employees.”). See, e.g., *State of New York v. UPS*, 253 F. Supp. 3d 583 (S.D.N.Y. 2017); *SEC v. Tropikgadget FZE.*, 146 F. Supp. 3d 270 (D. Mass. 2015). Under the False Claims Act, however, a plaintiff cannot establish scienter by aggregating the “collective knowledge” of company employees. Rather, a plaintiff must show that particular employees acted with the requisite intent. *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1274–75 (D.C. Cir. 2010) (“the ‘collective knowledge’ theory allows ‘a plaintiff to prove scienter by piecing together scraps of ‘innocent’ knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds.’”); see also discussion *infra*, chapter 11.

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These agreements can require that a company impose remedial measures, pay a monetary penalty, admit wrongdoing, and submit to an independent compliance monitor or examiner. While the number of deferred prosecution agreements have dropped, and some courts have rejected them, they remain an important tool for prosecutors to invoke against companies. *See* chapter 9. In addition, intrusive supervision of corporate compliance activities by the government is routine for pharmaceutical companies settling healthcare fraud marketing charges.

In the 1980s, corporate criminal fines generally were capped by practice or statute at several hundred thousand dollars or less. Today, through the use of multiple-count indictments as well as the Criminal Fines Enhancement Act, which bases sentences on the amount of gain to the offender or loss to the victim, the prosecutor's ability to seek and impose criminal fines appears limited only by the net worth of the corporation.

But in tandem with the increase in prosecutorial sticks, there are ways for corporations to obtain leniency if they have engaged in vigorous self-policing and, notwithstanding that an employee broke the law, have disclosed the violation and cooperated with the government. The "Principles of Federal Prosecution of Business Organizations," which provide the criteria prosecutors must use in deciding whether to charge a company, emphasize these two considerations as have subsequent pronouncements regarding corporate cooperation such as the Yates Memorandum, remarks of Rod Rosenstein at a conference in 2018 and the FCA Cooperation Credit Guidelines issued by DOJ in May 2019.⁴ As a result, the government has enlisted corporations in its battles against crime. Instead of devoting its resources exclusively to deterring and detecting law-breakers, the government now spends time and effort seeking to modify the behavior of companies to become law enforcers.

The result has been a proliferation of self-policing corporate compliance programs in almost every area of business and commerce. These programs involve auditing and monitoring efforts, employee

4. *See infra* chapters 1 and 2. *See* U.S. DEPARTMENT OF JUSTICE, Individual Accountability for Corporate Wrongdoing (2015), www.justice.gov/archives/dag/file/769036/download; U.S. DEPARTMENT OF JUSTICE, Deputy Attorney General Rod. J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (2018), www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0; U.S. DEPARTMENT OF JUSTICE, Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual (2019), www.justice.gov/opa/pr/departments-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

“hotlines” to report suspected or actual violations of law or questionable business practices, corporate ombudsmen departments, more vigorous screening of applicants for employment, and severe discipline of employees who violate a company’s compliance standards.

There are good reasons for implementing such programs even though the Organizational Sentencing Guidelines are no longer binding on the district courts as a result of Supreme Court rulings:

1. Their existence can be used to persuade prosecutors that criminal charges are inappropriate and unnecessary;
2. They may qualify the company for more lenient treatment in the event of a criminal conviction; and
3. Most importantly, they may succeed in preventing or deterring criminal conduct by employees that might otherwise ensnare the company in the legal and public relations morass often reported in the front or business pages of the newspapers.

At the same time, companies have encountered significant difficulties with their compliance programs. For example, as recommended by the Organizational Sentencing Guidelines, corporations have established hotlines for employees to report information on illegal activities. Some employees, however, have used the hotlines to make false charges against rivals. Other employees have reported suspicions of wrongdoing that, upon investigation, proved to be without merit. When some of these employees were laid off, they filed lawsuits claiming they had been retaliated against for reporting questionable activity. Companies need to be constantly vigilant in this area.

Another potential obstacle to effective compliance programs arises from government programs rewarding whistleblowers. The FCA, for example, provides bounties of up to 30% of the government’s recovery to private parties who bring allegations of fraud to the government. The SEC has similar rules awarding whistleblowers up to 30% of the monetary penalties recovered in a successful judicial or administrative action for violation of federal securities laws. The potential for large monetary awards may incentivize corporate employees to report information to the government before they utilize internal reporting procedures. The SEC, recognizing the potential harm to corporate compliance programs, included provisions designed to discourage whistleblowers from bypassing internal reporting procedures while at the same time preserving a whistleblower’s eligibility for an award. The FCA, however, imposes no such requirement. Both the FCA statute and Dodd-Frank protect whistleblowers from retaliation, and the SEC cautions companies against entering into severance agreements with employees that impede them from contacting the government about improprieties. *See* chapter 6.

The longstanding compliance tool of internal investigations has both benefits and disadvantages. On the positive side, they are an effective means for management to learn quickly the facts about potential illegal conduct by employees and to formulate an appropriate legal strategy. An internal investigation can reassure the public, stockholders, creditors and enforcement agencies that the company is addressing its problems. An internal investigation can identify and recommend internal controls, monitoring procedures, and audit strategies to prevent a similar occurrence even though, as pointed out above, the organizational sentencing guidelines are no longer binding on the district courts as a result of Supreme Court rulings.

But the risks of internal investigations must be recognized. Both for the company and the investigator, it can be likened to running an obstacle course on a minefield. Some investigations have uncovered wrongdoing that was not originally targeted, sent frantic employees into the arms of prosecutors, tarnished the reputations of the internal investigators, and proved more controversial than the events that prompted them in the first place. More than one internal investigation has uncovered evidence that later was used to convict the corporation, which had not disclosed the violation voluntarily to government agencies. Indeed, in one famous example the prosecution's trial exhibits included the "confidential" and "privileged" report of the investigation, questionnaires filled out by employees concerning their knowledge of bribes and slush funds, and notes taken by attorneys during interviews of company employees.⁵

An internal investigation that uncovers criminal violations by corporate employees—not yet known to enforcement agencies—leaves a company with a difficult choice if there is no statute or regulation requiring disclosure of the violation. If the company opts for disclosure of an employee's violation of law for which the company can be criminally prosecuted, it will be handing to the prosecutor the evidence of its guilt. But voluntary disclosure may avoid criminal charges, result in a reduced fine or result in regulatory leniency.

Taken together, these trends have transformed the practice of corporate criminal representation for both inside and outside counsel. In today's new enforcement climate, every action by a company in dealing with suspected criminal conduct by its employees, implementing a compliance program or responding to a grand jury subpoena can set in motion a chain of events that may determine its ultimate fate at the hands of a prosecutor, jury or judge.

5. See *United States v. Southland Corp.*, 760 F.2d 1366, 1371–72, 1375–77 (2d Cir. 1985).

As an example, in conducting an internal investigation, the company's attorneys must advise employees whom they interview that the attorneys represent only the company, who will ultimately determine whether to maintain confidentiality or to disclose the information to a third party (typically, law enforcement agencies). The failure to give such advice could result in creation of an attorney-client relationship between the investigating attorneys and the employee, and courts have criticized incomplete warnings in this regard.⁶ In turn, that relationship could limit the company's ability to disclose voluntarily the employee's violations of law to law enforcement agencies.

White collar defense counsel maximize the opportunity to obtain leniency for, or even avoid prosecution of, their corporate and individual clients by strong advocacy of factual and legal defenses available in the event of a trial. Put another way, the defense counsel should consider openly and persuasively identifying for the prosecutor the weaknesses in his or her legal and factual theories. Ultimately, this tactic requires balancing risks and rewards. On the one hand, such disclosure of defenses well in advance of trial may give the prosecutor an opportunity to fill holes in its case. On the other, identifying flaws in the prosecutor's case may be the only means for defense counsel to obtain sufficient leverage to obtain a plea or deferred prosecution agreement, or even avoid charges altogether. Even when deployed, this tactic will succeed only to the extent that such weaknesses exist; therefore, from the outset defense counsel must thoroughly and creatively develop aggressive defenses that will at least shake a prosecutor's confidence in his or her case. Even if unsuccessful at deterring a prosecution, such defenses certainly will be needed for a trial.

Today, there are two categories into which a corporation whose employees have violated criminal law will fall. The first category includes companies that, because they did not cooperate or (more common) failed to cooperate in a timely and thorough manner, receive severe and painful punishment at the hands of prosecutors armed with the variety of law enforcement tools summarized above. The second category, which companies increasingly seek to join, includes companies that receive lenient treatment, including amnesty or a declination of prosecution, for comparable offenses because they have adopted defensive measures, such as compliance programs to deter and detect criminal violations, and have responded swiftly and carefully to such violations. Into which camp a corporation falls will depend greatly upon how the corporation conducts internal investigations.

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6. See, e.g., *In re Grand Jury Subpoena*, 415 F.3d 333, 340 (4th Cir. 2005).

Introduction

As never before, in giving advice on corporate criminal and regulatory issues, a company's in-house counsel must have at least a working knowledge of the many issues that surround modern criminal and regulatory practice. The Arnold & Porter Kaye Scholer LLP *Deskbook on Internal Investigations, Corporate Compliance, and White Collar Issues* represents the *beginning* of the process of reaching that level of understanding. It can never be a substitute for the advice of experienced white collar law practitioners.

The Deskbook is divided into two parts. Part I addresses "process" issues, including corporate compliance, internal investigations, and government leniency programs. Part II addresses "substance," that is, selected, specific white collar substantive law issues, such as pharmaceutical drug offenses, the False Claims Act, the Foreign Corrupt Practices Act, criminal antitrust, perjury statutes and money laundering.

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