Corporate and White Collar Crime

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Corporate and White Collar Crime

Cases and Materials

Seventh Edition

The Late Kathleen F. Brickey
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In Memory of Kathleen F. Brickey (1944-2013)

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Preface

In December 1939, in a keynote address for the joint annual meeting of the American Sociological Society and the American Economic Association, Edwin Sutherland introduced the concept of the "white collar criminal," gave the world a catchphrase, and launched an entire new discipline. A decade later, in his book *White Collar Crime*, he defined the term to mean an offense "committed by a person of respectability and high social status in the course of his occupation." The construct he developed relied on the social status of the type of offender — with an emphasis on corporations and tycoons — and the circumstances surrounding the crime as the relevant points of reference. In his book, focused on business crime, Sutherland zeroed in on what he deemed to be criminal behavior by the seventy largest U.S. manufacturing, mining, and mercantile corporations. Reviews at the time saw his groundbreaking work as a contribution to "the largely unexplored field — violation of law in the American business community."

As the concept of white collar crime evolved over time, scholars and law enforcement shifted the focus away from the offender to the nature of the offense, the locus of the wrong, or the means used to commit it. Increasingly, experts have used the term to describe the many economically motivated, non-violent offenses committed by a variety of individuals, not just powerful business leaders and government officials. Under the new framework, one that Sutherland would not likely recognize, prosecutions of the poor for welfare fraud or blue collar workers for small-time embezzlement could count as cracking down on white collar crime. After decades of academic debate, there is still no standard definition nor a coherent organizing principle. Notwithstanding the difficulty of defining the subject, in the wake of Enron-era accounting scandals, the insider-trading epidemic, the mortgage-fraud-backed financial crisis, and the recent convictions of a slew of President Donald Trump's campaign associates, white collar crime has become a growing field within the legal profession and is becoming an established part of the law school curriculum.

This casebook endeavors to provide a theoretical and policy framework for considering the respective roles of institutional and individual responsibility and for systematically examining the principal federal statutes that prosecutors regularly invoke in corporate and white collar crime cases. In addition to relying on reported judicial decisions as vehicles for discussion, the book uses problems, case studies, and other similar materials to illustrate the context within which the issues are framed.

This edition nonetheless retains a strong focus on substantive criminal law. And because major federal criminal statutes are the organizing principle of the course, the book is designed to be used with a companion statutory supplement.

For the sake of brevity and clarity, many footnotes and citations in the edited cases have been omitted and most parallel citations have been eliminated without indication.

Footnotes that have been retained are renumbered consecutively throughout each chapter. Explanatory footnotes that have been added to cases and other quoted material are identified by the legend "—ED."

JENNIFER TAUB

February 2021

Acknowledgments

Kathleen Brickey was a pioneer in the field of corporate and white collar criminal law. Beginning in 1984 with her multi-volume treatise *Corporate Criminal Liability*, Professor Brickey cleared a path for many scholars to follow. One of her most generous contributions is this casebook.

It was with great honor that I accepted Aspen Publishing's invitation after her passing to carry forward this casebook. I have benefitted from feedback received from students and colleagues on earlier editions of the book, and on related white collar crime research, including by BreannaWeaver and KurtWalters. I thank them for their helpful comments. I am also indebted to the following authors, organizations, and copyright holders for permission to reprint excerpts from their works:

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Corporate and White Collar Crime

1

Corporate Criminal Liability

I. INTRODUCTION

For well over a century, Congress has viewed criminal sanctions as appropriate mechanisms for controlling corporate misconduct. The federal government's early predisposition to include criminal penalties in statutes that regulate corporate behavior is nowhere better illustrated than with the passage of the Sherman Antitrust Act of 1890. Even though corporate criminal liability was not yet widely recognized, Congress nonetheless made the Sherman Act's criminal and civil prohibitions against unlawful restraints of trade and monopolies expressly applicable to corporations. Because the financial impact of imposing criminal fines on corporations would ultimately be borne by innocent shareholders, it seemed inevitable that the Supreme Court would be called upon at a relatively early date to consider the wisdom, fairness, and legality of doing so.

A. CORPORATE CRIMINAL LIABILITY

NEW YORK CENTRAL & HUDSON RIVER RAILROAD v. UNITED STATES

212 U.S. 481 (1909)

Mr. Justice DAY delivered the opinion of the court.

[In 1904, several sugar refiners contracted with the New York Central & Hudson River Railroad (the "Railroad") to ship sugar from New York to Detroit. Under the Elkins Act of 1903, it was unlawful for any railroad to provide discounts off published shipping rates. Correspondence between the Railroad and the sugar refiners' managers established that the Railroad agreed to charge the refiners five cents less than the published rate per hundred pounds for the New York to Detroit route. The refiners obtained the rebate by sending rebate claims to the Railroad's assistant traffic manager Fred Pomeroy, who then forwarded them to the general manager. The claims were paid from the Railroad's funds. The correspondence made clear that Railroad provided the discount to prevent the refiners from shipping their sugar by barge and to give the refiners

some competitive relief. The Railroad and Pomeroy were convicted for violating the Elkins Act and sentenced to pay, respectively, fines of $102,000 and $6,000.]

The principal attack in this court is upon the constitutional validity of certain features of the Elkins Act. That act, among other things, provides:

> (1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce . . . which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor . . . under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed . . . by this act. . . .

It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. . . . It is urged that as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates, they could not be lawfully charged against the corporation. As no action of the board of directors could legally authorize a crime, and as indeed the stockholders could not do so, the arguments come to this: that owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case.

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Modern 559) that "a corporation is not indictable, although the particular members of it are." In Blackstone's Commentaries, chapter 18, § 12, we find it stated: "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may in their distinct individual capacities." The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, § 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: "Since a corporation acts by its officers and agents[,] their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously." Without citing the state cases holding the same view, we may note Telegram Newspaper Company v. Commonwealth, 172 Mass. 294, in which it was held that a corporation was subject to punishment for criminal contempt, and the court, speaking by Mr. Chief Justice Field, said: "We think a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong." . . .

It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment.

And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct.

A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act.

In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted by the defendant at the trial that, at the time mentioned in the indictment, the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central & Hudson River Company, and were authorized to unite with other companies in the establishing, filing, and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus, the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy. . . .

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 its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact

that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity 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.

There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises. . . .

Affirmed.

Notes and Questions

1. In what sense was the act of giving rebates the act of the corporation? What evidence supports that conclusion?

2. What policy considerations led the Court to conclude that corporations can be held criminally responsible? Is the Court's reasoning persuasive?

3. Some commentators have suggested that *New York Central* has historically been misconstrued as establishing a general rule that corporations are criminally liable under respondeat superior principles. What was the Court's precise holding in *New York Central* and what were the critical steps in the Court's reasoning? How broadly (or narrowly) should the Court's opinion be read?

4. Most corporations are creatures of state law. They operate under charters issued by the state and must comply with state requirements to remain in good standing. Why does the federal government have the power to sanction corporations like New York Central?

FRANCIS T. CULLEN, GRAY CAVENDER, WILLIAM J. MAAKESTAD & MICHAEL L. BENSON, CORPORATE CRIME UNDER ATTACK

355-356, 362-363 (2d ed. 2006)

Corporate Criminals or Criminal Corporations? The Rise of Organizational Liability

On June 16, 2002, a Chicago jury declared the accounting firm of Arthur Andersen guilty of a felony charge of obstructing justice for destroying more than a ton of documents and deleting more than 30,000 e-mails and computer files related to one of its most important clients: Enron. At the time of the conviction, Andersen was one of the five largest accounting firms in the world, with nearly 85,000 employees worldwide. Within a year of the conviction, employees of Andersen numbered less than 300. The Arthur Andersen trial marked the most publicized criminal prosecution of a business organization since the Ford Pinto case. And, though the firm's conviction was later overturned by the U.S. Supreme Court on technical grounds, the Andersen case

highlighted a core issue identical to one that had been raised in Ford Pinto more than 20 years before: Can a corporation — or any other form of business enterprise — commit a crime?

While the very idea of holding a business enterprise criminally responsible was attacked on several legal fronts during the pretrial stage of the Ford Pinto prosecution, by the time of the Andersen prosecution, corporate criminal liability presented far fewer legal and conceptual obstacles. As Kathleen Brickey has observed, the Pinto case served as an important catalyst for getting us to think more broadly about the spectrum of liability for business crimes. In short, viewed after a quarter-century, Ford Pinto has left "less a product liability legacy, and more an enterprise liability legacy.". . .

Commentators on corporate social control have long debated whether it is better for individual executives or business organizations to be the target of criminal sanctions. That is, is it best to apply the law to "corporate criminals" or "criminal corporations"? The most common answer — and one that is embedded in prevailing American law — is that the preferred statutory scheme should generally provide for both individual and enterprise liability, with the appropriateness of each to be determined case by case through the exercise of sound prosecutorial discretion. Current legal rules concerning enterprise liability came into being after many years of discussion over such foundational issues as whether an organization could even possess the requisite mental state (*mens rea,* or guilty mind) to commit a crime. . . .

Despite these developments and the relatively small number of corporate prosecutions, the concept of organizational crime remains controversial, and some critics continue to argue against the application of criminal sanctions to corporate and other business enterprises, primarily on three grounds. First, they challenge the deterrent effect of the sanction, essentially because "corporations don't commit crimes, people do." Second, they question the retributive function because corporate criminal sanctions may actually end up punishing innocent shareholders (by reducing the value of their shares) and consumers (by increasing the costs of goods and services). Third, they contest the efficiency of organizational liability, arguing that economic analysis shows that, on the whole, civil liability may deter unlawful corporate conduct at less cost than criminal liability. Although a detailed analysis of each objection is beyond the scope of this chapter, a few comments are in order, particularly because the Pinto prosecution — along with other important cases like the Arthur Andersen prosecution — involved organizational rather than individual defendants. We suggest that, in many instances, sanctioning the organization is the most prudent and equitable policy, and thus prosecutors' options should not be confined to imposing individual criminal liability.

The critics' first objection — that people, not corporations, commit crimes — ignores the reality that the labyrinthian structure of many modern corporations often makes it extremely difficult to pinpoint individual responsibility for specific decisions. Even in cases in which employees who carried out criminal activities can be identified, controversial questions remain. John S. Martin, a former U.S. Attorney who actively prosecuted corporate and white-collar crime cases, comments that when individual offenders can be identified they "often turn out to be lower-level corporate employees who never made a lot of money, who never benefited personally from the transaction, and who acted with either the real or mistaken belief that if they did not commit the acts in question their jobs might be in jeopardy." Further, says Martin, "they may have believed that their superior was aware and approved of the crime, but could not honestly

testify to a specific conversation or other act of the superior that would support an indictment of the superior." Thus, a thorough investigation may well lead a prosecutor to conclude that indictments against individuals simply cannot be justified, even though the corporation benefited from a clear violation of a criminal statute. Such a result would disserve the deterrent function.

The existence of corporate criminal liability also provides a powerful incentive for top officers to supervise middle- and lower-level management more closely. Individual liability, in the absence of corporate liability, encourages just the opposite: top executives may take the attitude of "don't tell me, I don't want to know." In the words of Peter Jones, former chief legal counsel at Levi Strauss, "a fundamental law of organizational physics is that bad news does not flow upstream." Only when directives come from the upper echelon of the corporation "will busy executives feel enough pressure to prevent activities that seriously threaten public health and safety." For a similar reason, proponents of the conservative "Chicago School" of law and economic thought advocate corporate rather than individual sanctioning: a firm's control mechanisms will be more efficient than the state's in deterring misconduct by its agents and will bring about adequate compliance with legal standards as long as the costs of punishment outweigh the potential benefits.

The second objection — that the cost of corporate criminal fines is actually borne by innocent shareholders and consumers — also seems unfounded. With regard to shareholders, whether individual or institutional, incidents of corporate criminal behavior may give the owners the right to redress the diminution of their interest by filing a derivative suit against individual officers and/or members of the board of directors. Although the cost and the uncertainty of winning such a suit may be high, shareholders must regard this cost as one of the risks incurred when they invest in securities. Just as shareholders may occasionally be enriched unjustly through undetected misbehavior by their company, it is only fair to expect them to bear a part of the burden on those occasions when illegality is discovered and duly sanctioned.

Next, it is simplistic, if not untenable, to argue that corporate criminal fines will simply be passed on to the consuming public through higher prices. Stephen Yoder, among others, notes that in such instances our economic system allows consumers to exert a type of indirect, collective control. If we assume that competition exists in the offending corporation's industry, the firm cannot simply decide to raise its prices to absorb the fine or the costs related to the litigation. If it does so, it risks becoming less competitive and suffering such concomitant problems as decreased profits, difficulty in securing debt and equity financing, curtailed expansion, and the loss of investors to more law-abiding corporations.

The final objection — that civil remedies may be a cheaper and hence more efficient deterrent of unlawful conduct than criminal sanctions — also misses the mark. First, . . . it is common for corporate wrongdoing to be met by both criminal and civil responses, each seeking different moral and instrumental ends. Second, as Lawrence Friedman reminds us, deterrence and efficiency are not the only interests in play. Deterrence has never been regarded as the sole justification for criminal liability, and efficiency is but one basis for social policy. The pursuit of justice and the imposition of just deserts are also traditional and worthwhile considerations. Civil and criminal liabilities have distinct social meanings, and in the real world findings of civil and criminal liability are not transmutable for purposes of moral condemnation.

. . . Dan Kahan concludes his broad investigation for social meaning in the context of corporate wrongdoing with a passage that emphasizes the civil-criminal distinction:

> Just as crimes by natural persons denigrate social values, so do corporate crimes. Members of the public show that they feel this way, for example, when they complain that corporations put profits ahead of the interests of workers, consumers, or the environment. Punishing corporations, just like punishing natural persons, is also understood to be the right way for society to repudiate the false valuations that their crimes express. Criminal liability "sends the message" that people matter more than profits and reaffirm the value of those who were sacrificed to "corporate greed."

Notes and Questions

1. What are the principal arguments for and against criminally prosecuting corporations and other entities? What purposes do such prosecutions serve?

2. To what extent does a corporate prosecution impose the cost of corporate wrongdoing on the corporation's shareholders? Is fining the corporation the equivalent of punishing the shareholders as well? Is it fair to impose the economic burden of a criminal fine on shareholders?

3. If, as the authors posit, corporations are often subject to both civil and criminal sanctions, what is the rationale for having a dual system of parallel remedies? Do criminal and civil actions against a corporation serve the same purposes?

B. CORPORATE PROSECUTION POLICY

Notwithstanding continued controversy over the wisdom of prosecuting corporations and other business entities, the notion of corporate criminal liability is now firmly embedded in American jurisprudence. The corporate accounting fraud problems of the 1990s and early 2000s, including the Enron scandal, heightened public consciousness of the need for greater transparency and accountability in corporate governance matters. That, in turn, spawned a number of reforms to promote consistency and coordination among federal prosecutors and other members of the enforcement community, particularly regarding the criteria prosecutors use in deciding whether to charge a corporation or other business entity.

One of the most visible and, at times, controversial initiatives has been the ongoing effort by the Justice Department (the "DOJ") to articulate a clear corporate prosecution policy by promulgating formalized — though not formally enforceable — prosecutorial guidelines.

KATHLEEN F. BRICKEY, ENRON'S LEGACY

8 BUFF. CRIM. L. REV. 221, 234-237 (2004)

JUSTICE DEPARTMENT CORPORATE PROSECUTION GUIDANCE

Corporate prosecutions constitute a small minority of federal criminal cases. But as the government's prosecution of Arthur Andersen for obstruction of justice attests,

federal prosecutors will charge business entities in cases they believe are truly egregious. In 1999, the Justice Department issued non-binding guidelines to provide United States Attorneys offices a framework for deciding whether to bring charges against a corporation. Called Federal Prosecution of Corporations, the guidance identified eight factors that would generally be relevant to the charging decision: (1) the nature and seriousness of the crime, including potential harm to the public; (2) the pervasiveness of wrongdoing within the company; (3) the company's prior history of similar misconduct; (4) the company's timely and voluntary disclosure of the wrongdoing and the degree of its cooperation in identifying responsible individuals and providing evidence; (5) the effectiveness of the company's compliance program in preventing and detecting wrongdoing; (6) remedial measures the company took upon discovery of the wrongdoing; (7) potential collateral consequences of a corporate conviction, including adverse effects on third parties; and (8) the adequacy of available non-criminal remedies as an alternative to criminal prosecution.

The guidance recommended that when prosecutors decide to indict a corporation they should bring the most serious sustainable charge, and cautioned that it is generally inappropriate to condition corporate plea agreements on the government's promise to forgo prosecuting culpable individuals.

1. CORPORATE COOPERATION

In January of 2003, the Justice Department issued revised corporate prosecution principles that respond to the corporate fraud scandals. Now called Principles of Federal Prosecution of Business Organizations,[1] the revised guidance retains the same analytical framework but calls for "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation" with the investigation.[2] Like the original guidance on cooperation, the revised principles take into account the company's willingness to disclose the results of its internal investigation, to identify culpable individuals, to make witnesses available and assist in locating evidence, and to waive attorney-client and work product protections. But the revised principles emphasize the importance of scrutinizing whether the corporation is really cooperating or whether it is merely going through the motions while actually impeding the investigation. Examples of conduct that impedes 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 presentations or submissions that contain misleading assertions or

1. U.S. Dept. of Justice, Principles of Federal Prosecution of Business Organizations, Jan. 20, 2003 [hereinafter Principles of Prosecution].

2. Memorandum on Principles of Federal Prosecution of Business Organizations, from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys, Jan. 20, 2003 [hereinafter Thompson Memorandum].

> 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. The revisions make clear that such conduct should weigh in favor of a corporate prosecution.

Id. As Deputy Attorney General, Mr. Thompson also chaired the Corporate Fraud Task Force.

omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.[3]

The clear import is that conduct that impedes prompt and full exposure of wrongdoing should weigh in favor of prosecuting the corporation.

Conversely, exemplary corporate cooperation can reap handsome rewards. Homestore, the largest online provider of real estate listings, is an illustrative case in point. Homestore executives enriched themselves through a series of fraudulent transactions that inflated the company's revenue. As soon as its audit committee learned of the fraud, Homestore promptly reported it to the SEC. Homestore also hired outside counsel to conduct an internal investigation, provided the investigative report to the government, and waived attorney-client and work product protections applicable to materials it supplied to the SEC. Homestore also fired the responsible individuals and implemented remedial measures to prevent the fraud from recurring.

[The government's investigation resulted in the filing of criminal charges against eleven Homestore employees, including the CEO, COO, the CFO, and the executive vice president of business development.[4]] As is often the case, the SEC simultaneously sued the top executives.

In view of the company's extensive cooperation, it is not surprising that Homestore was not criminally charged. But its assistance in the investigation also apparently induced the SEC to forgo filing a civil enforcement action against the corporation as well.

2. CORPORATE COMPLIANCE PROGRAMS

A second substantive change in the guidance relates to evaluating the effectiveness of corporate compliance policies and procedures to ensure that they are not "mere paper programs." The new emphasis here is on scrutinizing the role of the board of directors.[5]

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3. Principles of Prosecution, supra note 1, at VI, Comment.

4. Many of the defendants pled guilty, and most became cooperating witnesses. After appealing his initial 15-year sentence, in 2010 the CEO was resentenced to 54 months in federal prison. — ED.

5. Corporate boards have received bad report cards in the wake of the corporate scandals. See, e.g., The Role of the Board of Directors in Enron's Collapse, S. Rep. No. 107-70, at 11-59 (2002) (finding that Enron's Board must assume significant responsibility for the company's collapse; the Board abdicated its fiduciary responsibilities by tolerating high-risk accounting practices and transactions with blatant conflicts of interest, by failing to address extensive undisclosed off-books transactions, by awarding excessive executive compensation, by failing to curb abusive use of a personal multi-million dollar credit line by CEO Ken Lay, and by allowing its own independence to be compromised); Richard C. Breeden, Restoring Trust: Report to The Hon. Jed S. Rakoff, The United States District Court For the Southern District of New York, on Corporate Governance for the Future of MCI, Inc., 1-2, 5-6, 45-76 (Aug. 2003) (report by court-appointed corporate monitor criticizing WorldCom Board's lack of independence and cronyism, and providing a blueprint for reform); Dennis R. Beresford, Nicholas deB. Katzenbach & C.B. Rogers, Jr., Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc., 29-35, 264-337 (Mar. 31, 2003) (criticizing WorldCom Board for relinquishing too much power to CEO Bernard Ebbers and exercising too little restraint over him, and detailing an almost complete breakdown of corporate governance mechanisms); First Interim Report of Dick Thornburgh, Bankruptcy Court Examiner, In re: WorldCom, Inc., Case No. 02-15533 (AJG), 6-7, 37-43 (Bankr. S.D.N.Y. Nov. 4, 2002) (making preliminary findings that WorldCom's Board and its audit and compensation committees virtually abdicated their responsibilities to CEO Ebbers); Second Interim Report of Dick Thornburgh, Bankruptcy Court Examiner, In re: WorldCom, Inc., Case No. 02-15533 (AJG), 114-115 (Bankr. S.D.N.Y. June 9, 2003) (finding "significant and troubling questions" about WorldCom Board's due diligence in making hundreds of

Did the board independently review management's proposals, or did it serve as a rubber stamp? Did management provide sufficient information to enable the board to exercise independent judgment? Were the company's internal audit controls adequate to ensure independence and accuracy? Did the directors establish an information and reporting system designed to facilitate informed decision making by management and the board on corporate legal matters? These questions probe not only whether the design of the compliance program is adequate, but also whether management has conscientiously enforced it.

The corporate compliance criteria in the guidance also complement corporate governance reforms, imposed by [the Sarbanes-Oxley Act of 2002], that subject corporate boards to increased scrutiny. Thus, for example, Sarbanes-Oxley relieves senior management of the responsibility for hiring, compensating, and monitoring outside auditors and assigns it to the board's audit committee. Sarbanes-Oxley also endeavors to eliminate financial conflicts of interest from the audit oversight function by requiring directors who serve on audit committees to satisfy statutory financial independence criteria. Under the new standards, audit committee members may not receive fees or compensation from the corporation other than their compensation as board members. Nor may they be affiliated with the corporation or its subsidiaries in any capacity other than as members of the board. And to help ensure informed decision making, Sarbanes-Oxley requires that at least one member of the audit committee qualify as a "financial expert." Sarbanes-Oxley also assigns the audit committee the responsibility of establishing procedures for receiving internal and external complaints relating to financial and audit matters.

Thus, prosecutors may look to corporate governance requirements imposed by Sarbanes-Oxley to assist their evaluation of a company's compliance program as they assess the merits of charging the corporation. Indeed, while corporate prosecutions are likely to remain the exception rather than the rule, the revised guidance sends a clear message that the Justice Department believes the threat of criminal prosecution can serve as a catalyst for positive change in a corporation's culture.

Notes and Questions

1. If, as the Justice Department predicts, corporate prosecutions are likely to remain a small minority of federal criminal prosecutions, is it realistic to believe that the threat of criminal prosecution will serve as a catalyst for change?

2. Like the Principles of Federal Prosecution of Business Organizations (hereinafter Principles of Prosecution) codified in the Justice Manual (formerly known as the U.S. Attorneys' Manual), the Federal Sentencing Guidelines for organizational offenders emphasize the twin elements of corporate cooperation and corporate compliance programs. While the Principles of Prosecution treat corporate cooperation and effective compliance programs as highly relevant factors in determining whether to prosecute a corporation, the Sentencing Guidelines consider them highly relevant to the decision

millions of dollars in loans to CEO Bernard Ebbers); Westar Energy, Inc., Report of the Special Committee to the Board of Directors, 81- 82 (Apr. 29, 2003) (faulting Westar Board for failing to curb abusive use of company airplanes for personal use).

whether the corporation is entitled to a mitigated sentence. Does this potential "double whammy" increase the likelihood that the threat of corporate prosecution will serve as a catalyst for change?

3. Even though corporate prosecutions are relatively rare, the recent prosecution of Arthur Andersen for shredding Enron documents demonstrates the government's willingness to prosecute business organizations for what they believe is egregious conduct.[6] What role does a case like the Andersen prosecution play in making the threat of prosecution credible to the business community?

4. Why would the Justice Department give priority to a corporation's cooperation and voluntary disclosure? What benefits might flow from corporate — as opposed to individual — cooperation?

5. If a corporation cooperates fully, should that automatically entitle it to immunity from prosecution?

6. What are the hallmarks of an effective compliance program? Should an effective compliance program be expected to prevent all or virtually all criminal wrongdoing within the organization?

7. Are career prosecutors qualified to evaluate the effectiveness of corporate compliance programs? If not, does this diminish the appropriateness of considering corporate governance as a factor in the decision whether to prosecute? Are there reliable (and fair) alternative ways to implement this component of the Principles of Prosecution?

8. While the Principles of Prosecution caution that prosecutors should make sparing use of their ability to charge corporations, they also see potential benefits of corporate prosecutions — particularly when there is pervasive criminal conduct in a particular sector of the business community. What benefits could be derived from prosecuting one or more corporations when there is industry-wide criminal conduct? Can you identify particular industries in which pervasive, nationwide misconduct has occurred?

9. Are there particular types of crimes that are most likely to be committed by businesses? If so, is there a stronger reason to prosecute corporations whose employees engage in that kind of wrongdoing?

The Principles of Prosecution discussed in the preceding excerpt continue to be an evolving work in progress, partly because the factors relating to corporate cooperation and waiver of the corporate attorney-client privilege proved to be highly volatile. Although the basic structure and themes of the Principles of Prosecution remain essentially the same, the Justice Department has since refined them on several more occasions to respond to critics in the business community and the defense bar, and to ward off legislation — including the proposed Attorney-Client Privilege Protection Act — designed to curtail some prosecutorial policies and practices.

These guidelines initially were expressed in a memorandum authored in 1999 by Deputy Attorney General Eric Holder (who would later become the Attorney General). This guidance encouraged prosecutors to consider "collateral consequences" including adverse affects on third parties when deciding whether to prosecute a corporation. After Enron, in 2003, the DOJ issued revised guidelines, which were then again updated in

6. See Kathleen F. Brickey, Andersen's Fall from Grace, 81 Wash. U. L.Q. 917 (2004).

2006. In 2008, the guidelines were codified as part of the U.S. Attorneys' Manual (recently renamed the Justice Manual) as the Principles of Federal Prosecution of Business Organizations (the "Principles of Prosecution"). Further focus on corporate prosecutions followed the 2008 financial crisis. Public suspicion surfaced that the government had not pursued criminal cases against certain large financial institutions due to the collateral consequences analysis. Critics claimed this analysis meant certain large firms were effectively above the law. These so-called "too big to jail" concerns were raised again in 2013 after Attorney General Holder testified before the Senate Judiciary Committee. During the hearing, Holder said that some institutions are "so large that it does become difficult for us to prosecute them." In March 2014, the DOJ released a video in which Attorney General Holder clarified the government's views and asserted that, "there is no such thing as 'too big to jail.'"

In September 2015, Deputy Attorney General Sally Yates issued new guidance in a memorandum informally referred to as the "Yates Memo." This guidance would be used to update the Principles of Prosecution. Most notable was the addition of a new Foundational Principles section and a Focus on Individual Wrongdoers section, each of which emphasizes the importance of individual accountability, a topic that will be discussed in greater detail in Chapter 2 of this casebook.

A day after issuing the memorandum, Yates delivered a speech at the NYU Law School Program on Corporate Compliance and Enforcement. Thereafter, in November 2015, a newly revised Principles of Prosecution was released. Notably new "foundational principles" language was added to the beginning stating that: "The prosecution of corporate crime is a high priority for the Department of Justice." In July 2020, the Justice Department quietly made several changes to the Principles of Prosecution. These changes related to victims of corporate crime. An entirely new section was added called "Interests of the Victims," and several other sections were also amended, including most notably the list of factors prosecutors should consider before charging a corporate defendant now include "the interest of any victims." In the section on "collateral consequences," prosecutors are instructed, before entering into a DPA or NPA, to consider "the interests of any victims and be aware of any impact on the Crime Victims Fund."

ATTORNEY GENERAL ERIC HOLDER TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

(March 2013)

SENATOR CHARLES GRASSLEY: On the issue of bank prosecution. I'm concerned we have a mentality of "too big to jail" in the financial sector, spreading from fraud cases to terrorist financing to money laundering cases. . . . I think we are on a slippery slope. . . . I don't have recollection of DOJ prosecuting any high-profile financial criminal convictions in either companies or individuals. Assistant Attorney General Breuer said that one reason that DOJ has not brought these prosecutions is because it reaches out to "experts" to see what effect the prosecution would have on the financial markets. On January 29th, Senator [Sherrod] Brown and I requested details on who these so-called "experts" are. . . .

ATTORNEY GENERAL ERIC HOLDER: We will endeavor to answer your letter, Senator. . . . I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute, if we do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy. And I think that is a function of the fact that some of these institutions have become too large. . . . I think it has an inhibiting influence, impact on our ability to bring resolutions, that I think would be more appropriate. And I think that's something that we — you all [in Congress] — need to consider. The concern that you raised is actually one that I share.

A MESSAGE FROM ATTORNEY GENERAL ERIC HOLDER, VIDEO POSTED ON JUSTICE DEPARTMENT WEBSITE

(May 2014)

ATTORNEY GENERAL ERIC HOLDER: There is no such thing as "too big to jail." Some have used that phrase to describe the theory that certain financial institutions, even if they engage in criminal misconduct, should be considered immune to prosecution due to their sheer size and their influence on the economy. That view is mistaken, and it is a view that has been rejected by the Department of Justice.

To be clear, no individual or company — no matter how large or how profitable — is above the law. When the Department of Justice conducts investigations, we will always follow the law and the facts wherever they lead. Now, sometimes a company's conduct may be wrong, it may be hard to defend, but not necessarily be violative of the criminal law. Or sometimes there may be an appearance of criminal wrongdoing that cannot be supported by evidence that would be admitted in a court of law. But, when laws indeed appear to have been broken and the evidence supports the allegations, a company's size will never be a shield to prosecution or penalty.

It is true that criminal charges involving a financial institution can sometimes trigger serious follow-on actions by that company's financial regulators. In some cases, it may even trigger the loss of the institution's charter. Preparing a case it would be irresponsible not to consider that fact. But rather than wall off banks from prosecution, the potential for such severe consequences simply means that federal prosecutors conducting these investigations must go the extra mile to coordinate closely with the regulators that oversee these institutions' day-to-day operations. So long as this coordination occurs, it is fully possible to criminally sanction companies that have broken the law, no matter their size.

We have made great strides in improving this type of coordination between our prosecutors and other governmental regulators. This cooperation will prove key in the coming weeks and months as the Justice Department continues to pursue several important investigations . . . I am personally monitoring the status of these ongoing investigations, I am resolved to seeing them through, and in doing so, I intend to reaffirm the principle that no individual or entity that does harm to our economy is ever above the law.

DEPUTY ATTORNEY GENERAL SALLY QUILLIAN YATES, REMARKS AT NEW YORK UNIVERSITY SCHOOL OF LAW ANNOUNCING NEW POLICY ON INDIVIDUAL LIABILITY IN MATTERS OF CORPORATE WRONGDOING

(September 10, 2015)

These cases can present unique challenges for DOJ's agents and attorneys: there are complex corporate hierarchies, enormous volumes of electronic documents and a variety of legal and practical challenges that can limit access to the evidence we need.

In the most basic ways, though, corporate misconduct isn't all that different from everything else DOJ investigates and prosecutes. Crime is crime. And it is our obligation at the Justice Department to ensure that we are holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom. In the white-collar context, that means pursuing not just corporate entities, but also the individuals through which these corporations act.

Few people understood this better — or were more committed to ensuring equal justice — than our former Attorney General, Eric Holder. Last September, he spoke forcefully about this very topic here at NYU. In that speech, he discussed the many reasons why individual accountability in corporate cases is so important — because it deters future illegal activity, because it incentivizes changes in corporate behavior, and because it ensures that the people who engage in wrongdoing are held responsible for their actions. He made clear that, as a matter of basic fairness, we cannot allow the flesh-and-blood people responsible for misconduct to walk away, while leaving only the company's employees and shareholders to pay the price. And, as he pointed out, nothing discourages corporate criminal activity like the prospect of people going to prison.

But former Attorney General Holder was also frank about the challenges we face in pursuing financial fraud cases against individuals. In modern corporations, where responsibility is often diffuse, it can be extremely difficult to identify the single person or group of people who possessed the knowledge or criminal intent necessary to establish proof beyond a reasonable doubt. This is particularly true of high-level executives, who are often insulated from the day-to-day activity in which the misconduct occurs. Without an inside cooperating witness, preferably one identified early enough to wear a wire, investigators are left to reconstruct what happened based on a painstaking review of corporate documents, looking for a smoking gun that most financial criminals are far too savvy to leave behind. And since virtually all of these corporations operate worldwide, restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad make it even more challenging to obtain the necessary evidence to bring individuals to justice.

But regardless of how challenging it may be to make a case against individuals in a corporate fraud case, it's our responsibility at the Department of Justice to overcome these challenges and do everything we can to develop the evidence and bring these cases. The public expects and demands this accountability. Americans should never believe, even incorrectly, that one's criminal activity will go unpunished simply because it was committed on behalf of a corporation. We could be doing a bang-up job in every facet of the department's operations — we could be bringing all the right cases

and making all the right decisions. But if the citizens of this country don't have confidence that the criminal justice system operates fairly and applies equally — regardless of who commits the crime or where it is committed — then we're in trouble. . . .

To codify and supplement the changes announced in yesterday's memo, we will be revising several of the guidance documents that our attorneys rely on when investigating corporate misconduct, including the U.S. Attorneys' manual and the principles of federal prosecution of business organizations, sometimes known as the Filip Factors. . . .

Effective immediately, we have revised our policy guidance to require that if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status, or seniority in the company, and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals.

Now, to the average guy on the street, this might not sound like a big deal. But those of you active in the white-collar area will recognize it as a substantial shift from our prior practice. While we have long emphasized the importance of identifying culpable individuals, until now companies could cooperate with the government by voluntarily disclosing improper corporate practices, but then stop short of identifying who engaged in the wrongdoing and what exactly they did. While the companies weren't entitled to full credit for cooperation, they could still get credit for what they did do and that credit could be enough to avoid indictment.

The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all nonprivileged evidence implicating those individuals.

While this is new for the corporate world, there's nothing radical about the concept. It's the same rule we apply to cooperators in any other type of criminal investigation. A drug trafficker can decide to flip against his co-conspirators. He can proffer to the government the full scope of the criminal scheme. He can take the stand for the government and testify against a dozen street-level dealers. But if he has information about the cartel boss and declines to share it, we rip up his cooperation agreement and he serves his full sentence. The same is true here. A corporation should get no special treatment as a cooperator simply because the crimes took place behind a desk. . . .

Building on this point, a company should not assume that its cooperation ends as soon as it settles its case with the government. Going forward, corporate plea agreements and settlement agreements will include a provision that requires the companies to continue providing relevant information to the government about any individuals implicated in the wrongdoing. A company's failure to continue cooperating against individuals will be considered a material breach of the agreement and grounds for revocation or stipulated penalties. . . . The purpose of this policy is to better identify responsible individuals, not to burden corporations with longer or more expensive internal investigations than necessary. . . .

We make these changes recognizing the challenges that they may present. Some corporations may decide, for example, that the benefits of consideration for cooperation

with DOJ are not worth the costs of coughing up the high-level executives who perpetrated the misconduct. Less corporate cooperation could mean fewer settlements and potentially smaller overall recoveries by the government. In addition, individuals facing long prison terms or large civil penalties may be more inclined to roll the dice before a jury and consequently, we could see fewer guilty pleas. . . .

THE JUSTICE MANUAL (FORMERLY KNOWN AS THE UNITED STATES ATTORNEYS' MANUAL) TITLE 9, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS[7]

(August 2008, with revisions through July 2020)

9-28.010 Foundational Principles of Corporate Prosecution

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, among other things: (1) protecting the integrity of our economic and capital markets by enforcing the rule of law; (2) protecting consumers, investors, and business entities against competitors who gain unfair advantage by violating the law; (3) preventing violations of environmental laws; and (4) discouraging business practices that would permit or promote unlawful conduct at the expense of the public interest.

One of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing. Such accountability deters future illegal activity, incentivizes changes in corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system. . . .

9-28.100 Duties of Federal Prosecutors and Duties of Corporate Leaders

Corporate directors and officers owe a fiduciary duty to a corporation's shareholders (the corporation's true owners) and they owe duties of honest dealing to the investing public and consumers in connection with the corporation's regulatory filings and public statements. A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders who seek to promote trust and confidence. . . .

7. A footnote to one of the sections of the guidelines notes that: "While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations." — Ed.

9-28.200 General Considerations of Corporate Liability

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. 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.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed in these guidelines. In doing so, prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm — e.g., environmental crimes or sweeping financial frauds — may be committed by a business entity, and there may therefore be a substantial federal interest in indicting a corporation under such circumstances.

In certain instances, it may be appropriate to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in JM 9-28.1100 (Collateral Consequences). Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in JM 9-28.1200 (Civil or Regulatory Alternatives). When considering whether to enter into a non-prosecution or deferred prosecution agreement with the defendant, prosecutors should consider the interests of any victims and be aware that any fines collected under such agreements will not be deposited into the Crime Victims Fund, but will rather go to the General Fund of the Treasury. See JM 9-28.1400.

Prosecutors have substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities. Prosecutors should ensure that the general purposes of the criminal law — appropriate punishment for the defendant, deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, rehabilitation, and restitution for victims — are adequately met, taking into account the special nature of the corporate "person."

9-28.210 Focus on Individual Wrongdoers

A. General Principle: Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Provable individual culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution. In other words, regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals. . . .

9-28.300 Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation's willingness to cooperate including as to potential wrongdoing by its agents;
5. the existence and effectiveness of the corporation's pre-existing compliance program at the time of the offense, as well as at the time of a charging decision;
6. the corporation's timely and voluntary disclosure of wrongdoing;
7. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
8. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;

9. the adequacy of remedies such as civil or regulatory enforcement actions including remedies resulting from the corporation's cooperation with relevant government agencies; and
10. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
11. the interests of any victims.

B. Comment: The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. . . .

9-28.500 Pervasiveness of Wrongdoing Within the Corporation

A. General Principles: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation. . . .

9-28.600 The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges and how best to resolve cases.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it. The corporate structure itself (*e.g.*, the creation or existence of subsidiaries or operating divisions) is not dispositive in this analysis, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane.

9-28.700 The Value of Cooperation

Cooperation is a mitigating factor, by which a corporation — just like any other subject of a criminal investigation — can gain credit in a case that otherwise is

appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

A. General Principle: In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals substantially involved, its cooperation will not be considered a mitigating factor under this section. . . .

9-28.710 Attorney-Client and Work Product Protections

. . . [W]aiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. . . .

9-28.720 Cooperation: Disclosing the Relevant Facts

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys. . . .

9-28.730 Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation. Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. . . .

9-28.740 Offering Cooperation: No Entitlement to Immunity

A corporation's offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents. Thus, a corporation's willingness to cooperate is not determinative; that factor, while relevant, needs to be considered in conjunction with all other factors.

9-28.750 Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection by Corporations Contrary to This Policy

The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General. . . .

9-28.800 Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of some crimes may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program. . . .

9-28.1000 Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases. . . .

9-28.1100 Collateral Consequences

A. General Principle: Prosecutors may 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.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it, or have been victimized by it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

Almost every conviction of a corporation, like almost every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. . . .

[W]here 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. . . . However, when considering whether to enter into a deferred prosecution or non-prosecution agreement with the defendant, prosecutors should consider the interests of any victims and be aware of any impact on the Crime Victims Fund. The appropriateness 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.

9-28.1200 Civil or Regulatory Alternatives

A. General Principle: Prosecutors should consider whether non-criminal alternatives would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution — *e.g.*, civil or regulatory enforcement actions — the prosecutor should consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on federal law enforcement interests. . . .

9-28.1300 Adequacy of the Prosecution of Individuals

A. General Principle: In deciding whether to charge a corporation, prosecutors should consider whether charges against the individuals responsible for the corporation's malfeasance will adequately satisfy the goals of federal prosecution. . . .

9-28.1400 Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor at least presumptively should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's misconduct and that is likely to result in a sustainable conviction. . . .

9-28.1400 Interests of the Victim

A. General Principle: In deciding whether to charge a corporation, prosecutors should consider the interests of any victims.

B. Comment: It is important to consider the economic and psychological impact of the offense, and subsequent prosecution, on any victims. Prosecutors should take into account such matters as the seriousness of the harm inflicted and the victim's desire for prosecution. Prosecutors should solicit the victim's views on major case decisions such as dismissals, plea negotiations, and pre-trial diversion, in accordance with the Crime Victims' Rights Act and Attorney General Guidelines for Victim and Witness Assistance. For more information regarding the Department's obligations to victims, see the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Victims' Rights and Restitution Act, 34 U.S.C. § 20141, and the Attorney Guidelines for Victim and Witness Assistance. When considering whether to initiate a prosecution or pursue an alternative resolution, such as a deferred or non-prosecution agreement, prosecutors should consider the interests of any victims and be aware that any fines collected under such agreements will *not* be deposited into the Crime Victims Fund, but will rather go to General Fund of the Treasury. See 31 U.S.C. 3302(b). Conversely, the vast majority of fines collected pursuant to *criminal conviction* are automatically funneled to the CVF per statute. See 34 U.S.C. § 20101. The CVF is a statutorily created fund that is financed by fines and penalties paid by convicted federal offenders. Money from the CVF is used to support federal, tribal, state, and local crime victim assistance programs and to help compensate crime victims across the country.

9-28.1500 Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, as with individuals, prosecutors should generally *seek* a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Absent extraordinary circumstances or