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Corporate Criminal Liability: An Overview of Federal Law

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Summary

A corporation is criminally liable for the federal crimes its employees or agents commit in its interest. Corporate officers, employees, and agents are individually liable for the crimes they commit, for the crimes they conspire to commit, for the foreseeable crimes their coconspirators commit, for the crimes whose commission they aid and abet, and for the crimes whose perpetrators they assist after the fact.

The decision whether to prosecute a corporation rests with the Justice Department. Internal guidelines identify the factors that are to be weighed: the strength of the case against the corporation; the extent and history of misconduct; the existence of a compliance program; the corporation's cooperation with the investigation; the collateral consequences; whether the corporation has made restitution or taken other remedial measures; and the alternatives to federal prosecution. As in the case of individual defendants, corporation prosecutions rarely result in a criminal trial. More often, the corporation pleads guilty or enters into a deferred or delayed prosecution agreement.

During a criminal investigation and throughout the course of criminal proceedings, corporations enjoy many, but not all, of the constitutional rights implicated in the criminal investigation or prosecution of an individual. Corporations have no Fifth Amendment privilege against self-incrimination. On the other hand, the courts have recognized or have assumed that corporations have a First Amendment right to free speech; a Fourth Amendment protection against unreasonable searches and seizures; a Fifth Amendment right to due process and protection against double jeopardy; Sixth Amendment rights to counsel, jury trial, speedy trial, and to confront accusers, and to subpoena witnesses; and Eighth Amendment protection against excessive fines.

Corporations cannot be jailed. Otherwise, corporations and individuals face many of the same consequences following conviction. The federal Sentencing Guidelines influence the sentencing consequences of conviction in many instances. Corporations can be fined. They can be placed on probation. They can be ordered to pay restitution. Their property can be confiscated. They can be barred from engaging in various types of commercial activity. The Guidelines speak to all of these.

For example, the corporate fine Guidelines begin with the premise that a totally corrupt corporation should be fined out of existence, if the statutory maximum permits. A corporation operated for criminal purposes or by criminal means should be fined at a level sufficient to strip it of all of its assets. In other cases, the Guidelines recommend fines and other sentencing features that reflect the nature and seriousness of the crime of conviction and the level of corporate culpability.

This report is available in an abbreviated form without the footnotes or citations and attributions to authorities that appear here. The abridged report is entitled CRS Report R43294, *Corporate Criminal Liability: An Abbreviated Overview of Federal Law*.

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Introduction

Under federal law, corporations or most other legal entities may be criminally liable for the crimes of their employees and agents.[1] This is true in the case of regulatory offenses, like crimes in violation of the Federal Food, Drug, and Cosmetic Act; it is true in the case of economic offenses, like crimes in violation of the securities laws; and it is true in the case of common law crimes, like keeping a house of prostitution in violation of the Mann Act. Ordinarily, the agents and employees who commit the crimes for which their principals and employers are liable also face prosecution and punishment.

Individual criminal statutes, Justice Department policies, and the Sentencing Guidelines largely dictate the circumstances under which, and the extent to which, agents, employees, corporations, and similar unincorporated entities are prosecuted and punished. This is a brief overview of federal law in the area.

Background

It was said at common law that "a corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities."[2] That perception changed over time. First, it was agreed that a corporation might be held criminally liable for its failure to honor certain legal obligations (nonfeasance);[3] then for the inadequate manner in which it performed certain legal obligations (malfeasance).[4] At the dawn of the 20th century, the Supreme Court expressed a more sweeping view:

> 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 ... 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.[5]

The Court spoke of "crimes which in their nature, cannot be committed by corporations," but did not explain what specific crimes it had in mind. When it spoke, it did so in the midst of a debate over whether a corporation could be held criminally liable not only for crimes of action and inaction (malfeasance and nonfeasance) of its agents but also for those crimes which required that

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[1] *United States v. Agosto-Vega*, 617 F.3d 541, 552-53 (1st Cir. 2010); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1118-119 (D.C.Cir. 2009); *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008); *accord*, *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998); *United States v. Investment Enterprises, Inc.*, 10 F.3d 263, 266 (5th Cir. 1994); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989); *United States v. Gold*, 743 F.2d 800, 822-23 (11th Cir. 1984); *United States v. Beusch*, 596 F.2d 871, 877-78 (9th Cir. 1979); *United States v. Carter*, 311 F.2d 934, 941-42 (6th Cir. 1963).

[2] 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765) (transliteration provided).

[3] WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 58 (2d ed. 1852)("[A] corporation may be indicted for a breach of duty imposed on it by law ... Whether this criminal liability extends to acts of misfeasance is more doubtful").

[4] 1 BISHOP, COMMENTARIES ON THE CRIMINAL LAW §420 (7th ed. 1882)("But while the courts everywhere hold corporations to be thus indictable for non-feasance, it is by some denied that they are for misfeasance.... But the contrary is established in England ... This English doctrine ... is the better doctrine in principle").

[5] *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 494-95 (1909).

their agents acted with a specific intent (mens rea) such as the intent to defraud ("since a corporation has no soul, it cannot have actual wicked intent").[6]

The Court pointed toward resolution of the issue, however, when it observed that the question turns on the nature of the crime and not the nature of the corporation ("some crimes in their nature, cannot be committed by corporations"). Since, in the federal sphere, there is no crime but by act of Congress, the question is one of statutory proscription and congressional intent.

Entities Subject to Corporate Criminal Liability

Most federal criminal statutes apply to "whoever," or to any "person" who violates their prohibitions. Although, in ordinary parlance, the word "person" usually refers to a human being, the law often gives it a broader meaning.[7] The Dictionary Act provides that "In determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words 'person' or 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[8] The courts have used the Dictionary Act definition to give meaning to the words "person" or "whoever" in the context of a criminal statute.[9]

Federal statutes frequently provide individual definitions of the entities that fall within their proscriptions. Some are as terse as that of the racketeering statute, "'person' includes any individual or entity capable of holding a legal or beneficial interest in property."[10] Others, like the tax crime definition, are more detailed:

> When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—(1) Person.-The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation. (2) Partnership and partner.-The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. (3) Corporation.-

[6] Brickley, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASHINGTON UNIVERSITY LAW QUARTERLY 393, 411 (1982), quoting, *State v. First National Bank*, 2 S.D. 568, 571, 51 N.W. 587, 587 (1892); see also, PERKINS, CRIMINAL LAW 640-41 (2d ed. 1969)("If a corporation had such a duty which it neglected to perform no sound reason against its conviction was available, and it was but a short step from recognition of corporate guilt for a civil offense based upon nonfeasance to such guilt based upon affirmative misconduct. Since such an offense does not have the normal mens-rea requirement for criminal guilty, and conviction may be supported on the basis *of respondeat superior*, the possibility of convicting a corporation of a civil offense became firmly established. For years it seemed the change from the original position would stop at this point and that a corporation would be held incapable of committing a true crime on the ground that it could not have means rea.... Gradually, however, the change moved over into the area of true crime").

[7] *Clinton v. City of New York*, 524 U.S. 417, 428 n.13 (1998).

[8] 1 U.S.C. 1.

[9] E.g., *United States v. A & P Trucking Co.*, 358 U.S. 121, 123 (1958)(violation of Interstate Commerce Commission safety regulations, former 18 U.S.C. 835 (1958 ed.)); *United States v. Polizzi*, 500 F.2d 856, 907 (9th Cir. 1974) (violation of the Travel Act, 18 U.S.C. 1952); *Western Laundry and Linen Rental Co. v. United States*, 424 F.2d 441, 443 (9th Cir. 1970)(antitrust violations under the Sherman Act, 15 U.S.C. 1); *United States v. Hougland Barge Line, Inc.*, 387 F.Supp. 1110, 1114 (W.D.Pa. 1974) (conspiracy, 18 U.S.C. 371).

[10] 18 U.S.C. 1961(3).

> The term "corporation" includes associations, joint-stock companies, and insurance companies.[11]

Still others have taken special care to mention governmental entities when listing those covered by their proscriptions.[12] The caution reflects judicial reluctance, absent explicit language, to conclude that Congress intends to expose governmental entities to punitive measures.[13]

Scope of Authority

In federal law, corporate criminal liability is ordinarily confined to offenses (a) committed by the corporation's officers, employees, or agents; (b) within the scope of their employment; and (c) at least in part for the benefit of the corporation.[14] The test for whether an activity falls within the individual's scope of authority is whether the individual engages in activities "on the corporation's behalf in performance of [his] general line of work.... those acts must be motivated, at least in part, by an intent to benefit the corporation."[15] If the standard is met, the corporation will be liable notwithstanding the fact that it expressly directed its agent, employee, or officer not to commit the offense at issue.[16]

Under the Model Penal Code[17] and many state penal codes, corporate criminal liability may depend upon the misconduct of senior management officials; the misconduct of lower level

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[11] 26 U.S.C. 7701(a)(1)-(3).

[12] E.g., 42 U.S.C. 6903(15) for purposes of the Resource Conservation and Recovery Act (RCRA), "the term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States."

[13] *Newport v. Fast Concerts, Inc.*, 453 U.S. 247, 258-71 (1981)(municipalities are immune from punitive damages under 42 U.S.C. 1983, for civil rights violations); *Gentry v. Resolution Trust Corp*., 937 F.2d 899, 914 (3d Cir. 1991)("the prevailing punitive nature of section 1964(c)'s compulsory award of treble damages convinces us that Congress, in keeping with the common law, did not intend to subject municipal corporations to RICO liability").

[14] *United States v. Singh*, 518 F.3d 236, 249-50 (4th Cir. 2008)("a corporation accused is liable for the criminal acts of its employees and agents acting within the scope of their employment for the benefit of the corporation and such liability arises if the employee or agent acted for his own benefit as well as that of his employer"); *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006); *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998); *United States v. Sun Diamond Growers*, 138 F.3d 961 (D.C.Cir. 1998).

[15] *United States v. Agosto-Vega*, 617 F.3d 541, 25 (1st Cir. 2010) ("[t]he test is whether the agent is performing acts of the kind which he is authorized to perform and those acts are motivated—at least in part—by an intent to benefit the corporation"); *United States v. Singh*, 518 F.3d at 250-51; *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984)("the servant's conduct is within the scope of his employment if it is of the kind he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part by a purpose to serve the master").

[16] *United States v. Potter*, 463 F.3d 9, 26 (1st Cir. 2006); *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 (4th Cir. 1985); *United States v. Ionia Management S.A.*, 525 F.Supp.2d 319, 324 (D. Conn. 2007).

[17] MODEL PENAL CODE §2.07 (1985)("A corporation may be convicted of the commission of an offense if (a) the offense is a violation ... in which a legislative purpose to impose liability on corporations plainly appears ... or (b) the offense consists of an omission to discharge a specific duty or affirmative performance imposed on corporations by law; or (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. (2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears ... (5) In any prosecution of a corporation ... for the commission of an offense included within the terms of Subsection (1)(a) ... it shall be a defense ... that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent it commission ... ").

employees is not always enough even when they act within their scope of authority for the corporation's benefit.[18]

Imputed Intent and Knowledge

As a general rule, "[c]orporations may be held liable for the specific intent offenses based on the 'knowledge and intent' of their employees."[19] Again, the rule extends only to those instances when the employee or agent acted, or acquired knowledge, within the scope of his or her employment, seeking, at least in part, to benefit the corporation.[20] The law is somewhat more uncertain when a corporation's liability turns not upon the knowledge or the intent of a single employee but upon cumulative actions or knowledge of several.[21]

Liability of Officers, Employees, Agents, Accomplices, and Conspirators

With rare exception, statutes which expose a corporation to criminal liability do not absolve the officers, employees, or agents whose violations are responsible for the corporation's plight. From

[18] E.g., ARIZ. REV. STAT. ANN. §13-305 ("A. Notwithstanding any other provisions of law, an enterprise commits an offense if: 1. The conduct constituting the offense consists of a failure to discharge a specific duty imposed by law; or 2. The conduct undertaken in behalf of the enterprise and constituting the offense, is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment; or 3. The conduct constituting the offense is engaged in by an agent of the enterprise while acting within the scope of employment and in behalf of the enterprise; and (a) the offense is a misdemeanor or petty offense; or (b) The offense is defined by a statute which imposed criminal liability on an enterprise").

[19] *United States v. Philip Morris USA, Inc*., 566 F.3d 1095, 1118 (D.C.Cir. 2009), citing, *N.Y. Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909), and *United States v. A & P Trucking Co*., 358 U.S. 121, 125 (1958); see also, *United States v. LaGrou Distribution Systems*, 466 F.3d 585, 591 (7th Cir. 2006).

[20] *United States v. LaGrou Distribution Systems, 466 F.3d at 591; United States v. Route, 2 Box 472, 136 Acres More or Less (Dyer's Trout Farms, Inc.)*, 60 F.3d 1523, 1527 (11th Cir. 1995*); United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987).

[21] Compare, *United States v. Bank of New England*, 821 F.2d at 856 (internal citations omitted)("A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this. Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation: A corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly"), with, *United States v. Philip Morris USA, Inc*., 566 F.3d at 1122 ("Like Defendants and other courts, we are dubious of the legal soundness of the "collective intent" theory. *Saba [v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996)('corporate knowledge of certain facts [can be] accumulated from the knowledge of various individuals, but the proscribed intent (willfulness) depends[s] on the wrongful intent of specific employees')" and *Southland Securities v. Inspire Insurance Solutions*, 365 F.3d 353, 366 (5th Cir. 2004)("For purposes of determining whether a statement made by the corporation was made by it with the requisite Rule 10(b) scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment").

time to time, the courts have encountered the argument that an individual cannot be at once both the person who violates the statute and the personification of the corporation that violates the statute: "[W]hen the officer is acting solely for his corporation, the appellee contends that he is no longer a 'person' within the Act. The rationale for this distinction is that the activities of the officer, however illegal and culpable, are chargeable to the corporation as the principal but not to the individual who perpetrates them."[22] To which the courts have responded, "No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion."[23]

Conspiracy raises a slightly more difficult issue. Conspiracy is the agreement of two or more persons to commit some other federal crime.[24] Although the courts have sometimes recognized an intracorporate defense in civil conspiracy cases, they have concluded that a corporation and each of the participating individuals may be liable for plots among two or more of the corporation's officers or employees.[25] On the other hand, a "corporate officer, acting alone on behalf of the corporation, [may] not be convicted of conspiring with the corporation."[26]

Conspiracy also presents one of the three situations in which corporate officials and employees may face criminal liability under federal law even though they themselves did not commit, and perhaps did not even know of, the misconduct of other officers or employees. Thus, though an officer or employee has no direct hand in the matter, he is liable for foreseeable offenses committed by one of his co-conspirators in furtherance of their common scheme.[27]

The second situation occurs when the official or employee either instructs another to commit a federal offense or aids and abets another in the commission of a federal offense, or takes some action after the fact to conceal the commission of a federal offense by another. Like conspiracy, liability for procuring or aiding and abetting the offense of another focuses on conduct committed before the commission of the underlying substantive offense:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.[28]

"In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring

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[22] *United States v. Wise*, 370 U.S. 405, 407 (1962).

[23] *Id.* at 409, citing, *United States v. Dotterweich*, 320 U.S. 277 (1943).

[24] 18 U.S.C. 371.

[25] *United States v. Sain*, 141 F.3d 463, 475 (3d Cir. 1998); *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994); *United States v. Ames Sintering Co.*, 927 F.2d 236-37 (6th Cir. 1990); *United States v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986).

[26] *United States v. Stevens*, 909 F.2d 431, 432-34 (11th Cir. 1990); *United States v. Peters*, 732 F.2d 1004, 1008 n.6 (1st Cir. 1984).

[27] *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946); *United States v. Singh*, 518 F.3d 236, 252-53 (4th Cir. 2008); *United States v. Skilling*, 554 F.3d 529, 547 (5th Cir. 2009), aff'd in part and vac'd in part on other grounds, 130 S.Ct. 2896 (2010); *United States v. Sklena*, 692 F.3d 725, 729-30 (7th Cir. 2012); *United States v. Clark*, 717 F.3d 790, 808-809 (10th Cir. 2013).

[28] 18 U.S.C. 2(a); see e.g., *United States v. Sain*, 141 F.3d 463, (3d Cir. 1998)("an individual who causes a corporation to commit a crime is criminally liable for the corporations' criminal conduct as an aider and abettor ... "); *United States v. Cohen*, 260 F.3d 68, 77-8 (2d Cir. 2001)(the president of a company which operated an off-shore internet gambling site was in a position to cause the company's continued violation of the Wire Act (18 U.S.C. 1084)).

about, that he seek by his action to make it succeed."[29] The officer or employee must know of the colleague's pending misconduct and by his action intend to facilitate it.[30] Moreover, unlike conspiracy, which requires at least two individuals, even a sole stockholder may be guilty of aiding and abetting the crime of a corporation.[31]

Misprision and liability as an accessory after the fact focus on conduct committed after the commission of the underlying substantive offense.[32] Misprision requires proof that the defendant knew of the commission of a federal felony by another, and that he not only failed to report the offense to authorities but affirmatively acted to conceal it.[33] An accessory after the fact charge requires proof that the defendant knew of the commission of a federal offense by another and assisted the other to avoid arrest, trial or punishment.[34] Both statutes essentially create general obstruction of justice offenses. Consequently, the specific actions which offend their prohibitions will often constitute offenses under other more specific federal obstruction statutes.[35]

The third instance of official liability triggered by the misconduct of others within the corporation requires no knowing participation, but instead occurs when a corporate official, responsible to do

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[29] *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); see also, *United States v. Davis*, 717 F.3d 28, 33 (1st Cir. 2013)("Aiding and abetting requires proof that: 1) the substantive offense was actually committed; 2) the defendant assisted in the commission of that crime or caused it to be committed; and 3) the defendant intended to assist in the commission of that crime and or to cause it to be committed. Moreover ... a culpable aider and abetter need not perform the substantive offense, be present when it is performed, or be aware of the details of its execution"); *United States v. Joseph*, 709 F.3d 1082, 1102 (11th Cir. 2013).

[30] *United States v. Rodriguez-Lozada*, 558 F.3d 29, 41 (1st Cir. 2009); *United States v. Dearing*, 504 F.3d 897, 901 (9th Cir. 2007); *United States v. Kemp*, 500 F.3d 257, 293 (3d Cir. 2007).

[31] *United States v. Sain*, 141 F.3d 463, 474-75 (3d Cir. 1998)("AEC, because it is a corporation, is a separate legal entity, even though Sain owned all the stock. Thus, it has the capacity of being aided and abetted. To hold otherwise would allow the controlling stockholder of a corporation to enjoy the benefits of the corporate form, protection from personal liability for corporation's debts, without accepting the burden of assuming criminal responsibility when the individual causes the corporation to commit a crime.... Even assuming that Sain is correct that it was impossible for him to conspire with AEC, that conclusion does not preclude imposition of aiding and abetting responsibility. Arguably, Sain could not conspire with AEC because AEC could not form the mental state required to conspire with another. This is because a corporation is a conspirator only pursuant to respondeat superior liability. If an agent of the corporation conspires with another individual, the corporation for which the individual is the agent may be criminally liable. However, there must be at least two natural individuals for a conspiracy involving a corporation to exist because two entities must have the required mental state to form a conspiracy. The aiding and abetting statute allows for broader liability and does not require proof that an unwitting entity being used to commit the crime possessed any mental state. 18 U.S.C. §2(b) ('Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'). Only the person causing the unwitting entity to act must possess the knowing mental state. Therefore, an individual who causes a corporation to commit a crime is criminally liable for the corporation's criminal conduct as an aider and abettor even if the corporation does not act with a knowing mental state.. For that reason, conviction of Sain was proper even assuming arguendo that Sain caused AEC to unwittingly commit the crime. Thus, the district court committed no error in sustaining Sain's conviction as an aider and abettor").

[32] 18 U.S.C. 3, 4.

[33] *United States v. White Eagle*, 721 F.3d 1108, 1119 (9th Cir. 2013)("Misprision of a felony in violation of 18 U.S.C. §4 requires the government to establish: (1) the commission and completion of a felony by a third party, (2) the defendant's knowledge of the felony, 3) the defendant's failure to notify the authorities, and (4) that the defendant took an affirmative step to conceal the crime"); *United States v. Boyd*, 640 F.3d 657, 662 (6th Cir. 2011); *United States v. Gebbie*, 294 F.3d 540, 544 (3d Cir. 2002); *United States v. Cefalu*, 85 F.3d 964, 868 (2d Cir. 1996).

[34] *United States v. Boyd*, 640 F.3d at 662; *United States v. Gerrhard*, 615 F.3d 7, 23-4 (1st Cir. 2010); *United States v. Gianakos*, 415 F.3d 912, 919 n.4 (8th Cir. 2005); *United States v. DeLaRose*, 171 F.3d 215, 221 (5th Cir. 1999); *United States v. Osborn*, 120 F.3d 59, 63 (7th Cir. 1997).

[35] E.g., 18 U.S.C. 1001 (false material statements relating to a matter with the jurisdiction of a federal department or agency), 1512 (witness tampering or destruction of evidence), 1520 (destruction of federal audit records).

so, fails to prevent the commission of an offense. This is the least common of the three. It arises in the context of a regulatory scheme, crafted to ensure public welfare and capped with a criminal proscription which says nothing of the knowledge necessary for conviction. Two Supreme Court cases under the Federal Food, Drug, and Cosmetic Act first brought to prominence this so-called "responsible corporate official" doctrine.[36]

The doctrine is triggered by legislation "of a now familiar type which dispenses with the conventional requirement of criminal conduct-awareness for some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[37] The legislation generally involves the regulation of "potentially harmful or injurious items."[38] "In such situations," the courts "have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation,"[39] And they have further "assumed that in such cases Congress intended to place the burden on the defendant to 'ascertain at his peril whether his conduct comes within the inhibition of the statute.'"[40] Thus, they "essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements."[41]

In such a legislative setting, "the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[42]

[36] *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975).

[37] *United States v. Park*, 421 U.S. at 669, quoting, *United States v. Dotterweich*, 320 U.S. at 280-81.

[38] *Staples v. United States*, 511 U.S. 600, 607 (1994).

[39] *Id.*

[40] *Id.*, quoting, *United States v. Balint*, 258 U.S. 250, 254 (1922).

[41] *Staples v. United States*, 511 U.S. at 607. See e.g., *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998)(internal citations omitted)("A corporate officer who is in a 'responsible relationship' to an activity within a company that violates provisions of the federal food laws, such as meat misbranding, can be held criminally responsible even though that officer did not personally engage in that activity. As previously noted, the misbranding provisions of which the corporate officers were convicted required the officer to act with an intent to defraud. Thus, the jury could convict a defendant corporate officer if it found a defendant: (1) had an intent to defraud; and (2) either personally participated in the misbranding or was in a responsible relationship within the company regarding the misbranding of meat").

[42] *United States v. Park*, 421 U.S. at 673-74.

Prosecutorial Discretion

Generally

The decision to prosecute a corporation or its culpable employees or both is vested in the Justice Department.[43] The courts will review the exercise of that discretion only in rare instances and then primarily to protect the constitutional rights of a defendant or potential defendant.[44]

The Justice Department has two sets of guidelines governing the decision to prosecute—one general ("Principles of Federal Prosecution") and the other a supplement devoted to corporations ("Principles of Federal Prosecution of Business Organizations").[45] As they make clear, the decision to prosecute is in fact a series of decisions. The first is whether to initiate, decline, or defer a prosecution. Here perhaps the most easily assessed factor is the strength of the case against the defendant or defendants. Prosecutors ordinarily will not initiate a prosecution unless there is probable cause to believe that a person has committed a federal crime.[46]

On the other hand, prosecutors will seriously consider initiating a prosecution if they believe that they have sufficient admissible evidence to secure a conviction.[47] In those instances, the additional factors that influence the determination to prosecute fall into three categories: the weight of the federal interest, the prospect of effective prosecution elsewhere; and the adequacy of other alternatives.[48]

Federal Interests

Whether to proceed with a prosecutable case ordinarily turns on the nature and seriousness of the offense and the culpability of the defendants. Some crimes, such as those involving immigration, civil rights, or federal tax violations, may warrant federal prosecution because of their very nature. Others, such as those involving major fraud or illicit drug trafficking, may call for federal prosecution because of the wide-spread harm they can inflict. The critical factors when it comes

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[43] *Wayte v. United States*, 470 U.S. 598, 607 (1985)(internal citations and quotation marks omitted)("In our criminal justice system, the Government retains broad discretion as to whom to prosecute. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); *United States v. Nixon*, 418 U.S. 683, 693 (1974)("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). *United States v. Armstrong*, 517 U.S. 456, 464 (1996)("The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to take Care that the Laws be Faithfully executed"), citing inter alia, U.S. Const. Art. II, §3, and 28 U.S.C. 516, 547.

[44] *Wayte v. United States*, 470 U.S. at 608 (internal citations and quotation marks omitted) ("[A]lthough prosecutorial discretion is broad, it is not unfettered ... In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification including the exercise of protected statutory and constitutional rights"); *United States v. Armstrong*, 517 U.S. at 464 ("Of course, a prosecutor's discretion is subject to constitutional constraints").

[45] *U.S. Attorneys' Manual (USAM)*, §§9-27.000 et seq., and §§9-28.000 et seq., respectively, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9. Although they refer to "business organizations" and "corporations," the business organization principles construe those terms broadly, *USAM* §9-28.000 n.1 ("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")

[46] *USAM*, §9-27.200[B]. Grounds for suspicion, short of probable cause, may justify further investigation, *id*.

[47] *USAM*, §9-27.220[A].

[48] *Id.*

to corporate liability, however, are culpability factors. The factors identified in the business organization guidelines include

- pervasiveness of the wrongdoing within the corporation;[49]
- the corporation's history of misconduct;[50]
- the existence and performance of compliance programs;[51]
- the corporation's timely and voluntary disclosure of wrongdoing;[52]
- the corporation's cooperation;[53]
- absence of obstruction;[54]
- collateral consequences;[55]
- restitution.[56]

Pervasiveness

The question is, was the corporation the victim of a rogue employee or is it a rogue corporation? Is crime committed for the corporation's benefit condemned, tolerated, or encouraged? Is the crime the work of an isolated individual or does corruption permeate the corporation? "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."[57] Conversely, it may not be appropriate to charge 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."[58] Most cases will fall between the two extremes and require recourse to other factors as well.

Corporate History

One indication of the pervasiveness of corruption within a corporation may be its involvement and response to any wrongdoing in its past. Past criminal conduct is telling, but the guidelines explain that earlier civil or regulatory enforcement actions may also be taken into account.[59] The same may be said of the past transgressions of subsidiaries or affiliates, although short of a

[49] *USAM* §9-28.500.

[50] *USAM* §9-28.600.

[51] *USAM* §9-28.800.

[52] *USAM* §9-28.720, 9-28.750.

[53] *USAM* §§9-28.700, 9-28.710, 9-28.740, 9-28.760.

[54] *USAM* §9-28.730.

[55] *USAM* §9-28.1000.

[56] *USAM* §9-28.900.

[57] *USAM* §9-28.500[A].

[58] *Id.*

[59] *USAM* §9-28.600[B]("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").

corporate department for the commission of criminal offenses the presence of subsidiaries or other liability-limiting features of corporate structure are not considered dispositive.[60]

Compliance Programs

As noted earlier, a corporation may be liable for employee misconduct even where it has warned its employees against committing the offense.[61] However, both the guidelines and the U.S. Sentencing Commission's Sentencing Guidelines encourage compliance programs.[62] While a mere "paper program" may be to little avail, a closely supervised, widely dispersed compliance program tailored to detect and prevent the offenses most likely to occur in the corporation's operational environment may have a real impact. An effective plan may reduce the chances of a prosecution and reduce the severity of the charges and any subsequent sentence should a prosecution occur.[63]

Cooperation

The cooperative aspects of the guidelines are among its most controversial attributes. It may be thought unseemly for a corporation to profit from the misdeeds of an employee and then escape liability by turning its benefactor over to the authorities. Moreover, the lines between rewarding cooperation and punishing the assertion of constitutional and other legal rights are not easily drawn. The guidelines point out that the Justice "Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities."[64] This is only one of the guideline's cooperation directives. A second is the reminder that cooperation alone does not necessarily shield a corporation from prosecution.[65] Earlier Justice Department policies relating to corporate cooperation with federal prosecutors came under fire because of concerns that they might interfere with the Sixth Amendment rights of corporations and corporate officials.[66]

The guidelines now seek to still those concerns by emphasizing that "[w]hat the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those [attorney-client and attorney work product] protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should

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[60] *Id.*

[61] *United States v. Potter*, 463 F.3d 9, 26 (1st Cir. 2006); *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 (4th Cir. 1985); *United States v. Ionia Management S.A.*, 525 F.Supp.2d 319, 324 (D. Conn. 2007).

[62] *USAM* §9-28.800[A]; U.S.S.G. §§8C2.5(f), 8B2.1.

[63] *USAM* §9-28.800[B]("[A] truly effective compliance program ... may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation"). An effective compliance program will reduce a convicted corporation's "culpability score" under the Sentencing Guidelines and consequently lower the corporation's ultimate sentencing range, U.S.S.G. §§8C2.5(f), 8A1.2.

[64] *USAM* §9-28.750.

[65] *USAM* §9-28.740 (emphasis added)("A corporation should not be able to escape liability *merely* by offering up its directors, officers, employees, or agents").

[66] See e.g., The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 110th Cong., 1st Sess. (2007); Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the Senate Comm. on the Judiciary, 110th Cong., 1st Sess. (2007); CRS Report RL33842, Prosecutorial Discretion in the Context of Corporate Attorney-Client Relations.

not ask for such waivers and are directed not to do so."[67] By the same token, while corporate officials are not free to obstruct an investigation, the mere fact that a corporation pays the attorneys' fees of its officers or employees or enters into joint defense agreements will ordinarily not constitute obstruction.[68] Attorneys who feel a prosecutor has breached these assurances are encouraged to contact senior Justice Department officials.[69]

A corporation may also receive credit for agreeing to make victim restitution, disciplining offending employees, or addressing short-comings in its compliance program.[70] Finally, a prosecutor may consider the adverse impact of a prosecution on innocent employees or shareholders.[71]

Prosecution Elsewhere

The general guidelines remind prosecutors that prosecution in another jurisdiction may be more advantageous, particularly when the interests of the other jurisdiction are comparatively more substantial or the prospects of a more appropriate sentence are greater.[72]

Alternatives to Criminal Trial

Prosecutors have several alternatives to criminal trial. They may accept a corporation's offer to plead guilty. They may defer prosecution of the corporation under a deferred prosecution agreement. They may accept a corporation's offer to sign a non-prosecution agreement, frequently with the intent to prosecute corporate officials or employees. They may elect to forgo prosecution in favor of civil sanctions.

Finally, since corporate misconduct often occurs in a regulatory context, civil or regulatory sanctions may be available. Whether prosecutors consider them appealing alternatives may depend in part on the severity of the misconduct and the severity of the sanctions. The factors the guidelines identify include "the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; and the probable sanction if the regulatory authority's enforcement action is upheld."[73]

Deferred and Non-prosecution Agreements

The common perception is that the announcement of its indictment sounds a large corporation's death knell.[74] Consequently, a large corporation, threatened with the prospect of indictment, may

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[67] *USAM* §9-28.710; see also, *USAM* §9-28.720 ("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").

[68] *USAM* §9-28.730.

[69] *USAM* §9-28.760.

[70] *USAM* §9-28.900.

[71] *USAM* §9-28.1000.

[72] *USAM* §9-27.240.

[73] *USAM* §9-27.1100[B]. Prosecutors will sometimes agree to a combination of criminal and civil sanctions, see e.g., *Johnson & Johnson Agrees to Pay 24.1 Million Criminal Penalty to Remedy Foreign Corrupt Practices Act and Oil for Food Investments*, Department of Justice Press Release (April 8, 2011)(announcing corporate agreement to pay criminal fine of $21.4 million and a Securities Exchange Commission disgorgement penalty of $48.6 million).

[74] Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the*

be inclined to accept a deferred prosecution agreement or a non-prosecution agreement at terms particularly favorable to the government.[75]

Although they are very similar, "a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court." On the other hand, a non-prosecution agreement does not involve filing of formal charges and "the agreement is maintained by the parties rather than being filed with a court."[76]

In either case, an agreement gives both parties resolution without the expensive ordeal and uncertain outcome of a criminal trial and its attendant appeals. As part of, or in conjunction with an agreement, a corporation may be induced to shed executives,[77] assist in their prosecution,[78] underwrite extensive remedial action,[79] pay substantial fines,[80] acquiesce in the confiscation of

Twenty-First Century, 15 UNIVERSITY OF PENNSYLVANIA JOURNAL OF BUSINESS LAW 797, 800 (2013)("For many commentators, it is now unquestioned dogma that a criminal indictment alone can easily destroy even a large, powerful corporation").

[75] See generally, Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 111th Cong., 1st Sess. (2009); Government Accountability Office, Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements, GAO-09-636T (2009); Warin, 2013 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, Harvard Law School Forum on Corporate Governance and Financial Regulation, available at http://blogs.law.harvard.edu/corpgov/2013/07/24/2013-mid-year-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements.

[76] *Criminal Resource Manual (CRM)* §163 n.2 (Mar. 7, 2008). The distinction is not insignificant, because the courts serve as an additional guarantor of the public interest when they are involved, see e.g., *United States v. Orthofix, Inc*., ___ F.Supp.2d ___ (2013 WL 3835233)(July 26, 2013 D.Mass.)(rejecting a deferred prosecution agreement as insufficient to protect the public interest).

[77] See e.g., *United States v. Stein*, 541 F.3d 130, 137 (2d Cir. 2008)(internal citations omitted)("KPMG retained Robert S. Bennett ... to formulate a cooperative approach for KPMG to use in dealing with federal authorities 's counsel. Bennett's strategy included a decision to clean house—a determination to ask Jeffrey Stein, Richard Smith, and Jeffrey Eischeid, all senior KPMG partners ... —to leave their positions as deputy chair and chief operating officer of the firm, vice chair-tax services, and a partner in personal financial planning, respectively"). The government subsequently announced a deferred prosecution agreement in which it noted that six former KPMG partners and a former deputy chairman were to be prosecuted, *KPMG to Pay $456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case*, Department of Justice Press Release (Aug. 29, 2005). Corporate agreements may coincide with individual plea agreements with corporate executives or former executives, see e.g., *Internet Gambling Company PartyGaming PLC Enters Non-Prosecution Agreement with U.S. and Will Forfeit $105 Million*, U.S. Attorney for the Southern District of New York Press Release (April 7, 2009)(noting that PartyGaming's founder and former executive had agreed to forfeit $300 million and plead guilty to gambling charge carrying a maximum term of imprisonment of two years).

[78] See e.g., *UBS AG Non-Prosecution Agreement* ("UBS shall ... (b) truthfully and completely disclose non-privileged information with respect to the activities of UBS, its officers and employees, and other concerning all matters about which the Fraud Section inquires of it ... (c) bring to the Fraud Section's attention all potentially criminal conduct by UBS or any of its employees that relates to violations of U.S. laws (i) concerning fraud or (ii) governing securities and commodities markets.... "), available at http://www.justice.gov/iso/opa/resources/13920121219117458457 57.pdf.

[79] See e.g., *United States v. BP America Inc. (Deferred Prosecution Agreement)* (No. 07-cr-683)(N.D.Ill. Oct.27, 2007)(agreeing to establish a $53,503 million victim restitution fund), available at http://www.justice.gov/criminal/vns/docs/2007/oct/10-25-07bpamerica-dpa.pdf.

[80] See e.g., *United States v. The Royal Bank of Scotland plc (3:13-CR-74-MPS)/United States v. RBS Securities Japan Limited (3:13-CR-73-MPS*), Department of Justice Press Release (Feb. 13, 2013)(announcing an agreement under which Royal Bank of Scotland and RBS Securities Japan agreed to pay $612 million in criminal penalties).

property of considerable value,[81] establish a robust compliance process,[82] and accept an oversight monitor for assurance of its continued good behavior.[83]

The guidelines address deferred prosecution and non-prosecution agreements primarily in their plea bargain instructions.[84] As in the case of individuals, the guidelines remind prosecutors to include at least a basic statement of facts.[85] In the case of government contractors, the guidelines prohibit prosecutors from "negotiat[ing] away an agency's right to debar or delist the corporate defendant."[86] They also discourage agreements that shield individual corporate officers, employees, or agents from liability.[87] Internal memoranda guide negotiation of agreements that feature the appointment of outside experts to serve as monitors of a corporation's continued good behavior.[88]

Constitutional Rights

During a criminal investigation and throughout the course of criminal proceedings, corporations and other legal entities enjoy many, but not all, of the constitutional rights implicated in the criminal investigation or prosecution of an individual.

Ex Post Facto

The Constitution's ex post facto clauses condemn retroactive criminal laws, state or federal.[89] In rough terms, the ex post facto clauses prohibit: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."[90]

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[81] See e.g., *United States v. Credit Suisse AG (Deferred Prosecution Agreement)*(D.D.C. Dec. 16, 2009)(agreeing to a forfeiture settlement of $268 million), available at http://www.justice.gov/criminal/pr/documents/12-16-09-deferred-%20proseuction-%20agreement.pfd.

[82] See e.g., *United States v. Sigue Corp. (Deferred Prosecution Agreement)*(No. 4:08-cr-00054-RWS) (E.D.Mo. Jan. 28, 2008) (in which Sigue agreed to develop and implement a compliance program which it estimated would cost it $9.7 million), available at http://www.justice.gov/opa/documents/sigue-deferred-prosecution-agreement.pdf.

[83] See e.g., *HSBC Deferred Prosecution Agreement, Attachment B, Corporate Compliance Monitor*, available at http://www.justice.gov/opa/documents/hsbc/dpa-attachment-b.pdf. See also, *United States v. HSBC Bank USA, NA* (2013WL3306161) (No. 12-cr-00763-JG)(E.D.N.Y. July 1, 2013).

[84] *USAM* §9-28.1300; see also, *USAM* §9-27.300 et seq.

[85] *USAM* §9-28.1300[B].

[86] *Id.*

[87] *Id.*

[88] *CRM* §§163 ("Morford Memorandum"), 166 ("Grindler Memorandum"). The recommendations cover selection of a monitor, the monitor's independence, his or her responsibility to oversee compliance with the agreement, development and weight of the monitor's recommendations, reporting newly discovered corporate misconduct, the monitor's tenure, and resolution of disputes between the monitor and the corporation.

[89] U.S. Const. Art. I, §9, cl.3; Art. I, § 10. cl.1.

[90] *Peugh v. United States*, 133 S.Ct. 2072, 2081 (2013), quoting, *Calder v. Bull*, 3 Dall. (U.S.) 386, 390 (1789).

In cases involving corporate defendants, federal courts have generally proceeded directly to an ex post facto analysis, without pausing to question whether the prohibition applies to such defendants.[91]

First Amendment

The Supreme Court has stated often that corporations are entitled to First Amendment protections.[92] "[I]n the context of political speech, the Government may [not] impose restrictions on certain disfavored speakers" be they individuals or corporations.[93] Nor may corporations suffer content-based blanket proscriptions of their truthful speech when it relates to lawful commercial activity.[94]

Fourth Amendment

The Fourth Amendment condemns unreasonable searches and seizures. Ordinarily, a government search or a seizure is unreasonable unless it is conducted pursuant to a warrant issued on the basis of probable cause.[95] "Corporations can claim no equality with individuals in the enjoyment of a [Fourth Amendment] right to privacy."[96] Nevertheless, it cannot "be claimed that corporations are without some Fourth Amendment rights."[97] At the turn of the 20th century, the Supreme Court acknowledged that corporations enjoyed the protection of the Fourth Amendment when faced with boundless government subpoenas.[98] In later cases, it found the Fourth Amendment's commands had been breached when officers seized a company's records and ledgers, once without a warrant and once with an invalid warrant.[99]

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[91] E.g., *Louis Vuitton S.A. v. Spencer Handbags Corp*., 765 F.2d 966, 971-72 (2d Cir. 1985)(construing amendments to the Trademark Counterfeiting Act narrowly after noting the possibility of an ex post facto violation otherwise); *United States ex rel. Baker v. Community Health Systems*, 709 F.Supp.2d 1084, 1108-112 (D.N.Mex. 2010)(holding that retroactive application of False Claims Act amendments would constitute an ex post facto violation); *United States ex rel. Sanders v. Allison Engine Co., Inc*., 667 F.Supp.2d 747, 752-58 (S.D.Ohio 2009)(same).

[92] *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 899-900 (2010)(citing two dozen cases for the proposition); see also, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990)("The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment"); *First National Bank of Boston v. Belliotti*, 435 U.S. 765, 779 n.14 (1978)("In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved").

[93] *Citizens United v. Federal Election Comm'n*, 130 S.Ct. at 899.

[94] *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 98 (1977).

[95] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U.S. Const. Amend. IV.

[96] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

[97] *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977).

[98] *Hale v. Henkel*, 201 U.S. 43, 76 (1905)("[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. ... We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, ... the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable").

[99] *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920); *Go-Bart Co. v. United States*, 282 U.S. 344 (1931).

The extent of the Amendment's protection will often turn not upon the nature of the subject to the search entity but the nature of its activities and the government's purpose for the search or seizure. In a regulatory context, commercial activities, corporate or otherwise, may be subject to reasonable warrantless inspections or inquiries bereft of probable cause, under some circumstances.[100] The courts continue to affirm, however, that corporate entities may claim Fourth Amendment protection in cases involving searches and seizures occurring on commercial premises but conducted in the course of a criminal investigation.[101]

Fifth Amendment

Of the rights which the Fifth Amendment guarantees, two have been denied corporations. "[A] corporation has no Fifth Amendment privilege" against self-incrimination,[102] nor does it have a right to grand jury indictment.[103] Of the others, two—Due Process, and Double Jeopardy—either have been said to protect corporations or have been construed to protect corporations.

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[100] *New York v. Burger*, 482 U.S. 691, 702-703 (1987)("Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search have lessened application in this context.... This warrantless inspection ... will be deemed to be reasonable only so long as three criteria are met. First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made.... Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.... Finally ... the regulatory statute must perform the two functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers").

[101] *Club Retro LLC v. Hilton*, 568 F.3d 181, 195 (5th Cir. 2009)("[T]he entry and search of Club Retro violated Club Retro, L.L.C.'s Fourth Amendment right to operate its commercial property free from unreasonable searches and seizures"); *United States v. SDI Future Health Inc*., 568 F.3d 684, 694 & n.3 (9th Cir. 2009)("The government first argues that Kaplan and Brunk lack standing to challenge the search and seizure of materials from SDI's premises. Wisely, the government does not argue that SDI itself lacks standing to challenge the underlying search and seizure. See *United States v. Leary*, 846 F.2d 592, 596 (10th Cir. 1988)('A corporate defendant has standing with respect to searches of corporate premises and seizure of corporate records')"); *Doe v. Heck*, 327 F.3d 492, 509 n.14 (7th Cir. 2003)("A private school, like any other corporation or business, is entitled to bring a Fourth Amendment challenge for the illegal search of its premises").

[102] *Braswell v. United States*, 487 U.S. 99, 105 (1988); *Louis Vuitton Malletier S.A., v. LY USA, Inc.*, 676 F.3d 83, 92 n.5 (2d Cir. 2012); *Eagle Hospital Physicians, LLC v. SRG Consulting, Inc*., 561 F.3d 1298, 1303 n.2 (11th Cir. 2009); *Amato v. United States*, 450 F.3d 46, 48 n.2 (1st Cir. 2006)("The collective-entity doctrine recognizes that the Fifth Amendment treats corporations and collective entities differently from individuals. Because corporations and collective entities have no Fifth Amendment privilege against self-incrimination ... the custodian cannot claim a personal Fifth Amendment privilege against the production of corporate records").

[103] *United States v. Macklin*, 389 F.Supp. 272, 273 (S.D.N.Y. 1975), aff'd, 523 F.2d 193 (2d Cir. 1975)("The corporate defendants, unlike defendant Macklin, are not subject to any term of imprisonment if convicted of the charges against them. Accordingly, the charges against them are not 'infamous' within the meaning of the fifth amendment"); see also, *United States v. Yellow Freight System, Inc*., 637 F.3d 1248, 1253-254 (9th Cir. 1981)(emphasis added and internal citations omitted) ("Relying on United States Supreme Court pronouncements that infamous crimes are those 'punishable by imprisonment in a penitentiary,' defendants contend that they have been charged with infamous crimes and may not be prosecuted except on grand jury indictment. In response, the United States notes that both defendants are corporations and therefore not amenable to imprisonment. It accordingly contends that this prosecution may proceed by information alone.... Since we hold that imposition of potential imprisonment on individuals violating a criminal statute does not of itself make corporate violations of the same statute infamous crimes, the only remaining question is whether another factor renders the crimes charged in this case infamous ... The class of inherently infamous crimes, *if it exists at all*, would encompass only the most serious mala in se. Regulatory crimes such as those charged in this case, are not inherently infamous"). Note that , Rule 7(a) of the Federal Rules of Criminal Procedure declares, without reference to the class of defendants, that "An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable (A) death; or (B) by imprisonment for more than one year," unless waived under Rule 7(b).

Due Process

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V.

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, §1.

The Fifth Amendment Due Process Clause limits the governmental prerogatives of the federal government; the Fourteenth Amendment Due Process Clause limits the prerogatives of the states. Nevertheless, the Supreme Court has recognized that many of the restrictions of the Bill of Rights, binding on the federal government, are—by virtue of the inclusion of those restrictions within the Fourteenth Amendment's understanding of due process—binding on the states under the same standards.[104]

The Supreme Court has said long and often that a corporation is a "person" for purposes of the Fourteenth Amendment.[105] Moreover, the courts have acknowledged the access of corporations to various due process rights, for example, the right to challenge a court's personal jurisdiction over them[106] or "the right to be heard at a meaningful time and in a meaningful manner before being deprived of a protected interest in liberty or property."[107]

On the other hand, the Supreme Court has said that the states of the United States are not "persons" for Fifth Amendment Due Process Clause purposes.[108] The lower federal courts have

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[104] *Malloy v. Hogan*, 378 U.S. 1, 4-5, 10 (1964)(internal citations omitted)("[S]ome of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.... We have held that the guarantees of the First Amendment, the prohibition against unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment"). In much the same way, the Fifth Amendment's understanding of due process includes an equal protection guarantee that the federal government must honor under the same standards, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)("The Fifth Amendment ... does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process"); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

[105] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978), citing, *Santa Clara County v. Southern Pacific R. Co*., 118 U.S. 394 (1886), and *Covington & Lexington Turnpike R. Co. v. Sandford*, 164 U.S. 578 (1896)("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment"); see also, *Grosjean v. American Press Co*., 297 U.S. 233, 244 (1936)("But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses.... ").

[106] *GSS Group Ltd v. National Port Authority*, 680 F.3d 805, 813 (D.C.Cir. 2012), citing inter alia, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2850-851 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 2785 (2011)("Both Supreme Court and this court have repeatedly held that foreign corporations may invoke due process protections to challenge the exercise of personal jurisdiction over them").

[107] *Chai v. Department of State*, 466 F.3d 125, 132 (D.C.Cir. 2006)(internal citations omitted).

[108] *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966)("The word 'person' in the context of the Due Process Clause of the Fifth Amendment, cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court"); see also, *South Dakota v. U.S. Dept*.

followed suit with observations that neither the political subdivisions of the states nor foreign governments are "persons" for purposes of the Due Process Clause.[109]

Double Jeopardy

The circuit courts have concluded that corporations are entitled to protection against double jeopardy.[110] In addition, the Supreme Court has upheld a corporation's double jeopardy challenge without recognizing the right in so many words.[111]

Sixth Amendment

The Sixth Amendment guarantees anyone accused of a federal crime several rights: the right to notice of the charges, to the assistance of counsel, to a public and speedy trial before a jury where the crime occurred, to call witnesses, and to confront his accusers.[112] The text implies the rights are available to anyone, corporate or otherwise, accused of a crime.[113]

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of Interior, 665 F.3d 986, 990 (8th Cir. 2012).

[109] *GSS Group Ltd v. National Port Authority*, 680 F.3d at 809("[F]oreign sovereigns and their extensively-controlled instrumentalities are not 'persons' under the Fifth Amendment"); *Frontera Resources Azerbaijan v. State Oil*, 582 F.3d 393, 399 (2d Cir. 2009)("Neither States of the Union nor foreign nations are persons for Fifth Amendment purposes"); *Greater Heights Academy v. Zelman*, 522 F.3d 678, 681 (5th Cir. 2008)(political subdivisions of the states are not persons for due process purposes).

[110] *United States v. Hospital Monteflores, Inc*., 575 F.2d 332, 335 (1st Cir. 1978); *United States v. Security National Bank*, 546 F.2d 492, 494 (2d Cir. 1976).

[111] *United States v. Martin Linen Supply Co*., 430 U.S. 564 (1977); but also, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 557 (1998)(Breyer, J., dissenting)(emphasis added)("Nor does application of the Due Process Clause automatically trigger the Takings Clause, just because the word 'property' appears in both. That word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted. Compare, e.g., *United States v. Martin Linen Supply Co*, 430 U.S. 564 (1977) (*'person' includes corporations for purposes of Fifth Amendment Double Jeopardy Clause*), with *Doe v. United States*, 487 U.S. 201, 206 (1988) ('person' does not include a corporation for purposes of fifth Amendment Self-Incrimination Clause); *Strategic Defense International, Inc. v. United States*, 745 F.Supp.2d 1214, 1234 (S.D.Fla. 2010)(parallel citations omitted) ("Corporate identity has been determinative of whether a particular constitutional right is or is not available to a corporation.... *United States v. Martin Linen Supply*, 430 U.S. 564 (1977)(corporation protected against double jeopardy) ... ").

[112] U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense").

[113] *United States v. Rad-O-Lite of Philadelphia, Inc*., 612 F.2d 740, 743 (3d Cir. 1979)("The sixth amendment describes the class of persons protected by its terms with the word 'accused.' This language does not suggest that the protection of sixth amendment rights is restricted to individual defendants").

Assistance of Counsel

A corporation accused of a crime has the right to the assistance of counsel in its defense.[114] A corporation, however, is not entitled to appointment of counsel at public expense to represent it.[115]

Notice of Charges

The Sixth Amendment assures the accused that he will be "informed of the nature and cause of the accusation."[116] Rule 7(c)(1) of the Federal Rules of Criminal Procedure carries forward the assurance regardless of whether the accused is charged by indictment or information.[117]

Public Trial

In the presence of prejudicial pre-trial publicity or inflamed public sentiment, the right to a public trial may conflict with an accused's Fifth Amendment due process right to a fair trial and his Sixth Amendment right to trial by an impartial jury.[118] Moreover, "the public trial right extends beyond the accused and can be invoked under the First Amendment."[119]

Speedy Trial

The courts use a balancing test to determine whether an accused has been denied his right to a speedy trial. The analysis consists of weighing "the length of [the] delay, the reason for the delay, the defendant's assertion of his right, and [the extent] of prejudice to the defendant [caused by the delay]."[120] The courts have used this constitutional analysis when the accused is a corporation.[121] It is in this context, that the corporate right to a public trial is most often asserted.

Jury Trial

The Sixth Amendment assures an accused of the right to a jury in serious criminal cases. In three cases involving legal entities—two labor unions and a corporation—the Supreme Court made it clear that an accused facing a substantial criminal fine has the right to a jury trial.[122]

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[114] *United States v. Unimex, Inc.*, 991 F.2d 546, 549-51(9th Cir. 1993); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d at 743; see also, *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C.Cir. 1984("It appears beyond sensible debate that corporations, in our society, do indeed enjoy the right to retain counsel. Corporations may not assert 'purely personal' rights but, no less than natural persons, they are entitled to due process and the equal protection of the laws.... [T]he right to effective assistance of counsel is not so peculiarly applicable to individuals that corporations should not be entitled to it. In fact, denying a corporation the right to retain counsel may be tantamount to stripping the corporation of its right to defend itself in court, for it is established that a corporation, which is an artificial entity that can only act through agents, cannot proceed pro se").

[115] *United States v. Hartsell*, 127 F.3d 343, 350 (4th Cir. 1997); *United States v. Unimex, Inc.*, 991 F.2d at 550; *United States v. Rivera*, 912 F.Supp. 634, 638 (D.P.R. 1966).

[116] U.S. Const. Amend. VI.

[117] "The indictment or information must be a plain, concise, and definite written state of the essential facts constituting the offense charged.... " F.R.Crim.Pro. 7(c)(1); e.g., *United States v. Triumph Capital Group, Inc*., 360 F.Supp.2d 470, 474-74 (D.Conn. 2004).

[118] *Rideau v. Louisiana*, 373 U.S. 723,726-27 (1963); *Estes v. Texas*, 381 U.S. 532, 538-40 (1965).

[119] *Presley v. Georgia*, 558 U.S. 209, 212 (2010).

[120] *Vermont v. Brillon*, 556 U.S. 81, 88 (2009), quoting, *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

[121] *United States v. Litton Systems, Inc*., 722 F.2d 264, 265-66 (5th Cir. 1984); *United States v. Sears, Roebuck and Co., Inc.*, 877 F.2d 734, 739 (9th Cir. 1989).

[122] *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)(a $10,000 fine imposed upon a large union did not trigger the jury trial

Venue

By virtue of the Sixth Amendment and Article III, all federal criminal trials must be held in the state and judicial district in which the crime occurs.[123] The venue standards which the courts use for individuals and for corporations are the same.[124]

Call Witnesses and Confrontation

The accused in a criminal proceeding enjoys the rights under the Sixth Amendment "to be confronted with the witnesses against [and] to have compulsory process for obtaining witnesses in his favor."[125] The right to confrontation includes the instruction that "testimonial statements of witnesses absent from trial can be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.[126] Under the right to compulsory process "at a minimum, ... criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and right to put before the jury evidence that might influence the determination of guilt."[127] The rights ensure the integrity of the criminal fact-finding process.[128] The sparse case law suggests they are available to corporations.[129]

Eighth Amendment

The Eighth Amendment states that excessive fines may not be imposed. A fine is excessive if it is grossly disproportionate to gravity of the crime for which the defendant was convicted.[130] A few

right); *United Mine Workers v. Bagwell*, 512 U.S. 821, 824, 838 (1994)($64 million in fines does trigger a jury trial right); *Southern Union Co. v. United States*, 132 S.Ct. 2344, (2012)("The RCRA subjects Southern Union to a maximum fine of $50,000 for each of violation. 42 U.S.C. 6928(d). The Government does not deny that, in light of the seriousness of that punishment, the company was properly accorded a jury trial. And the Government now concedes the District Court made factual findings that increased both the 'potential and actual' fine the court imposed. This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow").

[123] U.S. Const. Art. III, §2, cl. 3 ("The trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed ... "); Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to ... a trial, by an impartial jury of the State and district wherein the crime shall have been committed ...").

[124] *United States v. Oceanpro Industries, Ltd.*, 674 F.3d 323, 327-30 (4th Cir. 2012); *United States v. Canal Barge Co., Inc.*, 631 F.3d 347, 351-54 (6th Cir. 2011); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188-191 (2d Cir. 1989)—each citing as authority cases that only human defendants.

[125] U.S. Const. Amend. VI.

[126] *Williams v. Illinois*, 132 S.Ct. 2221, 2232 (2012), quoting, 541 U.S. 36, 59 (2004).

[127] *Taylor v. Illinois*, 484 U.S. 400, 408 (1988), quoting, *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

[128] *Perry v. New Hampshire*, 132 S.Ct. 726, 723 (2012)(internal citations omitted)("The Constitution ... protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include ... compulsory process and confrontation plus cross-examination of witnesses"); *Taylor v. Illinois*, 484 U.S. at 408 ("Indeed, this right [to compulsory process] is an essential attribute of the adversary system itself").

[129] *United States v. Nippon Paper Industries Co., Ltd.*, 17 F.Supp.2d 38, 40 (D.Mass. 1998)(right to confrontation); *United States v. Nebraska Beef, Ltd.*, 194 F.Supp.2d 949, (D.Neb. 2002)(compulsory process).

[130] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

courts avoid the question by noting that the Supreme Court has never decided whether the Eighth Amendment applies to corporations.[131] Others have ruled against corporations on the merits.[132]

Sentencing Guidelines

Corporations cannot be incarcerated. Nor can they be put to death.[133] Otherwise, corporations and individuals face many of the same consequences following conviction. Corporations can be fined.[134] They can be placed on probation.[135] They can be ordered to pay restitution.[136] Their property can be confiscated.[137] They can be barred from engaging in various types of commercial activity.

Corporations and individuals alike are sentenced in the shadow of the federal Sentencing Guidelines. Federal courts must begin the sentencing process for felonies or class A misdemeanors with a calculation of the sentencing ranges recommended by the Sentencing Guidelines.[138] When they impose sentence, they must consider the recommendation along with the factors prescribed in 18 U.S.C. 3553(a).[139] Appellate courts review the sentences imposed on an abuse of discretion standard and will overturn lower court sentences that are procedurally or substantively unreasonable.[140] A sentence is procedurally unreasonable when the sentencing court fails to correctly identify and apply the appropriate Sentencing Guidelines' recommended sentencing range.[141] A sentence is substantively unreasonable when it is unduly harsh or unduly lenient or otherwise inexpedient.[142]

The Sentencing Guidelines for organizations measure punishment according to the seriousness of the offense as well as the defendant's culpability and history of misconduct. On the other hand,

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[131] *United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 n.15 (11th Cir. 2011), citing, *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989).

[132] *United States v. Jalaram, Inc.*, 599 F.3d 347, 357 (4th Cir. 2010).

[133] Of course, government action, public scorn, or the two in concert may wipe them out of existence.

[134] Cf., 18 U.S.C. 3571 (designating maximum fines for organizations convicted of felonies and various misdemeanors).

[135] Cf., 18 U.S.C. 3561(a)(1)(noting that all defendants may be placed on probation other than individuals convicted of class A or B felonies); U.S.S.G. §8D1.1.

[136] Cf., U.S.S.G. §8B1.1. The statutes that authorize restitution orders refer to simply to "victims" or "defendants" rather than to "individuals," "organizations," or "corporations," 18 U.S.C. 3663, 3663A, 2248, 2259, 2264, 2327.

[137] Cf., U.S.S.G. §§8E1.2, 5E1.4.

[138] *Gall v. United States*, 552 U.S. 38, 49 (2007)("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark"); *United States v. Goodwin*, 717 F.3d 511, 520(7th Cir. 2013).

[139] *Gall v. United States*, 552 U.S. at 49-50.

[140] *Gall v. United States*, 552 U.S. at 51; *United States v. Douglas*, 713 F.3d 694, 700 (2d Cir. 2013).

[141] *Gall v. United States*, 552 U.S. at 51; *United States v. Alvarado*, 720 F.3d 153, 157 (2d Cir. 2013)("A district court errs procedurally when it fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the §3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence"); *United States v. Sandoval-Orellana*, 714 F.3d 1174, 1180 (9th Cir. 2013).

[142] *United States v. Douglas*, 713 F.3d at 700 (We set aside a district court's sentence as substantively unreasonable only if affirming it would damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law"); *United States v. Ciavarella*, 716 F.3d 705, 735 n.19 (3d Cir. 2013)("In evaluating the substantive reasonableness of a sentence, we consider whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. §3553(a)").

they reward self-disclosure, cooperation, restitution, and preventive measures. The Guidelines supply special corporate sentencing directions for fines, probation, forfeiture, special assessments, and remedial sanctions.

Fines

The corporate fine Guidelines begin with the premise that a totally corrupt corporation should be fined out of existence, if the statutory maximum permits.[143] A corporation operated for criminal purposes or by criminal means should be fined at a level sufficient to strip it of all of its assets.[144] On the other hand, a fine need not be imposed at all, if it would render full victim restitution impossible.[145]

Otherwise, corporations face different fine standards depending upon the offense of conviction. In chapter 8C, the Guidelines set specific standards for crimes with a commercial flavor—antitrust, smuggling, and gambling offenses, for instance.[146] The Sentencing Commission explicitly declined to promulgate special corporate fine standards for other offenses.[147] Instead, corporate fines for such offenses are governed by two general statutory sentencing provisions.[148] One, §3571, sets the permissible maximum amount for any fine.[149] The other, §3553, outlines the sentencing factors and procedures applicable to both individuals and corporations.[150] The limited case law suggests that sentencing courts may disregard the Guidelines completely in the case of a corporation convicted of one of these other offenses.[151]

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[143] U.S.S.G. §8C1.1. The Guidelines, however, operate within the confines established by Congress. The Guideline calculation that falls short of a statutory minimum or exceeds a statutory maximum must be adjusted accordingly, U.S.S.G. §§8C3.1, 5E1.2(c).

[144] U.S.S.G. §8C1.1. *United States v. Najjar*, 300 F.3d 466, (4th Cir. 2002)("Tri-City was exposed to a $500,000 fine under the statute and what has been called a death penalty fine under §8C1.1 of the Sentencing Guidelines.... It is clear that Tri-City was conceived in crime and performed little or no legitimate activity ").

[145] 18 U.S.C. 3572(b); U.S.S.G. §8C2.2.

[146] U.S.S.G. §8C2.1 ("The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under: §§2B1.1[theft], 2B1.4[insider trading], 2B2.3[trespass], 2B4.1[commercial bribery], 2B5.3[copyright or trademark infringement], 2B6.1[vehicle identification numbers]; §§2C1.1[bribery], 2C1.2[illegal gratuity], 2C1.6 [deleted]; §§2D1.7[sale of drug paraphernalia], 2D3.1[controlled substance regulatory offenses], 2D3.2[same]; §§2E3.1[gambling], 2E4.1[contraband tobacco products], 2E5.1[labor racketeering], 2E5.3[labor record false statements]; §2G3.1[dealing in obscenity]; §§2K1.1[failure to report stolen explosives], 2K2.1[unlawful firearms transactions]; §2L1.1[smuggling]; §2N3.1[odometer offenses]; §2R1.1[antitrust]; §§2S1.1[money laundering], 2S1.3[smurfing]; §§2T1.1[tax evasion], 2T1.4[tax fraud principal], 2T1.6[failure to collect taxes], 2T1.7[failure to deposit collected taxes], 2T1.8[withholding offenses], 2T1.9[tax conspiracy], 2T2.1[nonpayment of alcohol tax], 2T2.2[regulatory tax offenses], 2T3.1[evade customs duties]; or when one of these guidelines is determinative, §§2E1.1[racketeering], 2X1.1[attempt or conspiracy], 2X2.1 [aiding and abetting], 2X3.1[accessory after the fact], 2X4.1[misprision of a felony]").

[147] U.S.S.G. §8C2.10, *Background* ("The Commission has not promulgated guidelines governing the setting of fines for counts not covered by §8C2.1").

[148] U.S.S.G. §8C2.10.

[149] As a general rule, a court may impose a fine of not more than $500,000 when an organization is convicted of a felony, and a fine for misdemeanors ranging from not more than $10,000 to not more than $500,000, 18 U.S.C. 3571(c). These general limitations notwithstanding, a court may impose a fine of not more than twice the gain or loss associated with the offense, 18 U.S.C. 3571(c), (d), and may impose higher fines when Congress has authorized them for a specific crime, 18 U.S.C. 3571(c)(1).

[150] 18 U.S.C. 3553.

[151] *United State v. Iona Management S.A.*, 555 F.3d 303, 310 (2d Cir. 2009)(emphasis added)("Iona primarily argues that the District Court erred in its grouping analysis by not following Sentencing Guidelines Section 3D1.2. The District Court, however, was not sentencing pursuant to this section, and was not required to do so because *there were*

For the offense to which Chapter 8C's fine provisions apply, a sentencing court must begin by deciding whether the defendant entity is able to pay a fine.[152] If so, the amount of an organization's fine is determined by the applicable offense level and the level of its culpability.[153] An organization's offense level is calculated in the same manner as an offense level for an individual but without the adjustments for things like vulnerability of the victim or role in the offense.[154] Unless the amount of gain or loss associated with the offense is greater, the organization's base fine is pegged at one of 33 levels corresponding to its offense level—from $5,000 for an offense level of 6 or less to $72.5 million for an offense level of 38 or more.[155]

The applicable fine range is then ascertained by multiplying the amount assigned to the offense level by minimum and maximum factors determined by the corporation's culpability score.[156] A corporation's score sheet begins at 5.[157] Points are added or subtracted to reflect greater or less culpability.[158] The lowest culpability score merits a range ascertained by multiplying the offense level amount by .05 (setting the bottom of the range) and 0.2 (setting the top).[159] Conversely, the highest culpability score merits a range ascertained by multiplying the offense level amount by 2.0 (setting the bottom of the range) and 4.0 (setting the top).[160]

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no guidelines applicable to the organizational offense at issue. Accordingly, the District Court 'determine[d] an appropriate fine by applying the provisions 18 U.S.C. §§3553 and 3572'"); but see, 18 U.S.C. 3553(a)(4)("…. The court, in determining the particular sentence to be imposed, shall consider … (4) … the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendants as set forth in the [sentencing] guidelines … ").

[152] U.S.S.G. §8C2.2; *United States v. Patient Transfer Service, Inc.*, 413 F.3d 734, 745 (8th Cir. 2005).

[153] U.S.S.G. §8C2.3 to §8C2.9.

[154] U.S.S.G. §8C2.3(a)("For each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that [Chapter Two] guideline").

[155] U.S.S.G. §8C2.4. For example, a corporation, Bio-Med Plus Inc., and its operators were recently convicted of mail fraud, wire fraud, money laundering and racketeering in connection with a large scale Medicaid scheme, *United States v. Brady*, 644 F.3d, 1213, 1302 (11th Cir. 2011). Mail or wire fraud convictions begin with a **base offense level of 6**, U.S.S.G. §2B1.1(a)(2)**.** The fraud Guideline calls for additional offense levels based on the amount of the property involved in the fraud. In the Bio-Med case, the scheme involved over $33 million, hence an addition of 22 levels to an **offense level of 28**, U.S.S.G. §2B1.1(b)(1)(L). A fraud with multiple victims warrants a higher offense level, U.S.S.G. §2B1.1(b)(2)(B). Bio-Med's offense level grew by 4 levels to an **offense level of 32** because its fraudulent scheme victimized from than 50 individuals or entities. The receipt of stolen property (+2 offense levels, U.S.S.G. §2B1.1(b)(4)) and sophisticated attempts to avoid detection (+2 offense levels, U.S.S.G. §2B1.1(b)(10)), attributed to the plot, produced a final **offense level of 36**. The final offense level gave the court a starting point for its calculation of the fine to be imposed as discussed below.

[156] U.S.S.G. §§8C2.5 to 8C2.8.

[157] U.S.S.G. §8C2.5(a).

[158] Points are added for (1) the corporation's involvement in or tolerance of criminal conduct, (2) its history of misconduct, and (3) its involvement in any obstruction of justice; points are subtracted if the corporation has an effective compliance program, and for its acceptance of responsibility, cooperation with authorities, or self-disclosure of criminal misconduct, U.S.S.G. §§8C2.5(b) to 8C1.5(g).

[159] U.S.S.G. §8C2.6.

[160] *Id.* In the Bio-Med case noted above, "[t]he district court reached a culpability score of 10 based on: (1) a starting score of five pursuant to §8C2.5(a); (2) an increase of two pursuant to §8C2.5(b)(4) because Bio-Med had fifty or more employees, at least one of whom had substantial authority to act on behalf of the organization and participated in, condoned, or was willfully ignorant of the criminal conduct; and (3) an increase of three pursuant to §8C2.5(e) because Bradley III. on behalf of Bio-Med, obstructed justice. A score of 10 corresponds to a minimum multiplier of 2.00 and a maximum of 4.00. A total offense level of 36 corresponds to a fine amount of $45.5 million.... Accordingly, the Guidelines fine range for Bio-Med came to between $91 million and $182 million," *United States v. Bradley*, 644 F.3d 1213, 1303 (11th Cir. 2011).

The Guidelines then identify 11 factors to be considered when deciding where within the applicable range a corporation ought to be fined.[161] The absence of an effective ethics and compliance program is perhaps the most distinctive factor on the list. The Guidelines also identify a number of circumstances that may require or argue for a fine outside of the recommended range. First, the sentence imposed must conform to statutory requirements. Thus, applicable statutory maximums or minimums trump any conflicting Guideline sentencing range boundaries.[162] Second, the sentencing process may leave the corporation with the windfall from its misconduct. Consequently, the Guidelines recommend that the fine level be set so as to disgorge any illegally gotten gains that would otherwise be left to a corporation after the payment of its fine, compliance with the restitution order, or other remedial costs.[163] On the other side, a fine below the recommended range should be imposed when necessary to permit restitution or may be below that range when the corporation will be unable to pay a higher fine even on an installment basis.[164] A below-range corporate fine may also be fitting in light of individual fines imposed upon the owners of a closely held corporation.[165]

The Guidelines supply several examples of when a fine outside the recommended range might be considered. A fine above the range (referred to as upward departures) may be warranted when

- the offense resulted in a risk of death or serious bodily injury;[166]
- the offense constituted a threat to national security;[167]
- the offense presented a threat to the environment;[168]
- the offense presented a threat to the market;[169]
- the offense involved official corruption;[170]

[161] U.S.S.G. §8C2.8("(a) In determining the amount of the fine within the applicable guideline range, the court should consider: (1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization; (2) the organization's role in the offense; (3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct; (4) any nonpecuniary loss caused or threatened by the offense; (5) whether the offense involved a vulnerable victim; (6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct; (7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c); (8) any culpability score under §8C2.5(Culpability Score) higher than 10 or lower than 0; (9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set for in §8C2.5 (Culpability Score); (10) any factor listed in 18 U.S.C. §3572(a); and (11) whether the organization failed to have, at the time of the instance offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program). (b) In addition, the court may consider the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score").

[162] U.S.S.G. §8C3.1(b), (c).

[163] U.S.S.G. §8C2.9.

[164] U.S.S.G. §8C3.3.

[165] U.S.S.G. §8C3.4.

[166] U.S.S.C. §8C4.2.

[167] U.S.S.C. §8C4.3.

[168] U.S.S.C. §8C4.4.

[169] U.S.S.C. §8C4.5.

[170] U.S.S.C. §8C4.6.

- appropriate to offset reductions attributable to compliance programs;[171] and
- the corporation's culpability score exceeds the limit for additional multipliers.[172]

Departures below the range (referred to as downward departures) may be warranted when

- the corporation provides substantial assistance to authorities;[173]
- the corporation is a public entity, for example, a local governmental agency;[174]
- the corporation's beneficiaries (other than stockholders) are also victims of the offense;[175] and
- the corporation's remedial costs far exceed its gains from the misconduct.[176]

Probation

Corporations convicted of a federal crime must be placed on probation, if the court elects not to fine them.[177] If they are fined, the court may also sentence them to probation.[178] The court may impose a probationary term of no more than five years.[179] In the case of felony convictions, the term must be for at least one year.[180]

The Guidelines call for probation as a means of ensuring that convicted corporations comply with their obligations to pay a fine or special assessment, make restitution, establish a compliance program, perform community service, or comply with the court's remedial orders.[181] They also find probation appropriate when

- the organization committed the offense within five years of a prior similar conviction;[182]
- a senior corporate official involved in the offense within five years was involved in a prior similar offense;[183]
- necessary to reduce the risk of future criminal misconduct on the part of the corporation;[184] or
- necessary in order to comply with the sentencing directives of 18 U.S.C. 3553(a)(2), i.e., the need to

[171] U.S.S.C. §8C4.10.

[172] U.S.S.C. §8C4.11.

[173] U.S.S.C. §8C4.1.

[174] U.S.S.C. §8C4.7.

[175] U.S.S.C. §8C4.8.

[176] U.S.S.C. §8C4.9.

[177] U.S.S.G. §8D1.1(a)(7); 18 U.S.C. 3551(c).

[178] *Id*.

[179] U.S.S.G. §8D1.2(a); 18 U.S.C. 3561(c)(but for not more than one year if the corporation is convicted of an infraction rather than a felony or misdemeanor).

[180] U.S.S.G. §8D1.2(a)(1); 18 U.S.C. 3561(c)(1).

[181] U.S.S.G. §8D1.1(a)(1), (2), (3).

[182] U.S.S.G. §8D1.1(a)(4).

[183] U.S.S.G. §8D1.1(a)(5).

[184] U.S.S.G. §8D1.1(a)(6).

- reflect the seriousness of the offense, promote respect for the law, and provide just punishment,
- afford adequate deterrence,
- protect the public, and
- effectively provide for offender training, care, and correctional treatment.[185]

The only mandatory condition of corporate probation is a requirement that the corporation not engage in any further criminal conduct.[186] The array of discretionary probationary conditions under the Guidelines includes requirements that the corporation

- publicize its conviction at its own expense;[187]
- establish and maintain a compliance program;[188]
- notify its employees and shareholders of its offense and compliance program;[189]
- notify or periodically report to the court or the probation service on its finances, compliance program, or involvement in government investigations or proceedings;[190]
- undergo periodic audits at its own expense;[191] or
- make periodic restitution or fine payments.[192]

In addition, a sentencing court remains free to impose any probationary condition that is reasonably necessary and related to the considerations prescribed for sentencing generally under 18 U.S.C. 3553(a), (b)(2).[193]

In response to a corporation's failure to comply with the conditions of its probation, a court may resentence the corporation, extend the term of its probationary period, or impose additional probationary conditions.[194]

Special Assessments

Corporations are subject to a special assessment upon conviction at a rate of $400 for each felony count, $125 for class A misdemeanor count, $50 for each class B misdemeanor count, and $25 for each class C or infraction count.[195]

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[185] U.S.S.G. §8D1.1(a)(4); 18 U.S.C. 3553(a)(2).

[186] 18 U.S.C. 3563(a)(1), U.S.S.G. §8D1.3(a)(1). In the case of a felony conviction and in the absence of extraordinary circumstances, however, the court must require the corporation either to make restitution and do community service. Under extraordinary circumstances, the court may substitute one of the standard discretionary conditions in lieu of restitution or community service, 18 U.S.C. 3563(a)(2), U.S.S.G. §8D1.3(a)(2).

[187] U.S.S.G. §8D1.4(a).

[188] U.S.S.G. §8D1.4(b)(1).

[189] U.S.S.G. §8D1.4(b)(2).

[190] U.S.S.G. §8D1.4(b)(4), (3).

[191] U.S.S.G. §8D1.4(b)(5).

[192] U.S.S.G. §8D1.4(b)(6).

[193] 18 U.S.C. 3563(b)(22); U.S.S.G. §8D1.3(c).

[194] 18 U.S.C. 3565(a); U.S.S.G. §8F1.1.

[195] 18 U.S.C. 3013; U.S.S.G. §8E1.1.

Restitution, Compliance Programs, and Other Remedial Sentences

Restitution

Depending on the nature of the offense, a court may be required to order a convicted corporation to pay victim restitution. In other instances, it may do so as a matter of discretion. In still others, the court may impose restitution as a condition of probation or pursuant to a plea bargain.[196]

Restitution is required when a defendant has been convicted of

- a crime of violence;[197]
- a crime against property including fraud;[198]
- maintaining a crack house;[199]
- tampering with consumer products;[200]
- theft of medical products;[201]
- sexual abuse;[202]
- child pornography;[203]
- domestic violence;[204]
- telemarketing fraud;[205]
- child support;[206]
- copyright and trademark infringement;[207]
- production of methamphetamines;[208] or
- human trafficking.[209]

The court may order restitution when a corporation is convicted of

- any offense under title 18 of the U.S. Code for which mandatory restitution is not required;[210]

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[196] See generally CRS Report RL34138, *Restitution in Federal Criminal Cases*.

[197] 18 U.S.C. 3663A(c)(i); U.S.S.G. §8B1.1(a)(1).

[198] 18 U.S.C. 3663A(c)(ii); U.S.S.G. §8B1.1(a)(1).

[199] 18 U.S.C. 3663A(c)(ii); 21 U.S.C. 856; U.S.S.G. §8B1.1(a)(1).

[200] 18 U.S.C. 3663A(c)(iii); U.S.S.G. §8B1.1(a)(1).

[201] *Id.*

[202] 18 U.S.C. 2248; U.S.S.G. §8B1.1(a)(1).

[203] 18 U.S.C. 2259; U.S.S.G. §8B1.1(a)(1).

[204] 18 U.S.C. 2264; U.S.S.G. §8B1.1(a)(1). Although it seems unlikely that some of these offenses would be committed the benefit of a corporation thus triggering corporate liability, the Guidelines list them among the offenses for which corporate restitution must be imposed in section 8B1.1(a)(1).

[205] 18 U.S.C. 2327; U.S.S.G. §8B1.1(a)(1).

[206] 18 U.S.C. 228(d).

[207] 18 U.S.C. 2323(c).

[208] 21 U.S.C. 853(q).

[209] 18 U.S.C. 1593.

[210] 18 U.S.C. 3663(a)(1)(A); U.S.S.G. §8B1.1(a)(1). The Guidelines group the offenses triggering discretionary restitution with those triggering mandatory restitution , U.S.S.G. §8B1.1(a)(1)("(a) In the case of an identifiable victim,

- transportation of hazardous materials;[211]
- air transportation of hazardous materials;[212]
- air piracy;[213]
- interference with a flight crew;[214] or
- violations of the Controlled Substances Act under 21 U.S.C. 841 (possession with intent to distribute), 848 (drug kingpin), 849 (trafficking a truck stops or rest stops), 856 (maintaining a crack house), 861 (using children in drug operations), 863 (drug paraphernalia).[215]

In the absence of other specific authority, the court may order restitution as a condition of probation[216] or pursuant to a plea bargain.[217] In related matter, corporate defendants convicted of fraud may be ordered to pay for victim notification.[218]

Compliance Programs

The Guidelines' effective compliance and ethics program features are perhaps its most well-known corporate component. A corporation that lacks such a program is likely to have one imposed at sentencing or pursuant to a plea bargain. As noted earlier, a corporation that has one is likely to fare better during the investigation, bargaining, and sentencing phases of a criminal case.

The Guidelines envision programs that promote an ethical and law-abiding culture within a corporation and that are calculated to identify and prevent criminal misconduct within the corporation.[219] The elements of such a program consist of the following:

1. An established set of standards and procedures designed to detect and prevent criminal misconduct.[220]
2. Senior management involvement in the program including its day to day operations.[221]

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the court shall offenses—(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C.... §3663, or §3663A").

[211] 18 U.S.C. 3663(a)(1); 49 U.S.C. 5124.

[212] 18 U.S.C. 3663(a)(1); 49 U.S.C. 46312.

[213] 18 U.S.C. 3663(a)(1); 49 U.S.C. 46502.

[214] 18 U.S.C. 3663(a)(1); 49 U.S.C. 46504.

[215] 18 U.S.C. 3663(a)(1).

[216] 18 U.S.C. 3563(b)(2).

[217] 18 U.S.C. 3663(a)(1)(A), (3).

[218] 18 U.S.C. 3555; U.S.S.G. §§8B1.4, 5F1.4.

[219] U.S.S.G. §8B2.1(a).

[220] U.S.S.G. §8D2.1(b)(1): "Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following: (1) The organization shall establish standards and procedures to prevent and detect criminal conduct."

[221] U.S.S.G. §8D2.1(b)(2): "(A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program. (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program. (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level

3. Minimizing the operation participation of those previously ethically challenged.[222]
4. Training corporate employees and agents.[223]
5. Monitoring, auditing, and evaluating the program.[224]
6. Encourage and reward performance consistent with the program's goals; discipline inconsistent conduct.[225]
7. Responding appropriately to the discovery of in-house criminal conduct.[226]

Community Service

The Guidelines provide that a corporation may be sentenced to perform community service related to the harm caused by its offense as a probationary condition as long as the corporation has skills, facilities, or knowledge particularly suited to task.[227] Otherwise, it suggests that fines or other monetary sanctions may be more appropriate and that service unrelated to harm caused by the offense is not consistent with the Guideline.[228]

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personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority."

[222] U.S.S.G. §8D2.1(b)(3): "The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program."

[223] U.S.S.G. §8D2.1(b)(4): "(A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities. (B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents."

[224] U.S.S.G. §8D2.1(b)(5): "The organization shall take reasonable steps—(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation." See also, U.S.S.G. §8D2.1(c): "In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process."

[225] U.S.S.G. §8D2.1(b)(6): "The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct."

[226] U.S.S.G. §8D2.1(b)(7): "After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program."

[227] U.S.S.G. §8D1.3; U.S.S.G. §8D1.3 (*Commentary*).

[228] U.S.S.G. §8D1.3 (*Commentary*).

Other Remedial Orders

The court may impose other probationary conditions that address the harm caused or to be caused by the corporation's crime, including in cases of substantial anticipated future harm the creation of a trust fund.[229]

Forfeiture

Forfeiture, the confiscation of property as a consequence of its relation to a criminal offense, is a creature of statute.[230] Some forfeiture statutes are remedial, some punitive, and some serve both purposes.[231] The Guidelines confirm that the property of a corporation is no less subject to confiscation than the property of an individual.[232]

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[229] U.S.S.G. §8D1.2.

[230] See generally CRS Report 97-139, *Crime and Forfeiture*.

[231] E.g., 18 U.S.C. 981 (civil forfeiture), 982 (criminal forfeiture); *Austin v. United States*, 509 U.S. 602, 622 (1993).

[232] U.S.S.G. §§8E1.2, 5E1.4.