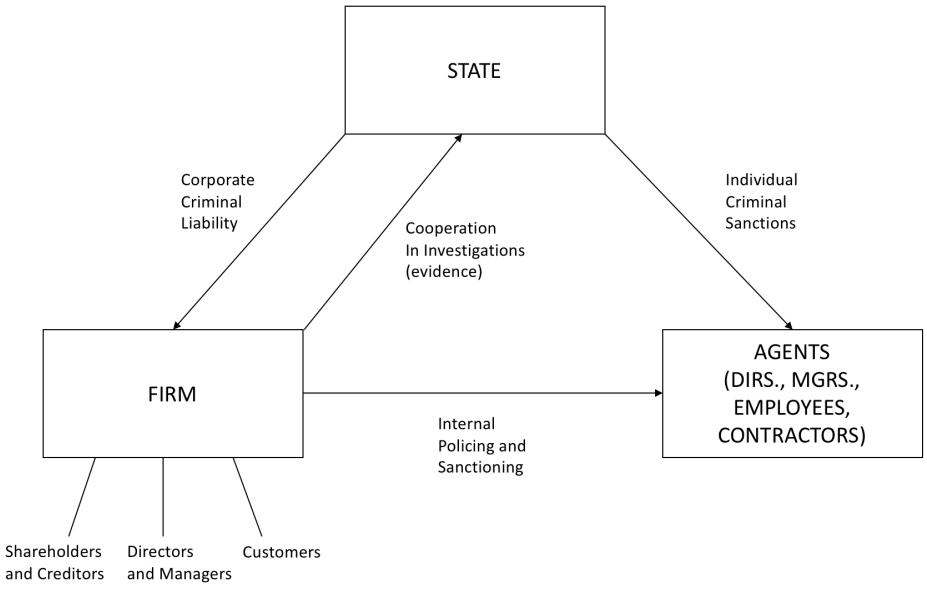
1. CRIMINAL LIABILITY OF BUSINESS FIRMS

A. Introduction

The central difference between corporate crime and what the rest of the American criminal justice system addresses is, of course, the corporation. Thus, an introduction to this field begins with understanding (1) the nature of the firm and (2) the rules and practices for imposing criminal liability on firms. (A basic course in Business Associations is essential for any prospective lawyer in this field.)

Ordinary criminal law and procedure are concerned with the relationship between the individual and the state. The presence of the firm introduces a third actor. This creates a triangle of relationships that must be considered in analyzing any problem of substantive law or procedure in this field. The firm is an especially interesting addition to the analysis of criminal law and justice because it can function like the individual—as the subject of criminal sanctions and threat of liability—and also function like the state—as an institutional mechanism for generating deterrence and investigating crime.

The relationship looks like this:



The state uses the instrument of corporate criminal liability to induce the firm to do two things: (1) cooperate in criminal investigations, meaning to provide the state with evidence of individual crimes; and (2) monitor and police its own employees and other agents to prevent the commission of crime in the first instance.

Because the firm itself does not have the capacity to reason, in reality this pressure is exerted on the persons who control the firm, primarily the board of directors, senior managers, major investors, and counter-parties in the markets in which the firm operates. To the extent that the potential imposition of criminal liability on the firm raises the

specter of undesirable costs for such persons, they will be induced to take action to forestall, or reduce the impact of, such liability, typically through cooperation with the state.

The state also uses its control over criminal liability to deter crime in the ordinary manner, by threatening persons in the corporate sector with individual criminal punishment. Notice, therefore, how the theory of corporate criminal enforcement anticipates pressure on the individual from two directions: from the state, with its power to levy legal sanctions, *and* from the firm, with its power and incentive to levy private sanctions in order to avoid legal sanctions on the firm.

A helpful organizing principle is the distinction between *de jure* corporate criminal liability and *de facto* corporate criminal liability.[2] *De jure*, the law of corporate criminal liability in the United States is broad and relatively absolute. Doctrine gives business firms little basis to resist the imposition of criminal liability if an employee has committed a crime in the course of her job. *De facto*, the contemporary practice of corporate criminal liability involves bargaining away (or bargaining down) that severe form of liability in exchange for helping the government overcome the special problem it faces in policing corporate crime: the difficulty of detecting and proving crimes that are committed within the complex and opaque setting of the large modern business firm.

The reality of the American approach to corporate crime enforcement is that it is overwhelmingly concerned with the instrumental project of crime reduction, primarily through mechanisms of deterrence. While some argue that the ancient and persistent idea of retribution in criminal punishment also explains corporate criminal liability, there is cause for skepticism of that claim, at least with respect to arguments for retribution that do not turn out, in the end, to rest on instrumentalist claims about how pursuing corporate retribution is an avenue for reducing corporate crime.[3] Because retributive theory plays a small role in the current practice of corporate criminal law, this text will address these arguments only briefly.[4]

The focus throughout this text will be primarily on *criminal* liability, both corporate and individual.[5] But it is important to understand that most cases of serious corporate

[2] Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (A. Harel & K. Hylton eds. 2012).
[3] *See* Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS. 25 (2020).
[4] For those interested in the idea of retribution for corporations, a continuing theoretical debate in the academic literature is easily accessible.
[5] An essential institutional point, that often confuses even practicing lawyers not immersed in this field, is that *only* prosecutors can bring criminal charges in the United States. This means that in the federal system only the Department of Justice and its subdivisions can charge corporations and individuals with crimes and seek the sanction of imprisonment. Other government enforcement agencies, such as the Securities and Exchange Commission (SEC), have no legal authority over criminal violations—even though parallel statutes often allow civil proceedings to be brought for the same or similar conduct and such enforcers sometimes say (incorrectly) that they have chosen to "prosecute" a case.

wrongdoing lead to the potential for four types of liability, all of which must be considered by the practitioner in this field:

(1) Criminal sanctions against the firm.

(2) Criminal sanctions against individuals.

(3) Civil sanctions against the firm, through private lawsuits and/or regulatory proceedings.

(4) Civil sanctions against the individual, through private lawsuits and/or regulatory proceedings.

The remainder of this chapter is organized as follows. First, this introductory part consists of a recent book chapter that frames corporate crime as a theoretical and public policy problem and summarizes the state of the discussion about corporate criminal liability in the United States legal system. Part B will cover the law that constitutes the *de jure* regime of corporate criminal liability. Part C will cover the *de facto* system of corporate criminal enforcement as it presently exists. Finally, Part D will discuss the role of the judiciary, if any, in the current *de facto* regime.

CORPORATE CRIMINAL LIABILITY

Samuel W. Buell

in EDWARD ELGAR RESEARCH HANDBOOK ON CORPORATE LIABILITY (M. Petrin and C. Witting eds. 2023)[6]

The most common question associated with corporate criminal liability in the academic literature is why the doctrine should exist. From the standpoint of criminal law theory, some question the conceptual soundness of applying the concepts of blame and punishment to inanimate legal persons. However, one can turn this framing around, observing that criminal liability's standard burdens of justification arise from the painful and liberty-depriving characteristics of punishment, which corporations cannot experience.

From the standpoint of corporate law theory, some question the potential wastefulness ("overdeterrence") in criminal liability's potential to spill over into harming employees, investors, counterparties, and others who neither participated in wrongdoing nor can directly control whether others within the corporation do—especially in instances of substantial reputational sanction or industrial delicensing or debarment. However, this framing also can be inverted, by pointing out that the argument's concession to criminal liability's unique potency highlights the very reason legal systems might view criminal liability as a necessary supplement to civil liability in encouraging managers of firms to

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control agent misconduct. Such misconduct, after all, can be highly profitable to both firms and individual agents.

While such consequentialist and deontological debates have proceeded without pause over decades and produced a voluminous literature, the United States and, more recently, many other legal systems have eagerly embraced criminal liability for corporations. Alongside increased scale, complexity, and globalization of the activities of multinational firms has come greater and justified worry about the costs of corporate crime. Salient corporate scandals seem to pile up like the faulty automobiles, crashed airplanes, spilled oil, laundered assets, and depleted pension funds left in their wake. A common response of governments has been to use criminal liability, and especially the threat of its imposition, as a lever in strategies meant to compel the massive private industrial sector to get its house in order. The law of corporate criminal liability can no longer be meaningfully understood without comprehending the institutional and political particulars of its enforcement. . . .

Theoretical discussion of criminal liability for corporations generally starts from the standpoint of criminal law, specifically what has become known as punishment theory. Because corporate *liability* . . . is itself not controversial in some form, the question becomes why law should impose liability on corporations through criminal process. This question logically points, at least initially, to the tools of criminal law theory.

Criminal sanctions are generally justified on two familiar lines of argument: deontological (roughly Kantian) theories that see punishment, given necessary conditions, as morally mandated, usually on grounds of retributive desert; and consequentialist (roughly Benthamite) theories that see punishment, when justified according to cost-benefit analysis, as necessary to the project of reducing crime, usually through the mechanism of deterrence. . . .

The most common objection to justifying criminal punishment of corporations on grounds of moral imperative is probably that corporations are inanimate (indeed, somewhat ethereal) objects in the world, not people or even living creatures, and thus cannot be themselves moral agents bearing responsibility and deserving retribution for wrongs committed by humans working within them. In the often-cited phrase of the Baron Lord Thurlow, a corporation has "no soul to damn, no body to kick.". . .

Corporations, especially large ones, are institutions, not objects. Their legal existence may be limited to paper filings and statutes. But their presence in the world is far larger and more complex. They comprise the collective actions of groups of humans engaged in directed and often highly impactful industrial projects. As Bishop said in an early foundational criminal law treatise, "If … the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously." Social practice certainly reflects Bishop's view. The modern world would be unintelligible without the common language of responsibility ascription that applies to corporations, especially when harm, disaster, or failure strikes. When we say that a

company spilled oil, harmed consumers, deceived markets, corrupted a government, or the like, we mean more than that some number of people did those things. We mean that their *group* enterprise went wrong, as a result of how they arranged themselves and pursued their common project. . . .

The trouble with corporate retribution is not that it cannot be deserved. It is that it cannot be carried out. Because a corporation, apart from its constituents, has no affective capacity to experience punishment as a grave setback to its interests (again, it can be a setback, but it cannot be a felt or experienced one), seeking to punish a corporation on retributive grounds is fruitless. Retribution may be deserved but it cannot be carried out. . . .

It thus should not be surprising that, even as some authors continue to explore the problem of corporate retribution, the literature on corporate criminal liability is overwhelmingly, and increasingly, in the consequentialist tradition. Here, corporate criminal liability finds much theoretical support. The basic instrumental case in favor of corporate criminal liability sees the firm as an additional actor, beyond the state and the individual, that can be exploited in the project of reducing criminal violations. If sanctions are directed at firms for the crimes of their agents, then firms, in their nicely rational cost-managing way, will be encouraged to invest in efforts to prevent crime on the job and to punish it when it occurs in order to deter others within the firm. Firms have exceptional "policing" capacities in their ability to monitor their employees and see within themselves. They also have "sanctions" (and rewards) they can impose on their employees in the form of assignments, promotion, compensation, and hiring or termination. All this corporate activity roughly combines now into an entire field of practice and study, called compliance.

The powers of the firm, properly directed, complement the powers of the state. Consider a corporate employee deciding whether to engage in activity that is a possible or known legal violation. There may be strong incentives and rewards available from pursuing such activities if they do not result in sanctions. With the state and the firm allied in the project of sanctioning wrongdoing, such an employee must consider: (1) the extent of official legal sanctions likely to be imposed if such an activity is caught; (2) the negative consequences to the employee's career within the firm, and elsewhere in the market, if the activity is caught; and (3) critical to any analysis of deterrence, the enhanced *probabilit*y of being caught that comes from the state's surveillance capabilities coupling with the firm deploying its own surveillance capabilities, in hopes of avoiding or reducing the imposition of criminal sanctions on the firm itself should the employee's crime be revealed. . . .

Now consider complications to this model, and how a consequentialist case for corporate criminal liability would respond. The most basic complication is one that the U.S. Sentencing Commission and the U.S. Department of Justice recognized quickly when they began designing guidelines for the sentencing decisions and prosecutorial discretion involved in criminal enforcement against corporations. If firms are not rewarded for

internal policing and sanctioning efforts (compliance) through reduced penalties, then they often will choose to forego such efforts and hope that legal violations will not be caught. What is the benefit in discovering and disclosing employee crimes if doing so only guarantees full prosecution of the firm? If it is to yield deterrence benefits, corporate criminal liability should be structured to include both sticks and carrots.

A further complication is agency costs. Managers may not fear imposition of criminal liability on the corporation if the costs of such liability do not flow through to managers sufficiently to outweigh the benefits managers may enjoy from tolerating legal risk-taking by underlings, foregoing distracting focus on compliance, or even engaging in criminal violations themselves. Corporate criminal liability itself, of course, cannot directly address the problem of agency costs in corporate governance. However, managers have substantial reasons to seek to avoid prosecution of the firm. Highest management has a legal duty under corporate law to do so. Criminal scandals are failures that can tarnish the reputations of corporate managers, potentially lead to termination, and affect their self-esteem and prospects. While it is frequently observed that fear of individual criminal liability is a more powerful reason for managers to steer firms away from criminal wrongdoing, core principles of legality and criminal punishment, at least at present, do not allow for the imposition of criminal liability for failures of supervision except in some very narrow circumstances involving misdemeanor liability. Even when senior managers personally engage in acts that are clearly defined as crimes, prosecutors may struggle to obtain indictments and convictions given the steep burden of proof for criminal liability and the tendency of the activities of supervisors to be less enmeshed in corporate documents and the testimony of employees.

A final complication to the consequentialist case for corporate criminal liability is that civil regulatory mechanisms, in most legal systems, allow for the imposition of financial and other penalties on corporations. A corporation can be fined, suspended or disbarred from sectors or lines or business, and even placed under court supervision and monitoring with mandated reforms, without having to resort to criminal prosecution. Some therefore argue that criminal liability for corporations is unnecessary or, worse, wasteful in at least some cases because of the capacity of criminal indictment and conviction to severely damage a corporation's ability to do business, causing losses to investors, employees, and counterparties who did not engage in wrongdoing and are not logical targets for deterrent incentives.

The response to this argument embraces, rather than disfavors, the reputational effects of corporate criminal prosecutions. Civil enforcement and liability cannot convey the seriousness and fault involved in a corporation's production of crime. Criminal prosecution—because it arises from, after all, the commission of defined *crime*, because it must satisfy the highest burden of proof, and because it has higher salience to observers than civil proceedings—carries a unique messaging effect that no other legal mechanism can produce. Corporate managers will especially seek to avoid the threatened or actual imposition of criminal sanctions on their firms and thus the presence of prosecutorial institutions in corporate affairs supplies a powerful incentive to devote resources to

compliance. A criminal prosecution of a firm that carries strong reputational effects may result in individual reputational damage to managers, and even employees, and may cause persons within a firm and in similar firms to reflect on the group failure represented by a criminal scandal and devote energies to avoiding such disasters in the future. Importantly, in many legal systems including that of the United States, regulatory regimes treat criminal convictions, beyond civil regulatory violations, as more likely to trigger debarment or exclusion of firms from industries or lines of business. In some industries and under some regulatory schemes, such provisions have the potential to operate in conjunction with criminal conviction as essentially a corporate death penalty. . . .

The simplest rule for corporate criminal liability is the one that applies in the United States under federal law, which governs most corporate prosecutions: *respondeat superior*. Under this doctrine, a corporation will be criminally liable for any criminal violation committed by any agent of the corporation while acting within the scope of employment and at least in part with the intention to benefit the company (thus excluding, for example, employee theft from the employer as a basis for employer liability). This very old doctrine of agency law was allowed to travel from tort law into the criminal law by an early twentieth century decision of the United States Supreme Court dealing with enforcement of the first antitrust laws.

The *respondeat superior* rule has two primary advantages. The first is its simplicity. All issues of act and mental state involved in determining whether a crime has been committed are dealt with in the traditional manner of criminal law, through the conduct of an individual. Corporate liability is then analyzed separately, through the application of agency principles, only after a crime has been proven. Regulated actors, prosecutors, judges, and juries all can see clearly when criminal liability will and should apply, if crimes are defined clearly (which is not always true, of course). The second advantage to the rule is its potency. Because it does not consider the conduct of the corporation itself in relation to the crime, firms cannot insincerely escape imposition of criminal liability by, for example, simply telling their employees not to break the law, adopting merely facial compliance programs, or purposely turning a blind eye to crimes committed by lower-level employees.

The greatest problem with the *respondeat superior* rule is that it is badly overinclusive. If the primary purpose of corporate criminal liability is to encourage firms to invest in efforts to prevent crime by their employees, then holding them liable for any crime by any employee in any branch and at any level of the firm may cause firms to forego such investment on the view that sanctions will be imposed in any event. Moreover, if the special potency of criminal liability for corporations comes from the communication of institutional fault, and the resulting reputational effects on the firm, then imposing criminal liability for employee crimes that do not represent instances of genuine institutional wrongdoing clouds and weakens the expressive potential of such legal processes.

The first of these problems has caused some to advocate for rules of corporate criminal liability that would insulate firms from sanctions if they can be shown to have engaged in sufficient compliance efforts prior to a given instance of employee crime. The second problem has led some approaches to maintain that a corporation should be held criminally liable only if a crime has been committed by one or more members of higher-level management, or only if it has been committed by a large number of employees across the organization.

Unfortunately, these more limited approaches are so badly underinclusive that they would make corporate criminal liability ineffective. If firms can avoid liability whenever managers cannot be proven to have engaged in criminal acts themselves, the law ends up providing corporate management with a perverse incentive not only to forego affirmative compliance efforts but also to actively insulate itself from knowledge of the conduct of employees, or even to affirmatively incentivize employees to take excessive legal risks through compensation systems and then to ignore the consequences. In addition, large and damaging cases of corporate criminality sometimes involve acts by lower-level employees that are correctly attributed to corporate systems and to decisions and conduct of corporate managers that are causal of crime, even though not themselves criminal. Disallowing corporate liability in such cases fails to communicate the truth of institutional responsibility.

A rule that required that lower-level employee crime be pervasive or widespread for the firm to be held liable falters for similar reasons. Under such a rule, management might be encouraged to push legal risk-taking onto a small number of individuals or a single node in the firm that could still do enormous damage as a result of intentionally designed corporate systems. Some recent cases of serious corporate crime, particularly in the financial sector, have involved one or a handful of persons who engaged in activities such as large-scale trading fraud or massive bribery as a result of being able to control assets and decision authority that higher management intentionally delegated to them. Depending on causal explanations that usually emerge fully only following investigation, a corporation can sometimes be seriously at fault for even a single mid-level employee's crime.

It thus has proven difficult to design doctrines of corporate criminal liability that resolve the tension between under- and overinclusion in relation to the target phenomenon of institutional fault. There is a literature in which various scholars have proposed concepts and tests that would pose the question of institutional responsibility directly, such as by examining whether employee crime resulted from the "ethos" of the corporation, whether the wrongdoing stemmed from the corporation's character, or whether the corporate organization can be said to have been "constructively" at fault.

These efforts have not yet successfully brought their arguments at the level of theory fully to ground in doctrinal realities. Any workable rule of corporate criminal liability must give legal actors—prosecutors, judges, and juries—the ability to argue about and determine the intersection of rule and fact. American criminal adjudication, at the

charging and liability stage, fundamentally proceeds through the proof of elements of criminal offenses. It is hard to see how legal actors can be expected to proceed fairly and rigorously with their duties when working with vague concepts such as ethos, character, or even adequacy of compliance efforts. Again, this difficulty arises from the great complexity of the large industrial organization and the intangible nature of corporate culture, which is real and causal but cannot be described, at least with present tools, in the terms of either the basic models of corporate governance or the traditional act and mental state elements of criminal offenses.

This survey of the doctrinal problem explains why American law and practice, as well as those of some other legal systems, have developed procedures for examining questions of organizational responsibility outside of the liability phase of criminal adjudication. Under American law, *respondeat superior* remains the *de jure* rule of liability but its severe effects are often slackened at the charging or sentencing phases of the criminal process. In the structure of the American criminal process, decisions are controlled at these stages by actors (the prosecutor at the charging stage and the judge at the sentencing stage) who are afforded discretion to engage in broader inquiries that account for a diverse totality of relevant circumstances. . . .

Without having been subject to any legal mandates, federal prosecutors in the United States have developed elaborate guidelines and practices under which corporations can earn leniency under the overbroad *respondeat superior* rule according to a variety of factors that relate to (1) the deterrent purposes of corporate criminal liability and (2) the question of whether fault for the crime is correctly attributed to the corporation. On the first score, enforcers heavily emphasize the extent to which a corporation has invested efforts in lowering the probability of employee crime ex ante and in making prosecution of employees more likely ex post (thus lowering the probability that others will choose to violate in the future). Effective compliance systems, self-reporting to the government of violations not yet known to officials, and full cooperation in providing prosecutors with access to testimonial and documentary proof are continually stressed as the most effective paths to leniency when it comes to sanctions at the corporate level. . . .

Leniency, when justified, is provided through several aspects of settlements of corporate prosecutions. Prosecutors may reduce monetary sanctions below what could have been legally imposed in the form of fines. They may forego requiring firms to be subject to onerous and intrusive outside monitoring mechanisms designed to ensure that they follow through on post-crime commitment to reforms, such as improved compliance programs. Most importantly for firms, prosecutors may choose forms of settlement that are less damaging to firms because they are less likely to result in a firm being prevented from doing future business in various regulated areas. Prosecutors may work with civil regulatory counterparts to agree to forego punitive debarment and delicensing measures. More commonly, prosecutors will permit firms to settle outside the traditional criminal settlement context in order to slacken the potential collateral consequences of a criminal conviction.

In the United States, criminal settlements for individuals usually take the form of guilty pleas with plea agreements (a form of contract) in which prosecutors agree to forego some charges or recommend lesser punishments. In the corporate context, because of the collateral consequences that can apply when a going business concern has been convicted of a serious crime, and because of the seriousness with which a formal conviction can be seen by constituents, counterparties, and other observers, a guilty plea is seen as a punitive resolution. Prosecutors thus frequently offer corporations settlements in the form of deferred and nonprosecution agreements (DPAs and NPAs) as less punitive settlements. The form of agreement under a DPA or an NPA is largely the same. It consists of a contract between the government and the company in which sanctions are imposed and obligations are undertaken, with at least theoretically severe consequences for the company, at the discretion of the prosecutor, should the company fall short on its commitments. With a DPA, a charge is also filed before a judge and agreed to be kept pending, with no further proceedings, until the company is determined to have completed its commitments, at which time the charge is dismissed. An NPA is more like a pre-suit settlement in a civil matter, in that no charge is filed and no court's jurisdiction is invoked. It is perhaps believed that a DPA, with its pending charge on file, represents a more threatening sword over the neck of a company, although under an NPA the government has the right to file charges immediately if it determines that a company has breached the agreement. . . .

This enforcement system has abundant critics. A strain of argument based in populist impulses, or in skepticism of prosecutors' motivations, has painted the contemporary American enforcement practice as affording undue leniency to corporations that violate the law. By allowing corporations to settle frequently without convictions (under DPAs and NPAs), routinely reducing monetary penalties to reward cooperation to a degree that makes criminal fines a priceable "cost of doing business," often arranging for regulatory forbearance on suspension and debarment, and almost never taking a large corporation all the way through indictment and trial, the government under-deters corporate crime and expresses public toleration of corporate criminality. It is sometimes contended that this pattern has emerged through distasteful "revolving door" capture dynamics, whereby American prosecutors handling corporate crime tend to negotiate forgivingly and amenably with their corporate counterparts, who now practice in a highly lucrative professional compliance and defense industry into which most American prosecutors will move following a period of public service. Some add the criticism that programmatic leniency in the corporate prosecution area—a system based in a philosophy of carrots before sticks—is especially distasteful and expressively problematic in the American criminal justice system, which treats street offenders notoriously harshly and with ingrained racially discriminatory effects.

Business interests, not surprisingly, tend to see the enforcement landscape from an entirely different perspective. To them, the Justice Department's program is not one of negotiated settlements but one of dictated corporate behavior. Because *respondeat superior* doctrine affords companies virtually no viable argument to defeat liability any time an employee commits a crime, because even the best compliance programs cannot

prevent all crime, and because criminal convictions threaten to disable firms from continuing to do business in the short or even long term, management must do what the government says, whether doing so is best for the firm's stakeholders or not. Full cooperation, they would say, is not an option but an obligation, when measured from the standpoint of business risks. Especially because some business crimes, including regulatory offenses, are defined vaguely and very broadly, this means that corporations must cooperate, settle, and admit wrongdoing even when they may believe they have meritorious defenses, or at least mitigating arguments, and that prosecutors are mistaken or overreaching. This line of argument is not without force, particularly when it comes to considering how prosecutors might best be supervised and regulated. But it strains credulity to think that large corporations, with the superb legal representation they typically enjoy, do not have ample opportunity to argue their points with prosecutors on questions such as the gravity of the wrongdoing or the fair level and kind of punishment. . . .

In sum, enforcement procedures have, over time, sought to accommodate the choice of an overbroad rule of corporate criminal liability, rather than an underinclusive one, with the necessity of rewarding corporations with leniency in order to encourage their partnership with the state in the project of reducing corporate crime. Most common business crimes are not observable outside the enforcement process and present empirical tools cannot effectively measure their prevalence. It thus cannot yet be meaningfully assessed whether an entirely different model, such as one in which prosecutors routinely prosecuted corporations to the fullest extent of on-the-books penalties and did not shy away from putting firms out of business, would result in more effective deterrence of corporate crime at justifiable cost. . . .

B. *De Jure* Corporate Criminal Liability

1. Statutes

There is no general statute on corporate criminal liability in the United State Code, even though people commonly talk about criminal liability of corporations as if it were a matter of blanket federal law. This statute is the closest thing to a general statute on the subject. Do you see how this statute is relevant? What important questions about the federal law of corporate criminal liability does it leave unanswered?

1 U.S.C. § 1 – Words denoting number, gender, and so forth ("The Dictionary Act")

In determining the meaning of any Act of Congress, unless the context indicates otherwise—. . . .the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; . . .

2. Respondeat Superior Liability

"Respondeat superior" liability is an ancient legal principle by which the master is held liable for his servant's violation of the law. Imported from the law of torts into corporate criminal law, respondeat superior liability can have the effect of imposing almost strict liability on corporate employers. I say "almost" because the imposition of liability is not entirely automatic. There are some qualifications of the doctrine, though, as we will see, how much limiting work these qualifications do is subject to skepticism.

The following case is the seminal one on criminal liability of firms in federal court based on respondeat superior principles. This case was brought under the Elkins Act, which, *inter alia*, prohibited shippers and railroad companies from engaging in the anticompetitive behavior of paying and accepting rebates off of the shipping rates set by federal regulation. It should not be surprising that the law of corporate criminal liability that prevails today originated in the era when American lawmakers and courts first embarked on comprehensive programs of legal control of the large corporation. Pay close attention to the holding and rationale(s). What did the Supreme Court really say here? Why might this case have become so routinely cited as establishing our modern *de jure* system of corporate criminal liability?

NEW YORK CENT. & HUDSON RIVER R.R. CO. V. UNITED STATES, 212 U.S. 481 (1909)

MR. JUSTICE DAY delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the southern district of New York, sued out by the New York Central & Hudson River Railroad Company, plaintiff in error. In the circuit court the railroad company and Fred L. Pomeroy, its assistant traffic manager, were convicted for the payment of rebates to the American Sugar Refining Company and others, upon shipments of sugar from the city of New York to the city of Detroit, Michigan. The indictment was upon seven counts and was returned against the company, its general traffic manager, and its assistant traffic manager. The first count, covering the offering of a rebate, was withdrawn from the jury by the district attorney, and it is unnecessary to consider it. The second count charges the making and publishing of a through tariff rate upon sugar by certain railroad companies, including the plaintiff in error, fixing the rate at 23 cents per 100 pounds from New York city to Detroit, and charges the railroad company's general traffic manager and assistant traffic manager with entering into an unlawful agreement and arrangement with the shippers, the American Sugar Refining Company of New York and the American Sugar Refining Company of New Jersey, and the consignees of the sugar, W. H. Edgar & Son, of Detroit, whereby it was agreed that, for sugar shipped over the line, the full tariff rate being paid thereon, the railroad company should give a rebate of 5 cents for each 100 pounds. This count charges that during the months of April and May, 1904, shipments were made under this agreement, and the regular tariff rates paid thereon. On July 14 of that year a claim for a rebate in the sum of $1,524.99 was presented by the agents of the shipper and consignees, and paid on the 31st day of August

to Lowell M. Palmer, agent of the sugar company, for the benefit of the shippers and consignees. In each of the counts, except the sixth, the lawful rate is charged to have been 23 cents per 100 pounds. During the month of June, 1904, the same was reduced to 21 cents per 100 pounds, and the rebate agreed to and paid being 3 cents per 100 pounds. The second count covers the shipments of April and May, 1904; the third count the shipments for July and August, 1904; the fourth for September, 1904; the fifth for October, 1904; the sixth for June, 1904, and the seventh for April and May, 1904. In each of these counts there is an allegation of the payment of the published rate, the presentation of the claim for the rebate, and the statement of a specific sum allowed and paid on account thereof.

Upon the trial there was a conviction upon all of the six counts, two to seven inclusive. The assistant traffic manager was sentenced to pay a fine of $1,000 upon each of the counts; the present plaintiff in error to pay a fine of $18,000 on each count, making a fine of $108,000 in all.

The facts are practically undisputed. They are mainly established by stipulation, or by letters passing between the traffic managers and the agent of the sugar refining companies. It was shown that the established, filed, and published rate between New York and Detroit was 23 cents per 100 pounds on sugar, except during the month of June, 1904, when it was 21 cents per 100 pounds.

The sugar refining companies were engaged in selling and shipping their products in Brooklyn and Jersey City, and W. H. Edgar & Son were engaged in business in Detroit, Michigan, where they were dealers in sugar. By letters between Palmer, in charge of the traffic of the sugar refining companies and of procuring rates for the shipment of sugar, and the general and assistant traffic managers of the railroad company, it was agreed that Edgar & Son should receive a rate of 18 cents per 100 pounds from New York to Detroit. It is unnecessary to quote from these letters, from which it is abundantly established that this concession was given to Edgar & Son to prevent them from resorting to transportation by the water route between New York and Detroit, thereby depriving the roads interested of the business, and to assist Edgar & Son in meeting the severe competition with other shippers and dealers. The shipments were made accordingly and claims of rebate made on the basis of a reduction of 5 cents a hundred pounds from the published rates. These claims were sent to the assistant freight traffic manager of the railroad company by Palmer, the agent of the sugar companies, and then sent to one Wilson, the general manager of the New York Central and Fast Freight Lines at Buffalo, New York. Wilson returned to the assistant traffic manager of the railroad company a cashier's draft for the amount of the claim. This draft was then sent to the agent of the sugar companies, and his receipt taken. It was stipulated that these drafts were ultimately paid from the funds of the railroad company.

Numerous objections and exceptions were taken at every stage of the trial to the validity of the indictment and the proceedings thereunder. The principal attack in this court is

upon the constitutional validity of certain features of the Elkins act. 32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907. That act, among other things, provides:

> (1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation; and, upon conviction thereof, it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed. . . .
>
> "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person."

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

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Mod. 559) that "a corporation is not indictable, although the particular members of it are." In Blackstone's Commentaries, chapter 18, § 12, we find it stated: 'A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities.' The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, § 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: 'Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for

example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.' Without citing the state cases holding the same view, we may note *Telegram Newspaper Co. v. Com.*, in which it was held that a corporation was subject to punishment for criminal contempt; and the court, speaking by Mr. Chief Justice Field, said: 'We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong.' It is held in England that corporations may be criminally prosecuted for acts of misfeasance as well as nonfeasance. *R. v. Great North of England R. Co.*

It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. *Lake Shore & M. S. R. Co. v. Prentice*.

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

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

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

governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz, Priv. Corp. § 733; Green's Brice, Ultra Vires, 366. 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.

It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins law, making corporations criminally liable.

This statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted and accessible to all alike. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*; *Armour Packing Co. v. United States*.

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism, and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress cannot control those who are

conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.

It is contended that the Elkins law is unconstitutional, in that it applies to individual carriers as well as those of a corporate character, and attributes the act of the agent to all common carriers, thereby making the crime of one person that of another, thus depriving the latter of due process of law and of the presumption of innocence which the law raises in his favor. This contention rests upon the last paragraph of § 1 of the Elkins act, which is as follows:

> 'In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment shall, in every case, be also deemed to be the act, omission, or failure of such carrier as well as that of the person.'

We think the answer to this proposition is obvious; the plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of the section. There is no individual in this case complaining of the unconstitutionality of the act, if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions. *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*). It may be doubted whether there are any individual carriers engaged in interstate commerce, and every act is to be construed so as to maintain its constitutionality if possible. There can be no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations. *Berea College v. Kentucky*. . . .

Notice that in *New York Central*, the Court did not actually hold that corporate respondeat superior liability is applicable to all federal crimes. Rather, the Court observed that corporate respondeat superior liability was contained in the Elkins Act and held that such statutory liability was not unconstitutional. However, federal courts have frequently cited *New York Central* as support for a broad rule of respondeat superior liability in cases of corporate crime.

Problem 1-1

(a) What argument do you find most persuasive in support of, or in opposition to, the law imposing criminal liability on corporations and other legal entities?

(b) If writing on a clean slate, what doctrinal rule would you propose for determining when a corporation is liable for a crime committed by one or more of its employees?

New Developments in UK Law. Contrast the doctrine of respondeat superior with the United Kingdom's approach to corporate criminal liability. Except under specific laws such as the UK Bribery Act (discussed in Chapter 5), UK law long based the criminal responsibility of corporations on the "Identification Principle," which held a company liable based only on the criminal conduct of those persons who embody the corporate entity's "directing mind and will." The identification principle rendered successful prosecution of a corporate entity difficult in many serious cases. Two new developments have modified this approach, though without adopting the breadth of liability that U.S. law imposes.

Liability for Senior Manager Conduct. First, Section 196 of the Economic Crime and Corporate Transparency Act of 2023 broadens the category of persons whose criminal conduct can lead to liability of the corporation, providing, in relevant part:

> (1) If a **senior manager** of a body corporate or partnership ("the organisation") acting **within the actual or apparent scope of their authority** commits a relevant offence after this section comes into force, the organisation is also guilty of the offence. . . .
>
> (2) "Relevant offence" means an act which constitutes— (a) an offence listed in Schedule 12 ("a listed offence"), (b) an attempt or conspiracy to commit a listed offence, (c) an offence—(i) under Part 2 of the Serious Crime Act 2007 (England and Wales and Northern Ireland: encouraging or assisting crime) in relation to a listed offence, or (ii) under the law of Scotland of inciting the commission of a listed offence, or (d) aiding, abetting, counselling or procuring the commission of a listed offence. . . .
>
> (4) In this section—. . ."**senior manager**", in relation to a body corporate or partnership, means an individual who **plays a significant role** in—(a) the **making of decisions** about how the whole or a substantial part of the activities of the body corporate or (as the case may be) partnership are to be managed or organised, or (b) the **actual managing or organising of the whole or a substantial part** of those activities.

Failure to Prevent Fraud. Second, with Section 199 of the Economic Crime and Corporate Transparency Act of 2023 the UK has enacted a "Failure to Prevent Fraud" offense, which imposes corporate liability for failure to prevent employee fraud. In essence, this statute couples a form of respondeat superior liability for fraud with a defense for compliance efforts in relation to fraud. Section 199 provides, in relevant part:

> (1) A relevant body which is a large organisation (see sections 201 and 202) is guilty of an offence if, in a financial year of the body ("the year of the fraud offence"), a person who is associated with the body ("the associate") commits a fraud offence intending to benefit (whether directly or indirectly)—(a) the relevant body, or (b)

any person to whom, or to whose subsidiary undertaking, the associate provides services on behalf of the relevant body.

(2) A relevant body is also guilty of an offence under subsection (1) if—(a) an employee of the relevant body commits a fraud offence intending to benefit (whether directly or indirectly) the relevant body, (b) the fraud offence is committed in a financial year of a parent undertaking of which the relevant body is a subsidiary undertaking ("the year of the fraud offence"), and (c) the parent undertaking is a relevant body which is a large organisation.

(3) But the relevant body is not guilty of an offence under subsection (1)(b) if the body itself was, or was intended to be, a victim of the fraud offence.

(4) It is a defence for the relevant body to prove that, at the time the fraud offence was committed—(a) the body had in place such prevention procedures as it was reasonable in all the circumstances to expect the body to have in place, or (b) it was not reasonable in all the circumstances to expect the body to have any prevention procedures in place.

(5) In subsection (4) "prevention procedures" means procedures designed to prevent persons associated with the body from committing fraud offences. . . .

(7) For the purposes of this section a person is associated with a relevant body if—(a) the person is an employee, agent or subsidiary undertaking of the relevant body, or (b) the person otherwise performs services for or on behalf of the body.

3. The "Intent to Benefit the Firm" Element

On the terms of *respondeat superior* doctrine, not all agent crimes will trigger corporate criminal liability: the agent must have acted not only within the scope of employment but also, at least in part, "with intent to benefit the firm." How, if at all, does this element of corporate criminal liability limit application of the doctrine? Read the following case and then try to imagine a case of crime by an employee that would *not* satisfy this element of corporate criminal liability. (It should be noted, of course, that the law governing federal campaign contributions was more restrictive at the time of this prosecution than at present.)

UNITED STATES v. SUN-DIAMOND GROWERS OF CALIFORNIA, 138 F.3d 961 (D.C. Cir. 1998)

STEPHEN F. WILLIAMS, Circuit Judge:

Sun-Diamond is a large agricultural cooperative owned by individual member cooperatives including Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet Growers, Valley Fig Growers, and Hazelnut Growers of Oregon. It came within the sights of an independent counsel, Donald C. Smaltz, who was responsible for investigating allegations of unlawful activity by former Secretary of Agriculture Mike

Espy. The independent counsel charged Sun-Diamond with making illegal gifts to Espy, committing wire fraud, and making illegal campaign contributions.

Linking Sun-Diamond and Espy was the figure of Richard Douglas. As Sun-Diamond's vice president for corporate affairs, Douglas was responsible for (among other things) representing the interests of the corporation and its member cooperatives in Washington. Given Sun-Diamond's business, the Department of Agriculture ("USDA") was naturally part of his bailiwick. According to performance evaluations signed by Sun-Diamond's president, Douglas was a diligent and able representative. He once described his approach to lobbying by paraphrasing Lord Palmerston: "We have no permanent friends or permanent enemies, only a permanent interest in Sun-Diamond Growers of California." Permanent friends aside, he had a long-time friend in Mike Espy—the two had gone to college together at Howard University and had stayed close in the years since.

The crimes charged to Sun-Diamond grow out of two largely independent stories. One involves illegal gratuities given to Espy while he was Secretary of Agriculture, the other wire fraud and illegal contributions to the congressional campaign of the Secretary's brother, Henry Espy. We save the recitation of facts for the discussion of the distinct legal issues raised by each story. . . .

Sun-Diamond was found guilty on Counts III and IV of committing wire fraud in violation of 18 U.S.C. §§ 1343 & 1346, and on Counts V through IX of violating the Federal Election Campaign Act, 2 U.S.C. §§ 441b(a) & 441f ("FECA"). Both sets of convictions flow from a scheme of Richard Douglas and James H. Lake to help repay the debts of the failed congressional campaign of Mike Espy's brother Henry. The following facts about the scheme come from the testimony of Lake, who was granted immunity by prosecutors in exchange for his cooperation.

Lake was one of the founding partners of a Washington based firm, Robinson Lake Sawyer & Miller ("RLSM"), which handled communications and public relations matters for Sun-Diamond. Sun-Diamond retained RLSM for a fee of $20,000 a month; Douglas oversaw Sun-Diamond's dealings with RLSM and maintained his own office there. RLSM was a wholly-owned subsidiary of Bozell Worldwide, Inc. ("Bozell").

After Mike Espy became Secretary of Agriculture, Henry Espy unsuccessfully pursued election to his brother's vacant seat in Congress, building up a sizable campaign debt in the process. In February 1994 Douglas left a telephone message at Lake's office—a crucial act for jurisdiction over one of the wire fraud counts. When Lake contacted Douglas, he learned that Secretary Espy had asked Douglas for help in retiring his brother's campaign debt. Lake immediately offered to donate $1,000, the maximum permissible individual contribution. Douglas replied that he had to raise at least $5,000 fast, and that he needed Lake's help. He then proposed a way around the campaign finance restrictions. If Lake would get five RLSM employees (including Lake himself) to write a check for $1,000 each, Douglas would find a way for Sun-Diamond to reimburse them all. Lake knew the scheme was illegal—corporations are forbidden to

make contributions "in connection with any election" for Congress, 2 U.S.C. § 441b(a), and no one may make a campaign contribution in the name of another person, 2 U.S.C. § 441f—but agreed to participate anyway. Lake testified that no one else at RLSM or Bozell knew about the plan.

Lake wrote a $1,000 check in his own name and then approached the four RLSM employees identified by Douglas. Three of them agreed to pay up. (A fourth—presumably suspicious about the notion of a reimbursable campaign contribution—declined.) Lake then passed the checks worth $4,000 to Douglas, who deposited them in a "Henry Espy for Congress" account he had opened.

As the vehicle for reimbursement, Douglas settled on the Joint Center Dinner, an annual benefit for which RLSM and Lake had in the past routinely bought tickets on Sun-Diamond's behalf. Lake's staff prepared an internal RLSM document authorizing reimbursement to Lake for his supposed purchase of tickets to the dinner in the amount of $5,000 (even though he had raised only $4,000 for Henry Espy). The same document became part of the monthly invoice sent to Sun-Diamond, billing the client $5,000 for the fictitious dinner attendance on top of its $20,000 monthly retainer and other expenses. Lake received a $5,000 reimbursement check from Bozell, which he cashed and used to pay back the three other individual contributors (apparently pocketing the extra $1,000 for himself). Douglas, as part of his normal duties at Sun-Diamond, approved the payment to RLSM, which eventually went through. The net result: a $5,000 expenditure by Sun-Diamond, $4,000 of which went into Henry Espy's campaign coffers and $1,000 into James H. Lake's pocket. The independent counsel charged that the scheme worked a fraud on Bozell and RLSM, depriving the former (albeit temporarily) of $5,000, and depriving the latter of the "honest services" of its agent Lake under 18 U.S.C. § 1346. The jury convicted, evidently convinced that at least one such deprivation occurred. The jury also found Sun-Diamond guilty of making illegal campaign contributions in violation of FECA, 2 U.S.C. §§ 441b(a) & 441f.

As a threshold matter, Sun-Diamond raises a challenge which it says goes equally to the wire fraud and FECA counts. Richard Douglas's campaign contribution scheme cannot be attributed to it, Sun-Diamond argues, because Douglas was not acting with an intent to benefit the corporation. It is true, as the district court instructed the jury in this case, that an agent's acts will not be imputed to the principal in a criminal case unless the agent acts with the intent to benefit the principal. Here, Sun-Diamond says, Douglas's scheme was designed to—and did in fact—*defraud* his employer, not benefit it. In this circumstance, it strenuously argues, there can be no imputation: "[T]o establish precedent holding a principal *criminally* liable for the acts of an agent who defrauds and deceives the principal while pursuing matters within his self-interest merely because the agent's conduct *may* provide some incidental benefit to the principal serves to punish innocent principals with no countervailing policy justifications."

This argument has considerable intuitive appeal—Sun-Diamond does look more like a victim than a perpetrator, at least on the fraud charges. The facts in the record,

however—that Douglas hid the illegal contribution scheme from others at the company and used company funds to accomplish it—do not preclude a valid finding that he undertook the scheme to benefit Sun-Diamond. Part of Douglas's job was to cultivate his, and Sun-Diamond's, relationship with Secretary Espy. By responding to the Secretary's request to help his brother, Douglas may have been acting out of pure friendship, but the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer. The scheme came at some cost to Sun-Diamond but it also promised some benefit. *See, e.g.*, *United States v. Automated Med. Laboratories, Inc.* (agent's conduct which is actually or potentially detrimental to corporation may nonetheless be imputed to corporation in criminal case if motivated at least in part by intent to benefit it); *cf. Local 1814, Int'l Longshoremen's Ass'n* ("[T]he acts of an agent motivated partly by self-interest—even where self-interest is the predominant motive—lie within the scope of employment so long as the agent is actuated by the principal's business purposes 'to any appreciable extent.'") (quoting *Restatement (Second) of Agency* § 236 & comment b (1957)). Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.

And the answer to Sun-Diamond's claim of the absence of any "countervailing policy justification" is simply the justification usually offered in support of holding corporate principals liable for the illegal acts of their agents: to increase incentives for corporations to monitor and prevent illegal employee conduct. One might well question this justification—and scholars have. Moreover, the justification may be at its weakest in cases like this one, where the offending employee breaches a duty of honesty to the very corporation whose goals he aims to advance. In any event, Sun-Diamond's argument here, whatever its merit as an issue of policy, has no real grounding in the relevant statutes. And Sun-Diamond does not invoke the Constitution, which in any event would require either an overruling of the Supreme Court's rejection of a due process attack on corporate liability, *New York Cent. & Hudson River R.R. Co. v. United States*, or the development of some new theory.

Sun-Diamond also raises a narrower objection concerning imputation, one which goes only to the fraud counts. To the extent Douglas's conduct is to be imputed to his employer, argues Sun-Diamond, then so must Lake's be imputed to his employers (RLSM and Bozell). Both men occupied high-level management positions in their respective firms, and both men's firms sought to establish and maintain good relations with Secretary Espy. If Douglas's knowledge can be imputed to Sun-Diamond to hold it responsible for Douglas's acts, then Lake's must be imputed to his employers, RLSM and Bozell, and they cannot be victims.

Even assuming the evidence showed the balance of private and corporate purpose in Douglas's and Lake's motivation to be identical, Sun-Diamond's argument rests on a faulty assumption—that the imputation rules must be the same on both the perpetrator and victim sides. They need not be, and indeed are not. Imputation is a legal fiction

designed to assist in the allocation of liability, not a literal description of the state of a principal's knowledge. The law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims. A rule that makes victim wariness a condition of criminally punishing the perpetrator—unlike, say, a rule of contributory negligence in tort—might not inspire much extra precaution in potential victims. However much they may benefit from the criminalization of fraud generally, potential victims (who have many incentives to avoid being gulled, independent of the criminal law) seem unlikely to step up their precautions just to increase the *ex ante* chances that their deceivers will face criminal sanctions—or so Congress could reasonably conclude. Thus, when an individual is swindled, the offender does not escape mail or wire fraud liability just because the victim was unwary, or even "gullible." Indeed, Congress's adoption of 18 U.S.C. § 1346, specifying that the term "scheme or artifice to defraud," as used in various federal criminal fraud statutes, should include schemes to deprive a principal "of the intangible right of honest services," is hard to square with an imputation rule on the victim side as broad as the one governing corporate criminal responsibility. . . .

4. Corporate Compliance Policies

Under federal law, it is no defense to corporate criminal liability that the corporation had a policy against criminal conduct by its employees, or even that it had a particularly good or effective such policy. The following case illustrates the rule. Is this well-considered law? *Should* something like this be a defense? (Notice that this case, like *New York Central*, involves anti-competitive behavior, and that this court also takes up the question of whether the statute defining the crime includes corporate liability.)

UNITED STATES v. HILTON HOTELS CORP., 467 F.2d 1000 (9th Cir. 1972)

BROWNING, Circuit Judge:

This is an appeal from a conviction under an indictment charging a violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

Operators of hotels, restaurants, hotel and restaurant supply companies, and other businesses in Portland, Oregon, organized an association to attract conventions to their city. To finance the association, members were asked to make contributions in predetermined amounts. Companies selling supplies to hotels were asked to contribute an amount equal to one per cent of their sales to hotel members. To aid collections, hotel members, including appellant, agreed to give preferential treatment to suppliers who paid their assessments, and to curtail purchases from those who did not.

The jury was instructed that such an agreement by the hotel members, if proven, would be a per se violation of the Sherman Act. Appellant argues that this was error.

We need not explore the outer limits of the doctrine that joint refusals to deal constitute per se violations of the Act, for the conduct involved here was of the kind long held to

be forbidden without more. "Throughout the history of the Sherman Act, the courts have had little difficulty in finding unreasonable restraints of trade in agreements among competitors, at any level of distribution, designed to coerce those subject to a boycott to accede to the action or inaction desired by the group or to exclude them from competition." Barber, *Refusals to Deal under the Federal Anti-trust Laws*, 103 U. Pa. L. Rev. (1955).

Appellant argues that in cases in which the per se rule has been applied to refusals to deal, the defendants intended "to destroy a competitor or a line of competition," while the purpose of the defendants in the present case "was solely to bring convention dollars into Portland." But the necessary and direct consequence of defendants' scheme was to deprive uncooperative suppliers of the opportunity to sell to defendant hotels in free and open competition with other suppliers, and to deprive defendant hotels of the opportunity to buy supplies from such suppliers in accordance with the individual judgment of each hotel, at prices and on terms and conditions of sale determined by free competition. Defendants therefore "intended" to impose these restraints upon competition in the only sense relevant here. The ultimate objective defendants sought to achieve is immaterial. . . .

This is not a case in which joint activity having a primary purpose and direct effect of accomplishing a legitimate business objective is also alleged to have had an incidental and indirect adverse effect upon the business of some competitors. The primary purpose and direct effect of defendants' agreement was to bring the combined economic power of the hotels to bear upon those suppliers who failed to pay. The exclusion of uncooperative suppliers from the portion of the market represented by the supply requirements of the defendant hotels was the object of the agreement, not merely its incidental consequence. . . .

Appellant's president testified that it would be contrary to the policy of the corporation for the manager of one of its hotels to condition purchases upon payment of a contribution to a local association by the supplier. The manager of appellant's Portland hotel and his assistant testified that it was the hotel's policy to purchase supplies solely on the basis of price, quality, and service. They also testified that on two occasions they told the hotel's purchasing agent that he was to take no part in the boycott. The purchasing agent confirmed the receipt of these instructions, but admitted that, despite them, he had threatened a supplier with loss of the hotel's business unless the supplier paid the association assessment. He testified that he violated his instructions because of anger and personal pique toward the individual representing the supplier.

Based upon this testimony, appellant requested certain instructions bearing upon the criminal liability of a corporation for the unauthorized acts of its agents. These requests were rejected by the trial court. The court instructed the jury that a corporation is liable for the acts and statements of its agents "within the scope of their employment," defined to mean "in the corporation's behalf in performance of the agent's general line of work," including "not only that which has been authorized by the corporation, but also that

which outsiders could reasonably assume the agent would have authority to do." The court added:

> "A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies."

Appellant objects only to the court's concluding statement.

Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment. Such liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions.

The intention to impose such liability is sometimes express, *New York Central & Hudson R. R. Co. v. United States*, but it may also be implied. The text of the Sherman Act does not expressly resolve the issue. For the reasons that follow, however, we think the construction of the Act that best achieves its purpose is that a corporation is liable for acts of its agents within the scope of their authority even when done against company orders.

It is obvious from the Sherman Act's language and subject matter that the Act is primarily concerned with the activities of business entities. The statute is directed against "restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Co. v. Leader*. In 1890, as now, the most significant commercial activity was conducted by corporate enterprises. *See New York Central & Hudson R. R. Co. v. United States*; *Regan v. Kroger Grocery & Baking Co.*

Despite the fact that "the doctrine of corporate criminal responsibility for the acts of the officers was not well established in 1890", *United States v. Wise*, the Act expressly applies to corporate entities. 15 U.S.C. § 7. The preoccupation of Congress with corporate liability was only emphasized by the adoption in 1914 of section 14 of the Clayton Act to reaffirm and emphasize that such liability was not exclusive, and that corporate agents also were subject to punishment if they authorized, ordered, or participated in the acts constituting the violation.

Criminal liability for the acts of agents is more readily imposed under a statute directed at the prohibited act itself, one that does not make specific intent an element of the offense. The Sherman Act is aimed at consequences. Specific intent is not an element of any offense under the Act except attempt to monopolize under section 2, and conscious wrongdoing is not an element of that offense. The Sherman Act is violated if "a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements." *United States v. Griffith*.

The breadth and critical character of the public interests protected by the Sherman Act, and the gravity of the threat to those interests that led to the enactment of the statute,

support a construction holding business organizations accountable, as a general rule, for violations of the Act by their employees in the course of their businesses. In enacting the Sherman Act, "Congress was passing drastic legislation to remedy a threatening danger to the public welfare. . . ." *United Mine Workers v. Coronado Coal Co.* The statute "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Ry. v. United States*.

With such important public interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.

Legal commentators have argued forcefully that it is inappropriate and ineffective to impose criminal liability upon a corporation, as distinguished from the human agents who actually perform the unlawful acts (*see* Francis, *Criminal Responsibility of the Corporation*; Canfield, *Corporate Responsibility for Crime*), particularly if the acts of the agents are unauthorized. *See* Mueller, *Mens Rea and the Corporation*. But it is the legislative judgment that controls, and "the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy." ALI Model Penal Code, Comment on § 2.07, Tentative Draft No. 4, (1956). Moreover, the strenuous efforts of corporate defendants to avoid conviction, particularly under the Sherman Act, strongly suggests that Congress is justified in its judgment that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent violations by employees.

Because of the nature of Sherman Act offenses and the context in which they normally occur, the factors that militate against allowing a corporation to disown the criminal acts of its agents apply with special force to Sherman Act violations. . . .

Thus the general policy statements of appellant's president were no defense. Nor was it enough that appellant's manager told the purchasing agent that he was not to participate in the boycott. The purchasing agent was authorized to buy all of appellant's supplies. Purchases were made on the basis of specifications, but the purchasing agent exercised complete authority as to source. He was in a unique position to add the corporation's buying power to the force of the boycott. Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks. . . .

Problem 1-2

Should the law of corporate criminal liability incorporate an affirmative defense that would bar liability if the defendant firm had an effective legal compliance program? If so, what should be the specific scope and contours of that affirmative defense? In other words, how would you draft the jury instructions for such a defense? Should the law go farther by shifting the burden to the prosecutor to prove the absence of such an effective program as an element of corporate criminal liability?

5. Corporate Mens Rea

Mental state is the keystone in most forms of criminal liability. So how should mens rea analysis work when the defendant is a firm and therefore has no brain? The general answer under current law is that respondeat superior liability means there is no need to inquire into "corporate mens rea." Provided other requirements are satisfied, if the firm is liable so long as an employee is liable, then the only question about mental state is whether the employee had whatever mens rea, if any, is required for the applicable offense.

But notice how the court in the following case deals with the issue of corporate mens rea. Does the court's analysis make sense? This case is much discussed but also controversial. There is debate about how far this concept of "collective mens rea" goes, or even whether other courts could be expected to follow the concept, which has not been sufficiently tested in the federal courts. Think about how the court's analysis might work, or not, with other kinds of criminal statutes.

The legal framework applicable in this case is federal money laundering laws. Part of that regime requires individuals and banks to file a form with the IRS for any cash transaction of $10,000 or more—the purpose being to make it easier for the government to identify and further investigate potentially suspicious transactions that might involve criminal proceeds. To make this rule more effective, federal law also prohibits "structuring" of cash transactions, that is, converting one large transaction into a series of smaller ones to avoid filing of the required report.

UNITED STATES v. BANK OF NEW ENGLAND, N.A., 821 F.2d 844 (1st Cir. 1987)

BOWNES, Circuit Judge:

The Bank of New England appeals a jury verdict convicting it of thirty-one violations of the Currency Transaction Reporting Act (the Act). 31 U.S.C. §§ 5311-22 (1982). Department of Treasury regulations promulgated under the Act require banks to file Currency Transaction Reports (CTRs) within fifteen days of customer currency transactions exceeding $10,000. 31 C.F.R. § 103.22 (1986). The Act imposes felony liability when a bank willfully fails to file such reports "as part of a pattern of illegal

activity involving transactions of more than $100,000 in a twelve-month period. . . .” 31 U.S.C. § 5322(b). . . .

The Bank was found guilty of having failed to file CTRs on cash withdrawals made by James McDonough. It is undisputed that on thirty-one separate occasions between May 1983 and July 1984, McDonough withdrew from the Prudential Branch of the Bank more than $10,000 in cash by using multiple checks-each one individually under $10,000-presented simultaneously to a single bank teller. . . .

Criminal liability under 31 U.S.C. § 5322 only attaches when a financial institution “willfully” violates the CTR filing requirement. A finding of willfulness under the Reporting Act must be supported by “proof of the defendant’s knowledge of the reporting requirements and his specific intent to commit the crime.” Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts.

The Bank contends that the trial court’s instructions on knowledge and specific intent effectively relieved the government of its responsibility to prove that the Bank acted willfully. The trial judge began her instructions on this element by outlining generally the concepts of knowledge and willfulness:

> Knowingly simply means voluntarily and intentionally. It’s designed to exclude a failure that is done by mistake or accident, or for some other innocent reason. Willfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law.

The trial judge properly instructed the jury that it could infer knowledge if a defendant consciously avoided learning about the reporting requirements. The court then focused on the kind of proof that would establish the Bank’s knowledge of its filing obligations. The judge instructed that the knowledge of individual employees acting within the scope of their employment is imputed to the Bank. She told the jury that “if any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment, . . .”

The trial judge then focused on the issue of “collective knowledge”:

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank’s knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several

> employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

After discussing the two modes of establishing knowledge—via either knowledge of one of its individual employees or the aggregate knowledge of all its employees—he trial judge turned to the issue of specific intent:

> There is a similar double business with respect to the concept of willfulness with respect to the bank. In deciding whether the bank acted willfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not do as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file. . . .
>
> Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing CTR requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the evidence as to the bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; its response to various bits of information that it got in August and September of '84 and February of '85; its policies, and how it carried out its stated policies. . . .
>
> If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports.

The Bank contends that the trial court's instructions regarding knowledge were defective because they eliminated the requirement that it be proven that the Bank violated a known legal duty. It avers that the knowledge instruction invited the jury to convict the Bank for negligently maintaining a poor communications network that prevented the consolidation of the information held by its various employees. The Bank argues that it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half.

A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. *Riss & Company v. United States*; *Inland Freight Lines v. United States*; *Camacho v. Bowling*; *United States v. T.I.M.E.-D.C., Inc.*; *United States v. Sawyer Transport, Inc*. 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. *See, e.g., United States v. Cincotta*; *United States v. Richmond*. Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. *Steere Tank Lines, Inc. v. United States*. 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.

United States v. T.I.M.E.-D.C., Inc. Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Nor do we find any defects in the trial court's instructions on specific intent. The court told the jury that the concept of willfulness entails a voluntary, intentional, and bad purpose to disobey the law. Her instructions on this element, when viewed as a whole, directed the jury not to convict for accidental, mistaken or inadvertent acts or omissions. It is urged that the court erroneously charged that willfulness could be found via flagrant indifference by the Bank toward its reporting obligations. With respect to federal regulatory statutes, the Supreme Court has endorsed defining willfulness, in both civil and criminal contexts, as "a disregard for the governing statute and an indifference to its requirements." *Trans World Airlines, Inc. v. Thurston*. Accordingly, we find no error in the court's instruction on willfulness.

The Bank asserts that the evidence did not suffice to show that it had willfully failed to comply with the Act's reporting requirements. We review the evidence in the light most favorable to the government. *United States v. Medina*.

As already discussed, the language of the Treasury regulations itself gave notice that cash withdrawals over $10,000 were reportable, regardless of the number of checks used. Primary responsibility for CTR compliance in the Bank's branch offices was assigned to head tellers and branch managers. Head tellers Orlandella and Murphy, who knew of the nature of McDonough's transactions, also knew of the CTR filing obligations imposed by the Bank. The jury heard testimony from former bank teller Simona Wong,

who stated that she knew McDonough's transactions were reportable, and that the source of her knowledge was head teller Murphy.

Even if some Bank personnel mistakenly regarded McDonough as engaging in multiple transactions, there was convincing evidence that the Bank knew that his withdrawals were reportable. An internal memo sent in May 1983 by project coordinator Jayne Brady to all branch managers and head tellers stated that "'[r]eportable transactions are expanded to include multiple transactions which aggregate more than $10,000 in any *one day.*' This includes deposits or withdrawals by a customer to or from more than one account." The Prudential Branch Manual instructed that if Bank personnel know that a customer has engaged in multiple transactions totalling $10,000 or more, then such transactions should be regarded as a single transaction. In addition, since 1980, the instructions on the back of CTR forms have directed that reports be filed on multiple transactions which aggregate to over $10,000. Finally, a Bank auditor discussed with Orlandella and Murphy, the Bank's obligation to report a customer's multiple transactions in a single day which amount to more than $10,000. We do not suggest that these evidentiary items in themselves legally bound the Bank to report McDonough's transactions; it is the language of the regulations that impose such a duty. This evidence, however, proved that the Bank had ample knowledge that transactions like McDonough's came within the purview of the Act.

Regarding the Bank's specific intent to violate the reporting obligation, Simona Wong testified that head teller Patricia Murphy knew that McDonough's transactions were reportable, but, on one occasion, deliberately chose not to file a CTR on him because he was "a good customer." In addition, the jury heard testimony that bank employees regarded McDonough's transactions as unusual, speculated that he was a bookie, and suspected that he was structuring his transactions to avoid the Act's reporting requirements. An internal Bank memo, written after an investigation of the McDonough transactions, concluded that a "person managing the branch would have to have known that something strange was going on." Given the suspicions aroused by McDonough's banking practices and the abundance of information indicating that his transactions were reportable, the jury could have concluded that the failure by Bank personnel to, at least, inquire about the reportability of McDonough's transactions constituted flagrant indifference to the obligations imposed by the Act.

We hold that the evidence was sufficient for a finding of willfulness. . . .

A More Recent Example

On September 9, 2010, a natural gas line in San Bruno, California owned by the PG&E corporation exploded, causing a fire in which eight people died and fifty-eight were injured. Federal prosecutors charged the corporation with violations of the federal Pipeline Safety Act (PSA). PG&E chose to contest the case at trial and a jury convicted the company on numerous counts.

In explaining corporate criminal liability in the case, the judge told the jurors that to convict on the PSA charges they needed to find, beyond a reasonable doubt, that a PG&E employee acting within the scope of employment and in part to benefit the company violated the PSA. When explaining the PSA to the jury, the judge said that a criminal violation of the statute occurs only when a defendant acts "willfully." The judge then stated to the jury that corporate "willfulness" exists when an employee acts willfully on behalf of the corporation and that "a corporation is considered . . . to have acquired the collective knowledge of its employees. The corporation's 'knowledge' is therefore the totality of what the employees know within the scope of their employment."

Was there any problem in the trial court's instruction? (Unfortunately for interested observers, PG&E and the government settled the matter after trial and no appellate decision resulted from the prosecution.)

C. *De Facto* Corporate Criminal Liability

Now we shift to examining *de facto* corporate criminal liability. All lawyers practicing in this field know that the imposition, and degree, of any criminal sanctions imposed on a business firm in a case of employee crime—should the case, as is common, result in settlement—will depend heavily on a number of factors that prosecutors will weigh. These factors thus guide negotiation between defense lawyers and the government over corporate criminal liability and, well before that stage, the advising of corporations on how to best position themselves to obtain leniency should they face an enforcement problem.

To introduce these discretionary factors, three items follow: (1) excerpts from the provisions of the Justice Manual setting out DOJ policy on prosecution of corporations, together with recent policy updates issued by the Trump and Biden Administration DOJs; (2) the SEC's "Seaboard Report," which is the most explicit statement from the SEC on its policy regarding enforcement against firms; and (3) a recent judicial decision on the question of whether courts have any role in the current *de facto* enforcement process.

Note that the DOJ's Justice Manual is the general handbook for all federal prosecutors containing the Department's internal rules and policies. It does not have the force of statute or regulation ("The Justice Manual provides internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigation prerogatives of DOJ."). In addition to the Justice Manual, the DOJ regularly issues memoranda, which often vary from administration to administration, setting out policies on enforcement, sometimes with the status of "pilot programs."

Notice the things the DOJ and SEC consider relevant to firm liability that are not found anywhere in American *de jure* doctrine. What is the policy motivation behind each of

these factors? These documents are not law or otherwise enforceable in court. So why do the DOJ and SEC have them?

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL (Excerpts)

9-28.010. Foundational Principles of Corporate Prosecution

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

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

Prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers, the Department accomplishes multiple goals. First, the Department increases its ability to identify the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and the extent of any corporate misconduct. Second, by focusing on individuals, the Department increases the likelihood that those with knowledge of the corporate misconduct will be identified and provide information about the individuals involved, at any level of an organization. Third, the Department maximizes the likelihood that the criminal investigation appropriately identifies and holds accountable culpable individuals and not just the corporation.

These Principles provide internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

[updated March 2023]

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

Corporate directors and officers owe a fiduciary duty to a corporation's shareholders (the corporation's true owners), and they owe duties of honest dealing to the investing public and consumers in connection with the corporation's regulatory filings and public statements. A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders who seek to promote trust and confidence. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which prosecutors perform their jobs—including the professionalism and civility demonstrated, willingness to secure the facts in a manner that encourages corporate compliance and self-regulation, and appreciation that corporate prosecutions can cause harm to blameless investors, employees, and others—affects public perception of the Department's mission. Federal prosecutors must maintain public confidence in the way in which the Department of Justice exercises charging discretion. This endeavor requires the thoughtful analysis of all facts and circumstances presented in a given case.

[updated April 2023]

9-28.200. General Considerations of Corporate Liability

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Holding corporations accountable for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.

B. Comment: There is no DOJ policy establishing a presumption against or in favor of seeking an indictment against a corporation. Rather, in all cases involving corporate wrongdoing, prosecutors should consider each of the factors discussed in these guidelines in determining whether to charge a corporation or enter into a corporate resolution, including the appropriate structure and form of a resolution, the monetary penalty, compliance terms, and other provisions. In doing so, prosecutors should be aware of the public benefits that can flow from charging a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when another corporation is charged with criminal misconduct that is pervasive throughout a particular industry, and thus an criminal charges can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate prosecution may result in specific deterrence by changing the culture of the charged corporation and the behavior of its

employees. Finally, certain crimes that carry with them a substantial risk of great public harm—*e.g.*, environmental crimes or sweeping financial frauds—may be committed by a business entity, and there may therefore be a substantial federal interest in charging a corporation under such circumstances.

In certain instances, it may be appropriate to resolve a corporate criminal case by means other than an indictment or pre-indictment guilty plea. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in JM 9-28.1100 (Collateral Consequences). Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in JM 9-28.1200 (Civil or Regulatory Alternatives).

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

When the Department enters into a plea agreement, a deferred prosecution agreement, or a non-prosecution agreement to resolve corporate criminal liability, the agreement should, to the greatest extent possible, include: (1) an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement; and (2) a statement of relevant considerations that explains the Department's reasons for entering into the agreement. Relevant considerations may, for example, include: the corporation’s voluntary self-disclosure (or any self-reporting) to the Department, cooperation with the Department’s investigation, and remedial efforts (or lack thereof); the basis for and extent of cooperation credit, if any, that the corporation is receiving; the seriousness and pervasiveness of the criminal conduct; the corporation’s history of misconduct; the state of the corporation’s compliance program at the time of the underlying criminal conduct and at the time of the resolution; the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable; other relevant factors listed in JM § 9-28.300; and any other key considerations related to the Department's decision regarding the resolution. Absent exceptional circumstances, corporate criminal resolution agreements will be published on the Department's public website.

[updated April 2023]

9-28.210. Focus on Individual Wrongdoers

A. General Principle: Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or outside the corporation. Because a corporation can act only through individuals, holding individual wrongdoers criminally liable may provide the strongest deterrent against future corporate wrongdoing. Provable individual criminal charges should be pursued, particularly if they implicate high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution. In other words, regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals.

Absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, no corporate resolution should provide protection from criminal liability for any individuals. The United States generally should not release individuals from criminal liability based on corporate settlement releases. Any such release of individuals from criminal liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

B. Comment: It is important early in the corporate investigation to identify the responsible individuals and determine the nature and extent of their misconduct. Prosecutors should not allow delays in the corporate investigation to undermine the Department's ability to pursue potentially culpable individuals. Every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception. In situations where it is anticipated that a tolling agreement is unavoidable, all efforts should be made either to prosecute culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

If an investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, or prosecution against individuals is not viable for other reasons, prosecutors must submit to the supervising United States Attorney or Assistant Attorney General a prosecution or resolution authorization memorandum that addresses the potential liability of individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and, whenever warranted, an investigative plan to bring the matter to resolution expeditiously and prior to the end of any statute of limitations period. In such cases, prosecutors must obtain the approval of the supervising United States Attorney or Assistant Attorney General of both the corporate resolution and the memorandum addressing the investigation of responsible individuals and why it is not resolving before or concurrently with the corporate case.

At times, Department criminal investigations take place in parallel to criminal investigations in foreign jurisdictions into the same or related conduct. In such situations, the Department may learn that a foreign government intends to bring criminal charges against an individual whom the Department is also investigating. Before declining to commence a prosecution in the United States on that basis, prosecutors must make a case-specific determination as to whether there is a significant likelihood that the individual will be subject to effective prosecution in the other jurisdiction. In making that determination, prosecutors should consider, *inter alia*: (1) the strength of the other jurisdiction's interest in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and other consequences if the individual is convicted in the other jurisdiction. When appropriate, Department prosecutors may wait to initiate a federal prosecution in order to better understand the scope and effectiveness of a prosecution in another jurisdiction. However, prosecutors should not delay commencing federal prosecution to the extent that delay could prevent the government from pursuing certain charges (*e.g.*, on statute of limitations grounds), reduce the chance of arresting the individual, or otherwise undermine the strength of the federal case. Similarly, prosecutors should not be deterred from pursuing appropriate charges just because an individual liable for corporate crime is located outside the United States.

Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of their duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.

Agents may act for mixed reasons—both for self-aggrandizement (direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. A corporate prosecution may be viable even where a corporation has a policy against the particular activity.

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

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

interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

[updated April 2023]

9-28.300 - Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* JM 9-27.220 et seq. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (*see* JM 9-28.400);
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by individuals in corporate management (*see* JM 9-28.500);
3. the corporation's history of misconduct, including prior criminal, civil, and regulatory enforcement actions against it, both domestically and internationally (*see* JM 9-28.600);
4. the corporation's willingness to cooperate, including as to potential wrongdoing by its current and former employees, directors, officers, and agents, as well as other individuals and entities that engaged in the misconduct under investigation (*see* JM 9-28.700);
5. the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision (*see* JM 9-28.800);
6. the corporation's timely and voluntary self-disclosure of wrongdoing (*see* JM 9-28.900);
7. the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to execute financial compensation measures that punish wrongdoing, or to pay restitution (*see* JM 9-28.1000);
8. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally

culpable, as well as impact on the public arising from the prosecution (*see* JM 9-28.1100);

9. the adequacy of remedies such as civil or regulatory enforcement actions, domestically or internationally, including remedies resulting from the corporation's cooperation with relevant government agencies (*see* JM 9-28.1200);
10. the adequacy of the prosecution of individuals responsible for the corporation's misconduct (*see* JM 9-28.1300); and
11. the interests of any victims (*see* JM 9-28.1400), including what steps the corporation has taken to identify potential victims, or other persons or entities who were significantly, even if indirectly, harmed by the criminal conduct, and what steps the corporation has taken to mitigate such harm.

B. Comment: The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Some of these factors may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be sufficiently aggravating to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. In addition, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.

[updated May 2024]

9-28.700. The Value of Cooperation

Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

A. General Principle: The Department encourages and rewards cooperation. Credit for cooperation takes many forms and is calculated differently based on the degree to which a corporation cooperates with the government's investigation and the commitment that the corporation demonstrates in doing so. A corporation's cooperation may, as part of a holistic analysis, impact the appropriate form of the resolution as well as the fine range and fine amount.

Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Corporations seeking cooperation credit ultimately bear the burden of ensuring that documents and information are provided in a timely manner to prosecutors.

In order for a corporation to receive any consideration for cooperation under this section, the corporation must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and timely provide to the Department all relevant facts relating to that misconduct. If a corporation seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved in or responsible for the misconduct, its cooperation will not be considered a mitigating factor under this section. Nor, where a corporation is prosecuted in such a case, will the Department support a cooperation-related reduction at sentencing.

Likewise, production of evidence to the government that is most relevant for assessing individual culpability should be prioritized. If the company is unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully, the organization may still be eligible for cooperation credit. For example, there may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.

In assessing a corporation's cooperation during a criminal investigation, prosecutors should consider the following non-exhaustive list of factors, exercising appropriate discretion regarding the weight to be attributed to each factor, as well as any additional factors that may be relevant for consideration given the facts of a particular case. The greatest amount of cooperation credit will generally be provided when companies cooperate through the following actions:

1. Timely disclosure of all facts relevant to the wrongdoing at issue, including:
    a. facts gathered during a corporation's internal investigation, if the company chooses to conduct one;
    b. attribution of facts to specific sources, rather than a general narrative of the facts; and
    c. identification of all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, including the corporation's officers, employees, customers, competitors or agents and third parties, and all relevant facts relating to the misconduct and the involvement by those individuals;
2. Proactive cooperation, rather than reactive; that is, timely disclosure of all facts that are relevant to the investigation and, where the corporation is aware of

opportunities for the Department to obtain relevant evidence not in the corporation's possession and not otherwise known to the Department, timely identification of those opportunities;

3. Timely voluntary preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of documents located overseas, the locations in which such documents were found, their custodians, and who authored and found the documents, (b) facilitation of third-party production of documents, and (c) where requested, provision of translations of relevant documents in foreign languages;
    a. Where a corporation claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the corporation bears the burden of establishing the prohibition and identifying reasonable alternatives such that the Department receives the necessary facts and evidence to continue its investigations and prosecutions. Moreover, a corporation should work diligently to identify all available legal bases to provide such documents;
    b. Prosecutors also should consider the extent to which a corporation enforced effective document and data retention policies in order to preserve, collect, and disclose documents, data, and other evidence relevant to the government's investigation (including as to third-party messaging data, regardless of whether the data is kept on corporate or personal devices that are used for work purposes);
4. De-confliction of witness interviews and other investigative steps that a corporation takes as part of its internal investigation, should it conduct one, to prevent the corporation's investigation from conflicting or interfering with the Department's investigation; and
5. Where appropriate and possible, making corporate officers and employees who possess relevant information available for interviews by the Department; this includes, officers, employees, and agents located overseas, as well as former officers and employees, and, where possible, the facilitation of interview of third-party witnesses.

B. Comment: A cooperating corporation must earn credit for cooperation; it is not provided as a matter of course. In other words, a corporation starts at zero cooperation credit and then earns credit for specific cooperative actions, rather than starting at maximum available credit that is decreased based on deficiencies in cooperation. A lack of genuine cooperation will result in a corporation receiving no credit or minimal credit, depending on the extent to which the cooperation was lacking. Moreover, a corporation that fails to demonstrate timely and full cooperation at the earliest opportunity reduces its ability to earn cooperation credit. For avoidance of doubt, a corporation is not required to waive its attorney-client privilege or attorney work product protection to be eligible to engage in cooperation or satisfy any threshold.

In investigating wrongdoing by or within a corporation, a prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.

This dynamic—*i.e.*, the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees, uncertainty about who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. This leads to timely resolution of investigations, which promotes public confidence, maximizes deterrence, and allows ongoing deficiencies at the corporation to be corrected and preventive measures established. With cooperation by the corporation, the government may be able to reduce tangible losses, limit undue damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation—and ultimately shareholders, employees, and other often blameless victims—by enabling the government to focus its investigative resources in a manner that may expedite the investigation and that may be less likely to disrupt the corporation's legitimate business operations. In addition, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

The requirement that companies cooperate completely as to individuals does not mean that prosecutors should wait for corporations to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary,

prosecutors proactively investigate individuals at every step of the process—before, during, and after any corporate cooperation. Prosecutors should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize, exaggerate, or otherwise misrepresent the behavior or role of any individual or group of individuals.

Prosecutors should strive to obtain from a cooperating corporation as much information as possible about responsible individuals before resolving the corporate case. In addition, the corporation's continued cooperation with respect to individuals may be necessary post-resolution. If so, the corporate resolution agreement should include a provision that requires the corporation to provide information about all individuals substantially involved in or responsible for the misconduct, and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

[updated March 2023]

9-28.720. Cooperation: Disclosing the Relevant Facts

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

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must timely disclose the relevant facts of which it has knowledge.

(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have

personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected. . . .

In short, the corporation may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it timely provides all relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information about individual misconduct alone does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in JM 9-28.300. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a potential mitigating factor, but it alone is not dispositive. . . .

[updated March 2023]

9-28.800. Corporate Compliance Programs

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

The adequacy of a corporation's compliance program, including its corporate culture, however, can have a direct and significant impact on the terms of any resolution with the Department. Prosecutors should evaluate a corporate compliance program as a factor in determining, *inter alia*, whether to charge the corporation, the terms of a corporate resolution, and the need for an independent compliance monitor. Prosecutors should evaluate the corporation's commitment to fostering a strong culture of compliance at all levels of the company. For example, as part of this evaluation, prosecutors should consider how the company has incentivized employee, executive, and director behavior, including through employee discipline, treatment of internal complaints of wrongdoing, and compensation plans, as part of its efforts to create an ethical and well-resourced compliance culture and organization.

Prosecutors should assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (1) the time of the offense; and (2) the time of a charging decision. The same criteria should be used in each instance.

B. Comment: The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior.* As explained in *United States v. Potter*, a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts, because "[e]ven a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents."

When evaluating a compliance program in the context of an identified violation of law, prosecutors are necessarily examining a violation of law that a corporation failed to prevent. However, this does not necessarily mean that the compliance program was poorly designed, operated in bad faith, or lacked adequate resources. Failures may occur even in well-designed compliance programs, as a result of honest mistakes or deliberate circumvention by bad actors.

In evaluating the effectiveness of a compliance program, prosecutors should consider not only its comprehensiveness, but also, among other factors, the extent and pervasiveness of the criminal misconduct; the level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any prior remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the compliance program, as well as those employees, officers, directors and third parties who may have tolerated, condoned, or encouraged criminal wrongdoing or failed to supervise adequately or install appropriate safeguards; and any revisions to corporate compliance programs in light of lessons learned. As part of assessing a corporation's culture and commitment to compliance, prosecutors should also consider the promptness of any disclosure of wrongdoing to the government; whether management disregarded the misconduct; and whether there was a failure to report any significant misconduct to corporate leadership or the board of directors.

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or permitting employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: (1) Is the corporation's compliance program well designed? (2) Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively? And (3) Does the corporation's compliance program work in practice?

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, resourced, reviewed, and revised, as appropriate, in an effective manner. In this regard, prosecutors evaluate a corporation's method for assessing and addressing applicable risks and designing appropriate controls to manage these risks. Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. Further, prosecutors should evaluate a corporation's methods for testing and measuring the effectiveness of its compliance program, including consideration of whether the corporation has sufficient resources to effectively monitor, audit, document, analyze, and utilize the results of the corporation's compliance efforts.

As part of this evaluation, prosecutors should consider whether the corporation has fostered a culture in which employees feel comfortable raising concerns, or one that discourages open discussion of such matters.

Careful consideration of these factors will enable prosecutors to make an informed decision as to whether the corporation has adopted and implemented a truly effective

compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation.

Compliance programs should be designed to detect and prevent the particular types of misconduct most likely to occur in a particular corporation's line of business. At times, corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a compliance program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with specialized compliance programs and can be helpful to prosecutors in evaluating such programs. In addition, the Fraud Section and Money Laundering and Asset Recovery Section of the Criminal Division, the Consumer Protection Branch of the Civil Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist United States Attorneys' Offices in finding the appropriate agency office(s) for such consultation.

Use of Communication Platforms & Personal Devices

As part of evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential violations of law, prosecutors should consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and communication platforms, including third-party applications, to ensure that business-related electronic data and communications are preserved.

Compensation Structures that Promote Compliance

Corporations can help to deter criminal activity if they reward compliant behavior and penalize individuals who engage in misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can incentivize compliant conduct or deter risky behavior. In assessing a compliance program, prosecutors should consider whether the corporation's compensation agreements, arrangements, and packages (the "compensation systems") incorporate elements—such as compensation clawback provisions—that enable financial recoveries and penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct Corporations can also foster an ethical corporate culture by rewarding those executives and employees who promote compliance within the organization. Prosecutors should therefore also consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior. Affirmative incentives include, for example, the use of compliance

metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise.

Prosecutors should review a corporation's policies and practices regarding compensation and determine whether they are followed in practice. For example, if a corporation has included clawback provisions in its compensation agreements, prosecutors should consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue.

[updated March 2023]

9-28.900 - Voluntary Self-Disclosures

In conjunction with regulatory agencies and other executive branch departments, the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to self-disclose discovered misconduct to the appropriate authorities. For the purposes of this Section, a "voluntary self-disclosure" occurs only when a company discloses misconduct to the Department promptly and voluntarily (*i.e.*, where it has no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department or regulatory resolution), and when it does so prior to an imminent threat of disclosure or government investigation.

A. General Principle: Each Department component that prosecutes corporate crime must maintain a written and publicly available component policy on voluntary self-disclosure. That policy must set forth what constitutes a voluntary self-disclosure, including the component's expectations with regard to the timing of such disclosure and the need for the disclosure to be accompanied by timely preservation, collection, and production of relevant information, what benefits the corporation can expect to receive if they meet the standards for voluntary self-disclosure under the component's policy, and what circumstances constitute aggravating factors under the component's policy. All component voluntary self-disclosure policies shall share three common features:

1. Absent aggravating factors, the Department will not seek a guilty plea where a corporation is determined to have met the requirements of the applicable voluntary self-disclosure policy, fully cooperated, and timely and appropriately remediated the criminal conduct. Each Department component shall define such aggravating factors in their written policies.
2. The Department will not require the imposition of an independent compliance monitor for a cooperating company that is determined to have met the requirements of the applicable voluntary self-disclosure policy and, at the time of resolution, demonstrates it has implemented and tested an effective

compliance program. Such decisions will continue to be made on a case-by-case basis and at the sole discretion of the Department.

3. The Department will apply a presumption in favor of declining prosecution of a corporation that voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated misconduct uncovered as a result of due diligence conducted shortly before or shortly after a lawful, bona fide acquisition of another corporate entity.
    a. The prosecution team should apply this presumption in favor of declination only after concluding that the acquiror (i) voluntarily self-disclosed the misconduct in a timely manner, which generally means within 180 days of the closing date of the acquisition; (ii) fully remediated the misconduct in a timely manner, which generally means within 1 year of the closing date; and (iii) paid any disgorgement, forfeiture, and/or restitution arising from the misconduct at issue, in accordance with the applicable voluntary self-disclosure policy.
    b. Prior to declining a prosecution, the prosecution team must (i) determine that the acquisition served a bona fide business purpose (*i.e.*, was not engineered to circumvent accountability for misconduct) and that both parties to the transaction were not coconspirators in the misconduct; and (ii) consult with the Antitrust and National Security Divisions to ensure that the potential declination would not interfere or be inconsistent with any civil or administrative process related to the acquisition.
    c. When an acquiror discloses violations of the Sherman Act by the acquired entity, the prosecution team should apply this presumption of declination to the acquiror only when the parties (i) satisfy all relevant requirements of the Antitrust Division's leniency policy; (ii) voluntarily disclose the misconduct before the closing date of the acquisition; and (iii) suspend any review periods under the Hart-Scott-Rodino Act.

To be clear, a corporation's voluntary self-disclosure of misconduct is separate and distinct from its cooperation with an investigation, and they are to be treated as two separate and independent factors in connection with charging and resolution decisions. A company that self-discloses its misconduct can then be determined to be not fully cooperative; conversely, a company that does not self-disclose may later elect to fully cooperate with the government's investigation.

B. Comment: The Department's voluntary self-disclosure policies serve three complementary purposes: to help Department investigators and prosecutors identify corporate misconduct that they might not have otherwise discovered; to increase the likelihood of holding individual wrongdoers accountable through criminal prosecution; and to encourage corporations to promptly and thoroughly remediate misconduct that they unearth through internal compliance and audit functions.

With regard to Section 9-28.900(A)(3), prosecutors should apply a presumption in favor of declining prosecution only when the acquiror's voluntary self-disclosure relates to misconduct that the acquiror learned while conducting due diligence in connection with its acquisition of the acquired entity. If the prosecution team determines that the acquiror or its agents have presented false or misleading information to the Department, including about the extent of their prior knowledge of the acquiree's misconduct, the acquiror shall not qualify for a presumption of declination under this Section, and the prosecution team should determine whether a separate criminal investigation into the false statements is warranted.

Prosecutors may, in their discretion, apply a presumption of declination even when an acquiror voluntarily self-discloses the misconduct more than 180 days after the closing date, or when an acquiror requires more than 1 year after the closing date to fully remediate the misconduct, provided that prosecutors have a reasonable basis for extending such deadlines based on the specific facts and circumstances of the matter. Conversely, the Department expects that when a company possesses evidence of misconduct that endangers national security or presents an ongoing or imminent harm, the company will disclose that misconduct expeditiously rather than wait until the end of the 180-day post-closing window. As a result, prosecutors should not apply a presumption of declination when a company fails to disclose such misconduct expeditiously, and should consider the seriousness of the harm or potential danger when assessing how expeditious the disclosure should be.

The presumption of declination in Section 9-28.900(A)(3) applies only to the acquiror, not the acquired entity. To the extent that the acquired entity remains a distinct legal entity following the acquisition and faces potential criminal liability for its prior misconduct, prosecutors should credit the acquiring entity's timely disclosure and consider whether the acquired entity otherwise qualifies for benefits under the component's voluntary self-disclosure policies.

Although Section 9-28.900(A)(3) contemplates an acquiror and an acquiree, prosecutors may also in their discretion apply the policy to a corporate "merger of equals" or other transactional structure. In deciding whether to apply a presumption of declination in such cases, prosecutors should consider the extent to which the merged or consolidated company differs from the corporate entity where the misconduct occurred, including whether the new entity operates with a significantly more robust compliance function and under new management not associated with the prior misconduct. . . .

[updated March 2024]

9-28.1700 - Use of Independent Compliance Monitors in Corporate Resolutions

A. General Principle: Independent compliance monitors (monitors) can be an effective means of reducing the risk of further corporate misconduct and rectifying compliance

lapses identified during a corporate criminal investigation. Prosecutors should carefully assess the need for the imposition of a monitor on a case-by-case basis, without applying any presumption for or against such imposition. Two broad considerations should guide prosecutors when assessing the need for and propriety of a monitor, and the scope and duration of any monitorship: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) whether the costs of a monitor and its impact on the operations of a corporation (which can be calibrated by tailoring the scope and duration of a monitorship) substantially outweigh the potential benefits of a monitor.

In evaluating the necessity and potential benefits of a monitor, prosecutors should consider, among other factors:

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's voluntary self-disclosure policy;
2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;
3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;
4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);
5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;
6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;
7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;
8. Whether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;
9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and

10. Whether and the extent to which the corporation is subject to oversight from industry regulators or is receiving a monitor from another domestic or foreign enforcement authority or regulator.

B. Comment: Department attorneys should determine whether a monitor is required based on the facts and circumstances presented in each case. The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Monitorships should not be imposed for punitive purposes. The scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor.

In general, the Department should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship. Where a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, prosecutors should consider imposing a monitorship. This is particularly true if the investigation reveals that a compliance program is deficient or inadequate in numerous or significant respects. Conversely, where, at the time of a resolution, a corporation's compliance program and controls have been fully implemented, tested and demonstrated to be effective and adequately resourced, a monitor may not be necessary.

[added March 2023]

In recent decades, each new administration has announced revisions to and interpretations of the Justice Manual provisions on corporate prosecutions to emphasize varying policies and strategies. The following memorandum excerpts, issued by the second Trump Administration DOJ, are the most detailed statements to date about how it will approach corporate enforcement and settlement.

U.S. Department of Justice, Criminal Division, Memorandum of May 12, 2025

To: All Criminal Division Personnel
From: Matthew R. Galeotti**,** Head of the Criminal Division
Subject: Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime

The core mission of the Department of Justice (Department) is to do justice, uphold the rule of law, protect the American public, and vindicate victims' rights. The Department's efforts to carry out this mission are multi-faceted. Prosecutors and investigators in the Criminal Division are currently working tirelessly to, among other things, pursue the Total Elimination of Cartels and Transnational Criminal Organizations (TCOs), dismantle human smuggling organizations, curb the flow of fentanyl and other dangerous drugs, and neutralize child predators and violent criminals, including by securing significant charges and prison sentences against the worst criminal actors.

White-collar crime also poses a significant threat to U.S. interests. Unchecked fraud in U.S. markets and government programs robs hardworking Americans and harms the public fisc. The deadly activities of Cartels and TCOs are enabled by international money laundering organizations and other financial facilitators. Illicit financial and logistical networks undermine our national security by enabling shadow-banking for and sanctions evasion by hostile nation states and terror regimes. The Criminal Division is committed to rooting out such insidious conduct.

However, overbroad and unchecked corporate and white-collar enforcement burdens U.S. businesses and harms U.S. interests. The vast majority of American businesses are legitimate enterprises working to deliver value for their shareholders and quality products and services for customers. Prosecutors must avoid overreach that punishes risk-taking and hinders innovation. For these reasons, the Division's policies must strike an appropriate balance between the need to effectively identify, investigate, and prosecute corporate and individuals' criminal wrongdoing while minimizing unnecessary burdens on American enterprise.

The purpose of this Memorandum is to outline the Criminal Division's enforcement priorities and policies for prosecuting corporate and white-collar crimes in the new Administration. In investigating and prosecuting these crimes, Criminal Division attorneys are to be guided by three core tenets: (1) focus; (2) fairness; and (3) efficiency. This Memorandum elaborates on these principles and amends several Criminal Division policies, as set forth below.

I. Areas of Focus

The Criminal Division must be laser-focused on the most urgent criminal threats to the country. Therefore, consistent with the enforcement policies and priorities of this Administration, the Criminal Division will prioritize investigating and prosecuting corporate crime in areas that will have the greatest impact in protecting American citizens and companies and promoting U.S. interests.

A. Harms to America Posed by White-Collar Crime

Dishonest actors exploit government programs, funded by American taxpayers, to enrich themselves through waste, fraud, and abuse. Rampant health care fraud and program and procurement fraud drain our country's limited resources. Corporations and individuals defraud important government initiatives, including Medicare, Medicaid, defense spending, and other programs intended to assist vulnerable citizens. Anyone who cares about good and effective government should be concerned about waste, fraud, and abuse at the hands of bad actors in government agencies. The Criminal Division will lead the fight in holding accountable those who exploit these programs and harm the public fisc for personal gain.

Complex frauds also victimize U.S. investors and weaken the integrity of markets. Schemes that defraud Americans—such as Ponzi schemes, investment fraud, elder fraud, and others—take advantage of investors and consumers, especially the most vulnerable. The victims of such fraudulent conduct are often left devastated, burdened by emotional pain and deprived of their hard-earned savings.

Crimes that exploit our monetary systems undermine economic development and innovation. For example, in the digital assets context, prosecutors should "focus on prosecuting individuals who victimize digital asset investors, or those who use digital assets in furtherance of criminal offenses[.]" Prosecution of these righteous cases will vindicate U.S. interests.

The Criminal Division must also focus resources on threats to the U.S. economy, American competitiveness, and our national security. Trade and customs fraudsters, including those who commit tariff evasion, seek to circumvent the rules and regulations that protect American consumers and undermine the Administration's efforts to create jobs and increase investment in the United States. Prosecuting such frauds will ensure that American businesses are competing on a level playing field in global trade and commerce.

The exploitation of our financial system is detrimental to American interests in and of itself and can also enable underlying criminal conduct. Financial institutions, shadow bankers, and other intermediaries aid U.S. adversaries by processing transactions that evade sanctions. Corrupt companies and foreign officials help these sanctioned entities avoid appropriate restrictions and commit pernicious crimes, promoting the cycle of drugs and violence that has harmed so many Americans.

The National Security Presidential Memorandum/NSPM-3 ("the America First Investment Policy") emphasizes the importance of investor protection against fraudulent practices connected to certain foreign adversary companies listed on U.S. exchanges. In particular, the Policy addresses variable interest entities (VIEs), which are typically Chinese-affiliated companies listed on U.S. exchanges that carry significant risks to the investing public for several reasons. These companies provide few protections to investors, facilitate the flow of U.S. investor funds into strategic industries in China, and can be used to facilitate fraud in the U.S. markets, including schemes such as "ramp and dumps" and other market manipulation targeting U.S. investors.

White-collar criminals also corrupt our financial system—the safest and most secure in the world—by laundering criminal funds. Sophisticated money laundering operations, including Chinese Money Laundering Organizations, aid criminal actors by moving their tainted money across borders to conceal it from law enforcement and facilitate more crime. These crimes undermine national security by exploiting our financial system and strengthening foreign criminal organizations. They also facilitate the flow of dangerous drugs and fentanyl precursors to our shores.

Foreign terrorist organizations target U.S. nationals living at home and abroad for terror attacks. They often cannot carry out their operations without assistance from foreign companies and financial networks. Businesses and financial institutions that provide material support to foreign terrorist organizations place the lives and safety of U.S. citizens at risk.

B. Prioritization and Associated Policy Changes

To combat these harms, the Criminal Division will prioritize investigating and prosecuting white-collar crimes in the following high-impact areas:

1. Waste, fraud, and abuse, including health care fraud and federal program and procurement fraud that harm the public fisc;

2. Trade and customs fraud, including tariff evasion;

3. Fraud perpetrated through VIEs, including, but not limited to, offering fraud, "ramp and dumps," elder fraud, securities fraud, and other market manipulation schemes;

4. Fraud that victimizes U.S. investors, individuals, and markets including, but not limited to, Ponzi schemes, investment fraud, elder fraud, servicemember fraud, and fraud that threatens the health and safety of consumers;

5. Conduct that threatens the country's national security, including threats to the U.S. financial system by gatekeepers, such as financial institutions and their insiders that commit sanctions violations or enable transactions by Cartels, TCOs, hostile nation-states, and/or foreign terrorist organizations;

6. Material support by corporations to foreign terrorist organizations, including recently designated Cartels and TCOs;

7. Complex money laundering, including Chinese Money Laundering Organizations, and other organizations involved in laundering funds used in the manufacturing of illegal drugs;

8. Violations of the Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act (FDCA), including the unlawful manufacture and distribution of chemicals and equipment used to create counterfeit pills laced with fentanyl and unlawful distribution of opioids by medical professionals and companies;

9. Bribery and associated money laundering that impact U.S. national interests, undermine U.S. national security, harm the competitiveness of U.S. businesses, and enrich foreign corrupt officials; and

10. As provided by the Digital Assets DAG Memorandum: crimes (1) involving digital assets that victimize investors and consumers; (2) that use digital assets in furtherance of other criminal conduct; and (3) *willful* violations that facilitate significant criminal activity. Cases impacting victims, involving cartels, TCOs or terrorist groups, or facilitating drug money laundering or sanctions evasion shall receive highest priority.

Criminal Division prosecutors also will—consistent with the law—prioritize efforts to identify and seize assets that are the proceeds of, or involved in, such offenses and, where authorized under the law, use forfeited assets to compensate victims of these offenses. In all such investigations, prosecutors should prioritize schemes involving senior-level personnel or other culpable actors, demonstrable loss, and efforts to obstruct justice.

To demonstrate the Division's focus on these priority areas, in consultation with Money Laundering and Asset Recovery Section and the Fraud Section, I have reviewed the Criminal Division's existing pilot program relating to whistleblowers, consistent with the principles outlined above. Following discussion and consultation with relevant stakeholders, effective immediately, I am directing the following amendments to the Criminal Division's Corporate Whistleblower Awards Pilot Program to reflect priority areas of focus.

Specifically, we are adding the following to Section II.3 ("Subject Areas"), where those tips lead to forfeiture:

- Violations by corporations related to international cartels or transnational criminal organizations, including money laundering, narcotics, Controlled Substances Act, and other violations.

- Violations by corporations of federal immigration law.

- Violations by corporations involving material support of terrorism.

- Corporate sanctions offenses.

- Trade, tariff, and customs fraud by corporations.

- Corporate procurement fraud.

II. Fairness – Prosecuting Corporations and Individuals

The Criminal Division has long been a leader in crafting policies to appropriately investigate and prosecute white-collar offenders. For instance, the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP) has applied across the Division since 2018. The CEP's directives concerning self-disclosure, cooperation, and remediation have resulted in the Department bringing more cases against individual wrongdoers while rewarding good corporate citizens.

The Criminal Division developed these policies because justice demands the equal and fair application of criminal laws to individuals and corporations who commit crimes. The Department's first priority is to prosecute individual criminals. It is individuals—whether executives, officers, or employees of companies—who commit these crimes, often at the expense of shareholders, workers, and American investors and consumers. The Criminal Division will investigate these individual wrongdoers relentlessly to hold them accountable.

Not all corporate misconduct warrants federal criminal prosecution. Prosecution of individuals, as well as civil and administrative remedies directed at corporations, are often appropriate to address low-level corporate misconduct and vindicate U.S. interests. Prosecutors in the Criminal Division must consider additional factors when determining whether to charge corporations, including whether the company reported the conduct to the Department, its willingness to cooperate with the government, and its actions to remediate the misconduct.

It is critical to American prosperity to promote policies that acknowledge law-abiding companies and companies that are willing to learn from their mistakes and provide those companies with transparency from the Department. Companies that enter into agreements with the Criminal Division agree to implement corporate compliance programs, report relevant misconduct, cooperate with the government, and more. These obligations serve important functions for companies that have committed serious wrongdoing. But where corporate criminal resolutions are necessary, prosecutors should consider all forms—non-prosecution agreements, deferred prosecution agreements, and guilty pleas—in making a case-by-case analysis about the appropriate disposition. When applying these policies, prosecutors must conduct an individualized assessment of the facts and evidence in each case and make an appropriate determination based on the application of law to those facts. To ensure fairness and individualized assessments, I have directed the Criminal Division's Fraud Section and the Money Laundering and Asset Recovery Section to revise the CEP and clarify that additional benefits are available to companies that self-disclose and cooperate, including potential shorter terms. A fair justice system requires that the Department be maximally transparent so that companies—including directors, executives, employees, and counsel—can make appropriate decisions when faced with potential misconduct. We have thus refined the CEP such that its core components—the paths for potential declination, the available fine reductions for a company's cooperation and remediation, and relevant factors that determine the contours of a corporate resolution—are more easily understandable.

In addition, I have directed these Sections to review the length of terms of all existing agreements with companies to determine if they should be terminated early. Factors that may lead to early termination include, but are not limited to, duration of the post-resolution period, substantial reduction in the company's risk profile, extent of remediation and maturity of the compliance corporate program, and whether the company self-reported the misconduct. That review is ongoing, and the Criminal Division has determined in multiple matters that companies met the terms of their

agreements, and thus the Criminal Division has ended those agreements early.

Going forward, when entering into a corporate resolution with companies that cooperate and remediate, Criminal Division prosecutors must impose a term that is appropriate and necessary in light of, among other things, the severity of the misconduct, the company's degree of cooperation and remediation, and the effectiveness of the company's compliance program at the time of resolution. These terms should not be longer than three years except in exceedingly rare cases, and Criminal Division prosecutors should assess these agreements regularly to determine if they should be terminated early.

III. Efficiency – Streamlining Corporate Investigations

The work of Criminal Division attorneys to investigate and prosecute white-collar crime is essential to the Department's efforts to advance American interests, protect victims, and strengthen our national security. But federal investigations into corporate wrongdoing can be costly and intrusive for businesses, investors, and other stakeholders, many of whom have no knowledge of, or involvement in, the misconduct at issue. Federal investigations can also significantly interfere with day-to-day business operations and cause reputational harm that may at times be unwarranted.

To maximize efficiency in all corporate investigations, I am therefore directing the implementation of the following procedures in corporate investigations in the Criminal Division, effective immediately:

A. Efficient Investigations

White-collar schemes are complex and often cross borders. As a result, these schemes take substantial time and effort to unravel. Evidence may be located abroad and records can be voluminous. But from the company's perspective, investigations into corporate crime can linger for years and, at times, with little meaningful progress. While particular facts and circumstances may require an investigation that spans multiple years, prosecutors must take all reasonable steps to minimize the length and collateral impact of their investigations, and to ensure that bad actors are brought to justice swiftly and resources are marshaled efficiently.

Accordingly, I am directing that prosecutors must move expeditiously to investigate cases and make charging decisions. That means that my office will work closely with the relevant Sections to track investigations and ensure that they do not linger and are swiftly concluded.

B. Narrowly Tailored Use of Monitors

Independent compliance monitors must only be imposed when they are necessary, *i.e.*, when a company cannot be expected to implement an effective compliance program or prevent recurrence of the underlying misconduct without such heavy-handed intervention. When imposed, monitorships must be narrowly tailored to achieve the necessary goals

while minimizing expense, burden, and interference with the business.

Therefore, I am announcing a new monitor selection memorandum that (1) clarifies the factors that prosecutors must consider when determining whether a monitor is appropriate and how those factors should be applied; and (2) ensures that when a monitor is necessary, prosecutors narrowly tailor and scope the monitor's review and mandate to address the risk of recurrence of the underlying criminal conduct and to reduce unnecessary costs. In keeping with these principles, the Criminal Division, in coordination with Department leadership, has undertaken an individualized review of all existing monitorships to make case specific determinations of whether each monitor is still necessary. . . .

A longstanding debate in the field of criminal and civil enforcement against corporations concerns whether legal rules threatening to impose financial penalties on miscreant corporations sufficiently incentivize managers and employees, who may not own shares in the employing entity, to comply with the law. Some have argued that law and enforcement should do more to target the compensation systems that transfer value from corporations to individual employees and managers. It is argued that individuals will be more strongly motivated by corporate actions that affect their own compensation, not just the corporation's overall profits and losses. Recently the Biden Administration Justice Department announced the following "pilot" program designed to link enforcement against corporations with individual compensation paid to managers and employees. The second Trump Administration has not yet expressed its view on this program.

U.S. DEPT. OF JUSTICE, CRIMINAL DIVISION: PILOT PROGRAM REGARDING COMPENSATION INCENTIVES AND CLAWBACKS (March 3, 2023)

The Department of Justice (Department) is committed to tackling corporate crime and will continue to investigate and prosecute companies (and responsible individuals) who engage in such misconduct. But the Department's ultimate goal is to prevent corporate crime before it occurs. Through its policies and enforcement actions, the Department strives to deter criminal conduct, incentivize the development and implementation of effective compliance programs, and promote ethical corporate cultures. . . .

Throughout this process, one consideration has been how policies may seek to potentially shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible. . . .

Accordingly, the Division is conducting a Compensation Incentives and Clawbacks Pilot Program (Program). As set forth below, the Program provides that, when entering into criminal resolutions, companies will be required to implement compliance-related

criteria in their compensation and bonus system and to report to the Division about such implementation during the term of such resolutions. The Program also directs Division prosecutors to consider possible fine reductions where companies seek to recoup compensation from culpable employees and others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct. . . .

During the Program, every corporate resolution entered into by the Division shall include a requirement that the resolving company implement criteria related to compliance in its compensation and bonus system. The company must also report to the Division annually during the term of the resolution about its implementation of such criteria. These criteria may include, but are not limited to: (1) a prohibition on bonuses for employees who do not satisfy compliance performance requirements; (2) disciplinary measures for employees who violate applicable law and others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct; and (3) incentives for employees who demonstrate full commitment to compliance processes. Division prosecutors will use their discretion in fashioning the appropriate requirements based on the particular facts and circumstances of the case, including, but not limited to, applicable foreign and domestic law. In making this determination, prosecutors will be mindful of, and afford due consideration to, how the company has structured its existing compensation program.

Where a criminal resolution is warranted, if a company fully cooperates and timely and appropriately remediates and demonstrates it has implemented a program to recoup compensation from employees who engaged in wrongdoing in connection with the conduct under investigation, or others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct, and has in good faith initiated the process to recoup such compensation before the time of resolution, an additional fine reduction may be warranted. Specifically, in such circumstances, Division prosecutors shall accord, in addition to any other reduction available under applicable policy, a reduction of the fine in the amount of 100% of any such compensation that is recouped during the period of the resolution. Any fine reduction afforded under the Program does not affect any applicable restitution, forfeiture, disgorgement, or other agreed-upon payment by the company.

To accommodate the process required to recoup such compensation, at the time of resolution, the company will be required to pay the full amount of the otherwise applicable fine (Original Fine) less 100% of the amount of compensation the company is attempting to claw back (Possible Clawback Reduction). At the conclusion of the resolution term, if the company has not recouped the full amount of compensation it sought to claw back, the company will be required to pay the Possible Clawback Reduction minus 100% of the compensation actually recovered.

If a company's good faith attempt to recoup any such compensation is unsuccessful, Division prosecutors may in their discretion accord a reduction of up to 25% of the amount of compensation the company attempted to clawback such that the company must at the conclusion of the resolution term make an additional fine payment of the Possible Clawback Reduction less the determined reduction percentage of the compensation sought. Such reductions may be warranted where, for instance, a company incurred significant litigation costs for shareholders or can demonstrate that it is highly likely that it will successfully recoup the compensation shortly after the end of the resolution term.

Next, consider the SEC's primary statement on the subject of civil enforcement against corporations in the securities industry and compare what the SEC says to DOJ's policy.

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 44969 / October 23, 2001

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 1470 / October 23, 2001

Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions ("The Seaboard Report")

Today, we commence and settle a cease-and-desist proceeding against Gisela de Leon-Meredith, former controller of a public company's subsidiary. Our order finds that Meredith caused the parent company's books and records to be inaccurate and its periodic reports misstated, and then covered up those facts.

We are not taking action against the parent company, given the nature of the conduct and the company's responses. Within a week of learning about the apparent misconduct, the company's internal auditors had conducted a preliminary review and had advised company management who, in turn, advised the Board's audit committee, that Meredith had caused the company's books and records to be inaccurate and its financial reports to be misstated. The full Board was advised and authorized the company to hire an outside law firm to conduct a thorough inquiry. Four days later, Meredith was dismissed, as were two other employees who, in the company's view, had inadequately supervised Meredith; a day later, the company disclosed publicly and to us that its financial statements would be restated. The price of the company's shares did not decline after the announcement or after the restatement was published. The company pledged and gave complete cooperation to our staff. It provided the staff with all information relevant to the underlying violations. Among other things, the company produced the details of its internal investigation, including notes and transcripts of interviews of Meredith and

others; and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation.

The company also strengthened its financial reporting processes to address Meredith's conduct— developing a detailed closing process for the subsidiary's accounting personnel, consolidating subsidiary accounting functions under a parent company CPA, hiring three new CPAs for the accounting department responsible for preparing the subsidiary's financial statements, redesigning the subsidiary's minimum annual audit requirements, and requiring the parent company's controller to interview and approve all senior accounting personnel in its subsidiaries' reporting processes.

Our willingness to credit such behavior in deciding whether and how to take enforcement action benefits investors as well as our enforcement program. When businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly. In setting forth the criteria listed below, we think a few caveats are in order:

First, the paramount issue in every enforcement judgment is, and must be, what best protects investors. There is no single, or constant, answer to that question. Self-policing, self-reporting, remediation and cooperation with law enforcement authorities, among other things, are unquestionably important in promoting investors' best interests. But, so too are vigorous enforcement and the imposition of appropriate sanctions where the law has been violated. Indeed, there may be circumstances where conduct is so egregious, and harm so great, that no amount of cooperation or other mitigating conduct can justify a decision not to bring any enforcement action at all. In the end, no set of criteria can, or should, be strictly applied in every situation to which they may be applicable.

Second, we are not adopting any rule or making any commitment or promise about any specific case; nor are we in any way limiting our broad discretion to evaluate every case individually, on its own particular facts and circumstances. Conversely, we are not conferring any "rights" on any person or entity. We seek only to convey an understanding of the factors that may influence our decisions.

Third, we do not limit ourselves to the criteria we discuss below. By definition, enforcement judgments are just that—judgments. Our failure to mention a specific criterion in one context does not preclude us from relying on that criterion in another. Further, the fact that a company has satisfied all the criteria we list below will not foreclose us from bringing enforcement proceedings that we believe are necessary or appropriate, for the benefit of investors.

In brief form, we set forth below some of the criteria we will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing

reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.

1. What is the nature of the misconduct involved? Did it result from inadvertence, honest mistake, simple negligence, reckless or deliberate indifference to indicia of wrongful conduct, willful misconduct or unadorned venality? Were the company's auditors misled?

2. How did the misconduct arise? Is it the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company? What compliance procedures were in place to prevent the misconduct now uncovered? Why did those procedures fail to stop or inhibit the wrongful conduct?

3. Where in the organization did the misconduct occur? How high up in the chain of command was knowledge of, or participation in, the misconduct? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct? How systemic was the behavior? Is it symptomatic of the way the entity does business, or was it isolated?

4. How long did the misconduct last? Was it a one-quarter, or one-time, event, or did it last several years? In the case of a public company, did the misconduct occur before the company went public? Did it facilitate the company's ability to go public?

5. How much harm has the misconduct inflicted upon investors and other corporate constituencies? Did the share price of the company's stock drop significantly upon its discovery and disclosure?

6. How was the misconduct detected and who uncovered it?

7. How long after discovery of the misconduct did it take to implement an effective response?

8. What steps did the company take upon learning of the misconduct? Did the company immediately stop the misconduct? Are persons responsible for any misconduct still with the company? If so, are they still in the same positions? Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators? Did the company cooperate completely with appropriate regulatory and law enforcement bodies? Did the company identify what additional related misconduct is likely to have occurred? Did the company take steps to identify the extent of damage to investors and other corporate constituencies? Did the company appropriately recompense those adversely affected by the conduct?

9. What processes did the company follow to resolve many of these issues and ferret out necessary information? Were the Audit Committee and the Board of Directors fully informed? If so, when?

10. Did the company commit to learn the truth, fully and expeditiously? Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior? Did management, the Board or committees consisting solely of outside directors oversee the review? Did company employees or outside persons perform the review? If outside persons, had they done other work for the company? Where the review was conducted by outside counsel, had management previously engaged such counsel? Were scope limitations placed on the review? If so, what were they?

11. Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?

12. What assurances are there that the conduct is unlikely to recur? Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct? Did the company provide our staff with sufficient information for it to evaluate the company's measures to correct the situation and ensure that the conduct does not recur?

13. Is the company the same company in which the misconduct occurred, or has it changed through a merger or bankruptcy reorganization?

We hope that this Report of Investigation and Commission Statement will further encourage self-policing efforts and will promote more self-reporting, remediation and cooperation with the Commission staff. We welcome the constructive input of all interested persons. We urge those who have contributions to make to direct them to our Division of Enforcement. The public can be confident that all such communications will be fairly evaluated not only by our staff, but also by us. We continue to reassess our enforcement approaches with the aim of maximizing the benefits of our program to investors and the marketplace.[7]

The CFTC and Foreign Examples

The focus in this text is, of course, on criminal enforcement. The relationship between criminal and civil enforcement is very important to understand. Given the vast size and

[7] In addition to the Seaboard Report with regard to corporations, the SEC has issued a policy statement regarding credit individuals may receive as a result of their cooperation in SEC enforcement investigations and actions, available at: https://www.sec.gov/rules/policy/2010/34-61340.pdf.

complexity of civil enforcement mechanisms in U.S. law, there is space here to proceed only by example. The SEC enforcement example is featured throughout this text because it is the one that most commonly overlaps with criminal enforcement. To see an example of how the DOJ's approach to *de facto* corporate liability has spread even beyond the SEC, consider the statements of factors controlling credit for cooperation issued by the Division of Enforcement of the Commodities Futures Trading Commission, available at:

(1) https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf (enforcement advisory for companies).
(2) https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf (updated advisory on full credit for self-reporting and cooperation).
(3) https://www.cftc.gov/PressRoom/PressReleases/8235-20 (guidance on evaluating corporate compliance programs).

The CFTC's statements echo many of the factors stressed in the DOJ guidelines. Some of the same factors are also being stressed by the United Kingdom and EU nations, as they begin to adopt procedures for settling enforcement actions with companies. *See* Organization for Economic Cooperation and Development (OECD), Resolving Foreign Bribery Cases with Non-Trial Resolutions (2019), available at:

https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf.

For recent UK enforcement policy statements that mirror many of the factors expressed by DOJ, SEC, and CFTC policy, see the sections on corporate cooperation, deferred prosecution agreements, and evaluating corporate compliance programs in the Operational Handbook of the Serious Fraud Office, available here:

https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook.

D. The Role of the Judiciary

Courts, of course, have a role in the criminal sanctioning of a corporation when a case goes to trial and conviction, or results in a guilty plea, and thus proceeds to sentencing. (Sentencing of corporations is addressed in Chapter 18.) Is there also a role for the courts in *de facto* corporate criminal liability? That is, in the process whereby the DOJ and other government agencies pursue policies designed to encourage business firms to behave in certain ways in order to obtain favorable settlements with lower sanctions? Some have argued that judicial supervision of the process would be helpful and even might be essential. Perhaps the primary difficulty is this: On what legal theory could courts police the process of settlement? The following case takes up that question.

UNITED STATES v. FOKKER SERVICES B.V., 818 F.3d 733 (D.C. Cir. 2016)

SRINIVASAN, Circuit Judge:

The Constitution allocates primacy in criminal charging decisions to the Executive Branch. The Executive's charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought. It has long been settled that the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences. The courts instead take the prosecution's charging decisions largely as a given, and assume a more active role in administering adjudication of a defendant's guilt and determining the appropriate sentence.

In certain situations, rather than choose between the opposing poles of pursuing a criminal conviction or forgoing any criminal charges altogether, the Executive may conclude that the public interest warrants the intermediate option of a deferred prosecution agreement (DPA). Under a DPA, the government formally initiates prosecution but agrees to dismiss all charges if the defendant abides by negotiated conditions over a prescribed period of time. Adherence to the conditions enables the defendant to demonstrate compliance with the law. If the defendant fails to satisfy the conditions, the government can then pursue the charges based on facts admitted in the agreement.

This case arises from the interplay between the operation of a DPA and the running of time limitations under the Speedy Trial Act. Because a DPA involves the formal initiation of criminal charges, the agreement triggers the Speedy Trial Act's time limits for the commencement of a criminal trial. In order to enable the government to assess the defendant's satisfaction of the DPA's conditions over the time period of the agreement—with an eye towards potential dismissal of the charges—the Speedy Trial Act specifically allows for a court to suspend the running of the time within which to commence a trial for any period during which the government defers prosecution under a DPA.

In this case, appellant Fokker Services voluntarily disclosed its potential violation of federal sanctions and export control laws. After extensive negotiations, the company and the government entered into an 18–month DPA, during which Fokker would continue cooperation with federal authorities and implementation of a substantial compliance program. In accordance with the DPA, the government filed criminal charges against the company, together with a joint motion to suspend the running of time under the Speedy Trial Act pending assessment of the company's adherence to the agreement's conditions. The district court denied the motion because, in the court's view, the prosecution had been too lenient in agreeing to, and structuring, the DPA. Among other objections, the court disagreed with prosecutors' decision to forgo bringing any criminal charges against individual company officers.

We vacate the district court's denial of the joint motion to exclude time under the Speedy Trial Act. We hold that the Act confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants. Congress, in providing for courts to approve the exclusion of time pursuant to a DPA, acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions. Nothing in the statute's terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges. . . .

The Speedy Trial Act establishes time limits for the completion of various stages of a criminal prosecution. *See* 18 U.S.C. §§ 3161–3174. For instance, the Act requires the commencement of trial within seventy days of the filing of an information or indictment by the government. § 3161(c)(1). The Act also excludes various pretrial periods from the running of that seventy-day time clock. Of particular relevance, the Act excludes "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." § 3161(h)(2).

That exemption exists to enable prosecutors to resolve cases through DPAs. DPAs, along with their out-of-court analogues, non-prosecution agreements (NPAs), afford a middle-ground option to the prosecution when, for example, it believes that a criminal conviction may be difficult to obtain or may result in unwanted collateral consequences for a defendant or third parties, but also believes that the defendant should not evade accountability altogether. Both DPAs and NPAs generally include an admitted statement of facts, require adherence to "conditions designed . . . to promote compliance with applicable law and to prevent recidivism," and remain in effect for a period of one to three years. U.S. Attorney's Manual § 9–28.1000 (2015). During that period, if the defendant fails to abide by the terms of the agreement, the government can prosecute based on the admitted facts. While prosecutors at one time seldom relied on NPAs and DPAs, their use has grown significantly in recent years.

DPAs differ from NPAs primarily with regard to the filing of criminal charges. With an NPA, "formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court." Craig S. Morford, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, (Mar. 7, 2008). A DPA, by contrast, "is typically predicated upon the filing of a formal charging document by the government."

For that reason, a DPA's viability depends on the specific exclusion of time for such agreements set forth in the Speedy Trial Act, 18 U.S.C. § 3161(h)(2). The filing of an information or indictment would ordinarily trigger the Act's seventy-day clock within which trial must commence. *See* § 3161(c)(1). But in the case of a DPA, if the defendant

were to fulfill the agreement's conditions, the prosecution would move to dismiss all charges with prejudice at the end of the specified time period, ordinarily one to three years. Without the statutory exclusion of time for DPAs provided in § 3161(h)(2), the government would relinquish its ability to prosecute based on the conceded facts if the defendant were to violate the agreement after seventy days. That would largely eliminate the leverage that engenders the defendant's compliance with a DPA's conditions. The statutory exclusion of time for DPAs therefore is essential to the agreements' effective operation. . . .

In light of Fokker's cooperation, remediation efforts, and other mitigating factors, federal agencies negotiated a global settlement with the company. The settlement included, as an integral component, an 18-month DPA. During the DPA's 18-month period, Fokker was to: continue full cooperation with the government, implement its new compliance policy, and pay fines and penalties totaling $21 million (a sum equaling the gross revenues gained by the company from the illicit transactions). Fokker also accepted responsibility for the acts described in the stipulated factual statement accompanying the DPA.

On June 5, 2014, pursuant to the agreement, the government filed with the district court a one-count information against Fokker, together with the DPA. The information charged Fokker with conspiracy to violate the International Emergency Economic Powers Act. *See* 18 U.S.C. § 371; 50 U.S.C. § 1705. The same day, the government and Fokker filed a joint motion for the exclusion of time under the Speedy Trial Act, in order to "allow [the company] to demonstrate its good conduct and implement certain remedial measures."

The district court then held a series of status conferences, during which it repeatedly emphasized its concerns about the absence of any criminal prosecution of individual company officers. The court requested several additional written submissions from the government. The government was asked to explain why the interests of justice supported the court's approval of the deal embodied by the DPA, and also to address whether Fokker's initial disclosures to the government had in fact been voluntary. In response, the government described why the "proposed resolution with Fokker Services is fair and is an appropriate exercise of the government's discretion," and affirmed the absence of any indication "that Fokker Services was motivated to make its disclosures out of fear about a nonexistent U.S. government investigation." The district court later expressed that it might still reject the DPA because it was "too good a deal for the defendant."

On February 5, 2015, the district court denied the joint motion for the exclusion of time. In explaining the reasons for its decision, the court criticized the government for failing to prosecute any "individuals . . . for their conduct." According to the court, approval of an agreement in which the defendant had been "prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies" would "promote disrespect for the law." The court further noted that certain employees had been permitted to remain with the company;

that the DPA contained no requirement for an independent monitor; and that the amount of the fine failed to exceed the revenues Fokker gained from the illegal transactions. Based on those considerations, the court rejected the DPA as an "[in]appropriate exercise of prosecutorial discretion."

The district court's order marks the first time any federal court has denied a joint request by the parties to exclude time pursuant to a DPA. Both parties filed a timely notice of appeal. Because both parties seek to overturn the district court's denial of their joint motion to exclude time, we appointed an amicus curiae to present arguments defending the district court's action. . . .

By rejecting the DPA based primarily on concerns about the prosecution's charging choices, the district court exceeded its authority under the Speedy Trial Act. The Act excludes any period of time "during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2). While the exclusion of time is subject to "the approval of the court," there is no ground for reading that provision to confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions. Rather, we read the statute against the background of settled constitutional understandings under which authority over criminal charging decisions resides fundamentally with the Executive, without the involvement of—and without oversight power in—the Judiciary. So understood, the statute's "approval of the court" requirement did not empower the district court to disapprove the DPA based on the court's view that the prosecution had been too lenient.

The Executive's primacy in criminal charging decisions is long settled. That authority stems from the Constitution's delegation of "take Care" duties, U.S. Const. art. II, § 3, and the pardon power, § 2, to the Executive Branch. Decisions to initiate charges, or to dismiss charges once brought, "lie[ ] at the core of the Executive's duty to see to the faithful execution of the laws." *Cmty. for Creative Non–Violence v. Pierce*. The Supreme Court thus has repeatedly emphasized that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder*.

Correspondingly, "judicial authority is . . . at its most limited" when reviewing the Executive's exercise of discretion over charging determinations. *Pierce*; *see ICC v. Bhd. of Locomotive Eng'rs.* The decision whether to prosecute turns on factors such as "the strength of the case, the prosecution's general deterrence value, the [g]overnment's enforcement priorities, and the case's relationship to the [g]overnment's overall enforcement plan." *Wayte v. United States.* The Executive routinely undertakes those assessments and is well equipped to do so. By contrast, the Judiciary, as the Supreme Court has explained, generally is not "competent to undertake" that sort of inquiry. Indeed, "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal

proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Newman v. United States*. "Judicial supervision in this area" would also "entail[ ] systemic costs." *Wayte*. It could "chill law enforcement," cause delay, and "impair the performance of a core executive constitutional function." *Armstrong*. As a result, "the presumption of regularity" applies to "prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.". . . .

Judged by those principles, the district court in this case erred in denying the parties' motion for exclusion of time under § 3161(h)(2). There is no indication that the parties entered into the DPA to evade speedy trial limits rather than to enable Fokker to demonstrate its good conduct and compliance with law. Rather, the district court denied the exclusion of time based on its view that the prosecution should have brought different charges or sought different remedies. In doing so, the court exceeded its authority under § 3161(h)(2).

From the first status conference concerning the DPA, the district court repeatedly criticized the government for failing to bring charges against individual company officers. Noting its belief that illegal conduct had been "orchestrated at the highest levels of the company," and unpersuaded by the government's efforts to ground its charging decisions in traditional prosecutorial considerations such as the strength of the evidence and the value of pursuing of different charges, the district court questioned why no individuals would be held separately accountable. The court also faulted the government for "not requiring Fokker Services to pay as its fine a penny more than the $21 million in revenue it collected from its illegal transactions." In addition, the court thought the prosecution should have required an independent monitor as part of the DPA's terms. The district court denied the motion for the exclusion of time for those reasons.

Even if the district court's criticisms of the prosecution's exercise of charging authority were entirely meritorious—an issue we have no occasion to address—the court should not have "assume[d] the role of Attorney General," *Microsoft*. Rather, the court should have confined its inquiry to examining whether the DPA served the purpose of allowing Fokker to demonstrate its good conduct, as contemplated by § 3161(h)(2). There is no reason to question the DPA's bona fides in that regard, and the district court made no suggestion otherwise. And insofar as a court has authority to reject a DPA if it contains illegal or unethical provisions, the district court again made no such suggestion here. The court instead denied the exclusion of time under § 3161(h)(2) based on a belief that the prosecution had been unduly lenient in its charging decisions and in the conditions agreed to in the DPA. The court significantly overstepped its authority in doing so. . . .

For a similar discussion of judicial authority, in which another federal appeals court reversed a trial judge for exceeding his authority in attempting to manage DPA-related procedures, see *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125 (2d Cir. 2017).

Problem 1-3

You are a prosecutor. Should you pursue prosecution of the organization, or just individuals, or neither, in the following cases? Explain your reasoning, as well as what more you would want to know before making your decision. (A quick internet glance at some of the events in these cases might help prime your intuitions.) You should consider the DOJ policies excerpted above.

(a) The Exxon Corporation for the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska, which was caused by an intoxicated ship captain.

(b) The BP Corporation for the 2010 oil spill in the Gulf of Mexico and the deaths of its workers which were caused by the explosion of the Deepwater Horizon rig.

(c) The Catholic Archdiocese of Boston for sexual abuse of children by members of the clergy who were allowed to continue employment after the Archdiocese had information of possible abuse by those persons. (The film *Spotlight* is a must-see.)