



Stetson University College of Law
Legal Studies Research Paper Series

Research Paper No. 2009-01

Educating Compliance

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American Criminal Law Review, forthcoming

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Educating Compliance

By - Ellen S. Podgor*

Introduction

The most effective way to achieve corporate compliance is to have individuals comply with the law. After all, a corporation has no human attributes to act or form the required *mens rea* of the crime.² Rather, it is the individuals within the corporation that qualifies this legal fiction for criminal prosecution. Corporate criminality evolved as a concept to allow entities to be punished for criminal acts³ committed by either high managerial agents within the entity⁴ or agents acting in a *respondeat superior* capacity, with jurisdictions differing over the level of individual participation needed for a criminal prosecution.⁵ Although the success of corporate compliance is threaded to the conduct of individuals within the corporation,⁶ the two parties

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² See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 2D ED. 257 (1986)("[I]t had no mind, and thus was incapable of the criminal intent then required for all crimes; it had no body, and thus could not be imprisoned.")

³ Corporate criminality initially came in acts of omission with regard to regulatory offenses. It then progressed to strict liability crimes that were not merely acts of omission. The extension beyond the strict liability arena is seen in the 1909 Supreme Court case of *New York Central & Hudson River Railroad v. United States*, a case that allowed for corporate criminal conduct for a violation of the Elkins Act. See *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909); see also Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 394 (1994) (discussing the development of corporate criminality).

⁴ The Model Penal Code allows for criminal culpability when "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment." Model Penal Code § 2.07.

⁵ The majority of jurisdictions, including the federal system, have not adopted the Model Penal Code's "high managerial agent" approach, which limits liability to those who are in a top corporate position. Rather, the more accepted model is to premise corporate criminal liability on a theory of *respondeat superior*, which allows for corporate liability premised on agency theory that looks at whether the employee acts within the scope of employment and on behalf of the corporation. See ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 23-25 (2009).

⁶ The criminal conduct of the individual either as a high managerial agent or under a *respondeat*

(corporation and individual) are often placed at odds with each other by prosecutors.⁷

Prosecutors proceed with deferred prosecution agreements that entail providing benefits to the corporation, oftentimes contingent upon the corporation providing information of employee wrongdoing to the government.⁸ Corporations can basically pay a hefty fine to the government, but avoid the collateral consequences of a conviction, by agreeing to a deferred or non-prosecution agreement with the Department of Justice (DOJ).⁹ These agreements recognize the importance of continuing the business, yet also provide for punishment for past misconduct.¹⁰

superior doctrine provides the basis for holding the corporation criminally liable. It is not necessary, however, that a specific actor be named or be the sole basis for the corporate liability. Criminal culpability can be a combination of several individuals within the corporation. See *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987) (holding that the "collective knowledge" of the corporation can be used to form corporate criminal liability).

⁷ See generally Ellen S. Podgor, *White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 *CARDOZO L. REV.* 795 (2002) (discussing how cooperation can pit the corporation and individuals against each other).

⁸ Deferred and non-prosecution agreements include many corporate concessions, such as providing a law school ethics chair, agreeing to a monitor, or firing specific personnel within the company. See Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 *KENTUCKY L.J.* 1 (2008) (discussing the different terms found within deferred and non-prosecution agreements).

⁹ Arthur Andersen LLP is an example of a company that did not reach a deferred prosecution agreement with the government. Instead they risked going to trial. Despite the later Supreme Court reversal of their conviction, the company did not survive. See Linda Greenhouse, *The Andersen Decision: The Overview; Justices Reject Auditor Verdict in Enron Scandal*, *NYTimes*, June 1, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9503E4D91F39F932A35755C0A9639C8B63> (last visited 7-29-09) (discussing the demise of the company from 28,000 employees in the United States to a skeleton crew of 200 who were closing down the partnership).

¹⁰ KPMG is an example of a company that reached a deferred prosecution agreement with the government. The company paid 456 million dollars, agreed to a monitor and to the implementation of a compliance and ethics program. See Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, forthcoming *Symposium on Criminal Procedure*, *CHICAGO-KENT L. REV.* (2009) (discussing the ramifications of electing to go to trial by Arthur Andersen LLP and taking a deferred prosecution agreement by KPMG). Unlike Arthur Andersen LLP, KPMG, also an accounting firm, was able to continue operating as a business. It did not suffer debarment, a collateral consequence of some companies that are convicted of crimes. The agreement with the Department of Justice explicitly provided that the company could continue "to audit the Department of Justice's financial statements." KPMG- Deferred Prosecution Agreement, U.S. Department of Justice Letter to Robert S. Bennett, Esq., at 1-2

The value of these agreements to the corporate entity, the shareholders, the workers associated with the company, and consumers who may benefit from the product produced by the company, is clear. They may suffer some loss,¹¹ but the company can continue to do business.¹²

These agreements, however, can place individuals within the company as the defendants in criminal cases, and defendants operating at an enormous disadvantage because of the corporation's desire to relieve itself of criminal liability by providing extensive cooperation to the government. Individual defendants may face corporate disdain because of the desire of the corporate directors to minimize the losses to the company. The corporate disenfranchisement faced by these individuals can include a loss of their attorney-client privilege,¹³ company provided counsel representation, and most importantly losing the support and recognition that the company had provided them in the past.¹⁴

Clearly some of the individuals who are prosecuted have knowingly committed acts for

(Aug. 26, 2005), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf> (last visited July 29, 2009).

¹¹ The fines provided for in deferred prosecution agreements can be enormous. Some examples: Beazer Homes agreed to pay 7.5 million; Novo Nordisk - 9 million; Wellcare - 40 million in civil forfeiture and 40 million in restitution; UBS - 780 million in fines, penalties, interest and restitution; Fiat - 7 million in civil penalties; Willbros - 22 million; Siemens AG - 450 million in fines and 350 million in disgorgement of profits. *See* Ellen S. Podgor, *Deferred Prosecution Agreements, White Collar Crime Prof Blog*, *available at* <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf> (last visited July 29, 2009).

¹² The demise of a company is usually a result of the collateral consequence of a conviction. This is particularly true for companies that can no longer certify reports, suffer a stigma that causes board of directors of other companies to shy away from hiring them, or are debarred or suffer a program exclusion such as a defense contractor or health care provider. *See* Zeirdt & Podgor, *supra* note 7, at 5.

¹³ The waiver of attorney-client privilege in deferred prosecution agreements has proved enormously controversial with pending legislation to preclude prosecutors from asking for a waiver as part of a deferred or non-prosecution agreement. *See* Privileges, *White Collar Crime Prof Blog*, *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/privileges/ (last visited July 29, 2009).

¹⁴ *See* *United States v. Stein*, 541 F.3d 130 (2d Cir. 2009) (finding that the government interfered with defendants' ability to present its defense to the charges when it entered into an agreement with the company that curtailed the support that the company might have provided to the defendants).

which they received a personal benefit and deserve prosecution and punishment. But there are also cases where the individual is acting to please corporate superiors or meet corporate agendas, and the individual perpetrator has received no personal profit or gain.¹⁵ Finally there are corporate leaders, such as CEOs or CFOs who may have taken the corporation down a path that ignored the law.¹⁶

Irrespective of the guilt or innocence of the alleged corporate perpetrators, this Essay argues that pitting the corporate entity against the individual is a bizarre construct for achieving compliance. This reactive model looks at punishing misconduct to achieve compliance with the law. Focusing more resources on the front end and using a pro-active model to achieve compliance would keep the corporate structure whole and yet also provide a sound basis for eradicating corporate criminality. This Essay proposes that an education model be implemented, with the government more actively participating in promoting compliance with the law.

Reactive Models to Achieve Compliance

Reaction is the hallmark of our criminal justice and political system. An extraordinary event typically triggers new legislation and government response. For example, the discovery of hundreds of companies paying significant money to foreign officials links to the passage of the Foreign Corrupt Practices Act.¹⁷<http://www.usdoj.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf> (last visited July 30, 2009). Likewise, one has to wonder if the Sarbanes Oxley Act

¹⁵ For example, Jamie Olis, the former Senior Director of Tax Planning and International Tax at Dynegey was convicted for his role in a fraudulent scheme. At a resentencing hearing, the court noted that the purpose of the conspiracy was not to enrich Olis. Memorandum Opinion, United States v. Olis, Case 4:03-cr-00217 *29-30 (Sept. 22, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/09/more_on_olis.html (last visited July 29, 2009).

¹⁶ *See* United States v. Adelson, 441 F. Supp.2d 506, 515 (S.D.N.Y. 2006) (noting the different roles played by Richard P. Adelson the Chief Operating Office and President of Impath, Inc. and Bernard Ebbers, the former CEO of Worldcom).

¹⁷ The purpose of the Foreign Corrupt Practices Act, as outlined in the 1977 House Report, is that:

More than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of \$300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries.

Unlawful Corporate Payments Act of 1977, 95th Cong., House Report 95-640, *available at*

would be a reality but for the corporate and accounting scandals surrounding the Enron debacle.¹⁸ Corporate criminality appears to be no different, with a reactive model as the norm and proactive approaches often left for private entities to establish and administer.

Many scholars focus on the prosecution of corporate criminality as a means to achieve deterrence or rehabilitation.¹⁹ Professor Peter Henning stresses the importance of having punishment of corporate criminal liability serving an "expressive function" in society.²⁰ Professor Pam Bucy looks at "corporate ethos" in imposing criminal liability.²¹ Others claim that corporate criminality serves no valid legal function²² or should be discarded or usurped with the use of civil remedies.²³ Some want to see the doctrine refocused.²⁴ For example, Professor Miriam H. Baer looks at the importance of examining "linkage" - "the connection between cessation of future wrongful conduct and punishment for prior wrongful conduct."²⁵ But these articles discussing corporate criminality for the most part provide for an after-the-fact approach to curtailing corporate misconduct. They look at how different responses to the transgressions of

¹⁸ See Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1031-33 (2004) (discussing how the Sarbanes-Oxley Act was enacting to the corporate scandals of 2002).

¹⁹ See, e.g., Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1186 (1983).

²⁰ See Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, ____ AM. CRIM. L. REV. ____ (2009) (discussing both the expressive nature of the conviction and using rehabilitation as a goal of corporate criminality).

²¹ See Professor Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991) (proposing a corporate criminal liability standard that looks at the "corporate entity has a distinct and identifiable personality or 'ethos'").

²² See, e.g., Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 315-16 (1985); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

²³ See Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271 (2008) (showing the deficiencies of using criminal fines to achieve deterrence of criminal conduct); Daniel R. Rischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 310 (1996) (endorsing the use of civil as opposed to criminal penalties for corporate crimes).

²⁴ See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. OF LEGAL STUD. 833 (1994)(looking at some of the ramifications of corporate criminal liability).

²⁵ Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295 (2008) (discussing the importance of considering "linkage" in finding the appropriate response to fraud conduct).

law can assist in preventing future improprieties. Even the deferred and non-prosecution agreements of the government are reactive as they often include monitoring to prevent future criminal activities. But this happens only after there has been a determination or agreement that misconduct has occurred.

Pitting the corporation against individuals within the entity is a component of the government's use of a reactive model to counter criminality. By securing evidence from the company, the prosecutor has eased its investigative burden when proceeding against the individual wrongdoer. But there are repercussions to using the entity to gather evidence and play a cooperating role in the prosecution of individuals within the corporation.²⁶

A highlight of most deferred prosecution agreements is a requirement that the corporation cooperate with the government by providing evidence of wrongdoing by individuals within the company. This can include documents and any other materials that might be requested by the government.²⁷ For example, in the KPMG deferred prosecution agreement the company agreed to provide information on "present and former partners, employees, and agents of KPMG"²⁸ and

²⁶ See Zierdt & Podgor, *supra* note 7, at 7-14 (discussing the problems with deferred prosecution agreements that call for the corporation to waive attorney-client privilege).

²⁷ In the Bristol-Meyers Squibb Deferred Prosecution Agreement, the company agreed to:

(b) Completely, truthfully and promptly disclosing all information concerning all matters about which the Office and other government agencies designated by the Office may inquire, and continuing to provide the Office, upon request, all documents and other materials relating to matters about which the Office inquires, and analysis or other work product as may be requested by the Office, as promptly as is practicable. Cooperation under this paragraph shall include identification of documents that may be relevant to the matters under investigation.

Bristol-Meyers Squibb Deferred Prosecution Agreement ¶31, *available at* <http://www.usdoj.gov/usao/nj/press/files/pdf/deferredpros.pdf> (last visited Aug. 1, 2009).

²⁸ KPMG Deferred Prosecution Agreement ¶ 7 - 9. The KPMG deferred prosecution agreement provides"

KPMG acknowledges and understands that its cooperation with the criminal investigation by the Office is an important and material factor underlying the Office's decision to enter into this Agreement, and, therefore, KPMG agrees to cooperate fully and actively with the Office, the IRS, and with any other agency of the government designated by the Office ("Designated Agencies") regarding any matter relating to the Office's investigation about which KPMG has knowledge or information.

Id. at ¶ 7.

that their obligation to cooperate would continue even after the dismissal of the Information against them.²⁹

Although this cooperation serves to close criminal cases more efficiently, it removes a level of trust between the entity and its employees. Employees may be less likely to ask for the assistance of corporate counsel when faced with legal issues if they fear that this might later expose them to criminal liability.³⁰ Because the prosecution is operating using a reactive model, the focus is on the immediate issue – prosecuting the individual who acted illegally.

The few instances of pro-active efforts to achieve compliance usually result from the corporate guidelines that provide a reward to companies that have effective programs³¹ and court decisions that emphasize the need to have compliance measures in place to avoid civil suits.³² But these naked efforts serve only as threats for non-compliance or benefits that can accrue when there has been compliance, as opposed to efforts that might educate to assure compliance. Further, the efforts typically are private company responses to these government threats and benefits.

The sentencing guidelines for organizations provide benefits to companies that are being sentenced for criminal wrongdoing when they have in place an effective compliance program. The programs that companies implement do not require that they have a perfect scorecard on compliance, but the guidelines do say that an effective compliance and ethics program shall "exercise due diligence to prevent and detect criminal conduct" and "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."³³

²⁹ *Id.* at ¶ 9.

³⁰ *See* Podgor, *supra* note 6, at 802-07.

³¹ *See* U.S. SENTENCING GUIDELINES MANUAL §8B2.1 available at http://www.ussc.gov/2007guid/8b2_1.html (providing what constitutes an effective compliance and ethics program).

³² *See* Caremark International Inc. Derivative Litigation, 698 A.2d 959, 970 (Ct. Chancery Del. 1996)(noting a director's obligation to assure appropriate compliance measures). The *Caremark* standard has been reinforced in later court decisions. *See* McCall v. Scott, 239 F.3d 808 (6th Cir. 2001), *amended* 250 F.3d 997 (6th Cir. 2001) ("[u]nconsidered inaction can be the basis for director liability because, even though most corporate decisions are not subject to director attention, ordinary business decisions of officers and employees deeper in the corporation can significantly injure the corporation and make it subject to criminal sanctions"); Stone v. Ritter, 911 A.2d 362 (Del. 2006) ("Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith").

³³ U.S. Sentencing Guidelines Manual §8B2.1(a) (2004).

Minimal standards are set forth to achieve "due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law."³⁴ These include seven points such as "establish[ing] standards and procedures to prevent and detect criminal conduct"³⁵ and "[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program."³⁶ Commentary to the guidelines provide additional explanation of the "factors to consider in meeting requirements of this guideline."³⁷ The bottom line, for the purposes of this Essay, is that companies that engage in criminal activity can reduce their fine and sometimes their criminal exposure by having an effective compliance program.³⁸

Having a corporate compliance program is clearly important to assure that risk of civil suits is reduced, and if criminal activity is found to exist it can provide leverage for negotiating a lesser punishment. For major companies, corporate compliance is a branch within the company. Attorneys, both in-house and outside counsel, as well as compliance officers are employed to assure maximum respect for the rules and regulations established within the company. Some companies will have guidance focused on specific problems that can accrue within the company, such as compliance with the Foreign Corrupt Practices Act.³⁹ But even with highly sophisticated

³⁴ *Id.* at §8B2.1(b).

³⁵ *Id.* at §8B2.1(b)(1).

³⁶ *Id.* at §8B2.1(b)(7).

³⁷ *Id.* at Commentary.

³⁸ Companies can reduce their culpability score by three points when they have in place an effective compliance and ethics program. *See* U.S. Sentencing Guidelines Manual §8C2.5(f) (2007).

³⁹ For example, Willbros Group, Inc. now has a Foreign Corrupt Practices Act Compliance Manual to assist employees in understanding the complexities of these criminal statutes. *See* Willbros Group, Inc. Foreign Corrupt Practices Act Manual (2007), *available at* http://www.willbros.com/_filelib/FileCabinet/IR/Download/FCPA_letter_and_Compliance_Manual_1007.pdf?FileName=FCPA_letter_and_Compliance_Manual_1007.pdf. In giving a deferred prosecution agreement to Willbros, the Department of Justice explained that: [i]n recognition of Willbros' thorough review of the improper payments, the companies' exemplary cooperation, the companies' implementation of enhanced compliance policies and procedures, and the companies' engagement of an independent corporate monitor, the Department has agreed to defer prosecution of these companies for three years. If Willbros Group and Willbros International abide by the terms of the agreement, the Department

corporate compliance programs, criminal conduct occurs.⁴⁰

In addition to the federal sentencing guidelines, the U.S. Attorney's Manual also provides guidance in that it states that a compliance program can influence whether a company will face prosecution when the company has engaged in criminal activity. Merely having a program will not mean that a company escapes prosecution,⁴¹ but it is one factor that is considered by prosecutors.⁴²

will dismiss the criminal information when the term of the agreement ends.

Department of Justice Press Release, *Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations*, available at http://www.usdoj.gov/opa/pr/2008/May/08_crm_417.html (last visited July 30, 2009).

⁴⁰ In some cases it can be a rogue employee who fails to abide by the corporate policy and directives. *See, e.g., United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972)(finding criminal liability for the company under the Sherman Act despite a general corporate policy and express instructions to the agent not to engage in the conduct). Some advocate that companies should be afforded a good faith defense when the company has taken sufficient measures to comply with the law but been crossed by an employee who fails to abide by the established company norms and its compliance structure. *See generally* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007) (discussing why the time is right to allow for a "good faith defense"); Andrew Weissmann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411 (2007) (advocating for a "good faith defense"); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999) (same); Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252 (1996) (same); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of their Employees and Agents*, 41 LOY. L. REV. 279 (1995) (same); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993)(same).

⁴¹ In the U.S. Attorneys Manual it states that "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." *See* U.S. Atty's Manual 9-28.800.

⁴² In measuring a compliance program the U.S. Attorney's Manual provides that:

The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work?

Id. at Comment.

Although there are ramifications for not having an effective program and benefits for maintaining such a program, compliance programs result from private voluntary acts on the part of the company. The government does not establish these programs for the company, does not participate in the programs, and does not provide direct oversight. Additionally, the government is not the sponsor or organizer of authorized programs to educate companies on corporate compliance. Government involvement that does exist is responsive to a determination of the existence of criminal conduct.

While compliance programs can be routine in the larger more established companies, smaller companies can find it difficult to cover the cost of implementing such programs.⁴³ Smaller companies may also not have the expertise available to have a program that matches those seen in large corporations. In this regard, the U.S. Sentencing Guidelines do relax the requirements for meeting the effective compliance and ethics program for small organizations.⁴⁴

Pro-Active Models to Achieve Compliance

The government is seldom a participant in pro-actively educating corporations on the law. The existing government sponsored education for companies is not approached holistically. Rather one finds an education model used for some individual statutes or the focus of conduct overseen by a specific enforcement agency. An example of government participation in educating the general public is seen in the Department of Justice Lay-Person's Guide to the Foreign Corrupt Practices Act (FCPA).⁴⁵ This guide offers general information on the background of the Act and briefly explains the five elements of the statute. Additionally the Department of Justice has an opinion procedure that allows "any U.S. company or national [the ability to] request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct."⁴⁶ Perhaps the

⁴³ In studying compliance with the Sarbanes-Oxley statute, it was found that there were significant differences between what was happening in large and small companies. *See* Final Report of the Advisory Committee on Smaller Public Companies (2006); *available at* <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf> (last visited July 30, 2009) . An important drawback for companies trying to maintain such programs are the costs of implementating these measures. *See generally* Stuart Michelson, Jud Stryker, & Betty Thorne, *The Sarbanes-Oxley Act of 2002: What Impact Has It Had on Small Business Firms?* (to be published in *Managerial Auditing Journal* 2009), *available at* .

⁴⁴ The Commentary to section 8B2.1 of the U.S. Sentencing Guidelines states that "a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations." U.S. Sentencing Guidelines Manual §8B2.1, Commentary 2(C) (2004).

⁴⁵ Lay-Person's Guide to FCPA, *available at* <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> (last visited July 30, 2009).

⁴⁶ *Id.*

most beneficial aspect of the Department of Justice's FCPA website is that these opinion letters are placed online for companies to consider in making decisions.

For example, one request for an opinion letter provides a detailed statement of expenses that would be paid for a trip to the United States by a government delegation from another country. It also outlines what would not be paid, such as expenses for the "spouses, family, or other guests of the officials." The Department then issues an opinion letter letting the company know that "based upon the requestor's representations, consistent with the FCPA's promotional expenses affirmative defense, the expenses contemplated are reasonable" and acceptable under the statute.⁴⁷

In some cases the guidance sought may be to avoid liability such as Halliburton Company requesting the Department to advise them on whether their proposed acquisition of a United Kingdom company that specialized in "upstream oil and gas industry" would cause them to "inherit" any foreign corrupt practices act liability "for pre-acquisition unlawful conduct." The government response outlined the steps to be taken to avoid acquiring such criminal liability.⁴⁸

Offering education is not limited to the Department of Justice. For example, the Department of Commerce offers resources to assist companies and individuals in complying with U.S. export controls.⁴⁹ There is online training,⁵⁰ archived webinar programs, and compliance guidance such as "red flag indictors"⁵¹ and advice on how to avoid dealing with unauthorized parties.⁵²

⁴⁷ See Department of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release 07-01 (July 24, 2007), available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2007/0701.html> (last visited July 30, 2009).

⁴⁸ See Department of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release 08-02 (June 13, 2008), available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html> (last visited July 30, 2009).

⁴⁹ Bureau of Industry and Security, Department of Commerce, *Export Enforcement*, available at <http://www.bis.doc.gov/complianceandenforcement/index.htm>

⁵⁰ Bureau of Industry and Security, Department of Commerce, BIS Online Training Room, available at <http://www.bis.doc.gov/seminarsandtraining/seminar-training.htm> (last visited July 31, 2009).

⁵¹ Bureau of Industry and Security, Department of Commerce, *Red Flag Indicators*, available at <http://www.bis.doc.gov/complianceandenforcement/redflagindicators.htm> (last visited July 31, 2009).

⁵² Bureau of Industry and Security, Department of Commerce, *How Do I Avoid Dealing with Unauthorized Parties?*, available at <http://www.bis.doc.gov/complianceandenforcement/unauthorizedparties.htm> (last visited July 31,

But one does not find comparable guidance for companies on criminal statutes such as money laundering,⁵³ mail fraud,⁵⁴ or obstruction of justice.⁵⁵ Further there is no unified place for companies to go when they are seeking corporate compliance information.

Clearly it would be difficult to offer company guidance with respect to conduct coming from generic statutes like the mail and wire fraud statutes. After all, it is hard to imagine a company writing for an opinion asking if destruction of certain documents would constitute an obstruction of justice.

But general legal education on how to construct an effective compliance program might prove beneficial to those struggling to ensure compliance in a complex world of law and regulations that spreads from the federal through the state level, and may include international implications. In advocating for general legal education for companies, it is also important to recognize that clearly compliance needs to be company specific. For example, although there may be some measures that would fit both the automobile industry and banking centers, compliance would likely need to focus on the unique aspects of each of these different industries.

Benefits of a Pro-Active Model

Increased transparency could provide guidance to companies struggling to comply with complex legislation.⁵⁶ It also could reduce company costs when there is a violation of law and

2009).

⁵³ The U.S. Drug Enforcement Administration does offer a website on money laundering that includes items such as press releases. *See Money Laundering*, U.S. Drug Enforcement, *available at* <http://www.usdoj.gov/dea/programs/money.htm> (last visited July 31, 2009).

⁵⁴ This is especially problematic as courts are split on how to interpret the "right to honest services", section 18 U.S.C. 1346, as used for mail and wire fraud prosecutions. *See United States v. Rybicki*, 354 F.3d 124, 162-63 (2d Cir. 2003)(dissenting) (discussing the "wide disagreement among the circuits as to the elements of the 'honest services' offense").

⁵⁵ A key argument raised by Arthur Andersen LLP at its trial was that documents were shredded pursuant to a documentation retention policy. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005).

⁵⁶ Companies, today, are faced with both federal and state regulation. There are over 4000 federal crimes. *See John S. Baker, Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum # 26, *available at* <http://www.heritage.org/Research/LegalIssues/lm26.cfm>. Additionally state prosecutions are routine, especially in jurisdictions like New York state. *See Podgor, supra* note 39, at 1540-41 (discussing how companies are becoming increasingly subject to enforcement on the state level). Additionally, if operating outside the United States, the companies have to contend with the laws of another country. *Id.* at 1542.

the company has fines and costs imposed. These costs can include paying for a court monitor pursuant to a deferred prosecution agreement. If the pro-active model is successful, government costs should be reduced in that fewer investigations and prosecutions would be necessary. A pro-active model also has the entity and individuals in the company working together to assure compliance. Unlike a reactive model that attempts to secure compliance after misconduct through either rehabilitation or deterrence, the corporation and its employees are not pitted against each other as they try to obtain the best benefit for the entity. Finally, government sponsored education allows the government to reap the benefit of better evidence against a company or individuals within the entity when the company fails to comply with the law.

Contrast the few compliance resources from the government that are available to companies with what is required of a company that has violated the law. Typically the deferred prosecution agreement provides for the appointment of a monitor. The monitor is charged with making sure that the company complies with the law.⁵⁷ Monitorships can be as extreme as having the monitor or a government representative participating in board room decisions.⁵⁸ Significantly, monitorships also come at enormous costs to the company.⁵⁹

Expending twenty-seven million dollars to pay a monitor because of non-compliance can prove to be a serious consequence to a company.⁶⁰ Companies would surely welcome education by the government if it offered advice on how to have an effective program that will prevent these consequences.

A side benefit of educating compliance is that it can assist prosecutors in making their case when the companies fails to abide by the law. A key issue prosecutors face in white collar cases is proving intent. In the non-strict liability context, intent is a necessary element and

⁵⁷ Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679 (2009)(discussing the needs for qualified monitors).

⁵⁸ For example, in the Bristol-Myers Squibb (BMS) deferred prosecution agreement with the government, the company agreed that they would "appoint an additional non-executive Director acceptable to the Office to the BMS Board of Directors within sixty (60) days of the execution of this Agreement." See Bristol-Myers Squibb Deferred Prosecution Agreement, available at <http://www.usdoj.gov/usao/nj/press/files/pdf/deferredpros.pdf>; See also Richard A. Epstein, *The Deferred Prosecution Racket*, Wall St. Jrl, Nov. 28, 2006, available at <http://online.wsj.com/article/SB116468395737834160-search.html> (last visited August 1, 2009).

⁵⁹ Former Attorney General Ashcroft's contract to "monitor a medical device maker that entered into a deferred prosecution agreement with federal prosecutors" was estimated to be worth at least twenty-seven million dollars. See Angela Delli Santi, *Ashcroft Agrees to Testify in Hearing About No-Bid Monitoring Contracts*, AP (law.com), available at <http://www.law.com/jsp/article.jsp?id=1204026528285> (last visited July 31, 2009).

⁶⁰ *Id.*

depending on the statute, it can be a function of proving knowledge on the part of employees. From an evidentiary perspective, providing this knowledge via education not only provides a means for stopping future misconduct, but if in fact the criminality occurs there will now be proof of the company being aware that they had a legal duty and that duty was ignored. An education approach can also serve in proving willfulness on the part of the perpetrator of the crime in addition to offering evidence to counter any claims of willful blindness.

Obviously, specifics for accomplishing this proposal are needed as there is a huge spread between the lack of government guidance presently existing and the guidance by mandated monitorships. An argument against such a proposal may be that the government is not equipped to go into the education business.⁶¹ But outsourcing parts of the education component to qualified experts can certainly assist with achieving compliance.

Conclusion

The government expends enormous resources prosecuting corporate criminality.⁶² It can prove equally, if not more so, expensive to the corporation that needs to defend itself against these actions and accompanying civil actions that may accrue from a prosecution or the corporation's entry into a deferred or non-prosecution agreement.

In these days of limited resources, one has to wonder if a pro-active model might provide a better method for achieving corporate compliance. Reaching out and educating corporations as to what will be considered unacceptable conduct can allow corporations to formulate better compliance programs. It can also assist in providing education to personal within the corporation who may be unaware of the legalities and illegalities in a globalized world that allows many different prosecutors to proceed against the corporation for a host of different criminal violations.⁶³ An added benefit to prosecutors in proceeding with education is that it offers additional evidence of intent when the education is provided and then the law is not followed. An actual prosecution for a violation of law may require less resources if proof of the violation is apparent because of the education provided by the government and the failure of the company to adhere to the guidance provided.

With increased focus on individual criminal liability in the corporate setting, it is

⁶¹ See Ford & Hess, *supra* note 56, at 692-93 (discussing the development of compliance professionals).

⁶² The Department of Justice has requested for the FY2010 budget "a \$62.6 million increase and a total of 379 positions (including 54 agents and 165 attorneys) to aggressively pursue mortgage fraud, corporate fraud, and other economic crimes." Combating Financial Fraud and Protecting the Federal Fisc, U.S. Department of Justice FY 2010 Budget Request, *available at* <http://www.usdoj.gov/jmd/2010factsheets/pdf/cff-fisc.pdf>.

⁶³ See note 54.

important to make certain that individuals and corporate entities work together to assure compliance with the law. This is best effectuated by having the government provide guidance to both the corporation and the individual. It offers a positive approach to achieving compliance as opposed to waiting for the criminal act and then trying to achieve this same result with rehabilitation and deterrence.