

Criminal Prosecution of Corporations - A Renewed Reminder for a New Year **By Kevin W. DeVore and Renée I. Fossen**

As we begin another year, we tend to set resolutions to make changes for the better. As attorneys we should do the same for our corporate clients. The beginning of a new year is a good time to advise your clients to take a renewed look at their corporate compliance programs and be reminded about the potential for government inquiries or even criminal prosecution.

The corporation is on the hook.

Prosecutors have a duty to protect the public and the Department of Justice (“DOJ”) has made it clear that the prosecution of corporate crime is a high priority.¹ Corporations can be charged with crimes because they are considered “legal persons” capable of committing crimes.² Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents.³ To hold a corporation liable for these actions, the government must establish that the corporate agent’s actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation.⁴ The corporation does not need to profit from its agent’s actions for it to be held liable.⁵

Think *you* are immune from criminal prosecution? Think again.

Individual directors, officers, employees and shareholders also have significant exposure to criminal prosecution for the wrongdoings of the corporation because the corporation is incapable of acting without natural persons.⁶ From banks failing to maintain a robust compliance program to report anti-money laundering in violation of the Bank Secrecy Act, to companies that collude to fix bidding procedures or over bill their clients, every individual within a corporation is on notice that their actions or inactions will be dealt with.

Charges by the flip of a coin?

If a corporation cannot act without individuals, and the corporation is generally responsible for the actions of its agents, how will the prosecution decide where the charges should lie? The prosecution will consider both the corporation and individuals as potential targets for charges.⁷ When determining whether to charge a corporation or an individual, the government will apply the same set of factors.⁸ These factors include, among other things: 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.⁹

The buck stops here.

President Harry S. Truman kept a sign on his desk that read, “The Buck Stops Here.” The term derives from the slang term “pass the buck” which means to pass responsibility to someone else. President Truman used the term to let people know that he would take full responsibility for the actions of his presidential office; good or bad.

The same can be said for the boardrooms of today. Corporate leaders have a fiduciary duty to the shareholders to operate the corporation as a profitable and ethical entity, and they owe duties of honest dealing to the public in connection with the corporation's regulatory filings and public statements.¹⁰ There is no escaping exposure to potential liability for corporate wrongdoing, and corporate leaders would be well advised to implement stringent and business applicable corporate compliance policies.

You can't just talk the talk. You must walk the walk.

It may have been the day many years ago that a corporation would be *safe* from government scrutiny as long as it had its corporate minutes in good order and had a policy or two that covered general office procedures. Whether the corporation actually implemented those policies or "walked the walk" was a whole different matter. Today, however, it is different. The DOJ has made it known that a corporation cannot hide behind paperwork if it doesn't actually practice what it preaches.¹¹

Today, a corporation is *expected* to have thorough documentation in good working order. Without it and you are dead in the water. Paperwork alone is not enough, however. The corporation must also have an effective regulatory compliance program implemented into its business model and it must work. The compliance program must be adhered to from the ground up.¹² The entire culture of the organization must adopt, if not embrace, a culture of regulation compliance. Of course, this starts at the top. The directors of the organization are responsible for adopting the policies; the officers are responsible for implementing the policies into the company; and the managers are responsible for creating the culture for the employees whereby regulatory compliance is just part of the equation.

The compliance program required by the government is a Catch-22.

The government will readily admit that regulatory compliance and enforcement is a group effort. The government cannot possibly catch every criminal, let alone the majority of the criminals, without the help of the corporations themselves. On the other hand, to the corporation regulatory compliance is nothing more than a cost issue. Quite simply, it costs money to stay in compliance with the regulatory requirements. The catch is that the corporation doesn't have a choice. Because the government needs each corporation to be its eyes and ears, and because the effectiveness of the government's enforcement of money laundering crimes depends on corporate participation, the government simply made it a crime *not* to participate.¹³

A race to the finish line. Who wants to be a tattletale?

Since our childhood days on the neighborhood playground we have been told never to be a tattletale. A tattletale is someone who tattles or tells secrets of others; i.e., a nark or a snitch.¹⁴ It's never good to be known as a snitch. This instinctual belief is exactly what the DOJ played on when, in 1993, it announced a new Corporate Leniency Policy.¹⁵ Under the policy, a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the DOJ, and meeting certain other specified conditions. A year later, the DOJ announced a similar policy for individuals.¹⁶

With tougher penalties imposed by the courts, better investigatory methods, and strict adherence to the leniency policies, the DOJ slowly has been able to convince lawbreakers to come forward. In fact, now the fear of stiff penalties for those who stay true to the criminal operation compared to the possibility of immunity if one comes forward first, has the wrongdoers literally running to the DOJ's door in an effort to be the first in line. It is quite ingenious actually. The element of fear is so great that the wrongdoers are policing themselves.

What can you do to protect yourself from the unthinkable - criminal charges?

Again, it starts from the top. The board must employ its management team to figure out which regulatory compliance policies are necessary given the type of business the corporation is in. If the corporation is in the banking business, there is a plethora of compliance regulations, including the Bank Secrecy Act and anti-money laundering programs. If your company works for the government and you bill for your time and expenses, you will want policies concerning fair practices and billing procedures. In any event, your business should have policies and procedures well documented to ensure that from the top the corporation has a plan. From there, the corporate officers will need to ensure its management team creates a culture such that the employees adopt the procedures as a normal part of doing business. Compliance is a must.

If your corporate books are well documented, you have a culture in your organization that has adopted compliance as a regular part of doing business, and you have mechanisms in place to identify problems when they arise, you are ready. From there, you need to review your policies on a regular basis and keep up with regulatory changes in your industry in order to stay on top of new issues.

Are criminal charges the worst of it? Maybe – maybe not.

The collateral impact stemming from charges can be devastating to a corporation (e.g., Enron and Arthur Andersen) and the prosecution's guidelines address some of those effects such as potential suspension or debarment from eligibility for government contracts or participation in federally funded programs like health care programs.¹⁷ Financing procured by the corporation may be affected as well by way of increased interest rates, and the revocation of financing all together.

The legal costs of defending the corporation may end up being astronomical and may eclipse the financial wrongdoing of the corporation many times over. These costs should be considered when contemplating an offer for restitution. The prosecutor has substantial latitude in determining if there should be charges and the scope of those charges.¹⁸ The prosecution may consider an offer of restitution as evidence of acceptance of responsibility and may choose not to prosecute certain charges.¹⁹

Conclusion

Even an effective corporate compliance program may fail to prevent all criminal activity, and while there is no way to guarantee that a corporation will not suffer through an investigation or

indictment, being aware of the possibility and what the prosecutors will expect by way of cooperation will at least help level the playing field. Preparation and, if applicable, cooperation are the keys to protecting your corporate clients from unwanted investigation and prosecution.

¹ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, 9-28.100 (*Principles of Federal Prosecution of Business Organizations*), available at <http://www.usdoj.gov>.

² *Id.* at 9-28.200.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *See*, USAM 9-27.220, *et seq.*

⁹ USAM 9-28.300.

¹⁰ USAM 9-28.100.

¹¹ USAM 9-28.800.

¹² *Id.*

¹³ *See*, Bank Secrecy Act; USAM § 9-27-230.

¹⁴ <http://www.merriam-webster.com/dictionary/tattletale>

¹⁵ Corporate Leniency Policy, *see*, www.justice.gov/atr/public/guidelines/0091.htm.

¹⁶ Leniency Policy for Individuals, *see*, www.justice.gov/atr/public/guidelines/0092.htm.

¹⁷ USAM 9-28.1000.

¹⁸ USAM 9-28.300.

¹⁹ USAM 9-28.900.