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# **Corporate Criminal Liability: An Abbreviated Overview of Federal Law**

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## Summary

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

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

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

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

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

This is an abbreviated version of a longer CRS Report, without the footnotes or citations and attributions to authorities that appear in the longer report. The parent report is entitled CRS Report R43293, *Corporate Criminal Liability: An Overview of Federal Law*.

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## **Introduction**

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

## **Entities Subject to Corporate Criminal Liability**

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

Federal statutes frequently provide individual definitions of the entities that fall within their proscriptions. Some are as terse as that of the racketeering statute, “‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property.” Others, like the tax crime definition, are more detailed. Still others have taken special care to mention governmental entities when listing those covered by their proscriptions.

## **Scope of Authority**

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

## **Imputed Intent and Knowledge**

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

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

With rare exception, statutes which expose a corporation to criminal liability do not absolve the officers, employees, or agents whose violations are responsible for the corporation's plight. From time to time, the courts have encountered the argument that an individual cannot be at once both the person who violates the statute and the personification of the corporation that violates the statute: "[W]hen the officer is acting solely for his corporation, the appellee contends that he is no longer a 'person' within the Act. The rationale for this distinction is that the activities of the officer, however illegal and culpable, are chargeable to the corporation as the principal but not to the individual who perpetrates them." To which the courts have responded, "No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion."

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

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

The second situation occurs when the official or employee either instructs another to commit a federal offense or aids and abets another in the commission of a federal offense, or takes some action after the fact to conceal the commission of a federal offense by another. Like conspiracy, liability for procuring or aiding and abetting the offense of another focuses on conduct committed before the commission of the underlying substantive offense: "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." The officer or employee must know of the colleague's pending misconduct and by his action intend to facilitate it. Moreover, unlike conspiracy, which requires at least two individuals, even a sole stockholder may be guilty of aiding and abetting the crime of a corporation.

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

The third instance of official liability triggered by the misconduct of others within the corporation requires no knowing participation, but instead occurs when a corporate official, responsible to do so, fails to prevent the commission of an offense. This is the least common of the three. It arises in the context of a regulatory scheme, crafted to ensure public welfare and capped with a criminal proscription which says nothing of the knowledge necessary for conviction.

## Prosecutorial Discretion

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

The Justice Department has two sets of guidelines governing the decision to prosecute—one general (“Principles of Federal Prosecution”) and the other a supplement devoted to corporations (“Principles of Federal Prosecution of Business Organizations”). As they make clear, the decision to prosecute is in fact a series of decisions. The first is whether to initiate, decline, or defer a prosecution. Here perhaps the most easily assessed factor is the strength of the case against the defendant or defendants. Prosecutors ordinarily will not initiate a prosecution unless there is probable cause to believe that a person has committed a federal crime. On the other hand, prosecutors will seriously consider initiating a prosecution if they believe that they have sufficient admissible evidence to convict. In those instances, the additional factors that influence the determination to prosecute fall into three categories: the weight of the federal interest, the prospect of effective prosecution elsewhere; and the adequacy of other alternatives.

*Federal Interests:* Whether to proceed with a prosecutable case ordinarily turns on the nature and seriousness of the offense and the culpability of the defendants. Some crimes, such as those involving immigration, civil rights, or federal tax violations, may warrant federal prosecution because of their very nature. Others, such as those involving major fraud or illicit drug trafficking, may call for federal prosecution because of the wide-spread harm they can inflict. The critical factors when it comes to corporate liability, however, are culpability factors. The factors identified in the business organization guidelines include (1) the pervasiveness of the wrongdoing within the corporation; (2) the corporation’s history of misconduct; (3) the existence and performance of compliance programs; (4) the corporation’s timely and voluntary disclosure of wrongdoing; (5) the corporation’s cooperation; (6) an absence of obstruction; (7) collateral consequences; and (8) restitution.

In the eyes of the guidelines: “Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management.” Conversely, it may not be appropriate to charge a corporation, “particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.” Most cases will fall between the two extremes and require recourse to other factors as well.

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

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

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

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

The guidelines now seek to still those concerns by emphasizing that "[w]hat the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those [attorney-client and attorney work product] protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so." By the same token, while corporate officials are not free to obstruct an investigation, the mere fact that a corporation pays the attorneys' fees of its officers or employees or enters into joint defense agreements will ordinarily not constitute obstruction. A corporation may also receive credit for agreeing to make victim restitution, disciplining offending employees, or addressing short-comings in its compliance program. Finally, a prosecutor may consider the adverse impact of a prosecution on innocent employees or shareholders.

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

*Alternatives to Criminal Trial:* Prosecutors have several alternatives to criminal trial. They may accept a corporation's offer to plead guilty. They may defer prosecution of the corporation under a deferred prosecution agreement. They may accept a corporation's offer to sign a non-prosecution agreement, frequently with the intent to prosecute corporate officials or employees. They may elect to forgo prosecution in favor of civil sanctions. Finally, civil and regulatory sanctions may be available as an alternative or supplement. Whether prosecutors consider them appealing alternatives may depend in part on the severity of the misconduct and the severity of the sanctions. The factors the guidelines identify include "the strength of the regulatory

authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; and the probable sanction if the regulatory authority's enforcement action is upheld."

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

## Constitutional Rights

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

*Ex Post Facto:* The Constitution's ex post facto clauses condemn retroactive criminal laws. In cases involving corporate defendants, federal courts have generally proceeded directly to an ex post facto analysis, without pausing to question whether the prohibition applies to such defendants.

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

*Fourth Amendment:* The Fourth Amendment condemns unreasonable searches and seizures. Ordinarily, a government search or a seizure is unreasonable unless it is conducted pursuant to a warrant issued on the basis of probable cause. At the turn of the 20<sup>th</sup> century, the Supreme Court acknowledged that corporations enjoyed the protection of the Fourth Amendment when faced with boundless government subpoenas. In later cases, it found the Fourth Amendment's commands had been breached when officers seized a company's records and ledgers, once without a warrant and once with an invalid warrant.

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

*Due Process:* Of the rights which the Fifth Amendment guarantees, two have been denied corporations. "[A] corporation has no Fifth Amendment privilege" against self-incrimination, nor

does it have a right to grand jury indictment. Of the others, two—Due Process, and Double Jeopardy—have been said to protect corporations or have been construed to protect corporations.

The Fifth Amendment Due Process Clause limits the governmental prerogatives of the federal government. The Supreme Court has said long and often that a corporation is a “person” for purposes of the Fourteenth Amendment. Moreover, the courts have acknowledged the access of corporations to various due process rights, for example, the right to challenge a court’s personal jurisdiction over them or “the right to be heard at a meaningful time and in a meaningful manner before being deprived of a protected interest in liberty or property.” On the other hand, the Supreme Court has said that the states of the United States are not “persons” for Fifth Amendment Due Process Clause purposes. The lower federal courts have followed suit with observations that neither the political subdivisions of the states nor foreign governments are “persons” for purposes of the Due Process Clause.

*Double Jeopardy:* The circuit courts have concluded that corporations are entitled to Fifth Amendment protection against double jeopardy. In addition, the Supreme Court has upheld a corporation’s double jeopardy challenge without recognizing the right in so many words.

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

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

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

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

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

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

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

The accused in a criminal proceeding enjoys the rights under the Sixth Amendment “to be confronted with the witnesses against [and] to have compulsory process for obtaining witnesses

in his favor.” The right to confrontation includes the instruction that “testimonial statements of witnesses absent from trial can be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. Under the right to compulsory process “at a minimum, ... criminal defendants have the right to the government’s assistance in compelling the attendance of favorable witnesses at trial and right to put before the jury evidence that might influence the determination of guilt.” The rights ensure the integrity of the criminal fact-finding process. The sparse case law suggests they are available to corporations.

*Eighth Amendment:* The Eighth Amendment states that excessive fines may not be imposed. A fine is excessive if it is grossly disproportionate to gravity of the crime for which the defendant was convicted. A few courts avoid the question by noting that the Supreme Court has never decided whether the Eighth Amendment applies to corporations. Others have ruled against corporations on the merits.

## Sentencing Guidelines

Corporations cannot be incarcerated. Otherwise, corporations and individuals face many of the same consequences following conviction. Corporations can be fined. They can be placed on probation. They can be ordered to pay restitution. Their property can be confiscated. They can be barred from engaging in various types of commercial activity.

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

The Sentencing Guidelines for organizations measure punishment according to the seriousness of the offense as well as the defendant’s culpability and history of misconduct. On the other hand, they reward self-disclosure, cooperation, restitution, and preventive measures. The Guidelines supply special corporate sentencing directions for fines, probation, forfeiture, special assessments, and remedial sanctions.

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

Otherwise, corporations face different fine standards depending upon the offense of conviction. In chapter 8C, the Guidelines set specific standards for crimes with a commercial flavor— antitrust, smuggling, and gambling offenses, for instance. The Sentencing Commission explicitly declined to promulgate special corporate fine standards for other offenses. Instead, corporate fines for such offenses are governed by two general statutory sentencing provisions. One, §3571,

sets the permissible maximum amount for any fine. The other, §3553, outlines the sentencing factors and procedures applicable to both individuals and corporations. The limited case law suggests that sentencing courts may disregard the Guidelines completely in the case of a corporation convicted of one of these other offenses.

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

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

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

The Guidelines supply several examples of when a fine outside the recommended range might be considered. A fine above the range (referred to as upward departures) may be warranted when: (1) the offense resulted in a risk of death or serious bodily injury; (2) the offense constituted a threat to national security; (3) the offense presented a threat to the environment; (4) the offense presented a threat to the market; (5) the offense involved official corruption; (6) appropriate to offset reductions attributable to compliance programs; and (7) the corporation's culpability score exceeds the limit for additional multipliers.

Departures below the range (referred to as downward departures) may be warranted when: (1) the corporation provides substantial assistance to authorities; (2) the corporation is a public entity, for example, a local governmental agency; (3) the corporation's beneficiaries (other than stockholders) are also victims of the offense; and (4) the corporation's remedial cost far exceed its gains from the misconduct.

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

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

- the organization committed the offense within five years of a prior similar conviction;
- a senior corporate official involved in the offense within five years was involved in a prior similar offense;
- necessary to reduce the risk of future criminal misconduct on the part of the corporation; or
- necessary in order to comply with the sentencing directives of 18 U.S.C. 3553(a)(2), that is, the need to
  - reflect the seriousness of the offense, promote respect for the law, and provide just punishment,
  - afford adequate deterrence,
  - protect the public, and
  - effectively provide for offender training, care, and correctional treatment.

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

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

In addition, a sentencing court remains free to impose any probationary condition that is reasonably necessary and related to the considerations prescribed for sentencing generally under 18 U.S.C. 3553(a), (b)(2). In response to a corporation's failure to comply with the conditions of its probation, a court may resentence the corporation, extend the term of its probationary period, or impose additional probationary conditions.

*Special Assessments:* Corporations are subject to a special assessment upon conviction at a rate of \$400 for each felony count, \$125 for class A misdemeanor count, \$50 for each class B misdemeanor count, and \$25 for each class C or infraction count.

## **Restitution, Compliance Programs, and Other Remedial Sentences**

*Restitution:* Restitution is required when a defendant has been convicted of any of several offenses such as: (1) a crime of violence; (2) a crime against property including fraud; (3) sexual abuse; (4) child pornography; (5) copyright and trademark infringement; (6) production of methamphetamines; or (7) human trafficking. The court may order restitution when a corporation is convicted of a crime under title 18 of the U.S. Code for which mandatory restitution is not required or one of various Controlled Substance Act offenses. In the absence of other specific authority, the court may order restitution also as a condition of probation or pursuant to a plea bargain.

*Compliance Programs:* The Guidelines' effective compliance and ethics program features are perhaps its most well-known corporate component. A corporation that lacks such a program is likely to have one imposed at sentencing or pursuant to a plea bargain. As noted earlier, a corporation that has one is likely to fare better during the investigation, bargaining, and sentencing phases of a criminal case. The Guidelines envision programs that promote an ethical and law-abiding culture within a corporation and that are calculated to identify and prevent criminal misconduct within the corporation. The elements of such a program consist of the following: (1) An established set of standards and procedures designed to detect and prevent criminal misconduct. (2) Senior management involvement in the program including its day to day operations. (3) Minimizing the operation participation of those previously ethically challenged. (4) Training corporate employees and agents. (5) Monitoring, auditing, and evaluating the program. (6) Encouraging and rewarding performance consistent with the program's goals; and disciplining inconsistent conduct. (7) Responding appropriately to the discovery of in-house criminal conduct.

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

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

## **Forfeiture**

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

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