# Panel: A Continuing Trend - Investigations, Enforcement Actions And Prosecutions

John Fagg
Moore & Van Allen (Charlotte, NC)

johnfagg@mvalaw.com | 704.331.3622
http://www.mvalaw.com/professionals-279.html

A CONTINUING TREND:

INVESTIGATIONS, ENFORCEMENT ACTIONS AND PROSECUTIONS IN THE FINANCIAL SERVICES INDUSTRY

Moderator: **John Fagg**
Moore&VanAllen

# PANEL PARTICIPANTS

- Bradley Mirkin
  - Former Senior Litigation Counsel in FINRA's Enforcement Department
  - Former Chief Operating Officer and Chief Compliance Officer at a FINRA-registered brokerage firm
  - Counsel, Nixon Peabody
- Scott Schools
  - Former Associate Deputy Attorney General of the United States
  - Former U.S. Attorney for Districts of Northern California and South Carolina
  - Partner, Moore & Van Allen PLLC

# PANEL PARTICIPANTS

- John Buretta
  - Former Principal Deputy Assistant Attorney General of the United States
  - Former Deputy Assistant Attorney General of the United States
  - Former Assistant U.S. Attorney for the Eastern District of New York
  - Partner, Cravath, Swaine & Moore LLP
- Anne Termine
  - Chief Trial Attorney, U.S. Commodity Futures Trading Commission
  - Former Senior Assistant District Attorney, Orleans Parish District Attorney's Office

## Executive Summary

- While the financial crisis is in the rearview mirror, the financial services industry continues to be a major focus of governmental investigations and actions by federal, state, and international regulators and law enforcement entities. What does this mean for firms and individuals?
  - Public statements by senior officials from DOJ, CFTC, SEC, FINRA and others show that the pendulum is still swinging towards more action
    - Are recent cases an indication of what is to come?
    - Exponentially increasing fines
  - Government considerations in deciding whether to seek criminal charges or bring an enforcement action
  - Lessons Learned: Representing clients in an environment of increased enforcement actions and prosecutions

## Government's Continued Resolve

- May 2013: Eric Holder to Senate Judiciary Committee:
  - "I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute — if we do bring a criminal charge — it will have a negative impact on the national economy, perhaps even the world economy. I think that is a function of the fact that some of these institutions have become too large."

- In just over one year from Holder's statement, two major International financial institutions had pleaded guilty to federal crimes.
  - Credit Suisse (Eastern District of Virginia):
    - "This case shows that no financial institution, no matter its size or global reach, is above the law," Attorney General Eric Holder said on May 15, 2014 in connection with the guilty plea by Credit Suisse.
  - BNP Paribas (SNDY):
    - Despite a campaign from the French Prime Minister and other French and European officials, the U.S. Attorney's Office for the Southern District of New York obtained a guilty plea from BNP Paribas in July 2014.

## Recent Cases

- Guilty Pleas
  - By Parent Entity: Credit Suisse and BNP Paribas
  - By Foreign Subsidiary: UBS, HSBC, and RBS

- CFTC Enforcement Actions (as of November 2013)
  - Enforcement Actions: **82**
  - Sanctions: **$1.7 billion**
    - Civil Monetary penalties constituted $1.5 billion of the $1.7 billion
  - New Investigations Opened: 290+

- SEC Enforcement Actions (as of December 2013)
  - Enforcement Actions: **169**
  - Penalties: **$1.64 billion**
  - Disgorgement and Prejudgment Interest: **$981 million**

## Is $1 Billion the New $100 million?

- While virtually all risk associated with a regulatory or law enforcement investigation have gone up, the monetary penalties that are being imposed are exponentially greater than ever before.

- Since the financial crisis, financial institutions have paid more than $100B to U.S. authorities.

- A few examples of recent fines and penalties:
  - BNP Paribas (transactions with banned countries): $8.8B
  - Credit Suisse (tax conspiracy): $2.5B
  - JPMorgan Chase (mortgages): $13B
  - Bank of America (mortgages): $16.65B
  - MF Global (use of customer funds): $1B
  - UBS (References rates): $1.5B
  - RBS (Reference rates): $1.1B

## What Leads to a Decision to Prosecute?

- Government Task Forces and Working Groups
  - Financial Fraud Enforcement Task Force (DOJ, SEC, CFTC and many others)
  - Residential Mortgage-Backed Securities Working Group (DOJ, SEC, State AGs, and others)
  - Securities and Commodities Fraud Working Group (DOJ, CFTC, SEC, and others)
  - Corporate Fraud Task Force (DOJ, CFTC, SEC, FRB, FHFA, and others)
- Cooperation
  - Pressures on Corporations to Cooperate
- Burden of Proof
  - Is the government less concerned with its burden of proof were the matters to go to trial?
- DPAs and NPAs - Is this a better result?
  - Will BNP Paribas and Credit Suisse pleas change the calculus?



## Lessons Learned: Representing Clients in an Environment of Increased Focus

- Continued Pressure on Prosecutors and Regulators
  - Congress
  - Media
- Expect Turf Battles and Broad-Ranging Investigations
  - Managing the Complexities of Parallel proceedings
  - State AGs
  - Foreign regulators
- Compliance, Compliance, Compliance

# Endnotes


[1] "Credit Suisse pleads guilty to U.S. criminal charge in tax probe." Reuters (May 19, 2014) http://www.reuters.com/article/2014/05/19/us-creditsuisse-investigation-idUSBREA4I0E620140519

2 BNP Paribas Criminal Information (SDNY, July 2014)

3 "Banks pay out $100bn in US fines", The Financial Times (March 25, 2014)

4 SEC Report on Enforcement Actions – Addressing Misconduct That Led To or Arose From the Financial Crisis http://www.sec.gov/spotlight/enf-actions-fc.shtml

5 Memorandum from Mark R. Filip, Deputy Attorney Gen., to Head of Dep't Components and U.S. Attorneys (Aug. 28, 2008)

**» Print**



# Credit Suisse pleads guilty to U.S. criminal charge in tax probe

Mon, May 19 2014


By Aruna Viswanatha, Douwe Miedema and Karen Freifeld

WASHINGTON/NEW YORK (Reuters) - Swiss bank Credit Suisse on Monday pleaded guilty to a criminal charge for its role in helping Americans dodge taxes, U.S. Attorney General Eric Holder said, and will pay more than $2.5 billion as part of an agreement with U.S. authorities.

Separately, the New York Department of Financial Services said it had determined not to revoke the bank's license in the state.

U.S. prosecutors criminally charged Credit Suisse and two of its units, saying the bank helped clients deceive U.S. tax authorities by concealing assets in illegal, undeclared bank accounts, in a conspiracy that spanned decades.

Credit Suisse will pay financial penalties to the U.S. Department of Justice, the Internal Revenue Service, the Federal Reserve and the New York State Department of Financial Services to settle the charges. It had already paid $200 million to the Securities and Exchange Commission.

"This case shows that no financial institution, no matter its size or global reach, is above the law," Attorney General Eric Holder said at a press conference.

Credit Suisse Chief Executive Brady Dougan said in a statement, "We deeply regret the past misconduct that led to this settlement."

He added, "We have seen no material impact on our business resulting from the heightened public attention on this issue in the past several weeks."

The Swiss bank, which has a large business managing wealthy clients' money, helped them withdraw money from their undeclared accounts by either providing hand-delivered cash to the United States or using Credit Suisse's correspondent bank accounts in the U.S., the Justice Department said.

Credit Suisse was the largest bank to plead guilty to a criminal charge in 20 years, Holder said, amid a push by U.S. politicians for tougher punishments for big banks after the 2007-2009 financial crisis.

Dougan, who has come under pressure from Swiss politicians to resign, and Chairman Urs Rohner, would both stay in their jobs as part of the settlement, a person close to Credit Suisse said on Monday.

U.S. authorities have not often sought criminal convictions against a financial institution, fearing it could put a firm out of business, and result in lost jobs for people that had nothing to do with the crime, or jeopardize the financial system.

Ahead of the official announcement of the agreement, financial markets had been calm in the face of potentially stiff penalties against Credit Suisse. There had been no indications other banks have stopped doing business with the Swiss bank. It was still obtaining short-term funds in the repo and commercial paper markets, analysts said.

(Reporting by Aruna Viswanatha in Washington, Karen Freifeld in New York, and Oliver Hirt in Zurich; Additional reporting by Dan Wilchins and Richard Leong in New York and Douwe Miedema in Washington; Writing by Douwe Miedema; Editing by Karey Van Hall, Jeffrey Benkoe and Bernard Orr)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v. - :

BNP PARIBAS S.A., :

Defendant. :

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INFORMATION

14 Cr. _____

COUNT ONE

(Conspiracy To Violate the International Emergency Economic Powers Act and the Trading With the Enemy Act)

The United States Attorney charges:

The Conspiracy

1. From at least in or about 2004 up to and including in or about 2012, in the Southern District of New York and elsewhere, BNP Paribas S. A. ("BNPP"), the defendant, together with others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States, to wit, violations of the International Emergency Economic Powers Act ("IEEPA") under Title 50, United States Code, Sections 1702 and 1705; the Trading with the Enemy Act ("TWEA") under Title 50, United States Code Appendix, Sections 3, 5, and 16; and the executive orders and regulations issued thereunder.

2. It was a part and an object of the conspiracy that BNPP, the defendant, and others known and unknown, willfully and knowingly would and did violate executive orders prohibiting the exportation, directly and indirectly, of services from the United States to Sudan and Iran, and the evasion and avoidance of the aforementioned prohibition, to wit, BNPP

willfully and knowingly structured, conducted, and concealed U.S. dollar transactions using the U.S. financial system on behalf of banks and other entities located in or controlled by Sudan, and on behalf of an entity located in Iran, in violation of IEEPA, Title 50, United States Code, Section 1705(a) and (c); the Sudanese Sanctions Regulations, Title 31, Code of Federal Regulations, Sections 538.205 and 538.211, Executive Order 13067, Section 2 (b) and (g) (Nov. 3, 1997) and Executive Order 13412, Section 3(a) (Oct. 13, 2006) (U.S. sanctions against Sudan); and the Iranian Transactions and Sanctions Regulations, Title 31, Code of Federal Regulations, Sections 560.203 and 560.204, Executive Order 12959, Section 1 (b) and (g) (May 6, 1995); and Executive Order 13059, Section 2(a) and (f) (Aug. 19, 1997) (U.S. sanctions against Iran) .

3. It was a further part and an object of the conspiracy that BNPP, the defendant, and others known and unknown, willfully and knowingly would and did violate regulations prohibiting all transfers of credit and all payments between, by, through, and to any banking institution, with respect to any property subject to the jurisdiction of the United States, in which Cuba has any interest of any nature whatsoever, direct or indirect, and the evasion and avoidance of the aforementioned prohibition, to wit, BNPP willfully and knowingly structured, conducted, and concealed U.S. dollar transactions using the U.S. financial system on behalf of banks and other entities controlled by Cuba, in violation of TWEA, Title 50, United States Code Appendix, Sections 3, 5 and 16(a); and Title 31, Code of Federal Regulations, Sections 515.201 (a) (1), (c) and (d), and 515.313 (U.S. sanctions against Cuba).

Means and Methods of the Conspiracy

4. Among the means and methods by which BNPP, the defendant, and its co-conspirators carried out the conspiracy were the following:

a. BNPP intentionally used a non-transparent method of payment messages, known as cover payments, to conceal the involvement of banks and other entities located in or controlled by countries subject to U.S. sanctions, including Sudan, Iran and Cuba ("Sanctioned Entities"), in U.S. dollar transactions processed through BNPP's branch office in the United States headquartered in New York, New York ("BNPP New York") and other financial institutions in the United States.

b. BNPP worked with other financial institutions to structure payments in highly complicated ways, with no legitimate business purpose, to conceal the involvement of Sanctioned Entities in order to prevent the illicit transactions from being blocked when transmitted through the United States.

c. BNPP instructed other financial institutions not to mention the names of Sanctioned Entities in U. S. dollar payment messages sent to BNPP New York and other financial institutions in the United States.

d. BNPP followed instructions from Sanctioned Entities not to mention their names in U.S. dollar payment messages sent to BNPP New York and other financial institutions in the United States.

e. BNPP removed information identifying Sanctioned Entities from U.S. dollar payment messages in order to conceal the involvement of Sanctioned Entities from BNPP New York and other financial institutions in the United States.

Overt Acts

5. In furtherance of the conspiracy and to effect its illegal objects, BNPP, the defendant, and others known and unknown, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. In or about December 2006, BNPP, through its subsidiary based in Geneva, Switzerland, caused an unaffiliated U. S. financial institution located in New York, New York ("U.S. Bank 1") to process an approximately $10 million U. S. dollar transaction involving a Sanctioned Entity in Sudan by concealing from U. S. Bank 1 the involvement of the Sanctioned Entity.

b. In or about November 2012, BNPP, through its headquarters in Paris, France ("BNPP Paris"), processed an approximately $6.5 million U.S. dollar transaction on behalf of a corporation controlled by an Iranian entity through BNPP New York.

c. On or about November 24, 2009, BNPP Paris processed an approximately $213, 027 U.S. dollar transaction through BNPP New York in connection with a U. S. dollar denominated credit facility that provided financing to various Sanctioned Entities in Cuba.

(Title 18, United States Code, Section 371.)

FORFEITURE ALLEGATION

6. As a result of committing the offense alleged in Count One of this Information, BNPP, the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981 (a) (1) (C) and Title 28, United States Code, Section 2461 (c), all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offense, including but not limited to a sum of money in United States currency totaling $8,833,600,000.

Substitute Assets Provision

7. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853 (p), to seek forfeiture of any other property of the defendant up to the value of the forfeitable property described above.

(Title 18, United States Code, Section 981(a)(1)(C); Title 21, United States Code, Section 853(p); and Title 28, United States Code, Section 2461(c).)

LESLIE CALDWELL
Assistant Attorney General
Criminal Division

JAIKUMAR RAMASWAMY
Chief, Asset Forfeiture and Money Laundering Section

PREET BHARARA
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**UNITED STATES OF AMERICA**

**- v. -**

**BNP PARIBAS S.A.,**

**Defendant.**

**INFORMATION**

14 Cr. ____

(18 U.S.C. § 371.)

PREET BHARARA
United States Attorney

Last updated: March 25, 2014 6:42 pm

# Banks pay out $100bn in US fines

By Richard McGregor and Aaron Stanley in Washington


Wall Street banks and their foreign rivals have paid out $100bn in US legal settlements since the financial crisis, according to Financial Times research, with more than half of the penalties extracted in the past year.

The sum reflects a substantial shift in political attitudes towards banks, as regulators and the Obama administration seek to counter perceptions that bankers have got off lightly for their role in the financial crisis.

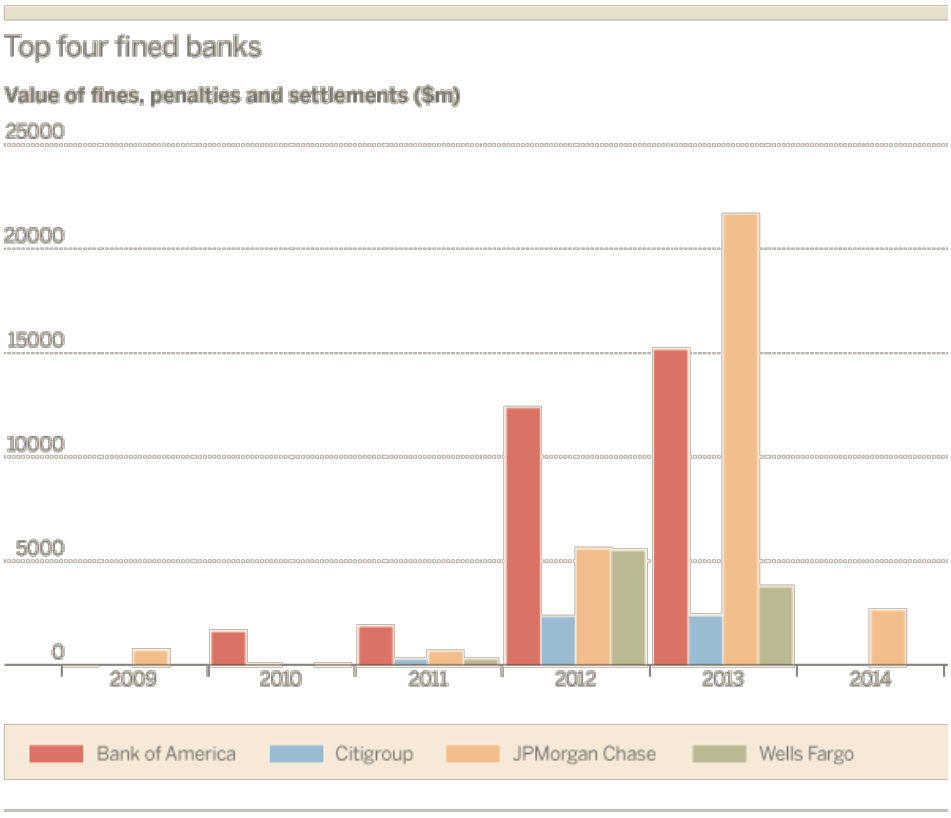
The milestone comes amid signs that banks' legal costs could rise further, with a number of large banks still under investigation by the task force set up by Barack Obama in 2012 and the political backlash still under way.

During stress tests last week, the Federal Reserve found that the biggest banks could still face a further $151bn bill for operational risk, repurchasing soured mortgage bonds and dealing with the falling value of buildings they own. Lawyers believe the bulk of this estimate is made up of expected litigation costs, suggesting the Fed is concerned that banks have misjudged badly their legal exposure.

Last week's $885m deal between Credit Suisse and the Federal Housing Finance Agency took the settlements to $99.5bn, of which $15.5bn came from foreign banks, according to an FT study of 200 fines and restitutions since 2007. A little more than $52bn of the total was paid out in 2013 alone. America's six big banks – JPMorgan Chase, Bank of America, Citigroup, Wells Fargo, Morgan Stanley and Goldman Sachs – had combined earnings of $76bn in 2013, just short of their collective peak in 2006.

The settlements and restitutions range from a high of $13bn, agreed to by JPMorgan Chase in a deal with the justice department, to fines as low as $1m. They span penalties levied by agencies such as the Commodity Futures Trading Commission and mortgage repurchases from Fannie Mae and Freddie Mac, the quasi-governmental US mortgage insurers.

The White House toughened its line from 2012 after complaints from Congress and Democratic voters about the failure to punish big banks for their role in the crisis compared to the impact on the broader community.




**Source:** FT Research
**Graphic:** Aaron Stanley, Kara Scannell, Tom Braithwaite, Gina Chon, Tom Pearson, Katie Carnie

Despite the large headline number and huge fines paid by individual banks, critics say they may have little impact on institutions with the capacity to easily absorb such penalties.

"The fines can be viewed as [a] 'cost of doing business'," said Anat Admati, of Stanford University. "They don't get at the heart of the problem, and aren't effective to change behaviour, because the strong incentives by individuals within the banks to keep engaging in the same practices remain in place."

However, Tony Fratto, of Hamilton Place Strategies in Washington, said the fines were "very substantial, in some cases orders of magnitude larger than anything we've seen in the past", and came on top of higher compliance costs imposed after the crisis.

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- Anat Admati, Stanford University

"If the goal is not to shutter banks, but to impress upon them the public interest in adhering to the law, and to better account for risk, the fines go beyond what was necessary," he said.

The more aggressive approach came after years in which the Obama administration had been criticised for not extracting enough big penalties from banks or pressing criminal charges against top executives.

The justice department and Eric Holder, the attorney-general, in particular, were repeatedly taken to task by Congress and sections of the media for failing to go after financial institutions.

In March last year, Mr Holder acknowledged before a congressional committee that some banks were "too large" to prosecute without risking a "negative impact" on the economy.

Since then, his approach has significantly toughened, along with the ratcheting up of pressure on Capitol Hill.

Two senators, Elizabeth Warren, a Democrat and an outspoken critic of Wall Street, and Tom Coburn, a Republican, introduced a bill in January that would force agencies to reveal the details of settlements reached with banks and other companies accused of wrongdoing.

Ms Warren earlier this month again called into question the effectiveness of regulatory enforcement in light of the recent pay increase for JPMorgan Chase's CEO Jamie Dimon.

At a Senate Banking Committee hearing, she questioned how Mr Dimon could receive a "fat pay bump" to $20m in 2013, a 74 per cent increase from the previous year, even after the bank had paid out record fines.

"I'm not confident the enforcement system is doing nearly enough," said Ms Warren, adding that the settlements did not appear to be translating into a deterrent for bad behaviour.

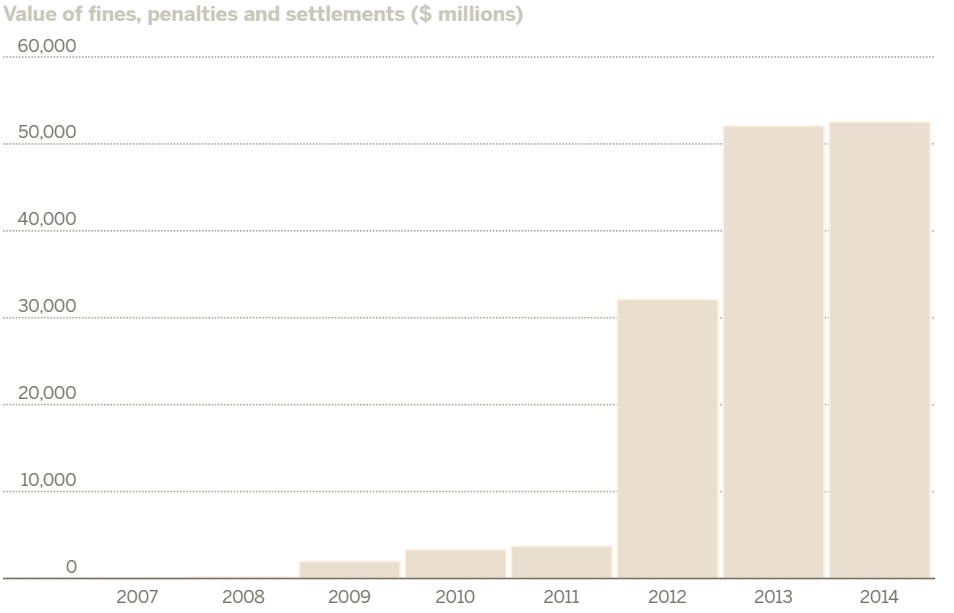
The fines cover the banks' practices in the foreclosure business, lending practices, market manipulation and fraudulently issuing mortgage-backed securities.

*Additional reporting by Tom Braithwaite in New York*

## US regulatory action against banks

1 2 3 4 5 6 7 8 9 10 Next >

Enforcement actions against banks and settled charges of wrongdoing have soared since the financial crisis...




Source: FT research

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2014

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U.S. Securities and Exchange Commission

Key Statistics (through August 21, 2014)

**Concealed from investors risks, terms, and improper pricing in CDOs and other complex structured products:**

Citigroup - SEC charged Citigroup's principal U.S. broker-dealer subsidiary with misleading investors about a $1 billion CDO tied to the housing market in which Citigroup bet against investors as the housing market showed signs of distress. The court approved a settlement of $285 million which will be returned to harmed investors. (10/19/11)

Commonwealth Advisors - SEC charged Walter A. Morales and his Baton Rouge-based firm with defrauding investors by hiding millions of dollars in losses suffered during the financial crisis from investments tied to residential mortgage-backed securities. (11/9/12)

Goldman Sachs - SEC charged the firm with defrauding investors by misstating and omitting key facts about a financial product tied to subprime mortgages as the U.S. housing market was beginning to falter. (4/16/10)

Goldman Settled Charges - Firm agreed to pay record penalty in $550 million settlement and reform its business practices. (7/15/10)

*Fabrice Tourre Found Liable* - A jury found former Goldman Sachs Vice President Fabrice Tourre liable for fraud relating to his role in a synthetic collateralized debt obligation tied to subprime residential mortgages. (8/1/13)

Harding Advisory LLC - SEC charged a Morristown, N.J.-based firm and its CEO for misleading investors in a CDO about the asset selection process. (10/18/13)

ICP Asset Management - SEC charged ICP and its president with fraudulently managing investment products tied to the mortgage markets as they came under pressure. (6/21/10)

ICP and President Settled Charges - ICP and its president Thomas Priore agreed to pay penalties and settle the SEC's charges (9/6/12)

J.P. Morgan Securities - SEC charged the firm with misleading investors in a complex mortgage securities transaction just as the housing market was starting to plummet. J.P. Morgan agreed to pay $153.6 million in a settlement that enables harmed investors to receive all of their money back. (6/21/11)

Merrill Lynch - SEC charged the firm with making faulty disclosures about collateral selection for two CDOs that it structured and marketed to investors, and maintaining inaccurate books and records for a third CDO. Merrill Lynch agreed to pay $131.8 million to settle the charges. (12/12/13)

Mizuho Securities USA - SEC charged the U.S. subsidiary of Japan-based Mizuho Financial Group and three former employees with misleading investors in a CDO by using "dummy assets" to inflate the deal's credit ratings while the housing market was showing signs of severe stress. The SEC also charged the deal's collateral manager and portfolio manager. Mizuho agreed to pay $127.5 million to settle the charges, and the others also agreed to settlements. (7/18/12)

NIR Capital Management - SEC charged the two managing partners of the Charlotte, N.C.-based investment advisory firm for compromising their independent judgment and allowing a third party to influence the portfolio selection process of a CDO. Scott H. Shannon and Joseph G. Parish III agreed to collectively pay more than $472,000 to settle the charges. (12/12/13)

Stifel, Nicolaus & Co. - SEC charged the St. Louis-based brokerage firm and a former senior executive with defrauding five Wisconsin school districts by selling them unsuitably risky and complex investments. (8/10/11)

RBC Capital Markets - SEC charged the firm for misconduct in the sale of unsuitable CDO investments to five Wisconsin school districts. The firm settled the charges by paying $30.4 million to be distributed to the school districts through a Fair Fund. (9/27/11)

Wachovia Capital Markets - SEC charged the firm with misconduct in the sale of two CDOs tied to the performance of residential mortgage-backed securities as the housing market was beginning to show signs of distress. Firm settled charges by paying more than $11 million, much of which will be returned to harmed investors. (4/5/11)

Wells Fargo - SEC charged Wells Fargo's brokerage firm and a former vice president for selling investments tied to mortgage-backed securities without fully understanding their complexity or disclosing the risks to investors. Wells Fargo agreed to pay more than $6.5 million to settle the charges. (8/14/12)

UBS Securities - SEC charged UBS Securities with violating securities laws while structuring and marketing a CDO by failing to disclose that it retained millions of dollars in upfront cash that should have gone to the CDO for the benefit of its investors. UBS agreed to pay nearly $50 million to settle the SEC's charges. (8/6/13)

**Made misleading disclosures to investors about mortgage-related risks and exposure:**

American Home Mortgage - SEC charged executives with accounting fraud and misleading investors about the company's deteriorating financial condition as the subprime crisis emerged. Former CEO settled charges by paying $2.45 million and agreeing to five-year officer and director bar. (4/28/09)

BankAtlantic - SEC charged the holding company for one of Florida's largest banks and CEO Alan Levan with misleading investors about growing problems in one of its significant loan portfolios early in the financial crisis. (1/18/12)

Bank of America - SEC charged Bank of America and two subsidiaries with defrauding investors in an offering of residential mortgage-backed securities by failing to disclose key risks and misrepresenting facts about the underlying mortgages. (8/6/13)

Bank of America settles charges as part of global settlement (8/21/14)

Bank of America - SEC files new additional charges as part of a global settlement in which Bank of

America admits that it failed to inform investors during the financial crisis about known uncertainties to future income from its exposure to repurchase claims on mortgage loans. The bank agreed to pay a $20 million penalty. (8/21/14)

Citigroup - SEC charged the company and two executives with misleading investors about exposure to subprime mortgage assets. Citigroup paid $75 million penalty to settle charges, and the executives also paid penalties. (7/29/10)

Commonwealth Bankshares - SEC charged three former bank executives in Virginia for understating millions of dollars in losses and masking the true health of the bank's loan portfolio at the height of the financial crisis. (1/9/13)

Countrywide - SEC charged CEO Angelo Mozilo and two other executives with deliberately

Countrywide - SEC charged CEO Angelo Mozilo and two other executives with deliberately misleading investors about significant credit risks taken in efforts to build and maintain the company's market share. Mozilo also charged with insider trading. (6/4/09)

Mozilo Settled Charges - Agreed to record $22.5 million penalty and permanent officer and director bar. (10/15/10)

Credit Suisse Securities (USA) SEC charged the firm with misleading investors in offering of residential mortgage-backed securities. Credit Suisse agreed to pay $120 million to settle the SEC's charges. (11/16/12)

Franklin Bank - SEC charged two top executives with securities fraud for misleading investors about increasing delinquencies in its single-family mortgage and residential construction loan portfolios at the height of the financial crisis. (4/5/12)

Fannie Mae and Freddie Mac - SEC charged six former top executives of Fannie Mae and Freddie Mac with securities fraud for misleading investors about the extent of each company's holdings of higher-risk mortgage loans, including subprime loans. (12/16/11)

IndyMac Bancorp - SEC charged three executives with misleading investors about the mortgage lender's deteriorating financial condition. (2/11/11)

CEO Settles Case - IndyMac's former CEO and chairman of the board Michael Perry agreed to pay an $80,000 penalty. (9/28/12)

J.P. Morgan Securities - SEC charged the firm with misleading investors in offerings of residential mortgage-backed securities. J.P. Morgan Securities agreed to pay $296.9 million to settle the SEC's charges. (11/16/12)

Morgan Stanley - SEC charged three firm entities with misleading investors about the delinquency status of mortgage loans underlying two subprime residential mortgage-backed securities securitizations that the firms underwrote, sponsored, and issued. Morgan Stanley agreed to settle the charges by paying $275 million to be returned to harmed investors. (7/24/14)

New Century - SEC charged three executives with misleading investors as the lender's subprime mortgage business was collapsing. (12/7/09)

Executives Settled Charges - Paid more than $1.5 million and each agreed to five-year officer and director bars. (7/30/10)

Option One Mortgage Corp. - SEC charged the H&R Block subsidiary with misleading investors in several offerings of subprime residential mortgage-backed securities by failing to disclose that its financial condition was significantly deteriorating. The firm agreed to pay $28.2 million to settle the charges. (4/24/12)

RBS Securities - SEC charged the Royal Bank of Scotland subsidiary with misleading investors in a subprime RMBS offering. RBS agreed to settle the charges and pay $150 million for the benefit of harmed investors. (11/7/13)

Thornburg executives - SEC charged three executives at formerly one of the nation's largest mortgage companies with hiding the company's deteriorating financial condition at the onset of the financial crisis. (3/13/12)

TierOne Bank executives - SEC charged three former bank executives in Nebraska for participating in a scheme to understate millions of dollars in losses and mislead investors and federal regulators at the height of the financial crisis. Two executives settled the charges by paying penalties and agreeing to officer-and-director bars. (9/25/12)

TierOne auditors - SEC charged two KPMG auditors for their roles in the failed audit of TierOne Bank. (1/9/13)

**Concealed the extent of risky mortgage-related and other investments in mutual funds and other financial products:**

Bear Stearns - SEC charged two former Bear Stearns Asset Management portfolio managers for fraudulently misleading investors about the financial state of the firm's two largest hedge funds and their exposure to subprime mortgage-backed securities before the collapse of the funds in June 2007. (6/19/08)

Cioffi and Tannin Settled Charges - Agree to pay more than $1 million and accept industry bars. (6/18/12)

Charles Schwab - SEC charged entities and executives with making misleading statements to investors in marketing a mutual fund heavily invested in mortgage-backed and other risky securities. The Schwab entities paid more than $118 million to settle charges. (1/11/11)

Evergreen - SEC charged the firm with overstating the value of a mutual fund invested primarily in mortgage-backed securities and only selectively telling shareholders about the fund's valuation problems. Evergreen settled the charges by paying more than $40 million, most of which was returned to harmed investors. (6/8/09)

The SEC also charged the lead portfolio manager of the fund, Lisa Premo. In December 2012, a judge found Premo liable for aiding and abetting some of Evergreen's violations, and she was barred from working as an investment adviser for five years.

Morgan Keegan - SEC charged the firm and two employees with fraudulently overstating the value of securities backed by subprime mortgages (4/7/10)

Morgan Keegan Settled Charges - Firm agreed to pay $100 million to the SEC and the two employees also agreed to pay penalties, including one who agreed to be barred from the securities industry. (6/22/11)

OppenheimerFunds - SEC charged the investment management company and its sales distribution arm for misleading statements about two of its mutual funds that had substantial exposure to commercial mortgage-backed securities during the midst of the credit crisis in late 2008. (6/6/12)

Reserve Fund - SEC charged several entities and individuals who operated the Reserve Primary Fund for failing to provide key material facts to investors and trustees about the fund's vulnerability as Lehman Brothers sought bankruptcy protection. (5/5/09)

State Street - SEC charged the firm with misleading investors about exposure to subprime

investments while selectively disclosing more complete information to specific investors. State Street agreed to repay investors more than $300 million to settle the charges. (2/4/10)

Two Former State Street Employees Charged - Accused of misleading investors about exposure to subprime investments. (9/30/10)

TD Ameritrade - SEC charged the firm with failing to supervise representatives who mischaracterized the Reserve Fund as safe as cash and failed to disclose risks when offering the investment to customers. Firm settled charges by agreeing to repay $10 million to certain fund investors. (2/3/11)

### Others

Aladdin Capital Management - SEC charged the Connecticut-based investment adviser, its affiliated broker-dealer, and a former executive with falsely stating to clients that it had "skin in the game" for two CDOs. Aladdin and its broker-dealer agreed to pay more than $1.6 million combined, and the former executive agreed to pay a $50,000 penalty. (12/17/12)

Bank of America - SEC charged the company with misleading investors about billions of dollars in bonuses being paid to Merrill Lynch executives at the time of its acquisition of the firm, and failing to disclose extraordinary losses that Merrill sustained. Bank of America paid $150 million to settle charges. (2/4/10)

Brooke Corporation - SEC charged six executives for misleading investors about the firm's deteriorating financial condition and for engaging in various fraudulent schemes designed to conceal the firm's rapidly deteriorating loan portfolio. Five executives agreed to settlements including financial penalties and officer and director bars. (5/4/11)

Former CEO Settled Charges - The sixth executive agreed to an officer and director bar and financial penalty. (9/8/11)

Brookstreet - SEC charged the firm and its CEO with defrauding customers in its sales of risky mortgage-backed securities. (12/8/09)

Judge Orders Brookstreet CEO to Pay $10 Million Penalty - Stanley Brooks and Brookstreet Securities ordered to pay $10,010,000 penalty and $110,713.31 in disgorgement and prejudgment interest. (3/2/12)

Brookstreet Brokers Charged - SEC charged 10 Brookstreet brokers with making misrepresentations to investors in sale of risky CMOs. (5/28/09)

Capital One - SEC charged Capital One Financial Corporation and two senior executives for understating millions of dollars in auto loan losses incurred during the months leading into the financial crisis. Capital One agreed to pay $3.5 million to settle the SEC's charges. The two senior executives also agreed to pay penalties to settle the claims against them. (4/24/13)

Claymore Advisors/Fiduciary Asset Management - SEC charged two investment advisory firms and two portfolio managers for failing to adequately inform investors about a closed-end fund's risky derivative strategies that contributed to its collapse during the financial crisis. Claymore agreed to distribute $45 million to fully compensate investors for losses related to the problematic trading, and Fiduciary Asset Management agreed to pay more than $2 million. (12/19/12)

**Colonial Bank and Taylor, Bean & Whitaker (TBW)** - SEC charged executives at the bank and the major mortgage lender for orchestrating $1.5 billion scheme with fabricated or impaired mortgage loans and securities, and attempting to scam the TARP program.

Lee Farkas, Chairman of TBW (6/16/10)

Desiree Brown, Treasurer of TBW (2/24/11)

Catherine Kissick, Vice President at Colonial Bank (3/2/11)

Teresa Kelly, Supervisor at Colonial Bank (3/16/11)

Paul Allen, CEO of TBW (6/17/11)

Credit Suisse bankers - SEC charged four former veteran investment bankers and traders for their roles in fraudulently overstating subprime bond prices in a complex scheme driven in part by their desire for lavish year-end bonuses. (2/1/12)

Fifth Third Bank - SEC charged the holding company of the Cincinnati-based bank and its former CFO for improper accounting of commercial real estate loans in the midst of the financial crisis. (12/4/13)

Jefferies & Co. executive - SEC charged a former executive at a New York-based broker-dealer with defrauding investors while selling mortgage-backed securities in the wake of the financial crisis so he could generate additional revenue for his firm. (1/28/13)

SEC charged Jefferies LLC with failing to supervise employees who lied to customers about the prices that the firm paid for certain mortgage-backed securities. Jefferies settled the charges and agreed to pay a total of $25 million to defrauded customers, the SEC, and the U.S. Attorney's Office for the District of Connecticut. (3/12/14)

KCAP Financial - SEC charged three top executives at a New York-based publicly traded fund being regulated as a business development company with overstating the fund's assets during the financial crisis. The executives agreed to pay financial penalties to settle the SEC's charges. (11/28/12)

UCBH Holdings Inc. - SEC charged former bank executives with misleading investors about mounting loan losses at San Francisco-based United Commercial Bank and its public holding company during the height of the financial crisis. (10/11/11)

company during the height of the financial crisis. (10/11/11)

SEC charged a former bank executive with misleading the bank's independent auditors regarding risks the bank faced on certain outstanding loans. (3/27/12)

Western Asset Management - SEC charged the Legg Mason subsidiary with engaging in illegal cross trading during the financial crisis, improperly allocating millions of dollars in savings to some clients at the expense of others. Western Asset Management agreed to settle the charges by paying a $1 million penalty and returning more than $7.4 million to harmed investors. (1/27/14)

**Stats (as of Aug. 21, 2014)**

| | |
|---|---|
| Number of Entities and Individuals Charged | 174 |
| Number of CEOs, CFOs, and Other Senior Corporate Officers Charged | 70 |
| Number of Individuals Who Have Received Officer and Director Bars, Industry Bars, or Commission Suspensions | 40 |
| Penalties Ordered or Agreed To | > $1.87 billion |
| Disgorgement and Prejudgment Interest Ordered or Agreed To | > $1.27 billion |
| Additional Monetary Relief Obtained for Harmed Investors | $418 million* |
| Total Penalties, Disgorgement, and Other Monetary Relief | > $3.57 billion |

* In settlements with Evergreen, J.P. Morgan, State Street, TD Ameritrade, and Claymore Advisors

*http://www.sec.gov/spotlight/enf-actions-fc.shtml*

**U. S. Department of Justice**

Office of the Deputy Attorney General

*Washington, D.C. 20530*

August 28, 2008

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Mark Filip
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Attached to this memorandum is a revision of the Principles of Federal Prosecution of Business Organizations, previously issued by Deputy Attorney General Paul McNulty in December 2006. The revised Principles will be set forth for the first time in the *United States Attorneys' Manual,* and will be binding on all federal prosecutors within the Department of Justice. The revised Principles will be effective immediately, on a prospective basis.

The Department of Justice, through the Deputy Attorney General's Office, has undertaken periodic revision of its policies concerning factors to consider in the prosecution of business organizations. Such revisions should not be understood as criticism of prosecutors who applied the prior policies diligently and in good faith, but rather as an effort to refine the Department's policy guidance in light of lessons learned from the Department's prosecutions as well as comments from other actors within the criminal justice system, the judiciary, and the broader legal community. As explained further below, the principal revisions to the Principles concern what measures a business entity must take to qualify for the long-recognized "cooperation" mitigating factor, as well as how payment of attorneys' fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement, will be considered in the prosecutive analysis. Much of the remainder of the Principles is unchanged.

General policy guidance is, of course, important. So too is thorough training and supervision, which the Department will provide to ensure compliance with these revised Principles. But there is no substitute for the application of considered judgment by line prosecutors and United States Attorneys throughout the Nation, and by their counterparts at Main Justice in Washington, D.C. The Department and Nation are best served when federal prosecutors thoughtfully and fairly consider these Principles and apply them consistent with our concurrent mandates: (1) to aggressively enforce the law; (2) to respect the rights of criminal defendants and others involved in the criminal justice process; and (3) to promote fair outcomes for the American people.

Thank you to the many leaders of the Department who participated in the dialogue that

led to these revisions. This was truly a collective effort, which is why these Principles should not bear the name of any particular individual at the Department, as prior iterations sometimes became known. In addition, that earlier practice has drawn criticism from some quarters for implying that Department policy is subject to revision with every changing of the guard. Accordingly, these Principles please should henceforth be referred to as the Department's "Principles of Federal Prosecution of Business Organizations," or the "Corporate Prosecution Principles," or by the relevant section of the United States Attorneys' Manual, as other sections typically are.

Title 9, Chapter 9-28.000

Principles of Federal Prosecution of Business Organizations

## 9-28.000 Principles of Federal Prosecution of Business Organizations[1]

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

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and by bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, to take just a few examples: (1) protecting the integrity of our free economic and capital markets; (2) protecting consumers, investors, and business entities that compete only through lawful means; and (3) protecting the American people from misconduct that would violate criminal laws safeguarding the environment.

In this regard, federal prosecutors and corporate leaders typically share common goals. For example, 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 in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal cases are designed to serve.

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. 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 we do our job as prosecutors—including the professionalism we demonstrate, our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation, and also our appreciation that corporate prosecutions can potentially harm blameless investors, employees, and others—affects public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion. This endeavor requires the thoughtful analysis of all facts and circumstances presented in a given case. As always, professionalism and civility play an important part in the Department's discharge of its responsibilities in all areas, including the area of corporate investigations and prosecutions.

### 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. Indicting corporations 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.

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[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed further below. In doing so, prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted 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 indicting a corporation under such circumstances.

In certain instances, it may be appropriate, upon consideration of the factors set forth herein, to resolve a corporate criminal case by means other than indictment. 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 Section X, *infra.* Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in Section XI, *infra.*

Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, particularly if it relates to 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.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. 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 his 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 (both 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. *See United States v. Potter,* 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is "whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation."). In *United States v. Automated Medical Laboratories, Inc.,* 770 F.2d 399 (4th Cir. 1985), for example, the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite the corporation's claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." *Id.* at 407. The court stated, "Partucci was clearly acting in part to benefit

AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." *Id.; see also United States v. Cincotta,* 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

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.

770 F.2d at 407 (internal citation omitted) (quoting *Old Monastery Co. v. United States,* 147 F.2d 905, 908 (4th Cir. 1945)).

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* USAM § 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 infra* section IV);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management *(see infra* section V);

3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it *(see infra* section VI);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents *(see infra* section VII);

5. the existence and effectiveness of the corporation's pre-existing compliance program *(see infra* section VIII);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies *(see infra* section IX);

7. 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 infra* section X);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions *(see infra* section XI).

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 such as 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.

In making a decision to charge a corporation, the prosecutor generally has 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. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate "person."

9-28.400 Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, tax, and criminal law enforcement policies. In applying these Principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required by the facts presented.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.,* voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate.

9-28.500 Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. 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. On the other hand, it may not be appropriate to impose liability upon 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. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role and conduct of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

USSG § 8C2.5, cmt. (n. 4).

9-28.600 The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges and how best to resolve cases.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it. The corporate structure itself *(e.g,* the creation or existence of subsidiaries or operating divisions) is not dispositive in this analysis, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane. *See* USSG § 8C2.5(c), cmt. (n. 6).

9-28.700 The Value of Cooperation

A. General Principle: In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.

Cooperation is a potential 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.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often 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 *(see, e.g, supra* section II), uncertainty about exactly 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. Moreover, and at a minimum, a protracted government investigation of such an issue could, as a collateral consequence, disrupt the corporation's business operations or even depress its stock price.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government—and ultimately shareholders, employees, and other often blameless victims—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. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, and critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

### 9-28.710 Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. *See Upjohn v. United States,* 449 U.S. 383, 389 (1981). As the Supreme Court has stated, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been

used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.

The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those 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. The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

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 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 disclose the relevant facts of which it has knowledge.[2]

(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

[2] There are other dimensions of cooperation beyond the mere disclosure of facts, of course. These can include, for example, providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records. This section of the Principles focuses solely on the disclosure of facts and the privilege issues that may be implicated thereby.

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.[3] On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

> [A]n . . . attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.

H.R. Rep. No. 110-445 at 4 (2007).

In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether

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[3] By way of example, corporate personnel are typically interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.

it chooses to waive privilege or work product protection in the process.[4] Likewise, a corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive 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 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 Section III above. 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 relevant potential mitigating factor, but it alone is not dispositive.

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes.[5] Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine. A

[4] In assessing the timeliness of a corporation's disclosures, prosecutors should apply a standard of reasonableness in light of the totality of circumstances.

[5] These privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct. They would include, for instance, legal advice provided by corporate counsel in an internal investigation report. Again, the key measure of cooperation is the disclosure of factual information known to the corporation, not the disclosure of legal advice or theories rendered in connection with the conduct at issue (subject to the two exceptions noted in Section VII(2)(b)(i-ii)).

corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit.

(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. *See, e.g, Pitt v. Dist. of Columbia,* 491 F.3d 494, 504-05 (D.C. Cir. 2007); *United States v. Wenger,* 427 F.3d 840, 853-54 (10th Cir. 2005); *United States v. Cheek,* 3 F.3d 1057, 1061-62 (7th Cir. 1993). The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney-client privilege. *See United States v. Zolin,* 491 U.S. 554, 563 (1989); *United States v. BDO Seidman, LLP,* 492 F.3d 806, 818 (7th Cir. 2007). As a result, the Department may properly request such communications if they in fact exist.

9-28.730 Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation. Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.[6] Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. § 1503. If the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the

[6] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, sometimes arise in the course of an investigation under certain circumstances—to take one example, to assess conflict-of-interest issues. Such questions can be appropriate and this guidance is not intended to prohibit such limited inquiries.

condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.

Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.

Finally, it may on occasion be appropriate for the government to consider whether the corporation has shared with others sensitive information about the investigation that the government provided to the corporation. In appropriate situations, as it does with individuals, the government may properly request that, if a corporation wishes to receive credit for cooperation, the information provided by the government to the corporation not be transmitted to others—for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets.

### 9-28.740 Offering Cooperation: No Entitlement to Immunity

A corporation's offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents. Thus, a corporation's willingness to cooperate is not determinative; that factor, while relevant, needs to be considered in conjunction with all other factors.

### 9-28.750 Qualifying for Immunity, Amnesty, or Reduced Sanctions Through Voluntary 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 disclose the relevant facts to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division has a policy of offering amnesty only to the first corporation to agree to cooperate. Moreover, amnesty, immunity, or reduced sanctions may not be appropriate

where the corporation's business is permeated with fraud or other crimes.

9-28.760 Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection By Corporations Contrary to This Policy

The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General. Like any other allegation of attorney misconduct, such allegations are subject to potential investigation through established mechanisms.

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 any problems 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. In addition, the nature of some crimes, *e.g.,* antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

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. See United States v. Basic Constr. Co.,* 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions."). As explained in *United States v. Potter,* 463 F.3d 9 (1st Cir. 2006), 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." *Id.* at 25-26. *See also United States v. Hilton Hotels Corp.,* 467 F.2d 1000, 1007 (9th Cir. 1972) (noting that a corporation "could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks"); *United States v. Beusch,* 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.").

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 pressuring 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: 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? In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.[7] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *See, e.g., In re Caremark Intl Inc. Derivative Litig.,* 698 A.2d 959, 968-70 (Del, Ch. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. 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. This will enable the prosecutor 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 the particular types of misconduct most likely to occur in a particular corporation's line of business. Many 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 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 compliance programs and can be helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist

[7] For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG § 8B2.1.

United States Attorneys' Offices in finding the appropriate agency office(s) for such consultation.

9-28.900 Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases.

B. Comment: In determining whether or not to prosecute a corporation, the government may consider whether the corporation has taken meaningful remedial measures. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.

Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct. Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. Although corporations need to be fair to their employees, they must also be committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. Prosecutors should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its acceptance of responsibility and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to appropriate disposition of a case.

9-28.1000 Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing, and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution

for victims.[8] Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.

9-28.1100 Other Civil or Regulatory Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution—*e.g.*, civil or regulatory enforcement actions—the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to a serious violation, a pattern of wrongdoing, or prior non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied through civil or regulatory actions. In determining whether a federal criminal resolution is appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

9-28.1200 Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor at least presumptively should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's misconduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal

[8] Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See id. §* 927.641.

criminal code, and maximize the impact of Federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, *inter alia,* such factors as the [advisory] sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *Id.*

9-28.1300 Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, as with individuals, prosecutors should generally seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees,

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-530. This means, *inter alia,* that the corporation should generally be required to plead guilty to the most serious, readily provable offense charged. In addition, any negotiated departures or recommended variances from the advisory Sentencing Guidelines must be justifiable under the Guidelines or 18 U.S.C. § 3553 and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and that ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors. *See* USSG §§ 8B1.1, 8C2.1, *et seq.* In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in fraud against the government *(e.g.,* contracting fraud), a prosecutor may not negotiate away an agency's right to debar or delist the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals as outlined herein. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in

the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. *See supra* section VIII.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is entirely truthful. To do so, the prosecutor may request that the corporation make appropriate disclosures of relevant factual information and documents, make employees and agents available for debriefing, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible personnel are identified and, if appropriate, prosecuted. *See generally supra* section VII. In taking such steps, Department prosecutors should recognize that attorney-client communications are often essential to a corporation's efforts to comply with complex regulatory and legal regimes, and that, as discussed at length above, cooperation is not measured by the waiver of attorney-client privilege and work product protection, but rather is measured by the disclosure of facts and other considerations identified herein such as making witnesses available for interviews and assisting in the interpretation of complex documents or business records.

These Principles provide only 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 litigative prerogatives of the Department of Justice.

# *Faculty Biography: John Fagg*

**Member | Moore & Van Allen | Charlotte, NC**

704.331.3622 | johnfagg@mvalaw.com
http://www.mvalaw.com/professionals-279.html

John Fagg is a member in Moore & Van Allen's Litigation Group. In addition to being an experienced trial lawyer, Mr. Fagg has extensive experience in conducting internal investigations and representing clients in domestic, international, and cross-border regulatory enforcement and white collar criminal defense matters.

In his white collar criminal defense and government investigations practice, Mr. Fagg has represented clients in regulatory, enforcement, and criminal matters involving the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Department of Justice (DOJ), the U.K. Financial Conduct Authority (FCA), the Monetary Authority of Singapore, various U.S. Attorneys' offices, numerous state attorneys general's offices, and the Food & Drug Administration (FDA), as well as self-regulatory bodies such as the Financial Industry Regulatory Authority (FINRA). He regularly conducts corporate internal investigations, including sensitive matters involving allegations of securities violations and alleged violations of federal and state laws and regulations.

Mr. Fagg has extensive litigation experience in a wide variety of complex litigation matters, including financial services litigation, defense of shareholder derivative suits, products liability claims, complex commercial disputes, allegations of unfair trade practices, and the defense of environmental claims in both the federal and state court systems.

Mr. Fagg has defended clients in serial litigation in federal and state courts throughout the United States and in multi-district litigation.

Mr. Fagg also has an active pro bono practice in which he represents indigent defendants in federal criminal cases.

**Practice Areas**

- Class Actions & Multi-District Litigation
- Environmental Litigation & Toxic Torts
- Financial Services & Insolvency Litigation
- Litigation
- Product Liability and Tort Litigation
- Securities, Corporate Governance & Sarbanes-Oxley
- White Collar, Regulatory Defense, and Investigations

**Education**

- B.A., University of North Carolina at Chapel Hill, 1999
- J.D., Wake Forest University, 2002