LONE WOLF OR THE START OF A NEW PACK: SHOULD THE FCPA GUIDANCE REPRESENT A NEW PARADIGM IN EVALUATING CORPORATE CRIMINAL LIABILITY RISKS?

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Traditionally, companies have relied on the judicial system to determine the scope of corporate criminal liability and companies have assessed and addressed corporate criminal liability risks based on judicial determinations, but a different model appears to be emerging in the Foreign Corrupt Practice Act (FCPA) context where very little is litigated through the courts. In the past year, the Department of Justice, in conjunction with the Securities and Exchange Commission, published a comprehensive 120-page resource guide on the FCPA. The guidance reads like a legal treatise describing key areas of the law and enforcement principles, providing detailed hypotheticals, and offering practical tips for reducing liability risks and complying with the law.

This article examines the reasons behind the development of the guidance, evaluates whether this type of guidance is unique in the corporate criminal liability context, and assesses whether extra-judicial guidance is desirable in the FCPA and other criminal enforcement contexts.

I. Introduction

In November 2012, the Department of Justice ("DOJ"), in conjunction with the Securities and Exchange Commission ("SEC"), issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("the FCPA Guidance" or "Guide").[1] What is most striking about the 120-page FCPA Guidance is not its content, but rather the

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1. U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) [hereinafter "FCPA Guide"], *available at* http://www.justice.gov/criminal/fraud/fcpa/guidance/.

fact that the DOJ co-issued it. The DOJ is an enforcement agency, not a regulatory agency, and typically one does not think of an enforcement agency as a guiding hand overseeing and aiding legal compliance by those who fall within its enforcement jurisdiction. This is particularly true of an agency with criminal enforcement authority. The statutory line between permissible behavior and criminal conduct is supposed to be clearly drawn. Corporations and individuals are expected to stay on the right side of the line. The DOJ is not supposed to tell them in advance what would cross the line and what would not. Rather, the way criminal enforcement works is that we should all know what is unlawful based on statutes, regulations, and court decisions, and we are all responsible for not engaging in criminal conduct. If, in the DOJ's view, a corporation or an individual has crossed the line, the DOJ will pursue criminal charges. So why has the DOJ issued the FCPA Guidance?

As an initial matter, it is important to note that the issuance of the FCPA Guidance is not the DOJ's first foray into providing guidance to corporations and individuals on what violates the FCPA. Since its inception, the DOJ has had a process through which it issues FCPA advisory opinions. The DOJ's regulations describe the process, which was revamped in 1993, as "procedures [that] enable issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act of 1977."[2] Although the current procedures have been available for almost twenty years, they have been used relatively infrequently. Indeed, the DOJ issues an average of only about two opinions per year through this process.[3] Despite the infrequency of its use, the long-standing availability of this opinion process demonstrates that the notion of a criminal enforcement agency offering guidance as to what does and what does not violate the FCPA is not entirely new.

Advisory opinions in the criminal law enforcement context are not unique to the FCPA. The DOJ has also been issuing "business review" letters through its Antitrust Division since 1968.[4] Through this program, those concerned about the legality of a proposed business relationship may obtain guidance regarding the DOJ's enforcement intentions, should the relationship be consummated. An advisory opinion process impacting potentially criminal conduct also exists in the healthcare context where, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Office of the Inspector General ("OIG") of the Department of Health and Human Services may issue advisory opinions about

2. 28 C.F.R. § 80.1 (2012).

3. *See Summaries for Opinion and Review Procedure Releases*, FRAUD SECTION, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/summaries/ (last visited Nov. 8, 2013).

4. *See Business Reviews*, ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/public/busreview/index.html (last visited Nov. 8, 2013).

whether proposed activity would constitute grounds for criminal enforcement under the anti-kickback statute of the Social Security Act (SSA).[5]

Despite the existence of transaction-specific guidance mechanisms, there is plainly a distinction between offering advisory opinions about specific facts presented by a party seeking such guidance and publishing 120 pages of commentary about what violates the law as the DOJ has now done with the FCPA Guidance. The FCPA Guidance appears to be an expansion of the DOJ's efforts to provide direction on what, from its perspective, violates the criminal law. It is a new type of guidance that is not intended to replace the advisory opinion process, but rather to add to the body of guidance available to corporations and individuals attempting to ensure that they do not cross the line of what the DOJ believes is criminally proscribed by the FCPA.

So why is such expansion necessary, or at least perceived to be necessary? Is it an implicit acknowledgement that the FCPA, even the criminal provisions of the FCPA, do not put the public on notice of what the statute forbids? If this is true, why is it true? And, is the provision of additional guidance the best way to solve the problem? Lastly, is the FCPA unique among criminal statutes? Does it make sense to have such extensive guidance for the FCPA, but not have similar guidance with respect to other criminal statutes? Can we or should we expect to see such guidance in other areas in the coming years from the DOJ? In other words, is the issuance of the FCPA Guidance the beginning of a trend, or is it merely a one-time event tailored to the idiosyncrasies of a specific criminal statute? This article explores each of these issues.

A good place to start the discussion is to consider how corporations and individuals have historically obtained guidance regarding what conduct would be considered criminal. Historically, criminal statutes typically had extremely high mens rea requirements. Presumably, an individual knows, for example, whether or not he is acting with the intent to defraud someone. And, a corporation would only be vicariously criminally liable for its employee's fraud if the employee acted with that intent. A trend in criminalizing conduct that previously might have been deterred through only civil litigation or regulatory enforcement has eroded traditional criminal mens rea requirements.[6]

Also, historically, the DOJ would pursue criminal charges against corporations (and more frequently individuals), and those charges would get litigated. Each of these litigated cases would provide judicial opinions regarding what conduct

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5. *See Advisory Opinions*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://oig.hhs.gov/compliance/advisory-opinions/index.asp (last visited Nov. 8, 2013).

6. *See, e.g.*, BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010) (analyzing the trend towards the use of criminal statutes to serve a regulatory purpose, the weakness or lack of mens rea requirements in these statutes, and the consequences of the erosion of strong mens rea requirements).

violates the criminal laws and what does not. Thus, in addition to the criminal statutes themselves, corporations and individuals (at least those advised by competent counsel) would have guidance available to them in the form of judicial opinions providing elaboration as to what specific fact patterns constituted criminal behavior and, likewise, what fact patterns did not.

This historical practice has run into two different trends, at least with respect to the FCPA, which have disrupted the paradigm of informing corporate and individual behavior through judicial guidance. First, while the DOJ has routinely prosecuted individuals under other white collar criminal statutes, there have been exceedingly few individuals prosecuted for violating the FCPA.[7] Second, in recent years exceedingly few corporations have litigated criminal charges. The latter is true both because of the DOJ's reluctance to prosecute corporations, in favor of negotiating non-prosecution or deferred prosecution agreements, and because of corporations' unwillingness to accept the risk associated with litigating criminal charges.[8] While this observation about the rarity of recently litigated cases against corporations applies to white collar criminal prosecutions generally, it also applies to FCPA prosecutions in particular.[9]

With respect to the DOJ's reluctance to litigate criminal charges against corporations, one can define the key source of reluctance easily: Arthur Andersen. After the collapse of the Enron Corporation, the DOJ brought criminal obstruction of justice charges against Enron's outside auditors, a "Big Five" accounting firm, Arthur Andersen.[10] The indictment of Arthur Andersen rapidly caused it to descend into a death spiral. The venerable, nearly ninety-year-old firm, which at one time had 28,000 employees in the United States and 85,000 employees around the globe, effectively folded. Arthur Andersen was convicted of criminal obstruction of justice in 2002.[11] The conviction was reversed three years later by a unanimous United States Supreme Court.[12] The "victory" for Arthur Andersen came far too late, however, to be anything other than a victory in name only. Not surprisingly, the DOJ came under considerable criticism for its prosecution of Arthur Andersen.[13] While the DOJ may have viewed Arthur Andersen as a repeat

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7. *See, e.g.*, Barry J. Pollack & Laura Billings, *After 30 Years of the FCPA, Will Courts Finally Get into the Act?*, CHAMPION, Sept./Oct. 2010, at 34, 34–38 (explaining that those charged with violating the FCPA have historically been companies rather than individuals).

8. *Id.* at 34 ("Most targets [of FCPA enforcement] have historically been companies that chose to settle pre-indictment rather than risk the potential downside of litigation.").

9. *Id.*

10. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 698–702 (2005).

11. *See id.*

12. *Id.* at 703–05 (holding that a federal obstruction of justice statute required proof of consciousness of wrongdoing).

13. *See, e.g.*, Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, WASH. POST, Nov. 23, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201852.html ("Critics of the government's aggressive efforts to crack down on business wrongdoing say the Andersen decision is the latest signal that prosecutors have overreached in an effort to boost investor confidence and calm the markets.").

offender that needed to be punished with the proverbial justification of the need to "send a message," the fact of the matter is that the prosecution of Arthur Andersen harmed thousands of employees who had nothing whatsoever to do with Enron or any other work by Arthur Andersen that had drawn regulatory scrutiny. Further, the public was harmed. The once "Big Eight" accounting firms had shrunk to the "Big Five" as a result of mergers that preceded the collapse of Arthur Andersen. Arthur Andersen's failure turned the "Big Five" into the "Big Four." We can see, therefore, that the problem of auditors being too close to their corporate clients for whom they were conducting supposedly independent audits was only exacerbated by the further concentration of audit work among even fewer big firms.

In sum, having been burned by its prosecution of Arthur Andersen, the DOJ started shying away from the flame of corporate prosecutions. Long before "too big to fail" came to symbolize the economic collapse of 2008, "too big to fail" had become an apt description of the DOJ's attitude towards corporate prosecutions.

On the flip side of the same coin, the dynamics have changed for corporations as well. Like the DOJ, corporations also learned the lesson of Arthur Andersen. In other words, the prosecution of Arthur Andersen and its impact did send a message, a message that corporate America heard loud and clear. Litigating against the DOJ was a losing proposition, even if you ultimately won. And criminal penalties have escalated dramatically in the years following the collapse of Enron and the resulting passage of Sarbanes-Oxley, increasing the risk of monetary penalties and reputational damage for corporations who want to fight rather than resolve criminal charges.[14] Moreover, the risk of prosecution by the DOJ is often only the tip of the iceberg for a corporation. Conviction may lead to debarment, the death penalty for a company that relies on government contracts, or exclusion, the death penalty for a health care provider who receives payments from Medicare or Medicaid. For publicly traded companies, criminal prosecution also is routinely accompanied by parallel SEC enforcement proceedings and civil shareholder litigation.

In sum, as reluctant as the DOJ has become post-Arthur Andersen to prosecute criminal charges against corporations, corporations have become even more reluctant to defend against such charges. The result is that criminal charges or potential criminal charges against corporations are almost always resolved by a negotiated resolution rather than through litigation.[15] Negotiated resolutions between the DOJ and corporations have also largely replaced litigated cases for other white collar criminal offenses beyond the FCPA, yet the DOJ routinely prosecutes individuals for these other offenses. In contrast, until recently, there have been few prosecutions of individuals for violating the FCPA. As a result, there have been exceedingly few criminal FCPA cases that have been fully

14. *See* Sarbanes-Oxley Act, Pub. L. No.107-204, §§ 901–06, 116 Stat. 745, 804–06 (2002).
15. *See* Pollack & Billings, *supra* note 7, at 34.

litigated.[16] Nor is the recent spate of individual FCPA prosecutions likely to change this trend in the long run. The DOJ has been largely unsuccessful in the individual FCPA cases it has litigated, both in terms of obtaining convictions and in terms of obtaining substantial terms of incarceration when it has obtained convictions. The DOJ may well decide that the resources it has put into individual prosecutions have not been sufficiently rewarded to warrant the continued expenditure of resources in this manner.

The reduced mens rea requirements[17] and broad wording of many white collar criminal statutes reduce the utility of the statutory language itself to provide clear guidance as to what exactly the law forbids and what it does not, and the lack of litigated cases results in a dearth of judicial guidance about what violates the law and what does not.

The DOJ has therefore stepped into the breach. When it announces its negotiated resolution of cases, it is effectively providing guidance on its enforcement theories and approaches. If a corporation pleads guilty or enters into a negotiated resolution based on a certain fact pattern, we know that this fact pattern, and presumably future similar fact patterns, will be deemed by the DOJ to cross the line of what is criminal.

But, by definition, the announcement of these settlements does not provide guidance as to what is not criminal. Assume, for example, that the DOJ investigates corporation *A* for six different potential criminal violations. Or, more likely in the modern world described above, a corporation is so concerned about the possibility of criminal prosecution, it voluntarily discloses to the DOJ six potential criminal violations. The company takes the position that of these six arguable violations, three are, in fact, violations of the law and three are not. The DOJ takes the position that five of the six constitute criminal violations. Ultimately, as a product of negotiation, the DOJ agrees that the fifth fact pattern did not cross the line and the corporation agrees that the fourth fact pattern did. The DOJ and corporation *A* then enter into a deferred prosecution agreement. Corporation *A* admits that it engaged in four sets of behavior that were criminal, pays a large monetary penalty and agrees to increase its compliance measures. The public reads this resolution and knows of four fact patterns that the DOJ believes cross the line. The public does not learn of the fifth and sixth fact patterns that the DOJ agreed, for the purposes of the negotiation, did not cross the line. Had the cases been litigated, the public would have learned that the DOJ charged the fifth fact pattern, but that this charge was dismissed by the court as failing to state an offense or that corporation *A* was acquitted of this charge and therefore that that fact pattern is not illegal, or, at a minimum, not likely to be prosecuted again.

The culture of negotiated resolution over litigation and judicial decision-making

16. *Id.*
17. *See* WALSH & JOSLYN, *supra* note 6, and accompanying text.

deprives the public of this valuable information. Put another way, corporations and individuals have not received any guidance about whether or not the fifth fact pattern constitutes criminal conduct.[18] Furthermore, without binding judicial precedent, the DOJ is under no obligation to treat the same conduct by different corporations with any consistency, increasing the challenges of corporate compliance and risk reduction.

This explains, at least in part, why the mere publication of negotiated resolutions is not an entirely satisfactory way for corporations and individuals to receive guidance as to what conduct does and what conduct does not violate a broadly-worded criminal law. Advisory opinions, called "opinion procedure releases," were intended to fill this void. The DOJ enacted regulations creating an opinion procedure whereby a corporation contemplating certain conduct could get the DOJ's opinion, before engaging in the conduct, as to whether or not the DOJ believed the conduct violated the criminal law. Yet not very many corporations have availed themselves of this opinion procedure.[19]

There may be a perception that the process is cumbersome and potentially harmful. Corporations may feel, for example, they will not get the guidance they need in time to act, as the process is fact-dependent. If the facts are evolving, by the time the opinion is received, the guidance may be out-of-date and no longer helpful. Corporations may fear that by seeking the guidance, they will draw enforcement scrutiny or increase their exposure to enforcement action. If a corporation takes action in the face of receiving an opinion from the DOJ that the action is unlawful, presumably it would be in a worse position than had it not asked the question in the first place. Contrast this with an opinion letter from the corporation's own counsel, which would remain confidential work product and not present a problem to the corporation if it ultimately fails to follow the counsel's advice. Moreover, even if a corporation follows the guidance offered by a DOJ opinion, the corporation may feel it is receiving little protection. If it gets an opinion that certain conduct is permissible and proceeds to engage in that conduct, it can be subject to scrutiny about whether or not it provided all of the relevant facts to the DOJ in seeking the opinion or whether the facts later changed.

While not every factor discussed above may apply to every corporation that has contemplated seeking a DOJ opinion, and conversely, while there may be many other factors that explain the infrequency with which the opinion procedure is utilized, the fact of the matter is that it is only infrequently utilized. Regardless of

18. Further, and equally importantly, the public is deprived of the information it would have received had the fourth fact pattern been litigated. Had corporation *A* been able to tolerate the risks associated with litigation and contested criminal liability for that fact pattern, it might have prevailed and there might be a published judicial decision stating that such facts do not constitute criminal behavior. Instead, the public is left with a deferred prosecution agreement stating that this fourth set of facts did constitute a violation.

19. *Summaries for Opinion and Review Procedure Releases*, *supra* note 3 (listing only thirty-six opinions since 1993).

the reasons, the opinion process has also not been an entirely satisfactory way to fill the guidance void caused by a vague statute and the little judicial guidance interpreting it, all of which may help explain an important part about why the FCPA Guidance was perceived to be necessary.