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# Doing Business in America in the New Millennium: Criminal Law Meets Corporate Responsibility

*Even before the recent U.S. corporate scandals and resulting 2002 Congressional legislation (the Sarbanes-Oxley Act), there were, and are, strict laws regulating the activities of corporate business in America. We have asked a guest writer to summarize extremely important prior legislation that cannot be overlooked, particularly by foreign corporations doing business in the United States.*

**T**he new millennium has brought with it a new legal responsibility for corporate America. The United States Congress has enacted — and the Department of Justice is now enforcing — laws governing corporations doing business in America. Federal prosecutors are now more willing to hold a company — and its senior executives — *criminally* responsible for the failure of its employees to act within the myriad of legal obligations imposed on companies that do business here. With today’s regulatory and prosecutorial climate, prudent companies will have the foresight to create mechanisms to detect and prevent violations of criminal laws. Doing so can maintain the continued viability of the corporation.

States will now be held criminally accountable for their actions. What was once treated as an SEC or civil tax matter may well result in a criminal investigation by the United States Attorney — and the manner in which a company responds to such an investigation may very well determine its survival. To protect itself from what would have seemed to be draconian consequences just months ago, a company must develop and maintain a *criminal compliance program* designed to meet the requirements of the 1991 Congressional Organizational Sentencing Guidelines (“the Guidelines”).

Designed in the aftermath of the Wall Street scandals of the 1980s, the Guidelines provide a framework for a corporation’s compliance with American criminal law. Although the Guidelines were enacted to punish criminal activities by corporations doing business in the United States, they also protect those corporations

## The History and Purpose of a Corporate Compliance Program

Recent history has shown that companies doing business in the United



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that implement such an internal criminal compliance program.

In enacting the Guidelines, Congress made this statement of policy:

Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. The *Guidelines* are designed so that the sanctions imposed upon organizations and their agents, taken together, will *provide* just punishment, adequate deterrence, and *incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct*. Culpability generally will be determined by the steps taken by the organization **prior** to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed.

## The Functioning of a Corporate Compliance Program

A compliance program can protect a company, its senior executives and board of directors. This is only true, however, if the program is enacted, implemented and utilized according to Guidelines authority. A Guidelines-tailored criminal compliance program

is a Code of Corporate Conduct, a written statement of the company's policies and rules that includes a definition of all applicable laws and regulations to which each employee is expected to adhere. It must be simple enough for all employees to understand, yet comprehensive enough to address all potential legal issues confronting the company. Moreover, to receive the ultimate protections anticipated by Congress, the Code must be properly maintained and monitored, with regular training as a staple. Many corporations that actually implement a criminal compliance program fail to reap the intended benefits because they fail to properly maintain or monitor the program. It is this monitoring, along with the proper training of company employees, that gives credence to the company's program in the eyes of law enforcement.

## The Benefits of a Corporate Compliance Program

The basic premise of such a program is that it will avoid the types of activities that will cause criminal issues to arise. However, in the event of a criminal investigation, the existence and correct maintenance of such a program may serve to prevent an indictment from being issued against the company as well as innocent officers and directors. If prosecution cannot be avoided, a Guidelines-based criminal compliance program can significantly minimize sanctions and militate against the imposition of dire criminal penalties.

Even the most vigorous prosecutor recognizes that very little can be done

to prevent an employee intent on committing a crime in the workplace from doing so. While a Guidelines-tailored program may or may not be able to detect such behavior, the program can isolate such conduct before it escalates into a corporate catastrophe. The senior management and the entire company can be protected from the actions of renegade employees.

This can be particularly useful to foreign companies that might be unaware of the complexity of American laws. What might be a benign business practice elsewhere may be illegal in the United States. What may have been previously treated as only a civil violation is now regarded as a criminal matter. A company can easily run afoul of American law in a multitude of ways

- Election law violations
- Labor law violations
- Tax fraud
- Antitrust offenses
- Securities fraud
- Bribery
- Kickbacks
- Money laundering
- Violations of the Foreign Corrupt Practices Act

Additionally, companies can incur criminal liability for conduct that had previously been treated as only civil wrongs

- Environmental violations
- Accounting irregularities
- Import/export violations
- Acts of wrongful discharge
- Sexual harassment
- Age/race/gender discrimination

To **avoid** criminal consequences to the company and its innocent executives, senior managers and boards of directors, a company must be proactive in developing an effective criminal compliance program. While compliance has long been a feature of EEO, OSHA and similar programs, compliance and legal managers often miss a critical distinction because there is often no similar “good faith” safe-harbor relief in many civil laws.

The participation of the entire organization is required to reap the ultimate benefits of a corporate compliance program. Self-policing procedures can be expensive to implement in terms of both time and money. Yet the prophylactic benefits greatly outweigh any burden, especially when the alternative could be a criminal indictment or a massive civil complaint. No corporation ever expects to be the subject of a grand jury or other federal criminal investigation. Yet, as recent history has shown, this can happen all too often. Companies that understand that the possibility exists and who take steps to protect themselves *before* such an occurrence can best weather any storm brought on by the wrongdoings of others.

## Historical Perspective

Until very recently, the most notable example of a company engulfed in *criminal* liability for the individual actions of its employees was the now-defunct airline maintenance company SabreTech Corporation. SabreTech was indicted by a Florida grand jury for manslaughter in the 1996 Everglades crash of a ValuJet airliner.

Prosecutors sought to hold the entire company criminally accountable for the actions of two of its employees, who had mislabeled combustible oxygen canisters that were carried as cargo on the ValuJet plane. Those oxygen canisters caught fire aboard the aircraft and caused the crash. Rather than charging only the two employees who were involved in the mislabeling, prosecutors sought additional indictments against the company and at least one of its senior executives. Charged with 110 counts of manslaughter (one count for each of the passengers killed in the crash), a jury acquitted the individual defendants but convicted the company. The penalties meted out to SabreTech at sentencing effectively put it out of business and hundreds of innocent employees lost their jobs. It was little consolation when, several years later, the company’s conviction was overturned on appeal.

Nor was SabreTech an isolated incident. In 2001, prosecutors in New York accused Sotheby’s, the venerable auction house, of price-fixing. A civil action against the company and the other auction house involved in the scheme, brought fines in excess of \$500 million dollars. Federal prosecutors also brought criminal charges for criminal fraud and price-fixing against the 78-year-old chairman of the board. His subsequent conviction and jail sentence was a signal to the corporate world that the government would no longer turn a blind eye to the criminal conduct of corporations or their executives. American law enforcement sent a clear message — it would not allow American corporations to evade its legal, *criminal*

responsibility. To the extent that SabreTech or Sotheby’s are thought to be isolated incidents, one has only to consider the current headline-producing, legal problems of so many companies to know that the government is serious about its enforcement policy.

## Summary

To protect itself in this new era of criminal responsibility, companies **must** have a compliance program to allow them to conduct business in the United States without fear of criminal investigation and/or prosecution. It is an essential corporate tool for conducting business in the U.S., as companies must more than ever comply with U.S. law. ■

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