ICLG

The International Comparative Legal Guide to:

Business Crime 2014

4th Edition

A practical cross-border insight into business crime

Published by Global Legal Group, in association with CDR, with contributions from:

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London SE1 3PL, UK
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
Global Legal Group

Printed by
Ashford Colour Press Ltd.
October 2013

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ISBN 978-1-908070-77-7
ISSN 2043-9199

Strategic Partners

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USA

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The United States has a federal system of government. Both the federal government and the state governments promulgate and prosecute violations of their own laws.

At the federal level, there are 93 United States Attorneys, appointed by the President, who are principally responsible for investigating and prosecuting federal crimes that occur within their judicial districts. By statute, they have authority to prosecute all crimes against the United States occurring in their district.

The U.S. Attorneys and their assistants are part of the Department of Justice ("DOJ"), the federal agency responsible for representing the United States in courts of law. The DOJ's Criminal Division is headquartered in Washington, DC, and has several divisions and sections that specialise in prosecuting particular types of crimes, including Tax, Antitrust, and Environment Divisions.

At the state level, the powers of particular enforcement authorities vary. Generally, each state has an Attorney General who is the chief legal officer of the state. In addition, criminal prosecutions generally are the responsibility of county-level public prosecutors within each state ("State's Attorneys" or "District Attorneys"). The jurisdiction of the state Attorneys General, State's Attorneys, and District Attorneys extends to violations of state and local criminal law that occur within the borders of the respective state or county.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

As a general matter, federal prosecutors are responsible for prosecuting violations of U.S. (national) law, which includes specific federal crimes, such as bribery of foreign officials, and more general crimes, such as embezzlement or fraud, that occur in multiple states or in federal territories like federal-government buildings and national waterways. State-level prosecutors prosecute violations of state law.

When criminal conduct potentially violates both U.S. and state criminal laws, the authorities may negotiate which agency will lead an investigator and prosecute. The U.S. constitutional prohibition against being tried twice for the same offence ("double jeopardy") generally does not prohibit dual prosecutions by state and federal authorities, because they are considered separate sovereigns.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Yes. In addition to criminal enforcement of violations of law by the DOJ, various federal agencies are authorised to investigate and bring civil enforcement proceedings. In civil proceedings agencies can seek civil monetary penalties, disgorgement (forfeiture), and injunctive (non-monetary) relief. Generally, criminal statutes apply to knowing and willful criminal conduct, while the standard of intent for civil violations is lower.

Examples of agencies that regularly conduct civil enforcement matters are:

- Commodities Futures Trading Commission: cases involving commodities exchanges.
- Environmental Protection Agency: environmental-quality cases.
- Federal Trade Commission: antitrust cases.
- Internal Revenue Service: tax cases.
- Securities and Exchange Commission: securities-fraud, insider-trading, accounting, and foreign bribery cases.

Certain U.S. federal agencies also may conduct administrative proceedings involving persons subject to regulation by those agencies. These proceedings involve adjudication by agency officials rather than a federal court. If the agency determines that a person has violated a rule or statute, it can order the person to cease and desist from committing such violations in the future, and can also impose injunctions, such as prohibiting or conditioning the person's continued engagement in particular commerce.

2 Organisation of the Courts

2.1 How are the criminal courts in the United States structured? Are there specialised criminal courts for particular crimes?

Both federal and state courts generally are divided into three types: (i) trial courts of general jurisdiction; (ii) first-level appellate courts that hear all appeals from the trial courts; and (iii) a second-level appellate court that hears selected appeals from the first-level appellate courts. Defendants who have lost at the trial-level court may appeal as of right to the first-level appellate court. Appeal to the highest court is frequently by discretion of the court rather than by right.

At the federal level, all courts hear both civil and criminal cases; there are no specialised criminal courts. At the state level, whether there are specialised criminal courts varies by state.

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2.2 Is there a right to a jury in business-crime trials?

Yes. In both federal and state courts, except in cases of certain petty offences, criminal defendants have the right to trial by jury.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in the United States to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud and misrepresentation in connection with sales of securities

It is a criminal offence for any person to willfully employ any device, scheme, or artifice to defraud, or to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made not misleading, or to do anything else that would constitute a fraud or deceit upon any person in connection with the purchase or sale of any security.

o Accounting fraud

Every company that has its securities registered with the Securities and Exchange Commission must make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company. There is no materiality element to this statute – any inaccuracy may constitute a violation.

o Insider trading

Insider trading is a form of securities fraud. It involves trading a corporation's securities by individuals who have access to material non-public information about the company, such as an imminent settlement in litigation, a regulatory approval for a significant product, or recent financial performance. Such individuals are called "insiders".

o Embezzlement

Embezzlement is the fraudulent conversion of property to a person's own use by a person who has been entrusted with it. It is different from theft in that the embezzler has a relationship of trust with the victim under which the embezzler was lawfully in possession of the property until he or she appropriated it.

o Bribery of government officials

It is a crime corruptly to provide, promise, or offer to any government official of the United States, or to a person who has been selected to become an official, directly or indirectly, anything of value in order to induce the official to act in any way. In addition, under the Foreign Corrupt Practices Act the ("FCPA"), it is a crime for any person corruptly to provide, promise, or offer anything of value to any person while knowing that all or part of it will be given to a foreign government official in order to induce the official to direct an advantage to any person.

o Criminal anti-competition

Under the Sherman Act (one of the US antitrust statutes) a person commits an offence when he or she enters into an agreement that unreasonably restrains competition and that affects interstate commerce. As a matter of policy, the DOJ Antitrust Division uses prosecutorial discretion to only prosecute criminally those offences considered to be "hardcore" cartel offences, such as bid rigging, price fixing and market allocation.

o Tax crimes

The most commonly prosecuted crime is tax evasion, which prohibits willfully attempting in any manner to evade or defeat any tax. To be liable for tax evasion, a person must take at least one affirmative act constituting an evasion or attempted evasion of the tax. Other tax crimes include willfully failing to collect and pay over tax that is due (such as employment taxes) and willfully failing to file a tax return.

o Government-contracting fraud

It is unlawful for any person to falsify, conceal, or cover up any material fact, to make any materially false statement, or to use any false document in dealing with the United States. A person who knowingly and willfully does any of these things may be subject to criminal liability.

o Environmental crimes

The major federal environmental laws, including the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act, criminalise knowing, willful or, often, negligent violations of the laws' requirements. Examples of specific conduct that is criminalised under environmental laws include: the discharge of pollutants to water bodies without a permit; the improper removal and disposal of asbestos-containing materials; the disposal of hazardous waste in unpermitted areas; tampering with emission- or discharge-monitoring equipment; the export of hazardous waste without the permission of the receiving country; and submitting false statements or reports to the federal government.

o Campaign-finance/election law

The Public Integrity Section within the U.S. Department of Justice's Criminal Division oversees federal prosecution of campaign finance and other election crimes. These attorneys prosecute selected cases against federal, state, and local officials, and also help oversee and supply advice and expertise to local U.S. Attorney offices bringing campaign finance prosecutions. Under the Federal Election Campaign Act, knowing and willful corporate contributions are criminal, as is involvement in contribution reimbursement, contribution coercion, and fraudulent misrepresentation of campaign authority. Individual states and numerous localities have their own campaign finance statutes, many of which include provisions for criminal prosecution of excess contributions and other violations.

o Manipulation of prices of commodities and derivatives contracts

Under the Commodity Exchange Act, it is unlawful to manipulate or attempt to manipulate the price of any commodity in interstate commerce, of any futures contract, or of any swap contract. Examples of price-manipulative practices include "cornering" the market (where a person acquires a sufficiently dominant supply of a commodity to allow the person to control price, typically requiring other traders needing to buy the commodity to pay an artificially high price for it) and "squeezing" the market (where a person acquires a dominant futures or swap position entitling it to delivery of a commodity and, in the event of shortages in the commodity, demands an artificially high price from those owing delivery to the person).

o Fraud or misrepresentation in connection with any cash-commodity, swap , or futures contract

It is a criminal offence for any person to willfully employ any device, scheme, or artifice to defraud, or to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made not misleading, or to do anything else that would constitute a fraud or deceit upon any person in connection with any cash-commodity contract, swap contract, or futures contract. In addition, it is a criminal offence for any person to willfully deliver by any means of communication a false, misleading, or inaccurate report concerning crop or market information that bears on the price of any commodity.

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3.2 Is there liability for inchoate crimes in the United States? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Yes, there is liability for attempted crimes in the United States, both at the federal and state levels. Generally, attempt statutes require proof of: (i) intent to commit a specific crime; and (ii) an action in furtherance of the attempt, which need not constitute criminal conduct on its own.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

Yes, under both federal and state law, a legal entity can be convicted of a crime.

An entity may be responsible for the conduct of an employee when the employee is acting: (i) within the scope of his or her employment; and (ii) for the benefit of the entity. The employee need not intend to benefit the entity to the exclusion of his or her own benefit – if an employee's action will benefit the entity at least in part, this element of the test is satisfied.

When the entity's state of mind is an element of the offence, the knowledge of its employees, officers and directors may be imputed to the entity to the same extent – knowledge is imputed to the entity when an employee obtains the knowledge while acting: (i) in the course of his or her employment; and (ii) for the benefit (at least in part) of the entity. In addition, under the Collective-Knowledge Doctrine, the knowledge of the entity is the aggregate of the imputed knowledge of every employee acting within the scope of his or her authority, even if no one employee has sufficient knowledge to form criminal intent.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

There is no automatic criminal liability for managers, officers, and directors when their entity is convicted of a crime. Rather, a criminal case must be made separately against the individuals. Under most statutes (with some exceptions), managers, officers, and directors are not strictly liable for the transgressions of a corporate entity.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

Federal prosecutors follow policy guidelines concerning when it is appropriate to bring criminal charges against an entity, called the Principles of Federal Prosecution of Business Organizations. Pursuant to these guidelines, whether or not it is appropriate to charge an organisation criminally depends on several factors as discussed in Section 8 below, including the nature and seriousness of the offence, the pervasiveness of wrongdoing at the organisation, the organisation's history of similar conduct, the nature of the compliance programme at the organisation and remedial measures taken in response to the misconduct, whether or not the corporation voluntarily disclosed the conduct to authorities and cooperated in investigation of the conduct, collateral consequences of a prosecution (including harm to shareholders) and the adequacy of other remedies including prosecution of individuals or civil outcomes. In considering whether or not to prosecute individuals in addition to an organisation, prosecutors consider several factors including the seriousness of the conduct and the potential deterrent effect of a prosecution.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

At the federal level, the enforcement-limitations period, when applicable, begins running on the date the offence is committed. Capital offences and certain other serious crimes are not subject to any limitations period. Generally, unless otherwise specified, federal crimes are subject to a five-year limitations period, and a number of banking-related crimes are subject to a ten-year period. The limitations period generally begins when the last act in furtherance of the crime is committed.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

Yes. Crimes that are part of a "continuing offence", such as a conspiracy, may be prosecuted even if the limitations period for some of the crimes within the continuing offence has lapsed, so long as the last crime constituting the continuing offence occurred within the limitations period. A continuing offence is an offence committed over a span of time.

5.3 Can the limitations period be tolled? If so, how?

The limitations period may be tolled for a number of reasons, most significantly, if the government can show active concealment of the crime. In addition, if the DOJ requires the assistance of overseas authorities to obtain evidence, it may apply to the court for a temporary stay of the limitations period.

The government and the potential defendant may enter into an agreement to toll the limitations period, which a potential defendant may do if it is cooperating with the government and hopes to enter into a settlement agreement.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Prosecutors generally are free to initiate investigations when they have reason to believe that a crime falling within their jurisdiction has been committed. U.S. law generally does not require the government to initiate investigations under particular circumstances.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

The United States has entered into Mutual Legal Assistance Treaties with numerous other countries and formal cooperation between the Department of Justice and foreign prosecutors occurs pursuant to these treaties. Federal prosecutors and regulators also cooperated

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with foreign regulators informally. Cooperation between US and non-US regulators has become increasingly common.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The government generally has three types of procedural tools at its disposal to gather information in criminal investigations: (i) an informal request, which is a request by the government to a person to voluntarily produce documents or provide information; (ii) a subpoena, which is a demand issued by a court to produce documents or appear for questioning; and (iii) a search warrant, which is a warrant issued by a court authorising the government to search a person's premises for particular items.

The government may use a subpoena to compel a person to provide formal testimony.

In civil investigations, the government may issue a civil investigative demand ("CID"), which is a formal demand by an investigative agency for documents or information.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Prosecutors and law-enforcement officers may demand documents via a subpoena. A subpoena is issued by the Grand Jury at the request of a prosecutor. A Grand Jury is a group of residents of a judicial district (at the federal level) or county (at the state level) who are summoned by the court to hear evidence presented by the government and to determine whether the government has sufficient evidence to proceed to prosecute a defendant.

A law-enforcement officer also may seek authority to raid a company to seize documents via a search warrant. Only a United States District Court (at the federal level) or a state court of general jurisdiction may authorise a law-enforcement agency to execute a search warrant. The warrant must be based on an affidavit setting forth the facts known to the officer that provide "probable cause" to search for and seize property. Probable cause is a low quantum of proof: it means that facts exist that would lead a reasonably prudent person to believe that evidence of a crime will be discovered in the place to be searched. The locations to be searched and the types of evidence that may be seized must be defined in the search warrant.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does the United States recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do United States's labor laws protect personal documents of employees, even if located in company files?

The United States recognises two protections against production or seizure: the attorney-client privilege; and the work-product doctrine. Some states recognise additional protections against disclosure, but they are more rarely invoked.

Generally, the attorney-client privilege protects from disclosure confidential communications between an attorney and a client regarding legal advice. It applies whether the client is an individual or a company, and, if the client is a company, the privilege applies whether the attorney is in-house or outside counsel. The federal courts generally hold that if any employee of a company communicates with an attorney about the subject matter of the employee's employment, that communication may be privileged. Some state courts, however, hold that only the communications of senior personnel who "control" the company are made on the company's behalf and thus subject the privilege.

The attorney-client privilege does not apply when the client communicates with the attorney in order to obtain assistance in committing or to plan a crime or a fraud (the "crime-fraud exception" to the attorney-client privilege).

The work-product doctrine generally protects from disclosure documents or tangible things made by or for an attorney in preparation for litigation. The purpose of the doctrine is to protect the attorney's opinions and impressions of facts learned by the attorney from disclosure.

When the government requests documents from a company or causes a subpoena to be issued to it, the company generally will review any documents relevant to the request or subpoena to determine whether or not they are protected from disclosure. The company may withhold those documents and generally must provide a list of any documents so withheld. If the government believes that any assertion is improper, it may ask a court to compel the company to produce improperly withheld documents.

When the government seizes documents under a warrant, it may decide to follow special procedures to segregate privileged documents so that it is not later barred from using seized materials in its prosecution.

U.S. labour laws generally do not protect employee documents from disclosure. In certain contexts, such as information regarding healthcare records, financial records, and tax records, there are privacy restrictions concerning the manner in which documents may be disclosed.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The government may seek documents from an employee to the same extent, and using the same procedures, that it may seek documents from the company.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

The government may seek documents from a third person to the same extent, and using the same procedures, that it may seek documents from the company.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The circumstances and manner in which the government can

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question an individual are strictly circumscribed.

Law-enforcement officers may seek a voluntary interview with employees, officers, and directors to answer questions, but these individuals may refuse to do so.

Law enforcement officers also may detain a person for questioning if the officers have "probable cause" to believe that the person has been involved in the commission of a crime.

In addition, the Grand Jury may issue a subpoena to an employee, officer, or director, commanding the individual to appear before the Grand Jury to answer questions.

The U.S. Constitution protects individuals from being compelled to provide testimony that would tend to incriminate themselves, and thus an individual may refuse to testify before a Grand Jury on this basis.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

The government may seek to question third persons to the same extent, and using the same procedures, that it seeks to question employees, officers, or directors of a company.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

Persons being questioned by the government have an absolute Constitutional right to remain silent and not provide answers that would tend to incriminate the person. Persons being questioned by the government also have the right to consult with an attorney.

When the questioning is being conducted on a voluntary basis by a law-enforcement officer, the person may refuse to answer any questions at any time, and may insist that his or her attorney be present during the questioning.

When the person is testifying before the Grand Jury, he or she may consult with his or her attorney before answering any particular question, but the attorney is not permitted to attend the testimony in the Grand Jury room. The person does have the right to refuse to answer any questions whose answer would tend to incriminate the person.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

For serious crimes punishable by more than one year in prison, if the Grand Jury has probable cause to believe that a crime has been committed by a person, it will return an "indictment" against the person. The indictment is drafted by the prosecutor and sets forth allegations against the person.

For minor crimes, the prosecutor may commence a criminal case without a Grand Jury by filing an "information" with the court, setting forth the allegations against the person.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

Yes. At the federal level, the Principles of Federal Prosecution, which is a DOJ policy, governs prosecutors' decision to charge an entity or individual with a crime.

When a federal prosecutor has probable cause to believe that an individual has committed a crime and that the prosecutor has sufficient admissible evidence to convict the individual in court, the prosecutor should commence a criminal case against the person unless the prosecutor believes: (i) no substantial federal interest would be served by prosecution; (ii) the person is subject to effective prosecution in another jurisdiction; or (iii) an adequate non-criminal alternative to prosecution exists.

Federal guidelines also set forth the following additional factors in assessing whether a corporation should be charged criminally:

- the nature and seriousness of the offence, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the company;
- the company's history of similar misconduct;
- the company's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
- the existence and effectiveness of any pre-existing compliance programme at the company;
- the company's remedial actions;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, and employees;
- the adequacy of the prosecution of individuals responsible for the company's malfeasance; and
- the adequacy of remedies such as civil enforcement actions.

These factors encourage companies involved in a DOJ investigation to cooperate with the prosecutors in order to maximise the likelihood that they will receive leniency, as described below in section 13.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

In the case of organisational defendants, the prosecutor may agree with the defendant to defer prosecuting the defendant (a "Deferred-Prosecution Agreement" or "DPA") or not to prosecute the defendant at all (a "Non-Prosecution Agreement" or "NPA") using the standards set out above in question 8.2. A DPA is an agreement that involves the government filing criminal charges against a defendant, but not prosecuting the defendant on them ("deferral" of the charges). An NPA is a type of settlement under which the government does not file any criminal charges against the defendant. Under both types of agreements, the defendant admits to a statement of facts concerning the offence.

If a prosecutor believes that an individual would benefit and be less likely to commit a future crime if he or she were diverted from the traditional penal process into community supervision and services, the prosecutor may place the individual in pretrial diversion. Only defendants who are not repeat offenders and who meet certain other criteria are eligible for pretrial diversion.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

Yes. Where the defendant's criminal conduct also constitutes a

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violation of U.S. civil law (such as, for example, securities law), the defendant may be subject to civil penalties or remedies as part of a civil enforcement or administrative proceeding, as described above in question 1.3. Often, a civil enforcement proceeding will run in parallel with a criminal proceeding.

In addition, if a defendant is a government contractor, it may lose its ability to sell goods or services to the government if it is convicted of a crime involving embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax violations, or receiving stolen property. The lead government agency with which the defendant contracts will determine whether the government may continue to contract with the defendant.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The government has the burden to prove every element of any crime charged. The defendant has the burden to prove every element of any affirmative defence asserted.

9.2 What is the standard of proof that the party with the burden must satisfy?

The government must prove every element of the crime "beyond a reasonable doubt". Reasonable doubt is doubt that a reasonable person could have based on the evidence presented at trial, or lack of evidence. It is the highest standard of proof possible in U.S. jurisprudence.

Defendants generally have the burden of proving any affirmative defences by "clear and convincing evidence" or a "preponderance of the evidence", which are lower standards of proof. The preponderance-of-evidence standard means that all of the evidence, taken together, makes a particular fact more likely than not. The clear-and-convincing standard is between the preponderance and beyond-a-reasonable-doubt standards.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The trial jury – known as "*petit jury*" – is the arbiter of fact in a criminal trial, unless the defendant waives his or her right to be tried by jury. Thus, the jury determines whether each party has satisfied any burden of proof.

At any time after the government completes putting on its evidence, however, the defendant may ask the judge to enter a judgment of acquittal of any offence for which the government's evidence was insufficient to sustain a conviction as a matter of law. This can include a motion to set aside a jury verdict finding the defendant guilty if the verdict is against the weight of the evidence.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Yes. Anyone who conspires with or aids or abets another person to commit a crime can be held liable as principal to the same extent as that person.

The elements of criminal conspiracy are satisfied when two or more persons agree to commit a crime and at least one of those persons takes at least one overt act toward the committing the crime.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Yes. Where the law defines an offence as requiring a particular state of mind by the defendant, the state of mind is an essential element of the offence. In such cases, the prosecutor must prove that the defendant had the requisite state of mind to commit the offence beyond a reasonable doubt.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Generally, defendants are presumed to know the law. Thus, when a defendant commits a crime, he or she is presumed not only to have performed the acts constituting the crime, but also to have intended to violate the law that prohibited those acts. For this reason, a "mistake-of-law" defence is generally not available.

The mistake-of-law defence is available in certain instances where the government is required to prove specific intent on the part of the defendant to violate the law. In these circumstances, the mistake-of-law defence is available where the defendant has a genuine, good-faith belief that he or she is not violating the law based on a misunderstanding caused by the law's complexity. Because specific intent is an element of the crime, the government has the burden of proving the defendant's intent beyond a reasonable doubt.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

The "mistake-of-fact" defence is available when the defendant's honest mistake negates the requisite state of mind for the offence. For example, if it were a crime intentionally to give a gift to a government official, and the defendant honestly believed that the person to whom he gave the gift was a private citizen and not a government official, then the defendant should be found not guilty because his mistake prevented him from forming the requisite intent to commit the crime. The government has the burden to prove the defendant's state of mind beyond a reasonable doubt.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

There is no affirmative obligation to report knowledge that a crime has been committed. However, if a person knows of the commission of a felony (a serious crime) by another, and conceals

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it, the person is guilty of a crime called "misprision of felony". To be guilty of misprision of felony, the defendant must have taken an affirmative step to conceal the crime.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

Yes. Under the Principles of Federal Prosecution, discussed above, DOJ prosecutors take into account a company's voluntary disclosure of wrongdoing and cooperation in the government's investigation in making its charging decisions and sentencing recommendations. Where a company discloses its own wrongdoing or voluntarily shares company information with the government in connection with its investigation, the prosecutor may agree to charge the company with a lesser offence, or may enter into a DPA or NPA with the company.

In addition to the Principles of Federal Prosecution, the U.S. Sentencing Guidelines (see question 15.1 below) also provide leniency for companies that cooperate with government investigations.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in the United States and describe the favourable treatment generally received.

Generally, the government will consider leniency when the company's disclosures and cooperation materially assist it in uncovering and investigating criminal acts it could not have uncovered and investigated without the company's assistance, or could not have uncovered and investigated without expending significant resources.

Typically, leniency requires that a company fully investigate – on its own – any criminal activity that is or may become the subject of a government investigation: a so-called "internal investigation". The company would generally be expected to share the results of this internal investigation with the government, and thus assist the government in focusing and resolving its own inquiry. The government also would expect a voluntarily agreement to produce relevant documents to the government and to make relevant employees available to be interviewed by law-enforcement officers.

In addition to merely assisting the government in its own inquiry, prosecutors will also give credit to companies that use the result of their own internal investigations to alter their business practices, for example by disciplining employees who engaged in misconduct and strengthening their compliance organisations and internal controls.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

Yes. A defendant may enter into a "plea agreement" with the government under which the government will charge the company with agreed-upon offences and will agree to recommend a particular, usually reduced, sentence to the court.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

There are two categories of benefit a defendant may hope to achieve from a plea agreement: reduced charges; and reduced sentence.

Charges: The government has discretion to charge (or not to charge) defendants with particular offences. Nevertheless, under DOJ policy, federal plea agreements should honestly reflect the totality and seriousness of the defendant's conduct; any departure from this standard must be disclosed in the agreement. The court does not approve the government's charging decisions, but the court does have the power to approve or reject an entire plea agreement, of which any reduced charges are part.

Sentence: While the prosecutor decides what charges to bring, the court has ultimate discretion on what sentence to impose. A plea agreement may include a recommendation to the court to impose a particular sentence, but the court is not bound by those recommendations. There is a narrow category of federal plea agreements under which both the charges and sentence are agreed between the government and defendant, and the court is asked either to reject or accept the entire package. Such agreements are disfavored both by courts and the authorities.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

Both federal and state laws provide the minimum and maximum sentences (i.e., the amount of fine, term of imprisonment, or both) to which a defendant can be sentenced for a particular offence. The minimum and maximum sentences may be set forth in the specific statute defining the particular offence, or they may be set forth in a separate general statute that sets forth permissible sentences for different classes of crimes. In addition, at the federal level, the "alternative fines" statute provides that a defendant may be sentenced to pay a fine of up to twice the amount of the pecuniary gain realised by the defendant, or the pecuniary loss to others caused by the defendant, from the criminal conduct.

At the federal level, once the court determines that a defendant is guilty and determines the maximum sentence for the offence of conviction, the court conducts a calculation using the U.S. Sentencing Guidelines. The Sentencing Guidelines comprise a series of steps that convert an offence of conviction and certain other relevant conduct into a numeric score, which the court then can use to determine the potential range of fines or term of imprisonment to which to sentence the defendant. Generally, the Sentencing Guidelines account for the severity of the defendant's crime and the defendant's criminal history. The Sentencing Guidelines provide for reduced sentences for defendants who disclose wrongdoing to the authorities and actively assist the authorities in their investigation of any criminal conduct. In addition, the Sentencing Guidelines provide for reduced sentences for companies that implement compliance programmes designed to detect and prevent wrongdoing by employees.

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15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

In considering imposing a sentence on a corporation, the court must consider the nature and circumstances of the offence and the history and characteristics of the defendant. In addition, the sentence should: reflect the seriousness of the offence, promote respect for the law, and provide just punishment for the offence; and be serious enough to deter future criminal conduct and to protect the public from further crimes of the defendant.

In making these determinations, the court will consider whether the company has implemented any compliance organisation and internal controls or disciplined the employees who were responsible for the misconduct.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

If a defendant is found guilty at trial, the defendant may appeal the verdict on any available grounds, but, if the defendant is found not-guilty, the government may not appeal.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

A defendant who has been convicted of a crime, whether after trial or as part of a plea agreement, may appeal a sentence if the sentence: (i) was imposed in violation of law; (ii) was imposed as a result of an incorrect application of the Sentencing Guidelines or is greater than the maximum sentence provided in the Sentencing Guidelines; or (iii) was imposed for an offence for which there is no Sentencing Guideline and is plainly unreasonable. If the defendant pleaded guilty under an agreement specifying the fine to which the court must sentence the defendant, the defendant may only appeal if the sentence violated the law or misapplied the Sentencing Guidelines.

The government may a appeal a sentence if the sentence: (i) was imposed in violation of law; (ii) was imposed as a result of an incorrect application of the Sentencing Guidelines or is less than the minimum sentence provided in the Sentencing Guidelines; or (iii) was imposed for an offence for which there is no Sentencing Guideline and is plainly unreasonable. The Attorney General, Solicitor General, or Deputy Solicitor General of the United States must approve any appeal by the government.

16.3 What is the appellate court's standard of review?

An appellate court may only overturn a trial court's finding of fact if it were "clearly erroneous". This means that the appellate court may only overturn a factual finding when it is unsupported by substantial evidence or contrary to the clear weight of the evidence.

An appellate court owes no deference to the trial court, however, respecting its conclusions of law, and may review those conclusions "*de novo*", which means afresh.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

The appellate court's remedial power depends upon the basis for the appeal.

In an appeal from the trial court's sentence, the appellate court may vacate the sentence and remand the case to the trial court for re-sentencing consistent with any instructions of the appellate court.

In an appeal from the defendant's conviction, the appellate court may vacate the trial court's judgment of conviction and remand the case to the trial court for a new trial. In exceptional circumstances, if the appellate court finds that the trial court erred in not entering a directed verdict of not guilty, the appellate court may remand the case to the trial court with instructions to do so and to release the defendant.

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