International
Comparative
Legal Guides

Business Crime 2021

A practical cross-border insight into business crime law

11th Edition

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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, each has the authority to prosecute all crimes against the United States occurring in his or her 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, D.C., and has several sections that specialise in prosecuting particular types of crimes, including the Fraud Section and Money Laundering and Asset Recovery Section. A separate Antitrust Division prosecutes anti-competition crimes.

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 is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

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 such as 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 investigation 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 prosecution of violations of criminal 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 wilful criminal conduct, while the standard of intent for civil violations is lower.

Examples of agencies that regularly conduct civil enforcement matters are:

- the Commodity Futures Trading Commission, for cases involving derivatives, including futures, swaps, options and related transactions in commodities;
- the Environmental Protection Agency, for environmental cases;
- the Federal Trade Commission, for antitrust cases;
- the Federal Reserve Bank, for enforcement of banking regulations;
- the Internal Revenue Service, for tax cases;
- the Office of Foreign Assets Control (OFAC), for economic and trade sanctions; and
- the Securities and Exchange Commission (SEC), for 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 also can impose injunctions, such as prohibiting or conditioning the person's continued engagement in particular commerce.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

There continue to be major settlements in the Foreign Corrupt Practices Act (FCPA) area. For example, in March 2020, Airbus concluded a four-year investigation and agreed to pay nearly $4 billion to authorities in the U.S., France and the UK, the largest global foreign bribery resolution to date. Airbus paid approximately $592 million to the DOJ and entered into a deferred prosecution agreement (DPA) in order to resolve criminal charges of conspiracy to violate the FCPA and conspiracy to violate the Arms Export Control Act. In December 2019, Ericsson paid over $1 billion to the DOJ and the Securities Exchange Commission (SEC) and entered into a DPA with the DOJ to resolve criminal charges of conspiracy to violate the anti-bribery provisions of the FCPA and conspiracy to violate the books-and-records provisions of the FCPA. The total settlement amount is one of the largest in the history of FCPA enforcement, but the amount of the bribes Ericsson allegedly paid – $62 million – is smaller than comparable settlements (which have involved between $300 million to $2 billion in bribes). This proportion is attributable, at least in part, to the amount of profits that the DOJ said resulted from Ericsson's misconduct – in this case, over $382 million.

The DOJ's ongoing investigation into corruption at Petróleos de Venezuela SA, Venezuela's state-owned and state-controlled energy company, has resulted in numerous FCPA cases against individuals.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction 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) second-level appellate courts that hear 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 trial court and appellate court level, courts hear both civil and criminal cases; there are no specialised criminal courts. At the state level, the existence of specialised criminal courts varies by state.

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 a Constitutional right to a trial by jury.

3 Particular Statutes and Crimes

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

• Securities fraud

It is a criminal offence for any person to wilfully employ any device, scheme or artifice to defraud, or to make any untrue statement of a material fact or to omit 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.

• Accounting fraud

Under the FCPA's internal controls provisions, every company that has its securities registered with the SEC 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.

However, in other cases of accounting fraud, materiality does come into the picture. The SEC Staff Accounting Bulletin No. 99, Section M, titled "Materiality", provides guidance in applying materiality thresholds to the preparation of financial statements filed with the commission and the performance of audits of those financial statements. The bulletin offers examples of how misstatements of relatively small amounts that come to the auditor's attention could have a material effect on the financial statements. These include misstatements that change a loss into income or vice versa, or misstatements that hide a failure to meet analysts' consensus expectations.

• Insider trading

Insider trading can be a form of securities fraud. Illegal insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, non-public information about the security. Insider trading violations also may include "tipping" such information, securities trading by the person "tipped" and securities trading by those who misappropriate such information.

• 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.

• Bribery of government officials

It is a crime to provide, promise or offer, in a corrupt manner, 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, the FCPA prohibits offering to pay, paying, promising to pay or authorising the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.

• Criminal anti-competition

Under the Sherman Act (one of the U.S. antitrust statutes), a person commits an offence when he or she enters into an agreement that unreasonably restrains competition and that affects interstate commerce. The DOJ Antitrust Division subjects "hardcore" cartel agreements, such as bid rigging, price fixing and market allocation, to a *per se* prosecution standard. Agreements not challenged as *per se* illegal are analysed under the rule of reason to determine their overall competitive effect, and in the past few years, some evidence has indicated that the DOJ has been pursuing other antitrust matters, such as no-poach agreements, equally aggressively.

• Cartels and other competition offences

Please see the answer to "Criminal anti-competition" above.

• Tax crimes

The most frequently charged criminal tax violation is the preparation of false tax returns, which generally involves a person who either wilfully submits any return or document under the internal revenue laws that he does not believe is true and correct, or wilfully assists in the preparation of any document under such laws. Another commonly prosecuted crime under the internal revenue laws is tax evasion, which involves wilfully attempting in any manner to evade or defeat any tax imposed by such laws. To be liable for tax evasion, a person must wilfully take at least one affirmative act constituting an evasion or attempted evasion of the tax, and it must be shown that a tax deficiency exists with respect to that person. Other tax crimes include wilfully failing to collect and pay over-tax that is due (such as employment taxes), wilfully failing to file a tax return, and wilfully delivering to the Internal Revenue Service any tax return or other document known by the person to be fraudulent or false.

• Government-contracting fraud

It is unlawful for any person to falsify, conceal or cover up any material fact, to make any materially false statement, to submit a false claim for payment, or to use any false document in dealing with the United States. A person who knowingly and wilfully does any of these things may be subject to criminal liability. The primary law guiding the DOJ's enforcement of government-contracting fraud is the False Claims Act (FCA), which includes mandatory treble damages for violations, reduced to mandatory double damages in the case of voluntary self-disclosure, and additional civil penalties. Over 30 states and municipalities also have enacted FCAs.

• Environmental crimes

The major federal environmental laws, including the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act, criminalise knowing, wilful or, often, negligent violations of the laws' requirements. Examples of specific criminal conduct under environmental laws include: discharging pollutants into water bodies without a permit; improper removal and disposal of asbestos-containing materials; disposal of hazardous waste in unpermitted areas; tampering with emission- or discharge-monitoring equipment; exporting hazardous waste without the permission of the receiving country; and submitting false statements or reports to the federal government. Individual states also have their own environmental laws that are usually similar to – but can be stricter than – the federal laws. As with the federal laws, under most state environmental laws, criminal liability can attach for conduct that knowingly, wilfully or, in some instances, negligently violates the statute.

• Campaign finance/election law

The Public Integrity Section within the DOJ's Criminal Division oversees federal prosecution of campaign finance and other election crimes. These attorneys in this agency 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 DOJ policy, U.S. Attorneys must consult with the Public Integrity Section before initiating any criminal investigation involving alleged violations of the Federal Election Campaign Act. Under the Federal Election Campaign Act, knowingly and wilfully making corporate contributions is 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 excessive contributions and other violations.

• Market manipulation in connection with the sale of derivatives

Under the Commodity Exchange Act, manipulating or attempting to manipulate the price of any commodity in interstate commerce, of any futures contract or of any swap contract is unlawful. Examples of price-manipulation practices include "cornering" the market (where a person acquires a sufficiently dominant supply of a commodity to allow that 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 him or her to delivery of a commodity and, in the event of shortages in the commodity, demands an artificially high price from those owing the delivery).

• Money laundering or wire fraud

Money laundering under U.S. law is broadly defined under two statutes, one that targets the transfer or transportation of proceeds of unlawful activity, and the other that criminalises fund transfers to further other illegal conduct or to conceal the proceeds from such conduct.

• Cybersecurity and data protection law

Cybersecurity and data protection are governed by a number of statutes, including the Gramm-Leach-Bliley Act, the Health Insurance Portability and Accountability Act, the Bank Secrecy Act, the USA PATRIOT Act and the Sarbanes-Oxley Act at the federal level. Generally speaking, these statutes oblige companies to maintain cybersecurity and data protection safeguards to defend systems and information from cyberattacks or unauthorised access. Many legal requirements focus on obliging banks and other financial institutions in particular to adopt risk analysis and oversight programmes, and require frequent testing, with some regulators such as the SEC requiring periodic submission of data relating to cybersecurity. The Federal Trade Commission frequently enforces minimum security requirements with respect to entities collecting, maintaining or storing consumer's personal information. State governments (most notably California) also have passed laws to protect consumers and personal information, and federal and state bank regulators may institute proceedings for engaging in "unsafe and unsound" conduct related to cybersecurity and data privacy on similar theories.

• Trade sanctions and export control violations

The OFAC administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals. OFAC acts under presidential national emergency powers, as well as authority granted to it by specific legislation, to impose controls on transactions and freeze assets under U.S. jurisdiction. The primary law under which sanctions are carried out is the International Emergency Economic Powers Act (IEEPA). IEEPA authorises the president to regulate commerce after declaring a national emergency in response to any unusual and extraordinary threat to the United States of a foreign source. Under IEEPA, it is a crime to wilfully violate or attempt to violate any regulation issued under the act. Institutions that violate or attempt to violate those regulations may face criminal enforcement actions by the DOJ. In addition to the DOJ, federal and state authorities and regulators may also initiate enforcement actions against financial institutions that violate sanctions laws. OFAC also may take actions under the Trading with the Enemy Act, which restricts trade with certain countries hostile to the United States.

In August 2017, Congress passed the Countering America's Adversaries Through Sanctions Act (CAATSA), which, among other items, codified various Russia-related sanctions previously promulgated by executive order into law. CAATSA

also subjected the president's ability to waive or terminate the application of sanctions imposed on targeted persons under CAATSA to congressional review.

The U.S. government also regulates the export, re-export and transfer of equipment, software, technology, technical data and certain services. Specifically, the Arms Export Control Act is the primary law guiding U.S. export control law regarding munitions. The Department of State implements this statute by the International Traffic in Arms Regulations (ITAR). All persons or entities that engage in the manufacture, export or brokering of defence articles and services as defined by the U.S. Munitions List must register with the U.S. government. ITAR sets out the requirements for licences or other authorisations for specific exports of defence articles and services. The export, re-export or transfer of certain significant defence articles or services also requires congressional notification. The Export Administration Regulations (EAR) originally were enacted under the now expired Export Administration Act and currently are maintained under IEEPA. Enforcement for violations of ITAR and EAR may include both criminal and civil penalties.

• Any other crime of particular interest in your jurisdiction

Under the Commodity Exchange Act, "spoofing" means placing bids or offers with the intent to cancel those bids or offers before a trade is executed. Spoofing violates the Commodity Exchange Act and knowingly spoofing is a criminal offence. Recently, U.S. prosecutors and regulators have pursued spoofing cases, particularly cases involving traders using high-speed algorithms that placed and quickly cancelled orders in order to give the impression that intense buying or selling interest existed in the market.

3.2 Is there liability for inchoate crimes in your jurisdiction? 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? Under what circumstances?

No automatic criminal liability for managers, officers and directors exists 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 the 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 that include the seriousness of the conduct and the potential deterrent effect of a prosecution.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

In general, when a company merges with or acquires another company, the successor company assumes the predecessor company's liabilities. Successor liability applies to all kinds of civil and criminal liabilities and also can apply if a transaction constitutes a "*de facto* merger" under state law, if the transfer was fraudulent or intended to be so, or if the successor entity is a continuation of the seller or continues substantially the same operations as the seller.

As an example, successor liability applies to liabilities related to violations of the FCPA. Where a target company was subject to the FCPA prior to a transaction, the DOJ and the SEC may pursue an enforcement action against either the predecessor company under a theory of direct liability, or the acquiring company under a theory of successor liability. The risk for acquiring companies can be minimised, however, by conducting thorough and appropriate due diligence and by promptly implementing sufficient internal controls and compliance measures at the acquired entity following the change in control.

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 on which 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 10-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 an "overt act" in furtherance of the continuing offense 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 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Prosecutors may enforce U.S. criminal statutes outside the United States where: (i) the "due process" clause of the U.S. Constitution permits extraterritorial application of the relevant statute; and (ii) Congress intended the relevant statute to have extraterritorial effect.

The due process clause permits the extraterritorial application of criminal law where a "sufficient nexus" exists between the United States and the defendant such that application of the law would not be arbitrary or unfair. Generally, this means that U.S. criminal law may apply where the defendant is a U.S. national or entity organised under the laws of a state or the United States, where some element of the offence occurred on U.S. territory or using the means of interstate commerce, or where the effects of the offence will impact the United States or U.S. nationals.

Assuming the due process clause permits the extraterritorial application of U.S. law, the next question is whether Congress intended the relevant law to apply extraterritorially. Generally, except in cases of crimes against the United States, U.S. courts presume that criminal statutes do not have extraterritorial application unless Congress clearly intended otherwise.

The U.S. foreign bribery statute (the FCPA, discussed in the answer to question 3.1), is an example of a statute prosecutors frequently enforce extraterritorially. Prosecutors also frequently prosecute securities fraud laws extraterritorially, although U.S. courts have called into question whether these laws should apply outside the United States.

6.2 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.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The United States has entered into mutual legal assistance treaties with numerous other countries, and formal cooperation between the DOJ and foreign prosecutors occurs pursuant to these treaties. Federal prosecutors and regulators also cooperate with foreign regulators on an informal basis. Cooperation between U.S. and non-U.S. regulators has become increasingly common.

In March 2018, Congress passed the Clarifying Lawful Overseas Use of Data Act (the CLOUD Act), clarifying the scope of data subject to warrants under the Store Communications Act and providing a framework for cross-border data access for law enforcement purposes. The CLOUD Act's immediate effect was to explicitly allow American law enforcement authorities to issue warrants for electronic data that is stored outside the U.S., an issue that was being litigated before the Supreme Court. The act also recognises the potential conflict between such warrants and foreign privacy regimes and sets up a framework for the U.S. to enter into agreements with foreign countries to facilitate access to each other's data without a mutual legal assistance treaty.

7 Procedures for Gathering Information from a Company

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

Generally, the government 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 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 that sets 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 your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The United States recognises two protections against production or seizure: the attorney-client privilege and the attorney 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 to privilege.

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

The attorney 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 from disclosure the attorney's opinions and impressions of facts learned by the attorney.

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 usually 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.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

State and federal labour laws do not usually protect employee documents from disclosure of employees' personal data to government or regulatory authorities. In certain contexts, such as information regarding health care records, financial records and tax records, privacy restrictions dictate the manner in which documents may be disclosed.

7.5 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 defendant company.

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

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

Questioning of Individuals:

7.7 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 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 participate.

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.

7.8 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.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Persons being questioned by the government have an absolute Constitutional right to remain silent and not to provide answers that would tend to incriminate themselves. 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 being questioned 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 that could produce answers that would tend to incriminate that 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 that person. The indictment is drafted by the prosecutor and sets forth allegations against the accused.

For minor crimes, the prosecutor may commence a criminal case without a grand jury proceeding by filing an "information" document with the court, setting forth the allegations against the accused.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

At the federal level, the Principles of Federal Prosecution, a DOJ policy, governs federal prosecutors' decision to charge an entity or an 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 an entity 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 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.

In June 2020, the DOJ's Criminal Division released updates to its Evaluation of Corporate Compliance Programs guidance. Where the guidance previously required prosecutors to determine if a corporate compliance programme had been "implemented effectively", it now requires a determination as to whether the programme has been "adequately resourced and empowered to function effectively". Prosecutors will assess whether the company dedicated resources commensurate with the risks confronting the entity, and whether management gave its compliance function sufficient authority and information to implement the programme.

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

In the case of corporate defendants, the prosecutor may agree with the defendant to defer prosecuting the defendant (a DPA) or not to prosecute the defendant at all (a non-prosecution agreement or NPA) using the standards set out above in the answer to 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 agrees not to file any criminal charges against the defendant. Under both types of agreements, the defendant admits to a statement of facts concerning the offence and to undertake compliance and remediation steps.

DPAs and NPAs are rare in anti-competition cases, because the DOJ Antitrust Division has a specialised leniency programme for such matters.

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 that individual in pretrial diversion. Only defendants who are not repeat offenders and who meet certain other criteria are eligible for pretrial diversion.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Prosecutors have discretion to decline or defer prosecution and, accordingly, DPAs and NPAs are not subject to court approval. A small number of courts in recent years have rejected DPAs, but these actions have usually been overturned on appeal.

8.5 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 may apply.

Yes. Where the defendant's criminal conduct also constitutes a 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 the answer to question 1.3. Often, a civil enforcement proceeding will run parallel with a criminal proceeding.

Additionally, 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 in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The government bears the burden to prove every element of any crime charged. The defendant bears 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?

In a criminal prosecution, 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 ranks between the preponderance and beyond-a-reasonable-doubt standards in difficulty.

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 a 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 business 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 a principal to the same extent as that other 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 commission of 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 to intentionally 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 or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

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 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.

Federal prosecutors can take voluntary disclosure into account in the resolution of criminal cases. For example, with respect to the FCPA, the DOJ Fraud Section's FCPA Corporate Enforcement Policy (made permanent in November 2017) provides a presumption of declination for companies that voluntarily self-disclose, cooperate and remediate. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offence, such as where the offender is a criminal recidivist. If a company voluntarily discloses wrongdoing and satisfies all other requirements, but aggravating circumstances compel an enforcement action, the DOJ will accord, or recommend to a sentencing court, a 50% reduction off the low end of the fine range determined by the U.S. Sentencing Guidelines and will not require appointment of a monitor if the company has implemented an effective compliance programme. By contrast, if a company chooses not to voluntarily disclose its FCPA misconduct, it may receive limited credit if it later fully cooperates and timely and appropriately remediates – but any such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing (a maximum of 25% off the low end of the fine suggested by the Sentencing Guidelines). On March 1, 2018, the DOJ informally extended the FCPA declination policy to non-bribery cases as non-binding guidance.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" 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 with the government's investigation in making their 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.

In anti-competition matters, if a company is the first company in an industry to voluntarily disclose a violation, the DOJ Antitrust Division may grant complete leniency under its specific leniency programme. This programme can extend to non-anti-competition crimes committed in connection with the anti-competition activity that is being reported. Historically, credit was not available for subsequent self-reporting participants in the violation. However, in July 2019, the DOJ Antitrust Division announced that later self-reporting participants in a violation could receive credit for corporate compliance efforts, and that the DOJ would take the effectiveness of the company's anti-competition programme into consideration when making charging decisions.

As discussed above at question 12.1, there is a more recently developed FCPA Corporate Enforcement Policy, which is aimed at entities that self-disclose FCPA violations, timely and appropriately remediate their misconduct, and cooperate with the DOJ's investigation. In March 2018, the DOJ informally extended the cooperation principles of this policy to non-bribery cases as non-binding guidance.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, 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 by conducting an "internal investigation". The company generally would 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 voluntary 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 also will give credit to companies that use the results of their own internal investigations to alter their business practices, for example, by disciplining employees who engaged in misconduct and strengthening their compliance functions and internal controls.

The DOJ Antitrust Division has a specific leniency programme that may provide leniency to the first company in an industry to voluntarily disclose a violation. Subsequent self-reporting participants can receive credit for their corporate compliance efforts.

In March 2019, the leadership of the DOJ Criminal Division clarified that cooperation with the DOJ pursuant to the FCPA Corporate Enforcement Policy (discussed above at questions 12.1 and 13.1) requires the disclosure of all relevant facts about individuals who were substantially involved in the misconduct.

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 defendant 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 a 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 reflect honestly 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 that recommendation. 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 disfavoured 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 a 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 terms of imprisonment with which to sentence the defendant. The court, however, may use its discretion in issuing a sentence.

With regard to business crimes, the penalty may not be limited to fines and/or imprisonment. For certain offences, the DOJ may seek criminal or civil forfeiture, or both, of property that constitutes or is derived from proceeds traceable to the offence. The DOJ and the SEC also may seek an injunction against the business where this is deemed necessary to advance public interests or enforce governmental functions. Injunction actions specifically may be provided for by statute, or they may be permitted to enforce statutes that do not specifically provide such a remedy.

Generally, the Sentencing Guidelines account for the severity of the defendant's crime and the defendant's criminal history. They provide for reduced sentences for defendants who disclose wrongdoing to the authorities and actively assist the authorities in their investigation of any criminal conduct. They also provide for reduced sentences for companies that implement compliance programmes designed to detect and prevent wrongdoing by employees.

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 the imposition of 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, 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 functions 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 for 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 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 for 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 only may overturn a trial court's finding of fact if the finding was "clearly erroneous". This means that the appellate court only may overturn a factual finding when the finding 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, it may review those conclusions *de novo*, meaning 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 resentencing 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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