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The British Importation of American Corporate Compliance

INTRODUCTION

Legislators and prosecutors in Britain are reevaluating laws and procedures concerning corporate crime. In an effort to modernize and strengthen corporate criminal laws, British policymakers are examining and, in some instances, “importing” corporate criminal laws and procedures from the United States. This exchange of legal theories is rooted in comparative law, which allows attorneys, legislators, and scholars to understand and learn from legal systems in foreign jurisdictions.¹ As in this instance, policymakers may be so influenced by a foreign legal system that they decide to incorporate a version of the foreign system into their domestic legal structure.²

The director of the Serious Fraud Office (SFO), the British counterpart to the United States Department of Justice (DOJ),³ has publicly advocated changing both the substantive

¹ The practice of comparing substantive laws and legal procedures is “at once very old and very modern.” Klaus J. Hopt, *Comparative Company Law* 1162 (Max Planck Inst. for Private Law & ECGI, Working Paper No. 77/2006, 2006), available at <http://ssrn.com/abstract=980981>. Comparative company law is “old” because “ever since companies and company laws first existed, trade has not stopped at the frontiers of countries and states.” *Id.* Academic treatment of comparative law in the corporate context, however, is a fairly recent development that was driven by “the spread of 1930s American securities regulation into Europe, the company law harmonization efforts of the European Community . . . [and] the rise of the corporate governance movement.” *Id.* at 1162-63. The corporate governance “international bandwagon” started in the United States and the United Kingdom, traveled over to Continental Europe and Japan, and has since “permeated practically all industrialized countries.” *Id.* at 1163.

² See *id.* at 1167 (“Comparative law has always been considered to be an enrichment of the stock of legal solutions . . .”) (internal quotation marks omitted).

³ The SFO has “jurisdiction in England, Wales, and Northern Ireland, but not in Scotland, the Isle of Man, or the Channel Islands.” *Who We Are*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/about-us/who-we-are.aspx> (last visited Nov. 1, 2010). For purposes of this note, I use “Great Britain” and “United Kingdom” and variations thereof to describe the territories over which the SFO has jurisdiction, recognizing that SFO jurisdiction does not correspond directly to the political or geographical territories designated by these terms. The United Kingdom, as a sovereign state, is comprised of the constituent countries and political entities of England, Scotland, Wales, and

corporate criminal laws and the procedural mechanisms in Great Britain to better combat corporate crime.⁴ In order to change the substantive law, the director has suggested lowering the required mens rea⁵ for corporate criminal liability.⁶ Although this change has not yet been implemented by Parliament, the SFO has made changes to its legal procedures by developing and using what I refer to herein as “Compliance Agreements” when dealing with corporate wrongdoers. These Compliance Agreements bear a strong resemblance to American Deferred and Non-Prosecution Agreements.⁷ However, the SFO is using these Compliance Agreements in conjunction with civil, rather than criminal, laws in an effort to fight corporate crime.⁸

Legislators in Britain are examining substantive laws and procedures in the United States for a variety of reasons, including the success that the United States government—specifically the United States Attorney’s Office for the Southern District of New York (SDNY)⁹—has had in prosecuting corporations for their crimes. Moreover, the United Kingdom and the United States both have “strong judiciaries, low levels of government corruption, and highly developed stock markets,” which facilitate the comparison and exchange of laws and legal procedures.¹⁰ Both jurisdictions also use the same general legal framework for corporate criminal culpability, and provide largely similar due process rights to

Northern Ireland. Great Britain, as a territory, refers to England, Scotland, and Wales, but excludes Northern Ireland.

⁴ Vivian Robinson, Gen. Counsel, Serious Fraud Office, Speech: International Co-operation in the Investigation of Serious Fraud and Corruption (Aug. 13, 2009), available at <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2009.aspx> (follow “International Co-operation in the investigation” hyperlink).

⁵ Mens rea is “an element of criminal responsibility; . . . a criminal intent. Guilty knowledge and willfulness.” BLACK’S LAW DICTIONARY 985 (6th ed. 1990).

⁶ Robinson, *supra* note 4.

⁷ Deferred and Non-Prosecution Agreements are essentially contracts whereby the government agrees to defer or to cease prosecuting a corporation that has engaged in some unlawful conduct in return for the corporation’s admission of wrongdoing and pledge to institute remedial reforms. *See infra* Part III.

⁸ *Id.*

⁹ The SDNY represents the interests of the United States government in a variety of matters. It has jurisdiction in New York County and seven other counties. The director, the United States Attorney for the Southern District of New York, reports to the United States Attorney General. For an overview of the DOJ and its agencies, see *Department of Justice Agencies*, U.S. DEPT JUST. (Apr. 30, 2010), <http://www.justice.gov/agencies/index-org.html>.

¹⁰ John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMPIRICAL LEGAL STUD. 687, 689 (2009) (footnotes omitted).

defendants.¹¹ Further, the prosecuting offices frequently work together or in parallel investigations to resolve multijurisdictional cases, especially those concerning foreign bribery and corruption.¹²

While British policymakers have looked to the United States for guidance in combating corporate crime, this note argues that American policymakers should similarly learn from the developments in Britain. The SFO is currently adopting a procedure that has been widely criticized since its inception in the United States.¹³ The SFO should familiarize itself with the criticisms of Deferred and Non-Prosecution Agreements, as they predict many of the likely problems that the SFO will face in adding Compliance Agreements to its procedural toolkit. The SFO should also anticipate unique problems that might arise from incorporating into a civil system a procedure that was designed for use in the criminal context.

Despite importing such a controversial procedure, the SFO has been successful in at least two instances in achieving corporate reform through the use of Compliance Agreements. These successes emphasize the drawbacks of the American corporate criminal system as a whole and demonstrate that civil laws and procedures may, in fact, achieve corporate reform without fostering adversarial relationships between the government and corporate entities. American policymakers

¹¹ JESSICA DE GRAZIA, REVIEW OF THE SERIOUS FRAUD OFFICE 2 (2008), available at <http://www.sfo.gov.uk/media/34318/de%20grazia%20review%20of%20sfo.pdf>.

¹² See Richard Alderman, Dir., Serious Fraud Office, Speech: The SFO and DOJ 'Special Relationship': The Future of UK/US Co-operation against Overseas Corruption and Other Crimes (Dec. 9, 2009), available at <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009.aspx> (follow "The SFO and DOJ 'Special Relationship'" hyperlink) (discussing the interaction between the SFO and the DOJ in Foreign Corrupt Practices Act (FCPA) cases, relating the SFO's progress concerning "global settlements," and discussing extradition policies of the United States and United Kingdom). One recent example of a parallel investigation by the SFO and the SDNY is the Allied Deals cases. DE GRAZIA, *supra* note 11, at 37. The conspiracies charged in these cases involved two brothers, one in New York City and the other in London, who operated a Ponzi scheme by which bank loans were laundered through Allied Deals, Inc., and an international network of companies that were purportedly engaged in metal trading. *United States v. Chu*, 183 F. App'x 94, 96 (2d Cir. 2006). See *infra* Part III for a full discussion of the foreign bribery statutes in the United Kingdom and the United States; see also *infra* notes 39-55 and accompanying text (discussing the parallel investigation and global settlement in *R v. Innospec Ltd.*, [2010] EW Misc. (EWCC) 7 (Eng.)).

¹³ The Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. § 4 (2009), which was introduced in Congress for consideration by the House Judiciary Committee, Subcommittee on Commercial and Administrative Law, illustrates many of the criticisms of the use of Deferred and Non-Prosecution Agreements.

should examine the developments in Great Britain and consider making changes to corporate criminal laws and procedures in light of the SFO's achievements.

Part I of this note examines the development of corporate criminal laws in the United States and Britain. Part II describes how policymakers at the SFO have suggested changes in substantive British laws to mimic corporate criminal laws in the United States. Part III compares corporate reform under Deferred and Non-Prosecution Agreements to corporate reform under British Compliance Agreements. Part IV describes the likely problems the SFO faces by importing a procedure that was designed for use in criminal prosecutions. Finally, Part V describes some of the successes of British Compliance Agreements, and uses the developments in the United Kingdom as a basis to suggest changes in corporate criminal procedures and substantive laws in the United States.

I. THE HISTORY AND COMPARISON OF SUBSTANTIVE CORPORATE CRIMINAL LAWS IN THE UNITED STATES AND GREAT BRITAIN

Until the early 1900s, American corporate criminal law¹⁴ closely followed English common law doctrine, which did not provide a basis for imputing liability to a corporation based on the actions of employees. However, an American case in the early 1900s established a distinctive theory of corporate criminal liability. While English law has since evolved, the two legal systems retain differences in the scope of liability for corporate entities. However, in the last several years, Parliament has passed new legislation broadening the scope of liability for corporations in some specific instances, thereby mimicking the theory of liability in the United States and reversing the flow of influence.

It is well established that, in the United States today, an organization¹⁵ may be held vicariously liable for the crimes that its employees commit within the scope of their employment. Until 1909, American courts declined to hold

¹⁴ This note focuses on federal laws and federal crimes. State laws may differ.

¹⁵ An "organization" is "a person other than an individual." 18 U.S.C. § 18 n.1. The term includes "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations." *Id.*

organizations liable for the acts of individuals.¹⁶ Then, in *New York Central Hudson River Railroad Co. v. United States*, the Supreme Court upheld a statute subjecting a corporate entity to criminal liability.¹⁷ The Court explained the theory behind vicarious liability for corporations for intent-based crimes, stating that a “corporation is held responsible for acts not within the agent’s corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized.”¹⁸ The Court imputed liability, citing public policy concerns and reasoning that “[s]ince a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done.”¹⁹

The *New York Central* decision “upheld a statute that expressly punished corporations. It did not suggest that statutes silent on the subject should be read to [impute liability to businesses].”²⁰ Rather, the Court noted that “there are some crimes, which in their nature cannot be committed by corporations.”²¹ After this decision, however, the Supreme Court and other courts in the United States routinely read criminal statutes to impose liability on corporations under a theory of respondeat superior.²²

Current federal law applies an expansive interpretation of this theory, holding that an organization can be convicted of nearly any crime committed by an employee, provided that he or she was acting within the scope of his or her authority and acted “with the intention to help the company, even if the

¹⁶ *N.Y. Central Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493-94 (1909).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 492-93 (citations omitted).

²⁰ Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009).

²¹ *N.Y. Central*, 212 U.S. at 494.

²² Alschuler, *supra* note 20, at 1363. Respondeat superior is the principle that authorizes corporate punishment whenever “an agent or other person acting for or employed by the corporation acting within the scope of employment violate[s] a statute’s prohibitions.” *Id.* at 1364. Some states in America, by contrast, have limited the standard of liability to cases in which “the commission of the offense was authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.” *Id.* (citing MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962)).

employee was violating express directions or corporate policies.”²³ A corporation can be held criminally liable if:

the criminal conduct is undertaken without the knowledge of top management; the criminal activity was performed by a low-level employee; the primary purpose was to benefit only the miscreant employee; there was no actual benefit to the corporation; the criminal acts were performed in direct violation of instructions from the company; . . . no single individual had the requisite intent or knowledge sufficient to violate the law; it is never possible to identify the actual employee or agent responsible for the crime; or the offending employees are all acquitted of the same offense.²⁴

This exposes corporations to liability for a vast array of federal crimes.²⁵ In fact, the scope of the modern rule is so expansive that “a single errant employee can cause the downfall of a multinational corporation and the loss of thousands of jobs.”²⁶

Unlike American courts that apply an expansive theory of corporate criminal liability, British courts are hesitant to impose liability on business organizations for the acts of employees. As early as the seventeenth century, English courts held that a corporation could not be indicted for wrongful acts, or misfeasance,²⁷ because it exists “not as a natural person, but

²³ Robert J. Ridge & Mackenzie A. Baird, *The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements*, 33 U. DAYTON L. REV. 187, 189 (2008). The requirement that employees must be acting within the scope of their employment “has been interpreted so expansively that it is practically invisible in many contexts.” Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L. J. 411, 422 (2007) (adding that the scope of employment is the agent’s “actual or *apparent* authority” (emphasis added)). The requirement that the employee intended to help the corporation has also been expanded “because courts recognize that many employees act primarily for their own personal gain.” *Id.* (quoting Kendel Drew & Kyle A. Clark, *Corporate Criminal Liability*, 42 AM. CRIM. L. REV. 277, 282 (2005)). An agent does not have to be acting with the sole motivation to assist the corporation, and organizations have been held liable for acts of agents “no matter what their place in the corporate hierarchy.” *Id.* at 423; *see also id.* at 423 n.37 (“Corporate criminal liability has been predicated on the actions of low-level employees, including salespeople, manual laborers, truck drivers, and clerical workers.”).

²⁴ Ridge & Baird, *supra* note 23, at 189 (quoting Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 64-65 (2007)).

²⁵ “Examples of the unlawful activity of [American] corporations range from routine ‘union busting,’ violations of environmental regulations, and price-fixing, to illegal foreign payments, smuggling, and fraud of various kinds.” Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1287-88 (2001) (footnotes omitted).

²⁶ Alschuler, *supra* note 20, at 1364.

²⁷ “Misfeasance” is an “improper performance of some act which a person may lawfully do.” BLACK’S LAW DICTIONARY, *supra* note 5, at 1000.

as an artificial entity.”²⁸ Courts reasoned that a corporate entity “lacked physical, mental, and moral capacity to engage in wrongful conduct, or to suffer punishment. It could neither commit criminal acts, entertain criminal intent, nor suffer imprisonment,” and therefore could not be subject to liability.²⁹ During this time however, a variety of cases demonstrated that a corporation could be held “liable on a presentment of nonfeasance.”³⁰

In 1846, in the leading case of *The Queen v. Great North England Railway*,³¹ the court recognized that a corporation could also be liable for misfeasance and “imposed corporate criminal liability for the misconduct of employees acting within the scope of employment” by “borrowing a theory of vicarious liability from tort law.”³² Despite recognizing that liability could attach to corporations for the acts of their employees, English courts resisted a broad interpretation of the “corporation-as-person metaphor” and continued to hold corporations liable only where statutes provided strict liability, since corporate entities could not manifest the required mens rea for crimes that had a “moral dimension.”³³

Today, British courts will hold entities liable where an offense makes an express provision for corporate liability, as the United States Supreme Court reasoned in *New York Central*.³⁴ Where no express statutory provision exists, however, British law provides that a corporation will have imputed to it the acts and state of mind of “those who represent the [company’s] directing mind and will.”³⁵ Whether the court will

²⁸ Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. Q. 393, 396 (1982).

²⁹ *Id.*

³⁰ *Id.* at 401 (citing *Case of Langforth Bridge*, (1635) 79 Eng. Rep. 919 (K.B.)). “Nonfeasance” is “the omission of an act which a person ought to do.” BLACK’S LAW DICTIONARY, *supra* note 5, at 1000.

³¹ (1846) 115 Eng. Rep. 1294 (Q.B.).

³² Brickey, *supra* note 28, at 402-03 (footnotes omitted).

³³ Weissmann & Newman, *supra* note 23, at 419.

³⁴ SERIOUS FRAUD OFFICE, GUIDANCE ON CORPORATE PROSECUTIONS 2-4, available at <http://www.sfo.gov.uk/media/65228/com1%20joint%20guidance%20on%20corporate%20prosecutions%20for%20publication.pdf> (last visited Nov. 1, 2010).

³⁵ *Id.* at 4 (citing *Lennards Carrying Co. & Asiatic Petroleum*, [1915] A.C. 705 (H.L.) (appeal taken from Eng.); *R v. Andrews Weatherfoil*, [1972] 56 Crim. App. 31 (A.C.) (Eng.); *Bolton Eng’g Co. v. Graham*, [1957] 1 Q.B. 159 (Eng.)). “Directing mind and will” is restricted to “the Board of Directors, the Managing Director, and perhaps other superior officers who carry out functions of management and speak and act as the company.” *Id.* (quoting *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 (H.L.) (appeal taken from Eng.)).

attribute acts of a natural person to the entity will be determined by evaluating the constitution of the company concerned (including articles of association, minutes of the general meetings, and various memoranda) and definitions in the applicable statute.³⁶

Although British law provides for vicarious liability, it rarely arises in trial because proving a corporation's state of mind such that liability could be imputed is "notoriously difficult."³⁷ Because British law requires the prosecution to "identify an individual as the directing mind and will of the company in respect of the relevant activity" in order to attribute that individual's state of mind to the company,³⁸ prosecution of corporations in Britain today occurs with much less frequency than in the United States.

Prosecutions of corporations, however, do occur in Britain. A recent example is the case of *R v. Innospec Ltd.*, where a British company and wholly owned subsidiary of a Delaware corporation, Innospec Inc., pleaded guilty to conspiracy to corrupt pursuant to section 1 of the Criminal Law Act 1997.³⁹ The DOJ, the Securities and Exchange Commission (SEC), and Office of Foreign Asset Control (OFAC) began investigating the parent company, Innospec Inc., in July 2005, and in October 2007 notified the SFO, which began its own investigation in May 2008.⁴⁰ The American investigation revealed that between 2001 and 2004, Innospec Inc. entered into five contracts under the United Nations' Oil for Food Program with the Iraq Ministry of Oil to sell tetraethyl lead,⁴¹

³⁶ *Id.* In this way, British law resembles the United States Model Penal Code and the laws of some individual states which have limited the principle of respondeat superior to offenses that were authorized or tolerated by a corporation's board of directors or by high managerial staff acting on behalf of the corporation or within the scope of employment. *See supra* notes 20-22 and accompanying text.

³⁷ Jonathan Cotton, *United Kingdom: A New, More American World?*, INT'L FIN. L. REV., THE 2009 GUIDE TO LITIGATION, Apr. 1, 2009 (internal quotation marks omitted), available at <http://www.iflr.com/Article/2176832/Channel/193438/United-Kingdom-A-new-more-American-world.html>. Thus even today "criminal corporate liability would not normally extend to crimes such as rape and murder" because they involve a moral dimension, and it would be unlikely that the court could find that the "directing mind and will" of the corporation "acted in the scope of employment and at least in part to benefit the company" such that vicarious liability could attach. Weissmann & Newman, *supra* note 23, at 419 n.17.

³⁸ Cotton, *supra* note 37.

³⁹ *R v. Innospec Ltd.*, [2010] EW Misc. (EWCC) 7, [1] (Eng.).

⁴⁰ *Id.* at [6].

⁴¹ Tetraethyl lead, or TEL, is an antiknock fuel additive, which has been phased out of use by regulators since the 1970s because of health and environmental concerns. *Id.* at [4].

agreeing to pay the Ministry ten percent of the contract price as a bribe.⁴²

Investigators also discovered that in addition to the bribes of the Iraq Ministry of Oil, Innospec Ltd., the British subsidiary, bribed Indonesian officials to secure contracts from the Indonesian government for the supply of tetraethyl lead.⁴³ The Crown Court ultimately found that directors of Innospec Ltd., whose executive offices were in Britain, had conspired with the company and others to make payments of approximately \$8 million to senior government officials in Indonesia in violation of section 1 of the Prevention of Corruption Act 1906.⁴⁴ In September 2008, independent directors of Innospec Inc. admitted to the criminal offenses and began discussions with American prosecutors to reach a “global settlement.”⁴⁵

In late 2009, the company agreed to plead guilty both to offenses in the United States and the United Kingdom, subject to court approval in both jurisdictions.⁴⁶ Prosecutors at the SFO and DOJ began discussions about the terms of the settlement and how the penalty should be divided, finally deciding in January 2010 that the SFO, DOJ, and the SEC and OFAC together, would each receive a proportion of the settlement, resulting in \$14.1 million to the DOJ, \$11.2 million to the SEC, \$2.2 million to OFAC, and \$12.7 million to the SFO.⁴⁷ Although the fines and other penalties could have exceeded \$400 million in the United States and \$150 million in the United Kingdom, this would have put the company out of business. Thus prosecutors agreed, in light of the company’s full admission and cooperation, to limit the penalty.⁴⁸ Innospec Ltd. also agreed to establish a compliance and ethics program and to submit to corporate monitoring for a period not less than three years, with the monitor to be chosen in agreement with the SFO.⁴⁹

⁴² *Id.* at [6]. After the United Nations Oil for Food Program was discontinued, Innospec Inc. continued to make bribes resulting in a total of \$5.8 million paid or promised. *Id.*

⁴³ *Id.* at [4].

⁴⁴ *Id.* at [1], [4]-[5].

⁴⁵ *Id.* at [7].

⁴⁶ *Id.* at [8].

⁴⁷ *Id.* at [13]. The SFO sought to recover \$6.7 million of this amount in a criminal penalty for the Indonesian corruption and \$6 million in a civil recovery for the Iraq corruption. *Id.* at [17(v)].

⁴⁸ *Id.* at [7].

⁴⁹ *Id.* at [18].

Although the British court eventually approved the global settlement, it held that prosecutors lack the authority to set the penalty amount of such agreements.⁵⁰ The court held that in criminal cases involving a plea agreement between the defendant (whether natural or artificial) and the government, a prosecutor may assist the court in determining the appropriate penalty.⁵¹ However, the court held that “principles of transparent and open justice require a court sitting in public itself first to determine by a hearing . . . the extent of the criminal conduct on which the offender has entered the plea, and then, on the basis of its determination as to the conduct, the appropriate sentence.”⁵² This holding effectively limits the ability of British prosecutors to negotiate and agree upon a settlement amount with either the defendant corporation or with foreign authorities.⁵³

The court approved the power of prosecutors to issue a Civil Recovery Order (CRO) for property obtained through the unlawful conduct of a corporation.⁵⁴ The court noted, however, that it would “rarely be appropriate for criminal conduct by a company to be dealt with by means of a [CRO].”⁵⁵ Rather, a civil penalty may provide a means of compensation in addition to a fine in the case of corporate criminality. As a result, British

⁵⁰ *Id.* at [26].

⁵¹ *Id.* at [27].

⁵² *Id.*

⁵³ The court noted that while “there may be discussion and agreement as to the basis of plea, a court must rigorously scrutinize in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest.” *Id.*

⁵⁴ *Id.* at [37]; see *infra* Part III.B (discussing CROs). The SFO sought approximately half of its share of the \$12.7 million settlement in a civil recovery for the conduct in Iraq. *Innospec*, [2010] EW Misc. (EWCC) at [13]. The SFO sought a civil recovery, rather than a criminal penalty, in part because the SFO was concerned that imposing a criminal penalty for the same conduct charged in the United States would subject the corporation to double jeopardy. *Id.* at [37]. The British court disagreed, and further stated that that in light of the unavailability of funds, the criminal penalty for the conduct in Indonesia should not have been reduced by requiring a civil recovery for the conduct in Iraq. *Id.* at [38]. Rather, the court noted that states should “adopt a uniform approach to financial penalties for corruption of foreign government officials so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state.” *Id.* at [31]. The court reasoned that “[i]f the penalties in one state are lower than in another, businesses in the state with lower penalties will not be deterred so effectively from engaging in corruption in foreign states, whilst businesses in states where the penalties are higher may complain that they are disadvantaged in foreign states.” *Id.*

⁵⁵ *Id.* at [38]. The court stated that “[i]t would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.” *Id.*

prosecutors may be required to seek a criminal penalty, rather than a civil recovery, where the “directing mind and will” of the corporation has committed some unlawful conduct such that liability could be imputed to the corporation. Nevertheless, *R v. Innospec Ltd.* demonstrates that while prosecutions of corporations in Britain occur with less frequency than in the United States, they do happen and have serious consequences.

II. CHANGES TO SUBSTANTIVE LAWS AND PROCEDURES IN BRITAIN

The SFO and Parliament have been considering and implementing changes to the substantive laws and procedural mechanisms in Britain to strengthen the government’s ability to combat corporate crime and to institute corporate reforms. These developments widen the scope of corporate criminal liability and alter the interaction between the SFO and business organizations operating in Britain.

A. *Changes to Substantive Corporate Criminal Laws*

While legislators in Britain have not yet changed the general standard for imputing criminal liability to corporations, Parliament has recently passed several statutes that include specific offenses for corporate entities, thereby broadening corporate criminal liability in certain instances.

In 2007, Parliament passed the Corporate Manslaughter and Corporate Homicide Act, which created a new homicide offense in which an organization will be found guilty “if the way in which its activities are managed or organised—(a) cause the person’s death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.”⁵⁶ The Act does not require that the corporation’s “directing mind and will” be responsible.⁵⁷ In early 2010, Parliament also passed the Bribery Act, which created new offenses for bribing a foreign public official and for the

⁵⁶ Corporate Manslaughter and Corporate Homicide Act, 2007, c.19, § 1(1) (U.K.).

⁵⁷ However, a corporation will only be found guilty if the “way in which its activities are managed or organised by its senior management is a substantial element” of the breach of the duty of care. *Id.* § 1(3). “Senior level” means individuals “who make significant decisions about the organisation or substantial parts of it.” MINISTRY OF JUSTICE, UNDERSTANDING THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007, at 1 (2007), available at <http://www.justice.gov.uk/guidance/docs/manslaughterhomicideact07.pdf>.

failure of a corporation to prevent a bribe from being made on its behalf.⁵⁸ These changes to the laws considerably broaden the scope of liability for corporate entities and demonstrate a shift toward the American framework.

Further, the United Kingdom Law Commission, a body appointed by the Lord Chancellor to examine and reform the laws, is evaluating the existing corporate criminal laws as a part of its project on the codification of substantive criminal law.⁵⁹ This suggests that further changes to the British system should be anticipated.

B. Developments at the Serious Fraud Office and Changes to Legal Procedures

While Parliament considers reforming the substantive laws, the SFO is undergoing structural changes and making significant amendments to its procedures for dealing with corporate wrongdoers.⁶⁰ The SFO was established in 1988 by the Criminal Justice Act 1987.⁶¹ The SFO is an independent government department that investigates and prosecutes, as a part of the British criminal justice system, overseas corruption cases and “serious and complex fraud” cases exceeding a value

⁵⁸ Bribery Act, 2010, c.23, §§ 1-3 (U.K.).

⁵⁹ *Corporate Criminal Liability*, LAW COMMISSION (July 2, 2008), <http://www.lawcom.gov.uk/1150.htm>.

⁶⁰ Practical developments have also emerged, including an increase in the level of fines or civil penalties and disgorgements that British companies have been required to pay as a result of their wrongdoing. These increases resemble the high fines levied against corporations in the United States. Cotton, *supra* note 37. Further, individuals in the United Kingdom who have been involved in corporate crime are being subjected to longer prison sentences, and the SFO has imposed greater asset confiscation orders on these individuals, which are more reflective of the penalties imposed on individuals in the United States. *Id.* “British law enforcement agents have said they [also] want to develop their use of the American ‘campaign based approach’ . . . in which investigators identify an industry they think is highly corrupt and then try to bring simultaneous prosecution against a large number of people in it.” Stephanie Kirchaessner & Michael Peel, *FBI Sting Nets 22 Executives in Bribery Probe*, FIN. TIMES (Jan. 19, 2010, 11:00 PM), <http://www.ft.com/cms/s/0/516f276c-054d-11df-a85e-00144feabdc0.html> (follow “Register For Free” hyperlink; then follow “Sign Up” hyperlink under “Registered” column for free access).

⁶¹ *History & Legislation*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/about-us/history--legislation.aspx> (last visited Nov. 1, 2010). During the 1970s and early 1980s, the British public was unhappy with officials for failing to investigate and prosecute serious and complex fraud. The government then established the Fraud Trials Committee, which recommended that a new organization be responsible for investigating and prosecuting these types of fraud. The Committee’s report spurred the introduction of the Criminal Justice Act 1987 and, thereby, the SFO. *Id.*

of £1 million.⁶² Like the DOJ, through the individual United States Attorney's Offices (like the SDNY), the SFO handles both the investigation and prosecution of various cases.⁶³

In 2006, the SFO, then under the direction of the British Attorney General Lord Peter Goldsmith and SFO Director Robert Wardle, was widely criticized for its decision to halt investigation of BAE Systems for bribery after Saudi Arabia threatened to cease purchasing aircrafts and sharing anti-terrorism intelligence with Britain.⁶⁴ In March 2007, Lord Goldsmith decided that the agency "needed a thorough makeover."⁶⁵ He invited Jessica de Grazia, a thirteen-year

⁶² *Who We Are*, *supra* note 3; *see also Does the Fraud Fit SFO Criteria?*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/about-us/our-policies-and-publications/does-the-fraud-fit-sfo-criteria.aspx> (last visited Nov. 1, 2010). The SFO investigates a variety of frauds including investment fraud, bribery, corruption, corporate fraud, and public sector fraud. *See* Kirchgassner & Peel, *supra* note 60. "Fraud is a type of criminal activity, defined as 'intentional deception to obtain an advantage, avoid an obligation, or cause loss to another person or company.'" *Fraud*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/fraud.aspx> (last visited Nov. 1, 2010); *see also* Fraud Act, 2006, c.35, §§ 1-4 (U.K.) (defining fraud as false representation, failure to disclose information, and abuse of position to require intent to realize personal gain or gain for another, to cause loss to another, or to expose another to risk of loss). Factors that will be examined in accepting a case of suspected fraud are whether there is "a significant international dimension," whether "the case [is] likely to be of widespread concern," whether "the case require[s] highly specialised knowledge, e.g. of financial markets;" and whether "there [is] a need to use the SFO's special powers, such as section 2 of the Criminal Justice Act." Richard Alderman, Dir., Serious Fraud Office, Speech: An Update from the Serious Fraud Office: The Way Forward (Feb. 26, 2009), *available at* <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009.aspx> (follow "An Update from the Serious Fraud Office: The Way Forward" hyperlink). Section 2 of the Criminal Justice Act refers to the investigatory powers of the SFO where there are reasonable grounds to suspect that a serious and/or complex fraud or corruption has been committed. Criminal Justice Act, 1987, c.38, § 2, sch. 1 (U.K.).

⁶³ DE GRAZIA, *supra* note 11, at 2. The DOJ and the United States Attorney's Offices are over two centuries old, however, while the SFO is only twenty years old and still evolving. *Id.*

⁶⁴ *A Bit of an Old Boy's Club*, FCPA BLOG (Feb. 2, 2009, 7:22 PM), <http://www.fcpublog.com/blog/2009/2/3/a-bit-of-an-old-boys-club.html>. The SFO was investigating the affairs of BAE Systems with regard to the Al Yamamah defense contract with the government of Saudi Arabia, and ceased the investigation citing "the need to safeguard national and international security." Press Release, Serious Fraud Office, BAE Systems Plc/Saudi Arabia (Dec. 14, 2006), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia.aspx>. The investigation centered on allegations that the company had bribed Saudi Arabian government officials in exchange for the sale of Typhoon jet fighters. *SFO to Request Prosecution of BAE*, FCPA BLOG (Sept. 30, 2009, 8:13 PM), <http://www.fcpublog.com/blog/2009/10/1/sfo-to-request-prosecution-of-bae.html>. On September 30, 2009, the SFO announced that it intended "to seek the Attorney General's consent to prosecute BAE Systems for offenses relating to overseas corruption," but the sales to Saudi Arabia were not part of the request for the prosecution. *Id.*

⁶⁵ David Leppard, *She Came, She Saw, She Scythed Through the SFO*, TIMES ONLINE (U.K.) (Feb. 1, 2009), <http://business.timesonline.co.uk/tol/business/economics/article5627453.ece>.

Assistant District Attorney in Manhattan to evaluate the agency with “unrestricted remit.”⁶⁶ Her commentary “amount[ed] to one of the most damning official indictments of a government agency ever penned.”⁶⁷ In her 157-page final report, de Grazia emphasized that the “SFO uses significantly more resources per case” than the SDNY and the District Attorney’s Office of New York (DANY) and “achieves significantly less for its efforts, as measured by both its productivity (the number of defendants prosecuted) and its conviction rate.”⁶⁸ She traced these facts to both external factors, including “laws, government policy, and legal professional rules and practices,” and internal factors of “the SFO’s own policies and practices,” including skills shortages, inadequate management and leadership, lack of clarity about roles and responsibilities, insufficient early case screening, unfocused investigations, risk-averse culture, and ineffective use of powers.⁶⁹

As a result of the report, in April 2008, several top officials at the SFO were fired, along with Director Wardle, who was replaced by Richard Alderman, a senior lawyer at HM Revenue & Customs.⁷⁰ Under Alderman, the SFO began a

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ DE GRAZIA, *supra* note 11, at 3. For example, in a prosecution of criminal conspiracy in the Allied Deals case

where the acts on both sides of the Atlantic were the same, SDNY used a total team of eight to convict 14 defendants in a third of the time that it took for an SFO team totaling 31 to prosecute four defendants, three of whom were convicted after an eight-month trial.

Id. With regard to productivity and conviction rate,

[i]n 2007, the SFO employed 56 staff attorneys and spent an additional £4,227,000 on external counsel. . . . During the five-year period FY 2003-2007, the SFO prosecuted to conclusion a total of 166 defendants. In contrast the DANY Frauds Bureau . . . which is staffed by only 19 lawyers (slightly less than a third of the SFO’s permanent legal staff) and [which] does not contract out any aspect of its work to the external bar, concluded the prosecution of 124 defendants in the same period.

Id.; see also *infra* notes 131-32 and accompanying text (discussing contract staff). Further, “during the five-year period of 2003-2007, the SFO’s average conviction rate was only 61% of defendants whose cases were concluded during this period. During the same period, DANY’s Frauds Bureau had a 92% conviction rate.” DE GRAZIA, *supra* note 11, at 3.

⁶⁹ DE GRAZIA, *supra* note 11, at 6-13.

⁷⁰ Leppard, *supra* note 65. The Financial Services Authority (FSA), an independent body that regulates the financial services industry, has also been reviewing its procedures and appointed a new Chief Criminal Counsel in March 2009. Cotton, *supra* note 37.

“fundamental rethink about its role, its culture and how it operates.”⁷¹ At a speech only two months into his tenure, Alderman indicated that he believed the SFO needed to have a bigger presence in the City⁷² and that it should develop its role in order to “provide the framework that is needed for a leading financial centre.”⁷³ He noted that, under his predecessor, “everything [was] geared to investigating complex cases and getting them to court for often lengthy trials.”⁷⁴ Alderman, however, believed that prosecution would not always be appropriate and began to look for alternatives.⁷⁵

Alderman became interested in incorporating some of the procedural tools that the DOJ had at its disposal, specifically Deferred and Non-Prosecution Agreements.⁷⁶ In the view of SFO General Counsel Vivian Robinson, these agreements are an “efficient and cost-effective way of disposing of appropriate cases as an alternative to often drawn-out prosecution through the courts . . . [and] have considerable deterrent effect.”⁷⁷ Further, she believed that these agreements produce corporate reform by incentivizing corporations to self-police and report wrongdoing to the government.⁷⁸

While the SFO does not yet have the ability to enter into Deferred or Non-Prosecution Agreements with corporations that have acted unlawfully, the SFO has begun to incorporate some of the central features of these agreements into Compliance Agreements,⁷⁹ which are used in conjunction with civil statutes to achieve corporate reform. These changes, both in procedure and in substance, alter the relationship between the SFO and corporate entities, and strengthen the ability of the SFO to reform the behavior of corporate wrongdoers.

⁷¹ Richard Alderman, Dir., Serious Fraud Office, Speech: Rotary Club of the City & Shoreditch (July 17, 2008), available at <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2008.aspx> (follow “Rotary Club of the City & Shoreditch” hyperlink).

⁷² The “City” refers to the “Square Mile” of the financial and commercial heart of Britain in London. It is used colloquially the same way as “Wall Street” is used in the United States to indicate a concentration of capital, legal, and regulatory systems of the financial market. Like the colloquial “Wall Street,” the “City” refers to both a physical place where many financial buildings are located as well as the greater theoretical place of financial markets.

⁷³ Alderman, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Robinson, *supra* note 4.

⁷⁸ *Id.*

⁷⁹ See *infra* Part III.B.

III. COMPARISON OF BRITISH COMPLIANCE AGREEMENTS AND AMERICAN DEFERRED AND NON-PROSECUTION AGREEMENTS

In the United States, with Deferred and Non-Prosecution Agreements, reformation of a corporate wrongdoer is largely a process that occurs within the criminal law context. With the British adoption of Compliance Agreements, reformation of a corporate wrongdoer may occur within the civil law arena. Despite this fundamental difference, the SFO has created a procedure that achieves many of the aims of the DOJ, including providing incentives for corporations to self-police ex ante and, once a corporation is found to have engaged in some unlawful conduct, to institute reforms and pay restitution ex post.

A. *Reforming Corporate Behavior Through Deferred and Non-Prosecution Agreements*

The most widely used procedure in American corporate criminal cases today is Deferred and Non-Prosecution Agreements. Although these agreements have existed since the early 1980s, they were rarely used in the corporate criminal context until 2003,⁸⁰ when the Holder Memorandum,⁸¹ and subsequently the Thompson Memorandum,⁸² provided for their

⁸⁰ Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 315-17 (2007). The first case in which a procedure resembling a Deferred Prosecution Agreement was used was a government investigation into Salomon Brothers for securities fraud violations. Peter Spivak & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163-64 (2008). The first actual Deferred Prosecution Agreement involving a major company occurred in 1994, when the SDNY "agreed to defer prosecution of Prudential Securities for securities fraud for three years, in return for substantial internal reforms." *Id.* at 164.

⁸¹ The Holder Memorandum was issued in 1999, by then-Deputy Attorney General Eric Holder, and set forth guidelines for indicting corporations as a response to "a group of private practitioners complaining that there was no uniformity in the way in which prosecutors decided to indict corporations." Peter Lattman, *The Holder Memo and Its Progeny*, WALL ST. J. L. BLOG (Dec. 13, 2006, 8:47 AM), <http://blogs.wsj.com/law/2006/12/13/the-holder-memo>.

⁸² The Thompson Memorandum was issued in 2003, by then-Deputy Attorney General Larry Thompson. See Memorandum from Larry D. Thompson, Deputy Att'y Gen., on Principles of Fed. Prosecution of Bus. Orgs. to the Heads of Dep't Components & U.S. Attorneys (Jan. 20, 2003), available at http://www.justice.gov/dag/cftf/corporate_guidelines.htm. The McNulty Memorandum was issued in 2006 and made two major changes to the Thompson Memorandum in light of *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006): the DOJ (1) could no longer consider as a negative factor a company's refusal to waive attorney-client privilege and (2) could no longer cut off the payment of legal fees for employees who were being investigated by the government.

use as an alternative to indicting a corporation and proceeding with trial.

Deferred and Non-Prosecution Agreements are essentially contracts offered by the prosecutor to a corporation after an alleged wrongdoing within the organization has occurred. Such agreements are signed and filed at the charging stage, at which point a criminal Complaint or Information is filed with the court.⁸³ Typically, these agreements require that the company (1) pledge to admit wrongdoing, (2) waive the statute of limitations, (3) consent to the agreement being admissible in court, (4) agree to cease violating the law, (5) assist the government in prosecuting individuals associated with the crimes, (6) pledge that employees will not violate the terms of the agreement, and (7) pay restitution and fines.⁸⁴ In exchange, the prosecutor guarantees that he or she will postpone or drop prosecution.⁸⁵ Deferred and Non-Prosecution Agreements can be, in essence, a form of probation for the corporation, typically lasting between approximately one and three years.⁸⁶

Deferred and Non-Prosecution Agreements make it possible for the government to extract promises from corporate entities to improve their structure and behavior, without having to prove any misconduct beyond a reasonable doubt in a court of law. Deferred and Non-Prosecution Agreements incentivize corporations to self-police ex ante by establishing

See Memorandum from Paul J. McNulty, Deputy Att'y Gen., on Principles of Fed. Prosecution of Bus. Orgs. to the Heads of Dep't Components & U.S. Attorneys (Dec. 12, 2006), available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf. In *United States v. Stein*, KPMG came under investigation for illegal tax shelters. The Thompson Memorandum provided that advancing attorney's fees to employees of a target corporation might viewed by the government as "protection" of individual actors, and prosecutors were instructed that they could take this into account in deciding whether to indict the corporation. *Stein*, 435 F. Supp. 2d at 337-38. Although KPMG had a policy of paying the attorney's fees of its employees, KPMG decided in light of its conversations with the government to withhold attorney's fees if the employee refused to cooperate with the government. *Id.* at 345-46. The court held that the government, by pressuring KPMG to cut off the legal fees of individual employees in order to meet the terms of the Deferred Prosecution Agreement, violated the Fifth and Sixth Amendment rights of the individual defendants. *Id.* at 345. The Second Circuit Court of Appeals upheld the decision to dismiss the charges against the individual employees because no remedy could cure the government's constitutional violations. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

⁸³ Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 888-89 (2007).

⁸⁴ Lawrence D. Finder et al., *Betting the Corporation: Compliance or Defiance?*, 28 CORP. COUNS. REV. 1, 4 (2009).

⁸⁵ *Id.*

⁸⁶ See Griffin, *supra* note 80, at 321.

“voluntary” corporate compliance programs to avoid prosecution altogether, or to avoid more punitive sentences if they are nevertheless found to have participated in some wrongful conduct.⁸⁷ The agreements have this effect in part because the prosecutor is instructed to evaluate whether the corporation has adopted and implemented a “truly effective” compliance program in deciding whether or not to enter into the Deferred or Non-Prosecution Agreement after a finding of corporate misconduct.⁸⁸ If the corporation has done so, the prosecutor may decide to charge only the corporation’s employees and agents, or to mitigate charges or sanctions against the corporation.⁸⁹ As a result of Deferred and Non-Prosecution Agreements and changes to corporate law brought by the Sarbanes-Oxley Act of 2002,⁹⁰ a vast majority of corporations in the United States have established “voluntary” compliance programs largely out of the fear of the threat of prosecution.⁹¹

Deferred and Non-Prosecution Agreements also give the federal government a greater ability to pursue individual wrongdoers.⁹² In deciding whether to enter into a Deferred or Non-Prosecution Agreement with a corporation, prosecutors are instructed to consider the adequacy of prosecuting the individuals responsible for the corporation’s wrongdoing.⁹³ The prosecutor is further instructed to evaluate the corporation’s willingness to replace responsible management or to discipline or terminate the responsible employees.⁹⁴ In order to pursue individual wrongdoers, prosecutors often require corporations to conduct an internal investigation, which includes disclosing information about individual actors in order to receive

⁸⁷ Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard’s Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 526 (2008) (footnotes omitted).

⁸⁸ U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-28.800 (as amended in 2008) [hereinafter USAM]. The programs must also be “designed, implemented, reviewed, and revised, as appropriate . . .” Finder et al., *supra* note 84, at 23.

⁸⁹ USAM, *supra* note 88, § 9-28.800.

⁹⁰ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.).

⁹¹ See Finder et al., *supra* note 84, at 14 n.42. As of January 22, 2009 “over 89% of publicly traded companies [in the United States] have a compliance program, 8% have only an ethics program, and 5% have neither an ethics program nor compliance program . . .” *Id.* Further, “69% of private companies have a compliance program, 12% have only an ethics program, and 29% have neither . . .” *Id.*

⁹² See Alschuler, *supra* note 20.

⁹³ USAM, *supra* note 88, § 9-28.300.

⁹⁴ *Id.*

mitigating credit for cooperating with the government.⁹⁵ This requirement gives prosecutors unparalleled access to information about the alleged crimes and actors, thereby allowing the government to bring charges that may not have otherwise been possible due to insufficient evidence.⁹⁶ In this regard, the corporation becomes a type of “investigative partner” to the government.⁹⁷

With the use of Deferred and Non-Prosecution Agreements, federal prosecutors also seek to institute reforms of corporate wrongdoers to ensure that the unlawful activity does not continue or recur. These agreements assist prosecutors in achieving this goal by requiring the corporation to hire a monitor, typically charged with retraining employees, suggesting changes to the pre-existing compliance program, restructuring whole sectors, and removing executives.⁹⁸ These monitors are notoriously expensive.⁹⁹

The threat of criminal prosecution also gives prosecutors the power to demand that a target corporation pay significant fines when it executes a Deferred or Non-Prosecution Agreement. The payments may be styled as damages, punitive fines, compensation to settle civil lawsuits, disgorgements, or back-taxes.¹⁰⁰ These fines have ranged from thousands of dollars to hundreds of millions of dollars and are often vastly disproportionate to the monetary value of the wrongdoing.¹⁰¹

Because of the increased ability of prosecutors to reform business organizations through Deferred and Non-Prosecution

⁹⁵ An internal investigation requires a corporation to disclose the “relevant facts” concerning misconduct of the corporation and of individuals. Memorandum from Mark R. Filip, Deputy Att’y Gen., on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep’t Components & U.S. Attorneys 9-11, 15-16 (Aug. 28, 2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

⁹⁶ See Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1458 (2007).

⁹⁷ *E.g.*, United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (where the government required the corporation to conduct an extensive internal investigation in order to satisfy the terms of a Deferred Prosecution Agreement); see also *supra* note 82 (discussing *Stein*).

⁹⁸ Kathleen M. Boozang & Simone Handler-Hutchinson, “Monitoring” *Corporate Corruption: DOJ’s Use of Deferred Prosecution Agreements*, 35 AM. J. L. & MED. 89, 100-01 (2009).

⁹⁹ *Id.*

¹⁰⁰ Garrett, *supra* note 83, at 900.

¹⁰¹ *Id.* From January 2003 to January 2007, the DOJ entered into thirty-five agreements producing a total of \$4.95 billion in restitution and averaging \$141 million per agreement. *Id.*

Agreements, these agreements have become the “sanction of choice” in cases of corporate misconduct.¹⁰² From 1993 to 2008, the United States government entered into a total of 112 agreements with various corporations.¹⁰³ During this time, the government refrained from filing any criminal charges against a major corporation without also entering into a Deferred or Non-Prosecution Agreement.¹⁰⁴

These agreements are most frequently used in cases where entities have violated the Foreign Corrupt Practices Act (FCPA),¹⁰⁵ which prohibits corporations and employees from bribing foreign officials and requires corporate entities to meet certain accounting requirements, including maintaining accurate accounting records and a system of internal accounting controls.¹⁰⁶ But Deferred and Non-Prosecution Agreements have been used in a variety of instances of corporate wrongdoing, most notably in cases of tax evasion, securities fraud, and health care fraud. With the widespread use of Deferred and Non-Prosecution Agreements, “pretrial diversion has become the ‘standard’ means for conducting corporate criminal investigations.”¹⁰⁷

B. *The British Civil Recovery Order and Corporate Compliance Agreements*

In Britain, the intent requirement in many corporate crimes is relatively high, and, as a result, successful

¹⁰² Boozang & Hutchinson, *supra* note 98, at 97.

¹⁰³ Finder et al., *supra* note 84, at 1. See *id.* at 3 for a list of the agreements from 2006-2008.

¹⁰⁴ Spivak & Raman, *supra* note 80, at 167. Milberg Weiss Bershad & Schulman and Reliant Energy Services are “arguable exceptions” because Milberg refused to enter into a Deferred Prosecution Agreement citing that the waiver of attorney-client privilege was “too onerous,” and, in the case of Reliant, although the government believed that it was “uncooperative” with the investigation, Reliant finally agreed to enter into an agreement in return for the dismissal of the indictment. *Id.* at n.42; see also *infra* note 159 (discussing the demise of Arthur Andersen after refusing to cooperate with authorities).

¹⁰⁵ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

¹⁰⁶ David Hess & Christie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 313-14 (2008); see also Marika Marris & Erika Singer, *Foreign Corrupt Practices Act*, 43 AM. CRIM. L. REV. 575, 580-81 (2006). The Organization on Economic Cooperation and Development (OECD) Anti-Bribery Convention went into effect in 1999 and all countries that ratified the agreement, including the United Kingdom, now have similar statutory provisions to the FCPA. The Convention requires that each signatory country “criminalize the bribery of foreign officials.” *Id.* at 594.

¹⁰⁷ Spivak & Raman, *supra* note 80, at 159.

prosecution by the SFO of corporate wrongdoers is difficult. Therefore corporations in Britain do not face a threat of criminal prosecution comparable to that faced by corporations operating in the United States, and the SFO cannot rely upon Deferred and Non-Prosecution Agreements to regulate corporate criminal misconduct. Instead of importing Deferred and Non-Prosecution Agreement procedures unchanged, the SFO has adopted a form of these agreements—the Compliance Agreement—to be used in conjunction with civil statutes. One such civil statute is the Proceeds of Crime Act 2002, in which Parliament gave the SFO the right, through the use of a Civil Recovery Order (CRO), to recover from a person, natural or artificial, any property “which is or represents property obtained through unlawful conduct.”¹⁰⁸ The CRO does not require the government to prove the culpability of any person, but rather requires it to proceed in rem against any proceeds traceable to any unlawful conduct and thereby obtain restitution for the wrongdoing.¹⁰⁹ By using the CRO in conjunction with a Compliance Agreement, the SFO is able to regulate corporate conduct and institute reforms, thereby achieving many of the same goals of prosecutors in the United States. This also allows the SFO to conserve resources for cases of corporate wrongdoing severe enough to merit prosecution.

In 2008, the SFO successfully obtained its first CRO against a major business organization. Balfour Beatty, an engineering and construction corporation, had been engaged in a joint venture to build the Bibliotheca Alexandria in Egypt.¹¹⁰ The corporation monitored its own accounting practices as required under section 221 of the Companies Act 1985, which sets forth the standards for maintaining accurate business records.¹¹¹ During the project, Balfour Beatty discovered

¹⁰⁸ Proceeds of Crime Act, 2002, c.29, pmb. (U.K.).

¹⁰⁹ *Id.* §§ 243, 304.

¹¹⁰ Press Release, Balfour Beatty, Balfour Beatty Reaches Full Settlement of Issues Relating to Bibliotheca Alexandria Project (Oct. 6, 2008) [hereinafter Balfour Press Release], available at <http://www.balfourbeatty.com/bby/media/press/2008/2008-10-06>.

¹¹¹ Press Release, Serious Fraud Office, Balfour Beatty plc (Oct. 6, 2008) [hereinafter SFO Press Release], available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx>. Section 221 of the Companies Act, 1985, c.40 (U.K.), provides that

[e]very company shall keep accounting records which are sufficient to show and explain the company's transactions and are such as to (a) disclose with reasonable accuracy, at any time, the financial position of the company at that time, and (b) enable the directors to ensure that any balance sheet and profit and loss account prepared under this Part complies with the requirements of this Act.

inaccurate accounting records due to “certain payment irregularities” at one of its subsidiaries, and reported this finding to the SFO.¹¹² As a result, Balfour Beatty agreed to forfeit to the government £2.25 million obtained through unlawful conduct and to contribute to the costs of proceedings.¹¹³ The SFO pursued civil recovery rather than criminal prosecution, concluding that an indictment could not be brought against the corporation or any individual since no financial benefit was derived by any individual employee and most of the “relevant individuals” were no longer employed at Balfour Beatty or its subsidiaries.¹¹⁴

The SFO combined its civil recovery procedure with a Compliance Agreement that largely mirrored a Non-Prosecution Agreement. Though the Companies Act does not require companies to self-police *ex ante*, Balfour Beatty had established a voluntary compliance program as previously suggested by the SFO, conducted its own “fully documented internal investigation of the irregularities,” and reported its findings to the SFO for further investigation.¹¹⁵ Once Balfour Beatty came under investigation, it cooperated fully with the SFO and “voluntarily” agreed to introduce certain compliance systems.¹¹⁶ This involved requiring Balfour Beatty to take “comprehensive steps to review and improve its control processes,” and to submit to a form of external monitoring for a set period of time.¹¹⁷

The SFO touted the power it wielded in the case of Balfour Beatty as a demonstration of its “commit[ment] to combating improper corporate behaviour in line with similar efforts being made in other jurisdictions.”¹¹⁸ While the SFO did not prosecute the company, it publicized its ability to obtain civil restitution and to mandate corporate reformation, thereby demonstrating its ability to sanction a major corporate

Id. The Companies Act also describes the information that the accounting records must contain. *Id.*

¹¹² Balfour Press Release, *supra* note 110.

¹¹³ *Id.*

¹¹⁴ SFO Press Release, *supra* note 111.

¹¹⁵ Balfour Press Release, *supra* note 110.

¹¹⁶ SFO Press Release, *supra* note 111.

¹¹⁷ *Id.* No further details exist as to the remedial measures that Balfour Beatty was required to undertake pursuant to the agreement, either with regard to the identity or duties of the monitor, or as to the length of time that he or she was to remain with the corporation. For a discussion of monitors, see *infra* Part V.C.

¹¹⁸ SFO Press Release, *supra* note 111.

wrongdoer without the use of criminal laws.¹¹⁹ The SFO emphasized that Balfour Beatty would be the first of many cases that would require a corporate wrongdoer to self-police, report to the government, pay restitution, and institute reforms, as corporations do under the Deferred and Non-Prosecution procedure in the United States.

Despite the success in the case of Balfour Beatty, the SFO has imported a controversial American procedure and Compliance Agreements will likely be subject to many of the same criticisms of Deferred and Non-Prosecution Agreements. However, the achievement of corporate reform and restitution without the threat of criminal sanctions may suggest ways in which Deferred and Non-Prosecution Agreements can be improved.

IV. PROBLEMS WITH IMPORTING A FORM OF DEFERRED AND NON-PROSECUTION AGREEMENTS

By importing a form of Deferred and Non-Prosecution Agreements, the SFO will likely face many of the same criticisms as the DOJ since it began to use these agreements, including the production of inconsistent agreements that are not regulated by statute or subject to judicial review. But the SFO may face unique problems, including the failure to prompt corporate entities to report wrongdoing and the production of uncertainty in the application and use of Compliance Agreements. These anticipated shortcomings stem in part from the fact the SFO is importing a procedure that was designed for use in the criminal context.

A. *Inconsistency Between Agreements and Lack of Oversight*

One of the most significant criticisms of Deferred and Non-Prosecution Agreements in the United States is that the guidelines for offering and entering into these agreements are not regulated by statute. Instead, the DOJ “has published a series of memoranda designed to guide its prosecutors in developing a more uniform approach to corporate conduct and to inform the defense bar and general public about the factors that [DOJ] prosecutors may take into consideration when making charging decisions.”¹²⁰ Because the guidelines are not

¹¹⁹ *Id.*

¹²⁰ Ridge & Baird, *supra* note 23, at 191.

codified, they may change with every new Attorney General, each of whom may put forth his or her own agreement policy.¹²¹ While the guidelines have been recently incorporated into the United States Attorney's Manual (USAM), they are still subject to change without approval from any legislative body.¹²²

Although the Proceeds of Crime Act and the CRO procedure in Britain were enacted by Parliament, a memorandum promulgated by SFO Director Alderman gave prosecutors the power to enter into and set the terms of Compliance Agreements. The Approach of the SFO to Dealing with Overseas Corruption, known as "the Guide" for prosecutors, was published after the investigation of Balfour Beatty at the request of corporate executives in the City.¹²³ The Guide, which pertains only to overseas corruption cases like that of Balfour Beatty, may be changed or replaced without the consent of Parliament.

Compounding this problem is the fact that Compliance Agreements, like Deferred and Non-Prosecution Agreements, are not subject to judicial oversight. Although prosecutors must appear before a judge in order to obtain a CRO, the judge does not retain any discretion over the terms of the Compliance Agreement. Deferred and Non-Prosecution Agreements have been widely criticized for this reason in the United States because federal prosecutors have the unilateral authority to decide whether the corporation has engaged in any unlawful activity, and if so, to determine what the terms of the resulting agreement will be and whether the corporation or its employees have met or breached the terms of the agreement, without any judicial review.¹²⁴

Another problem with Deferred and Non-Prosecution Agreements is that the DOJ does not require public disclosure

¹²¹ For example, Attorney General Paul McNulty promulgated significant changes to Deferred and Non-Prosecution Agreement procedures in a 2006 Memorandum. *See supra* notes 81-82.

¹²² *See id.*; USAM, *supra* note 88, ch. 9-28.

¹²³ SERIOUS FRAUD OFFICE, APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION 1 (2009) [hereinafter SFO Guide], available at <http://www.sfo.gov.uk/media/28313/approach%20of%20the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf>.

¹²⁴ Federal judges have oversight of plea agreements and charging decisions, however. Garrett, *supra* note 83, at 906. Judges can either accept or reject plea agreements, and can "examine voluntariness, factual basis, fairness, abuse of discretion, or infringement on the judge's sentencing power" in their review. *Id.* Although the "[f]ederal courts are more involved in reviewing plea bargains than charging decisions, . . . judges still remain highly deferential." *Id.*

of the terms of the agreements.¹²⁵ In the United States, some agreements have never been made public. The SFO has required slightly more disclosure, though not enough. The Guide provides that after the corporation has come under investigation by the SFO and agreed to forfeit a specified amount to the government, the corporation must make a public statement.¹²⁶ While the SFO and the target entity must agree on the content of the public statement, the Guide does not describe what facts must be disclosed.¹²⁷ Indeed, very little has been disclosed by Balfour Beatty or the SFO in press releases, and the actual terms of the agreement are not public.¹²⁸

Another major criticism of Deferred and Non-Prosecution Agreements in the United States is the inconsistency between agreements in different cases. Inconsistency has resulted, in part, because “ninety-four United States Attorney’s Offices and six divisions of Main Justice” have the authority to enter into, and to set the terms of, Deferred and Non-Prosecution Agreements.¹²⁹ Inconsistency between agreements also results from the particular requirements and needs of the prosecutor. In many cases, the terms of an agreement “could very likely turn on the luck of the draw regarding which office happens to handle the prosecution.”¹³⁰

The SFO may be able to avoid this basic problem of inconsistency, as it is the only office thus far in the United Kingdom that has entered into Compliance Agreements. This ensures that, at the very least, the prosecutor offering the agreement may be familiar with and have access to the terms of prior agreements. Whether or not the prosecutor chooses to follow the terms set forth in prior agreements, however, is within the discretion of the individual attorney, and thus agreements may still be inconsistent. Further, the SFO, unlike United States Attorney’s Offices, uses contract attorneys who

¹²⁵ See Spivak & Raman, *supra* note 80, at 180-81.

¹²⁶ SFO GUIDE, *supra* note 123, at 3.

¹²⁷ *Id.* at 3-4.

¹²⁸ See Balfour Press Release, *supra* note 110; SFO Press Release, *supra* note 111.

¹²⁹ See Ridge & Baird, *supra* note 23, at 191.

¹³⁰ Spivak & Raman, *supra* note 80, at 171-72. See *id.* at 171-75 for a comparison of requirements in Deferred and Non-Prosecution Agreements issued by the SDNY and the District of New Jersey. Further complicating this issue in the United States is that prosecutors at the state Attorney General’s offices also have authority to prosecute corporations and to enter into their own Deferred and Non-Prosecution Agreements.

conduct all Crown Court and appellate advocacy, including the preparatory work.¹³¹ Contracting out cases to attorneys undermines the accountability of prosecutors and of the SFO as a whole, and it jeopardizes the continuity of knowledge and decision-making in both specific cases and the SFO's prosecution practices in general.¹³²

By importing American procedures without improving upon them, the SFO is likely to face many of the same criticisms as the DOJ. The SFO's refusal to provide uniform, codified guidance on the use and terms of these agreements is likely to result in uncertainty and inconsistency in different cases. The absence of judicial oversight leaves prosecutors with powerful tools that are unchecked and may be abused. The SFO's failure to require public disclosure also creates uncertainty among corporate directors in making risk assessments *ex ante*, which heaps substantial costs on companies, employees, and shareholders, and could present problems for attorneys and consultants who are often hired to advise on corporate compliance programs.¹³³

Despite these likely problems, policymakers at both the DOJ and the SFO maintain that by providing only "general" guidelines on the terms of the agreements, prosecutors have the flexibility to tailor the agreements on a case-by-case basis and to experiment, which may over time lead to the emergence of best practices.¹³⁴ However, as shown in the past decade in the United States, "best practices" are unlikely to emerge. Instead, "best practices" simply become the most "common practices."¹³⁵

¹³¹ DE GRAZIA, *supra* note 11, at 57. In 2006-2007, the SFO spent £4,227,000 on contract barristers alone. *Id.* at 3. The Crown Court deals with more serious criminal cases, some of which are referred or on appeal from the Magistrates' Court. *Id.* at 120. Neither the DOJ nor any state prosecutors in the United States contract out any part of a prosecution. *See id.* at 3, 57.

¹³² De Grazia suggested that the SFO cease using contract attorneys for this reason. *See id.* at 6-7.

¹³³ Spivak & Raman, *supra* note 80, at 173. However, the failure to provide this guidance could have the opposite effect, making certain attorneys (such as ex-SFO staff) *more* valuable if they have internal, specific expertise about the SFO and its prosecutorial decision-making processes that is otherwise difficult to acquire.

¹³⁴ *See id.* at 173-74.

¹³⁵ *See* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 294 (2006). "Best practices" with regard to regulations set forth by agencies, for example, often create harmonized practices rather than prompt regulators to develop alternatives. *Id.* at 325. And on a global level, "best practices" may simply become a tool of international harmonization. *Id.* at 318-21.

And the only consistent trait of Deferred and Non-Prosecution Agreements is that they are inconsistent.¹³⁶

B. Limitations in Reporting Wrongdoing Despite Incentivizing Corporations to Self-Police

One goal of Deferred and Non-Prosecution Agreements is to create incentives for corporations to self-police ex ante and thereby establish corporate cultures designed to deter employee misconduct. The DOJ achieves this goal by promising less punitive sentences if the target entity was found to have established an “effective” compliance program before the wrongdoing occurred.¹³⁷ Similarly, the SFO seeks to “bring about behavioral change within businesses themselves” by incentivizing corporations to establish voluntary compliance programs, designed and implemented by management, which set forth internal regulations and programs to assist compliance officers in self-policing.¹³⁸

The SFO creates these incentives by first recommending in the Guide that corporations have self-policing programs in place before ever coming under investigation.¹³⁹ The SFO also threatens higher sanctions if it discovers unlawful activity within the corporation without the assistance of the entity itself.¹⁴⁰ In such case, “[t]he prospects of a criminal investigation followed by prosecution and confiscation order are much greater, particularly if the corporat[ion] was aware of the problem and had decided not to self report.”¹⁴¹

One common problem of both Deferred and Non-Prosecution Agreements and Compliance Agreements is that even a corporation’s good faith effort to self-police may still lead to a failure of the corporation to report unlawful activity to the government. This may occur, for example, because the compliance officer failed to find the fraud despite a strong self-policing program. In this case, both the DOJ and the SFO

¹³⁶ Spivak & Raman, *supra* note 80, at 172-73; *see also* Finder et al., *supra* note 84, at 11-13 (discussing how Deferred and Non-Prosecution Agreements have changed over time with regard to the needs of the government in each case).

¹³⁷ *See supra* notes 87-89 and accompanying text.

¹³⁸ SFO GUIDE, *supra* note 123, at 2.

¹³⁹ *See id.* at 1-2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

would hold the failure to self-report as a negative factor against the company.¹⁴²

The requirement that a corporation self-police and report the unlawful activity to the SFO in order to gain mitigation points creates unique problems in Britain. If a compliance officer detects that low-level employees, rather than the “directing mind and will” of the corporation, committed a crime, he may be eager to report to the SFO because the corporation itself will likely only face civil penalties. Such was the case in the Balfour Beatty investigation.¹⁴³ However, if the compliance officer anticipates that the corporation’s high-level employees, or the “directing mind and will” of the corporation, committed the crime, he may be reluctant to report to the SFO, knowing that the corporation would be more likely to face criminal charges. Compounding this problem is the fact that the SFO has not provided any guidance as to whether a corporation could gain mitigation credits for reporting wrongdoing if a criminal prosecution resulted from the investigation. As a result, the SFO’s policy to give credit to corporations that establish corporate compliance programs and self-police may only assist the SFO in identifying instances of wrongdoing by low-level employees, necessarily resulting only in civil penalties.

C. *Uncertainty in the Application of the Compliance Agreement Procedure*

In the United States, Deferred and Non-Prosecution Agreements can be used in response to any type of criminal activity. In Britain, Compliance Agreements have only been used in cases of foreign bribery, and then only in conjunction with CROs.¹⁴⁴ There is also no indication that the SFO would consider entering into a Compliance Agreement in a situation where the corporation could be held criminally responsible for violating a statute that provides a specific offense for corporations, such as the Corporate Manslaughter and Corporate Homicide Act and the Bribery Act.¹⁴⁵

¹⁴² *Id.* at 8.

¹⁴³ *See supra* Part III.B.

¹⁴⁴ *See supra* Part III.B.

¹⁴⁵ *See supra* Part II.A. In fact, the case of *R v. Innospec Ltd.*, [2010] EW Misc. (EWCC) 7 (Eng.), may prohibit the SFO from seeking a civil recovery where criminal penalty is possible. *See supra* notes 39-55 and accompanying text.

If the recent history of corporate criminal prosecution in the United States is any prediction, it is likely that the SFO will increase its efforts to encourage companies to self-police for all types of criminal wrongdoing. Congress enacted the FCPA in 1977, which provided criminal sanctions for individuals who bribed public officials, and encouraged public companies to create and maintain records of the way that employees used corporate assets.¹⁴⁶ As a result of the passage of the FCPA, attorneys began advising corporate clients of the need to create and maintain “internal processes” designed to deter employees from acting in contravention of the statute.¹⁴⁷ As a result, most, if not all, American corporations have some kind of self-policing program in place that now detects a variety of employee misconduct.¹⁴⁸

Similarly, after the SFO’s positive response to Balfour Beatty’s internal monitoring program that detected foreign bribery, British attorneys have begun to advise corporate clients of the increased need to establish internal processes designed to monitor all types of employee misconduct.¹⁴⁹ In addition, statutes such as the Corporate Manslaughter and Corporate Homicide Act encourage corporations to self-police and report wrongdoing to the government.¹⁵⁰ Moreover,

¹⁴⁶ See *supra* note 106 and accompanying text.

¹⁴⁷ Miriam Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 962-963 (2009).

¹⁴⁸ See *supra* note 91 and accompanying text.

¹⁴⁹ Client Alerts about the increased need for corporate compliance programs have been published by a number of international firms. See, e.g., *The UK’s Serious Fraud Office Announces Guide to Self-Reporting of Overseas Corruption by Corporations*, INT’L REG. BULL. (Bryan Cave LLP), July 23, 2009, available at <http://www.bryancave.com/bulletins/list.aspx?Date=2009> (follow “The UK’s Serious Fraud Office Announces Guide to Self-Reporting of Overseas Corruption by Corporations” hyperlink); *The Criminalisation of Corporate Conduct*, BRIEFING (Freshfields Bruckhaus Deringer LLP), May 2009, available at <http://www.freshfields.com/publications/pdfs/2009/may09/25753.pdf>; William Jacobson et al., *Two Recent Cases Show UK Is Active in Enforcement of Foreign Bribery Laws*, FULBRIGHT BRIEFING (Fulbright & Jaworski LLP), Oct. 13, 2008, available at http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=3619&site_id=494&detail=yes; Sarah E. Steicker & James T. Parkinson, *US DOJ and SEC Aggressively Pursuing FCPA Cases; SEC Forms Specialized FCPA Enforcement Unit*, FCPA WATCH (Mayer Brown LLP), Aug. 20, 2009, available at <http://www.mayerbrown.com/publications/article.asp?id=7442&nid=6>; see also Richard Alderman, Dir., Serious Fraud Office, Speech: Recent Developments at the Serious Fraud Office (Sept. 10, 2009), available at <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009.aspx> (follow “Recent developments” hyperlink) (discussing the SFO’s plan to continue using Compliance Agreements).

¹⁵⁰ The Corporate Manslaughter and Homicide Act provides that in considering the actions of corporations, the jury can evaluate “the extent to which the evidence shows that there were attitudes, policies, systems, or accepted practices within the organisation that were likely to have encouraged any such failure [of due

Alderman has announced that he seeks to expand the use of Compliance Agreements¹⁵¹ and may do so by using those agreements in response to different kinds of misconduct. Consequently, corporations are more likely to establish programs designed to deter all kinds of employee wrongdoing, and the SFO may increasingly consider these programs when evaluating the liability of the corporation and whether to pursue prosecution.

With policymakers in the United Kingdom importing procedures designed to effect corporate reform, multinational organizations face additional burdens. For example, differing substantive laws in various countries subject multinational corporations to different standards of liability and varying penalties. One pertinent example is the statutes governing foreign corruption in each jurisdiction which define bribery differently. Federal substantive law allows for facilitation payments,¹⁵² while British law does not.¹⁵³ A compliance program in a multinational corporation would have to account for these differences. Facilitation payments are only one example of thousands of variations in the laws that could trigger liability in one jurisdiction but not the other. The converse is also true; unlawful conduct committed by employees in one office in a

care] . . . or to have produced tolerance of it" Corporate Manslaughter and Homicide Act, 2007 c.19, § 8(3)(a) (U.K.).

¹⁵¹ In April 2009, Alderman stated that the SFO was "already identifying cases where there is clear evidence to establish that property was obtained through unlawful conduct" such that a CRO could be issued. Richard Alderman, Dir., Serious Fraud Office, Speech: The Changing Face of Fraud Trials (Apr. 30, 2009), *available at* <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009.aspx> (follow "The Changing Face of Fraud Trials" hyperlink). As recently as July 15, 2010, Alderman stated that the SFO "remain[s] very committed to [its] guidance and to the use of civil recovery in appropriate cases" and that, in addition to issuing more CROs, "[t]here will be more prosecutions to follow." Richard Alderman, Dir., Serious Fraud Office, Speech: Eversheds Round Table Discussion (July 15, 2010), *available at* <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2010.aspx> (follow "Evershed Round Table Discussion" hyperlink).

¹⁵² Facilitation payments assist a corporation in securing the issuance of work papers, police protection, mail delivery, electrical or plumbing services, or product clearance through customs. In order to qualify for exemption from liability, the payments must (1) "relate to a routine government action and be modest in amount," (2) the corporation must be able to show that the payment "affected the timing rather than the substance" of the government action, and (3) the corporation must be able to show that payment was required in order to protect against the destruction of an important commercial interest or risk to employees. Richard Alderman, Dir., Serious Fraud Office, Speech: Talking Corruption with the SFO (Oct. 20, 2009), *available at* <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009.aspx> (follow "Talking Corruption with the SFO" hyperlink).

¹⁵³ *Id.*

multinational corporation may subject it to further investigation and liability in multiple jurisdictions.¹⁵⁴

In addition, the SFO and the DOJ may not look to the same factors in evaluating the effectiveness of a compliance program. The SFO Guide states that prosecutors will examine a variety of enumerated factors,¹⁵⁵ while the USAM has no formulaic requirements. Further complicating the issue is that neither the DOJ nor the SFO will evaluate a corporation's compliance program in advance of an investigation to give an opinion as to whether it would be viewed as "effective" in a later proceeding.¹⁵⁶ This leaves multinational corporations operating in both jurisdictions with different sets of vague standards by which to model their compliance programs.

V. SUCCESSES OF COMPLIANCE AGREEMENTS AND SUGGESTIONS FOR IMPROVING DEFERRED AND NON-PROSECUTION AGREEMENTS

Despite the anticipated shortcomings of the Compliance Agreement procedure, the SFO's ability to achieve many of the same goals as American prosecutors by using a civil, rather than a criminal procedure may suggest ways to improve the American system. At the very least, the British successes demonstrate an alternative method of achieving corporate reform and restitution after a finding of corporate misconduct.

¹⁵⁴ See *supra* note 39-55 and accompanying text (discussing *R v. Innospec Ltd.*, [2010] EW Misc. (EWCC) 7 (Eng.) in which a subsidiary of Innospec Inc. came under investigation in the United Kingdom after the DOJ began investigating the parent company for foreign bribery).

¹⁵⁵ In assessing whether the corporation has instituted an effective compliance program, the Guide states that prosecutors at the SFO will examine whether the corporation has a code of ethics; a statement of anti-corruption culture that is "fully and visibly supported at the highest levels;" individual accountability for wrongdoing; training mechanisms; regular checks and auditing in a "proportionate manner" to the activity being performed; a corporate helpline which enables employees to report concerns; and "appropriate and consistent disciplinary processes." SFO GUIDE, *supra* note 123, at 7-8. The DOJ states that as long as the corporation's program is not merely a "paper program," it has no "formulaic requirements" for the program. USAM, *supra* note 88, § 9-28.800(B). In evaluating a corporation's compliance system, federal prosecutors are instructed to evaluate whether the program is "well designed," "applied earnestly and in good faith," and whether the program "work[s]." *Id.*

¹⁵⁶ The SFO does, in some instances, provide advisory opinions in advance of a transaction, as other regulatory bodies do in the United States and Britain. The SFO has stated that it will provide guidance in a situation where a corporation is proposing to take over another corporation, but during its due diligence, discovers evidence of overseas corruption, and the corporation seeks to understand what remedial measures the SFO would require if the transaction were to occur. SFO GUIDE, *supra* note 123, at 2. There is no indication that the SFO would provide an advisory opinion in any other circumstance.

A. *Limiting Adversarial Relationships Between Corporations and Governments*

Deferred and Non-Prosecution Agreements require the target corporation to cooperate with the government under threat of criminal prosecution. Thus, one criticism of these agreements is that they are inherently coercive and create adversarial relationships between the government and corporations operating in the United States.¹⁵⁷ In contrast, Compliance Agreements do not threaten future sanction for a corporation's failure to cooperate with the government. Criminal prosecution can only result if evidence emerges during the investigation that the "directing mind and will" of the organization was engaged in unlawful conduct.¹⁵⁸ In fact, the SFO Guide does not describe the course of action that the SFO would take if the target corporation failed to meet the terms provided in the Compliance Agreement.

Threat of criminal prosecution for noncompliance with the terms in a Deferred or Non-Prosecution Agreement may give corporations greater motivation to comply with the demands of the government in the United States than in the United Kingdom. Some have argued that because the consequences of an indictment are so severe, business organizations will go to almost any length in order to appease the prosecutor.¹⁵⁹ This means that the government, in turn, can expect the target corporation to be amenable to virtually every demand it makes.¹⁶⁰ This is especially so because it is the

¹⁵⁷ See Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. 312 (Pocket Pt. 2007); see also Baer, *supra* note 147, at 949.

¹⁵⁸ See *supra* note 35 and accompanying text.

¹⁵⁹ Indeed, some have argued that an indictment is a "death-sentence" for a corporation, citing the indictment of Arthur Andersen for its role in the Enron scandal. See, e.g., Spivak & Raman, *supra* note 80, at 165-66. When the government approached Arthur Andersen with a Deferred Prosecution Agreement, it "refused initially to accept responsibility for its misconduct and would not agree to major structural reforms." *Id.* at 165. Negotiations finally "collapsed, principally because the company viewed prosecutors' demands for cooperation as too onerous." *Id.* The company was then indicted and convicted, which "effectively put the eighty-nine-year old firm out of business and forced tens of thousands of people to find new jobs." *Id.* at 166 (quoting Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World*, 43 CRIM. L. REV. 1095, 1097 (2006)).

¹⁶⁰ Griffin, *supra* note 80, at 327. A DOJ official commented, "There's a right way and a wrong way to respond when the government comes knocking at your door," when comparing Arthur Andersen's indictment to Merrill Lynch's settlement agreement. *Id.* (quoting John R. Emshwiller & Ann Davis, *Merrill Takes Enron Responsibility*, WALL ST. J., Sept. 18, 2003, at A3).

prosecutor who ultimately decides whether the entity has sufficiently met all the terms of the agreement.¹⁶¹

Under this view, British Compliance Agreements, because they do not threaten criminal indictment, give target corporations less motivation to cooperate with the government. However, cases like Balfour Beatty¹⁶² and AMEC plc,¹⁶³ suggest that regardless of whether or not the threat of criminal indictment exists, corporations seek to comply with the government's demands. Thus, the cooperation of a target entity need not be predicated upon the threat of future criminal prosecution. Instead, civil sanctions combined with Compliance Agreements may achieve the same goals as Deferred and Non-Prosecution Agreements, while diminishing the adversarial and coercive relationship between the government and corporations. British Compliance Agreements have the added benefit of giving a target entity greater ability to advocate for terms of an agreement in its favor and to negotiate with the government to find mutually acceptable remedial measures, thereby achieving one of the goals of both the DOJ and SFO—to create agreements that are flexible and individually tailored for each corporation.¹⁶⁴

¹⁶¹ See Griffin, *supra* note 80 at 320-21. However, some argue that the threat of criminal prosecution may not be as severe as some once believed. For example, a jury recently acquitted W.R. Grace, and three of its executives, which had been indicted for violating the Clean Air Act, 42 U.S.C. §§ 7401-7671 (2006), by releasing asbestos-contaminated vermiculite. Bob Van Voris et al., *W.R. Grace Acquittal Clears Way for End to 8-Year Bankruptcy*, BLOOMBERG (May 9, 2009, 12:01 AM) <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6WFdRnflLuNE>.

¹⁶² See *supra* Part III.B.

¹⁶³ In March 2008, AMEC reported to the SFO a finding of irregular payments which were made when the company was associated in a project in which it was a shareholder. Press Release, Serious Fraud Office, SFO Obtains Civil Recovery Order against AMEC plc. (Oct. 26, 2009) [hereinafter AMEC Press Release], available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx>. The SFO determined that the unlawful conduct amounted to a failure to comply with section 221 of the Companies Act, 1985, c.40 (U.K.). *Id.* AMEC agreed to pay £4,943,648 in restitution and pledged to improve their compliance procedure and appoint a monitor to report back to the SFO. *Id.*

¹⁶⁴ Too little adversarialism comes with its own problems, however. Without some adversarial posture, prosecutors and regulators can become too lenient and can lose the “healthy dose of skepticism necessary to monitor and discipline” corporate actors. Baer, *supra* note 147, at 981 (citing William Bratton, *Enron, Sarbanes-Oxley and Accounting: Rules Versus Principles Versus Rents*, 48 VILL. L. REV. 1023, 1032 (2003)).

B. *The Ability of the SFO to Pursue Individual Corporate Wrongdoers*

Another goal of the federal government in entering into Deferred and Non-Prosecution Agreements is the increased ability to pursue individual wrongdoers by obtaining additional information from the target entity.¹⁶⁵ However, Deferred and Non-Prosecution Agreements have come under attack in recent years for including terms that require corporations to hand over privileged documents and that force employees to speak with prosecutors. In fact, because of *United States v. Stein* and internal DOJ responses to perceived prosecutorial overreaching, prosecutors are now limited in what they may demand from corporations during negotiations.¹⁶⁶ The DOJ may no longer compel a corporation to cease payment of promised attorneys' fees to employees, and eligibility for cooperation credit can no longer be given solely based upon the corporation's waiver of attorney-client privilege protection.¹⁶⁷ The DOJ may not request the disclosure of certain communications between employees and their attorneys or corporate counsel, including communications with attorneys that occurred prior to or at the time of the underlying conduct,¹⁶⁸ and it cannot request any "non-factual or core attorney work product."¹⁶⁹ The limit in what prosecutors may now demand from a target corporation illustrates how coercive the investigations and negotiations can become.

The British procedure demonstrates that prosecutors may be able to pursue individual wrongdoers without the threat of criminal indictment. The SFO Guide provides that, in deciding whether or not to enter into a Compliance Agreement, prosecutors will evaluate whether the corporation "is prepared

¹⁶⁵ Griffin, *supra* note 80, at 329-32.

¹⁶⁶ See note 82 and accompanying text. However, the limitations on the DOJ provided in the McNulty Memorandum as a result of *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), could be reduced or modified by subsequent memoranda as the guidelines are not statutorily codified. See *supra* notes 121-22 and accompanying text.

¹⁶⁷ USAM, *supra* note 88, § 9-28.720 to 9-28.730.

¹⁶⁸ This is limited to situations only with regard to communications between attorneys and individuals where the defendant has a "legitimate factual basis to support the assertion of the advice-of-counsel defense." USAM, *supra* note 88, § 9-28.720.

¹⁶⁹ "Non-factual or core-attorney work product" is defined, by way of example, as an attorney's "mental impressions or legal theories." *Id.* The government may still compel the disclosure of records and witness testimony through subpoenas as it would in any other criminal investigation, thereby giving prosecutors the ability to obtain information from the corporation and individuals alike. *Id.*

to work with [the SFO] on the scope and handling of any additional investigation [that the SFO] consider[s] to be necessary,” including taking “appropriate action . . . against individuals.”¹⁷⁰ In the investigation of AMEC for receipt of irregular payments and failure to comply with reporting standards in section 221 of the Companies Act,¹⁷¹ the SFO entered into a Compliance Agreement and obtained a CRO that required the corporation to make a financial forfeiture, but the SFO continued to investigate the individuals at AMEC because of their positions in the company.¹⁷² The AMEC case was settled with respect to the corporation, which provided information about individual actors during the investigation, but a criminal investigation continued against individual employees.¹⁷³ The SFO requested the relevant facts regarding the employee misconduct in order for the corporation to meet the terms of the Compliance Agreement and gain mitigation points. However, there is no evidence that the SFO required the corporation to turn over privileged documents, or that employees were forced to speak with the government in order for the corporation to meet the terms of the agreement. The AMEC investigation demonstrates that the threat of criminal prosecution may not be necessary in order for the government to pursue its goals, including the goal of securing information about individual actors. And in fact, the SFO may have more flexibility in requesting certain documents and interviews because the investigation into the corporation’s activities is civil, rather than criminal in nature.

C. *The Benefits of “Light Touch” Monitoring*

Another goal of the government in entering into Deferred and Non-Prosecution Agreements is the ability to

¹⁷⁰ SFO GUIDE, *supra* note 123, at 3-4. In determining possible criminal charges against individuals, the SFO will examine to what extent they were involved in the unlawful activity, what action the entity has taken with respect to them, and whether the individuals benefitted, and were continuing to benefit financially from the unlawful conduct. *Id.*

¹⁷¹ Companies Act, 1989, c.40, § 221(1) (governing accounting records).

¹⁷² Richard Alderman, Dir., Serious Fraud Office, Speech: The 4th ICAC Symposium (Dec. 15, 2009), *available at* <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009.aspx> (follow “The 4th ICAC Symposium” hyperlink); *see also* AMEC Press Release, *supra* note 163.

¹⁷³ Alderman, *supra* note 172. This is dissimilar from the case of Balfour Beatty, where the SFO concluded that the responsible individuals were no longer employed by the company and ceased further investigation. *See* Alderman, *supra* note 12.

require corporate wrongdoers to retain a monitor whose “primary responsibility should be to assess and [to] review a corporation’s compliance with those terms of the agreement that are specifically designed to address and [to] reduce the risk of recurrence of the corporation’s misconduct.”¹⁷⁴

In the United States, the imposition of a monitor of the government’s choosing has been a source of significant criticism of Deferred and Non-Prosecution Agreements. The first denunciation of monitors came after United States Attorney and subsequent governor of New Jersey, Christopher J. Christie, awarded his former boss, Attorney General John Ashcroft and his consulting firm, the Ashcroft Group, a multi-million dollar contract to monitor Zimmer Holdings, a medical-supply company that had come under investigation for paying kickbacks to doctors.¹⁷⁵ As a result, the DOJ distributed the Morford Memorandum in March 2008, which set forth guidelines for prosecutors in requiring corporations to hire a monitor.¹⁷⁶ The Morford Memorandum suggests that now, where a prosecutor requires a target corporation to hire a monitor, the corporation must be allowed to select the individual, subject to veto by the prosecutor, or, where a prosecutor feels that he must play a “greater role” in the

¹⁷⁴ Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations to Heads of Dep’t Components & U.S. Attorneys 5 (Mar. 7, 2008), available at <http://www.justice.gov/dag/morford-useof-monitorsmemo-03072008.pdf>. Despite the insistence by federal prosecutors that target corporations hire a monitor, some argue that monitors have not been successful in reducing corporate misconduct nor have they helped shareholders by improving corporate performance. See Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 73 COLUM. BUS. L. REV. 793, 833-34 (2008) (stating that the most recent studies find “no significant correlation” between monitors and the reduction in corporation misconduct (citations omitted)). An extreme example of the failure of monitors to reduce corporate misconduct came in the case of Bristol-Myers Squibb. The company was charged by the SEC in 2004 with various accounting frauds and agreed to appoint a monitor who was given the responsibility of reviewing the accounting practices of the corporation. Press Release, SEC, Bristol-Myers Squibb Company Agrees to Pay \$150 Million to Settle Fraud Charges (Aug. 4, 2004), available at <http://www.sec.gov/news/press/2004-105.htm>; see also Barnard, *supra*, at 835. Three years later, despite the fact that the appointed monitor was “a former United States Attorney and a retired federal judge,” the company was charged with “inflating its drug prices on bills to for insurers and government agencies” and, later, for entering into “a secret non-compete agreement [with a competitor].” Barnard, *supra*, at 835-36 (citing Sue Reisinger, *Doctor’s Orders*, CORP. COUNSEL (Oct. 1, 2007), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005491068>).

¹⁷⁵ Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES, Jan. 10, 2008, at A1.

¹⁷⁶ Morford Memorandum, *supra* note 174.

selection of a monitor, he should consider at least three qualified candidates.¹⁷⁷

The SFO noted the intense criticism of monitors in the United States and instituted a policy of “light touch” monitoring, whereby a target corporation may nominate a monitor, subject to veto by the SFO.¹⁷⁸ With the use of British Compliance Agreements, both the method for choosing the monitor and the responsibilities of the monitor exist independent from the threat of criminal prosecution. Thus, the corporation may have a greater ability to negotiate the length of time that a monitor is required, the person who fills this seat, and the breadth and scope of the monitor’s review.

D. Predictability in Required Restitution

The final major goal of the government in entering into a Deferred or Non-Prosecution Agreement is to secure an agreement that the target corporation will pay restitution, often in excess of the actual value of the corporation’s wrongdoing. Financial restitution under Deferred and Non-Prosecution Agreements is designed in part to serve the criminal law goals of general and specific deterrence and retributivism; however, the penalties that are now imposed on corporations by prosecutors are “more a matter of bargaining before charges are ever filed, and less an analysis of the proper punishment” of a target corporation’s misconduct.¹⁷⁹ This punishment falls upon innocent shareholders, creditors, and clients, who ultimately pay the fines.

British Compliance Agreements, however, do not themselves support payment of a fine by the target corporation. Rather, the government must obtain a CRO in order to collect financial restitution.¹⁸⁰ These orders are statutorily capped at the amount equal to the proceeds that the corporation obtained through unlawful activity plus costs.¹⁸¹ The CRO is also subject to judicial oversight.¹⁸² The statutory cap and the role that judges play in reviewing the fines sought by the government

¹⁷⁷ *Id.* at 3-4.

¹⁷⁸ SFO GUIDE, *supra* note 123, at 6.

¹⁷⁹ Henning, *supra* note 157, at 315.

¹⁸⁰ *See supra* Part III.B.

¹⁸¹ *See supra* notes 108-09 and accompanying text.

¹⁸² *See supra* note 124 and accompanying text.

provide the target entity with some predictability and relative fairness in the fines levied upon it for its wrongdoing.

In adopting Compliance Agreements that work in conjunction with civil statutes, the SFO has made some improvements to the American procedure. The successes of both the Balfour Beatty and AMEC cases demonstrate that the threat of criminal indictment may be unnecessary in many cases to achieve corporate reform and appropriate sanctions. The SFO has, with the establishment of Compliance Agreements, attempted to work within the confines of the substantive laws to strike a compromise between the coercive nature of Deferred and Non-Prosecution Agreements and the inadequacy of government regulation that previously existed in Britain. Further, the substantive corporate criminal laws in Britain as they presently exist, strike a balance between the overly expansive application of corporate criminal liability in the United States and the elimination of corporate criminal liability altogether.

CONCLUSION

A comparison of the corporate criminal laws and procedures in the United States and United Kingdom leads to a larger question of whether a corporation, as an entity, should be subject to criminal prosecution for the actions of its employees. Punishing corporations often does not discipline the entity as a whole, which acts only through individual employees, but rather harms the people associated with the corporation whose guilt remains unproven. The substantive criminal laws in Britain, as they stand, may attain a balance between the vast potential liability for the entity in the United States for virtually any misdeed of an employee and the elimination of corporate liability altogether. British law reflects the notion that corporations should not be held criminally liable unless the entity, at its highest level of management, was responsible for the wrongdoing. This stringent standard leaves culpability in place for corporations that are, at their core, mismanaged and severely corrupt,¹⁸³ while removing the threat of criminal prosecution for corporations that are

¹⁸³ A recent example might be American International Group (AIG) and the dishonest financial practices initiated under Hank Greenberg, AIG's CEO, particularly in reference to the extremely risky trading in derivatives by its financial products unit that subsequently caused its collapse.

managed responsibly, but mistakenly employ errant employees. While British Compliance Agreements may fall victim to many of the same criticisms as American Deferred and Non-Prosecution Agreements, they achieve many of the same goals of prosecutors in the United States without producing coercive and adversarial relationships between the government and target corporations.

With the British importation of American corporate compliance procedures, the world's two leading financial centers are aligning their interests to fight corporate crime. These developments create a stronger, more intrusive international corporate compliance regime by incentivizing corporations, directly or indirectly, to adopt programs designed to ward off internal misconduct. The result is that most, if not all, public corporations, regardless of a threat of future indictment, will establish some internal monitoring processes, if they have not yet done so. This creates an unprecedented international system of corporate compliance quasi-regulation. But, by largely mimicking the procedures of the United States, the SFO is abandoning an opportunity to develop a better system than the one that presently exists. This may lead to an international system of corporate compliance based upon common, rather than best practices. Policymakers in both the United States and the United Kingdom should examine these developments and reevaluate their own procedures accordingly.

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