

change Commission. In addition, the Model Code directs the Federal Bureau of Investigation to maintain centralized criminal records on corporate offenders.

CONCLUSION

Conventional law review scholarship consists of exposition and footnotes not statutory drafts; but I believe that one can best understand the virtues of codification of corporate sanctions by the articulation and examination of a Model Code. This Article presents such a code below, in an effort to "produce some order in an area which has developed in a rather disorderly way, and to state some general principles around which a rational formulation can be constructed."³⁸ Perhaps the Model Code might also interest Congress and the Clinton administration as they begin to grapple with problems of criminal law reform.

MODEL FEDERAL CORPORATE CRIMINAL CODE

CHAPTER A. GENERAL PROVISIONS

§ 1 *Definitions and Applicability*

(a) *Definition of Corporation*: As used herein, "corporation" means an entity created under the corporation laws of a state that as of the record date for its annual shareholders' meeting when the offense occurred had at least \$5 million or more of total assets.

[Derivation: American Law Institute Principles of Corporate Governance § 1.31-4 (Proposed Final Draft 1992), which, in turn, is derived from Securities Exchange Act § 12(g), Rule 12g-1 under that Act, and Federal Securities Code § 402(a).]

(b) *Applicability*: This statute is applicable only to the sentencing of corporations, as defined in subsection (a), for crimes classified as felonies under federal law.

38. Brickey, *supra* note 6, at 629 (quoting The American Law Institute Proceedings, 33d Annual Meeting, 172 (1956)) (discussion of Model Penal Code provisions on corporate criminal liability).

§ 2 *Liability of a Corporation for Conduct of an Agent*

A corporation is criminally liable for an offense if the conduct constituting the offense

- (a) is conduct of its agent, and such conduct—
 - (1) occurs in the performance of matters within the scope of the agent's employment, or within the scope of the agent's actual, implied, or apparent authority, and is intended to benefit the corporation; or
 - (2) is thereafter ratified or adopted by the corporation; or
- (b) involves a failure by the corporation or its agent to discharge a specific duty of conduct imposed on the corporation by law.

[Derivation: S. 1437, 95th Cong., 1st Sess. § 402 (1977).]

§ 3 *Liability of an Agent for Conduct of a Corporation*

(a) *Conduct on Behalf of a Corporation*: A person is criminally liable for an offense based upon conduct that the person engages in or causes in the name of the corporation or on behalf of a corporation to the same extent as if that person engaged in or caused the conduct in his or her own name or on his or her own behalf.

(b) *Omission to Perform a Duty of a Corporation*: Whenever a statute, regulation, rule or order issued pursuant thereto imposes a duty upon a corporation, an agent of a corporation having significant responsibility for the subject matter to which the duty relates is criminally liable for an offense based upon an omission to perform the duty, if the person has the state of mind required for the commission of the offense, to the same extent as if the duty were imposed upon him or her directly.

(c) *Reckless Failure to Supervise Conduct of a Corporation*: A person responsible for supervising particular activities on behalf of a corporation who, by his or her reckless failure to supervise adequately those activities, permits or contributes to the commission of an offense by a corporation, is criminally liable for the offense.

[Derivation: S. 1437, 95th Cong., 1st Sess. § 403 (1977).]

CHAPTER B. SENTENCES

§ 4 *Authorized Sentences*

A corporation found guilty of an offense shall be sentenced, in accordance with the provisions of this statute, to

- (a) Acknowledgement;
- (b) Compliance Program;
- (c) Community Service;
- (d) Notice to Victims;
- (e) Restitution;
- (f) A Fine;
- (g) Criminal Forfeiture.

Sentencing courts should give priority to the use of sanctions that have the purpose and effect of promoting the offender's future compliance with the law. Sentencing courts shall impose the sanctions authorized by subsections (a) and (b) in all cases. Sanctions authorized by subsections (a) through (g) are independent and the court may impose any combination of sanctions appropriate to a just disposition of the case. The sentencing court is authorized to retain jurisdiction over the corporation to supervise the corporation's performance of a sanction for the term specified in the sentence.

[Derivation: AMERICAN BAR ASSOCIATION STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES §§ 18-3.12, 3.13, 3.14, 3.15 (3d ed. 1993).]

§ 5 *Acknowledgement*

(a) A corporation found guilty of an offense shall be sentenced to an acknowledgement sanction requiring the corporation to give public notice and explanation of the conviction.

(b) The purpose of an acknowledgement sanction is to promote the corporation's future compliance with the law, to inform the public of the circumstances that gave rise to the corporation's criminal behavior and to act as a deterrent to the corporation and others.

(c) The sentencing court, in imposing an acknowledgement sanction, may order communications to the public at large, or to particular classes or persons, of information about the corporation's conviction and such other facts about the offense as appear appropriate to the court.

(d) An acknowledgement sanction may provide that the corporation, at its expense, supply managers, employees of the corporation, or agents hired from outside the corporation to perform the acknowledgement sanction for the period of the sentence.

(e) The term for an acknowledgement sanction shall be not more than six months.

[Derivation: AMERICAN BAR ASSOCIATION STANDARDS, SENTENCING

ALTERNATIVES AND PROCEDURES § 18-3.18 (Acknowledgement Sanctions) (3d ed. 1993).]

§ 6 *Compliance Program*

(a) A corporation found guilty of an offense shall be sentenced to a compliance program.

(b) The purpose of a compliance program is to promote the corporation's future compliance with the law.

(c) A compliance program may require that a corporation cease or modify specified practices or activities that gave rise to the corporation's criminal behavior, including a requirement that the corporation engage in an internal investigation to identify such practices or activities. A compliance program may involve supervision of or change in the management or control of the corporation.

(d) To the extent possible, a compliance program shall not interfere with, or delay the making of legitimate business judgment decisions by the corporation's management, governing board, shareholders or members.

(e) Continuing judicial oversight may be

(1) ordered as part of a sentence of a compliance program if the sentencing court finds that the corporation's criminal behavior was serious, repetitive, or facilitated by inadequate internal management, accounting or supervisory controls, or presented a clear and present danger to public health or safety;

(2) effected through the adoption of monitoring, reporting, record keeping or auditing controls designed to increase the corporation's mechanisms for internal accountability, such as an independent audit committee, special counsel, or a separate staff system for a corporation's governing board.

(f) The term for a compliance program sanction shall be not more than two years.

[Derivation: AMERICAN BAR ASSOCIATION STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 18-3.14 (Compliance Programs for Organizations) (3d ed. 1993).]

§ 7 *Community Service*

(a) A corporation found guilty of an offense may be sentenced to per-

form specified community service for a public agency or for a private non-profit organization without compensation.

(b) A community service sentence may provide that the corporation, at its own expense, supply managers or employees of the corporation to work for a public agency or for a non-profit organization for the period of the sentence.

(c) The term for a community service sanction shall be not more than two years.

[Derivation: AMERICAN BAR ASSOCIATION STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 18-3.17 (Community Service) (3d ed. 1993); 18 U.S.C. § 2563(b)(13) (1985) (existing law permits “work in community service” as a condition of probation).]

§ 8 *Notice to Victims*

(a) The court, in imposing a sentence on a corporation found guilty of an offense, may, in cases involving fraud or other intentionally deceptive practices, or in any other case in which the court ascertains the need to notify victims, order that the corporation give reasonable notice and explanation of the conviction, in such form as the court may approve, to victims of the offense. The court may order the offender to give notice by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the corporation to give such notice, the court shall consider the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable, and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense.

(b) The term for a notice to victim sanction shall be not more than six months.

[Derivation: Modification of existing law; this section eliminates current limitations on sanctions in 18 U.S.C. § 2555 (1985) to only “an offense involving fraud or other intentionally deceptive practices” and the \$20,000 monetary cap on cost of the notice. It proceeds independently of, but is related to, the acknowledgement sanction specified in § 5 of the Model Code.]

§ 9 *Restitution*

(a) The court, in imposing a sentence on a corporation that has been

found guilty of an offense, may order that the corporation make restitution to the victim of an offense.

[Derivation: Modification of existing law, 18 U.S.C. § 3556 (West Supp. 1992). It utilizes the same standard as existing law, but does not impose the sanction as a condition of probation. In addition, it omits the qualifications and limitations on probation currently in 18 U.S.C. § 3563 (1985).]

§ 10 *Fines*

(a) *Fines for Corporations*: Except as provided in subsection (b) of this section, a corporation that has been found guilty of an offense may be fined not more than the greater of

- (1) the amount specified in the law setting forth the offense; or
- (2) the applicable amount under subsection (b) of this section.

(b) *Alternative Fine Based on Gain or Loss*: If a corporation derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the corporation, the sentencing court may fine the corporation not more than the greater of twice the gross gain or twice the gross loss.

(c) *Factors to be Considered in Imposition of Fine*: In determining whether to impose a fine, and the amount, time for payment and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a) of title 18

- (1) the corporation's income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the corporation relative to the burden that alternative punishments would impose;
- (3) any pecuniary loss inflicted upon others as a result of the offense;
- (4) whether the court ordered restitution or whether the offender made restitution and the amount of such restitution;
- (5) the need to deprive the corporation of illegally obtained gains from the offense;
- (6) whether the corporation can pass on to consumers or others the expense of the fine;
- (7) the size of the corporation and any measures taken by the corporation to discipline any officer, director, employee or agent of the

corporation responsible for the offense and to prevent a recurrence of such an offense.

(d) *Fine not to Impair Ability to Make Restitution*: If as a result of the conviction, the corporation has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent that such a fine or penalty will not impair the ability of the corporation to make restitution.

[Derivation: Modification of 18 U.S.C.A. §§ 3571-3572 (West Supp. 1992).]

§ 11 *Criminal Forfeiture*

The court, in imposing sentence on a corporation that has been found guilty of an offense described in section 1962 of title 18 or in Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, may order, in addition to the sentence that is imposed pursuant to the provisions of section 10 of this statute, that the corporation forfeit property to the United States in accordance with the provisions of section 1963 of title 18 or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

[Derivation: Modification of 18 U.S.C. § 2554 (1985). The Code makes forfeiture discretionary rather than mandatory.]

§ 12 *Imposition of Sentence*

(a) *Mitigating Factors*: In sentencing a corporation found guilty of an offense under this statute, the court shall consider, in addition to any other factor specified by law, the following mitigating factors:

(1) *Effective Compliance Program*: The offense occurred despite an effective program to prevent and detect violation of law unless

(a) a high level manager of the corporation or the culpable unit of the corporation, or a person responsible for the administration or enforcement of a program to prevent and detect violations of law participated in, condoned, or was willfully ignorant of the offense; or

(b) after becoming aware of an offense, the corporation unreasonably delayed reporting the offense to appropriate governmental authorities.

(2) *Self-reporting*: The corporation, prior to an imminent threat of disclosure or governmental investigation and within a reasonably prompt time after becoming aware of the offense, reported the offense

to appropriate governmental authorities and fully cooperated in the investigation.

[Derivation: UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 8C2.5(f) (1993).]

(b) *Aggravating Factors*: In sentencing a corporation found guilty of an offense under this statute, the court shall consider, in addition to any other factors specified by law, the following aggravating factors:

(1) *Involvement in or Tolerance of Criminal Activity*:

(a) a high-level manager of the organization participated in, condoned, or was willfully ignorant of the offense; or

(b) tolerance of the offense by personnel with substantial authority was pervasive in the corporation or the culpable unit of the corporation.

(2) *Prior History*: The corporation committed any part of the offense

(a) less than ten (10) years after

(i) a criminal adjudication based on similar misconduct; or

(ii) civil or administrative adjudication based on two or more separate instances of similar misconduct; or

(b) less than five (5) years after a criminal conviction.

(3) *Violation of an Order*: The corporation, in committing the offense, violated a judicial order, injunction, or a condition of probation.

(4) *Obstruction of Justice*: The corporation willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedeance or attempted obstruction or impedeance.

[Derivation: UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 8C2.5 (1993).]

§ 13 *Violation of Court Imposed Sanction*

(a) Upon a finding of a violation of

(1) any court-ordered sanction, the court may resentence the corporation;

(2) any sanction ordered under §§ 5, 6, 7 or 8 of this act, the court may invoke contempt of court sanctions

(a) against the corporation; and

(b) after adequate personal notice and service, upon designated notified senior management, officers, or directors of the corporation.

CHAPTER C. ANCILLARY PROVISIONS

§ 14 *Self-Reporting of Criminal History and Criminal Convictions to Securities and Exchange Commission*

(a) Each corporation required to file annual or quarterly reports with the Securities and Exchange Commission shall file a report with the Securities and Exchange Commission, at such time and in such form as such Commission shall prescribe, disclosing any judgment of conviction or criminal sentence filed in any federal or state court against such corporation since January 1, 1980.

(b) Each corporation required to file annual or quarterly reports with the Securities and Exchange Commission shall include in such report disclosure of any criminal indictment, information, or sentence of conviction filed in any federal or state court in such form as the Securities and Exchange Commission shall prescribe.

(c) All criminal charge or conviction reports received by the Securities and Exchange Commission under subsections (a) and (b) shall be available for public inspection and shall be transmitted by such Commission to the Federal Bureau of Investigation.

§ 15 *Maintenance of Corporate Criminal Records by Federal Bureau of Investigation*

The Federal Bureau of Investigation shall maintain records of criminal charges and convictions against corporations for use in law enforcement and to facilitate sentencing of corporations by the federal and state courts.

