

‘Too scared to prosecute and too scared to jail?’ A critical and comparative analysis of enforcement of financial crime legislation against corporations in the United States of America and the United Kingdom

Dr. Nicholas Ryder, Professor in Financial Crime, Bristol Law School, Faculty of Business and Law, University of the West of England, Bristol.⁺

Key Words:

Financial crime, corporate criminal liability, financial crime, identification doctrine, deferred prosecution agreements and HSBC.

⁺ I would like to thank Dr Noelle Quenivet, Dr Lorenzo Pascculli, Professor Phil Rumney and Professor Umut Turksen for their very helpful comments on early drafts of this paper. This paper is based on a conference presentation entitled ‘Corporate Liability for Economic Crime – merely window dressing or a statement of intent’ at the *17th Annual Conference of the European Society of Criminology in September 14 2017 at Cardiff University*.

Abstract

This paper has two aims. Firstly, it critically considers the responses towards tackling corporate financial crime in the United States of America (US). Secondly, it analyses the United Kingdom's (UK) efforts to tackle corporate financial crime and then compares them with the US. The US presents an interesting case study for this paper due to its robust and aggressive stances towards tackling financial crime and also because it is one of the largest financial markets. Similarly, the UK has adopted a strong stance towards tackling financial crime and is also regarded as one of the most important global financial centres. Therefore, by comparing the two contrasting approaches towards corporate financial crime it is hoped that the best practices from each country could be adopted. The first section of the paper concentrates on the judicial response towards corporate financial crime in the US and it then moves onto highlight and critique the decision of the US Department of Justice (DoJ) to alter its enforcement policy by moving away from indicting corporations to using Deferred Prosecution Agreements (DPAs). Here, the continued use of DPAs is questioned because they have had a limited impact on the future conduct of corporations who are persistent reoffenders. The paper sets out a wide range of arguments for why DPAs should not be the enforcement weapon of choice for the DoJ. The final part of this section critiques the ability of law enforcement and financial regulatory agencies to impose financial penalties and bring civil actions for a wide range of financial crimes under the Financial Institutions Reform, Recovery and Enforcement Act 1989. The second part of the paper concentrates on the UK and concisely assesses the doctrine of corporate criminal liability, thus identifying the contrasting judicial approaches with the US. The next section discusses the use of DPAs for breaches of the Bribery Act 2010 by the Serious Fraud Office (SFO). The section advocates that in the UK DPAs must be utilised for a broader range of financial crime offences, thus drawing on the US model. The penultimate segment of the paper identifies and comments on several alternative enforcement measures which could be used to counteract the limitations of the doctrine of corporate criminal responsibility in financial crime cases. This distinctively includes the Financial Conduct Authorities (FCA) Senior Managers and Certification Regime (SMCR), its ability to impose financial penalties and to revoke the authorization of a regulated corporation. The paper concludes by making a number of recommendations and suggested reforms, thus further developing the scope of this research.

Introduction

Financial crime is synonymous with the seminal work of Professor Edwin Sutherland who famously and somewhat controversially used the term ‘white-collar crime’ in his 1939 presidential lecture to the American Sociological Society.¹ He defined white-collar crime as “a crime committed by a person of respectability and high social status in the course of his occupation”.² Sutherland concluded that financial crime was committed by “merchant princes and captains of finance and industry” whilst working for a wide range of corporations including those involved in “railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry [and] real estate”.³ White-collar crime has also been referred to as ‘financial crime’, ‘economic crime’ and ‘illicit finance’.⁴ The early interpretation offered by Sutherland has attracted a great deal of debate amongst criminologists and commentators. Some have expressed their support for the definition such as Benson and Simpson,⁵ whilst a majority of others have disputed the accuracy of Sutherland’s definition including Bookman,⁶ Podgor,⁷ and Freidrichs.⁸ Brody and Kiehl concluded that “many scholars continue to redefine and develop a more useful and working definition of the term”.⁹

Whilst commentaries on Sutherland’s definitions have concentrated on crimes committed by individuals who are an employee, representative or agent of a corporation, very few have considered financial crime committed by corporations. Corporations are juridical persons that through the legal process of incorporation are endowed with a legal identity, which distinguishes them from its creators. The common law provides that corporations are qualified to breach certain offences under the criminal law largely because of this legal procedure.¹⁰ A number of common law rules have evolved in order to limit disproportionate

¹ E. Sutherland ‘The White Collar Criminal’ (1940) 5 American Sociological Review 1.

² E. Sutherland, *White Collar Crime* (Dryden: New York, 1949) 9.

³ See Sutherland, above n. 1 at 2.

⁴ For the purpose of this article we will use the term financial crime. It is interesting to note that these terms are somewhat indiscriminately and interchangeably used although their meanings are different. See for example, R. Naylor ‘Towards a general theory of profit-driven crimes’ (2003) 43(1) British Journal of Criminology, 81.

⁵ M. Benson and S. Simpson, *White-Collar Crime: An Opportunity Perspective*, (Routledge: New York, 2009).

⁶ Z. Bookman ‘Convergences and omissions in reporting corporate and white collar crime’, (2008) 6 DePaul Business & Commercial Law Journal 355.

⁷ E. Podgor ‘White collar crime: a letter from the future’ (2007) 5 Ohio State Journal of Criminal Law 247.

⁸ D. Freidrichs ‘Wall Street: Crime Never Sleeps’ in S. Will, S. Handelman and D. Brotherton (eds), *How they got away with it – white collar criminals and the financial meltdown* (Columbia University Press: New York 2013) 9.

⁹ R. Brody and K. Kieh ‘From white-collar crime to red-collar crime’ (2010) 17 Journal of Financial Crime 351.

¹⁰ Ministry of Justice *Corporate Liability for Economic Crime Call for Evidence* (Ministry of Justice: London, 2017) at 10. See generally *Salomon v Salomon* [1897] A.C. 22.

abuse of power by corporations, including breaches of criminal law.¹¹ A detailed discussion of the incorporation process and a general commentary on the criminal liability of corporations is beyond the scope of this paper. This research seeks to provide an original commentary by comparing and contrasting the approaches in the US and the UK towards corporate financial crime. Corporate financial crime has been referred to as a “complex subject on many levels and efforts at strict definitional exactitude rapidly become self-defeating”.¹² Since the seminal definition of white-collar crime by Sutherland, financial crime has attracted a great deal of research and commentary. For instance, detailed research and related literature has been published on money laundering,¹³ terrorist financing,¹⁴ fraud,¹⁵ market manipulation¹⁶ and more recently bribery.¹⁷ However, there is a deficiency of literature on corporate financial crime within the UK and little that compares its enforcement mechanisms with those in the US. Most of the literature in this area initially concentrated on the development of the doctrine of corporate criminal responsibility.¹⁸ Subsequent literature has focused on the liability of corporations for breaching the Corporate Manslaughter and Corporate Homicide Act 2007,¹⁹ the creation of the failure to prevent bribery offences under the Bribery Act 2010²⁰ and the use of DPAs by the SFO.²¹ There is little published research

¹¹ See generally *R. v P&O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72, 83.

¹² T. Edwards House of Commons Library Briefing Paper – Corporate Economic Crime: bribery and corruption, Number 7359, 22 March 2017, at 3

¹³ See generally P. Alldridge, *Money laundering law: forfeiture, confiscation, civil recovery, criminal laundering the taxation of the proceeds of crime* (Hart: Oxford, 2003) and M. Gallant, M. *Money laundering and the proceeds of crime: economic crime and civil remedies* (Edward Elgar: Cheltenham, 2005).

¹⁴ See generally J. Gurule, *Unfunding terror: the legal response to the financing of global terrorism* (Edward Elgar: Cheltenham, 2010) and N. Ryder, *The Financial War on Terror: A review of counter-terrorist financing strategies since 2001* (Routledge: London, 2015).

¹⁵ See A. Doig, *Fraud* (Routledge: London, 2006) and M. Levi, *Regulating Fraud: White-Collar Crime and the Criminal Process* (Routledge: London, 1987).

¹⁶ See J. Austin, *Insider Trading and Market Manipulation: Investigating and Prosecuting Across Borders* (Edward Elgar: Cheltenham, 2017) and J. Markham, *Law enforcement and the history of financial market manipulation* (Routledge: London, 2015)

¹⁷ See A. Palmer, *Countering economic crime a comparative analysis* (Routledge: London, 2017) and D. Chaikin, and J. Sharman, *Corruption and money laundering a symbiotic relationship* (Palgrave: New York, 2009).

¹⁸ There are a number of contrasting views on the doctrine of corporate criminal liability. See for example the C. Wells, *Corporations and criminal responsibility* (Oxford University Press: Oxford, 2001) and E. Wlogast, *Ethics of an artificial person: lost responsibility in profession's and organisations* (Stanford University Press: Stanford, 1992).

¹⁹ See generally S. Griffin, ‘Corporate killing – the Corporate Manslaughter and Corporate Homicide Act 2007’ (2009) 1 Lloyd’s Maritime and Commercial Law Quarterly 73; D. Ormerod and R. Taylor ‘The Corporate Manslaughter and Corporate Homicide Act 2007’ (2008) 8 Criminal Law Review 589 and J. Gobert ‘The Corporate Manslaughter and Corporate Homicide Act 2007 – thirteen years in the making but was it worth the wait?’ (2008) 7 Modern Law Review 413.

²⁰ See generally C. Wells, ‘Who’s afraid of the Bribery Act 2010?’ (2012) 5 Journal of Business Law 420 and S. Gentle, ‘The Bribery Act 2010: Part 2: the corporate offence’ (2011) 2 Criminal Law Review 101.

²¹ See C. Grasso, ‘Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBC SB Plc.’ (2016) 5 Journal of Business Law 388.

on the Ministry of Justice (MoJ) call for evidence which has only recently been covered by Wells.²²

The international profile of corporate financial crime has substantially increased during the last past three decades. This is due, in part, to instances of corporate financial crime in the US including the Savings and Loans Crisis,²³ the collapse of several large corporations including Enron and WorldCom,²⁴ the Bernard Madoff Ponzi fraud scheme²⁵ and the ‘Great Wall Street Rip-Off’.²⁶ Similarly, the UK has experienced wide scale corporate financial crime including Barlow Clowes International,²⁷ the Bank of Credit and Commerce International,²⁸ Barings Bank,²⁹ market manipulation by financial institutions³⁰ and money laundering.³¹ It is within this context that this paper addresses the disparity in the literature and compares the approaches towards corporate financial crime in the US and UK and suggests a number of reforms.

The first section of the paper begins by providing a brief overview of the US approach towards tackling financial crime, which is traditionally seen as the international benchmark given its robust enforcement policy and its influence in international efforts to tackle money

²² See C. Wells, ‘Corporate failure to prevent economic crime - a proposal’ (2017) 6 Criminal Law Review 426.

²³ The Savings and Loans crisis in the 1980s and 1990s resulted in the financial collapse of over 1,000 savings institutions due to the excessive fraud committed by the institutions senior officials.

²⁴ The collapse of Enron and WorldCom are associated with wide scale elements of control fraud and several high ranking associates in both firms received long custodial sentences. For example, Jeffrey Skilling was initially sentenced to 24 years imprisonment for his role in the collapse of Enron but this was later reduced to 14 years following an agreement with the DoJ.

²⁵ In June 2009, Bernard Madoff was convicted for orchestrating the US largest Ponzi fraud schemes and was sentenced to 150 years imprisonment. See *United States v. Bernard L. Madoff*, 2009, 29 June 2009, United States District Courts.

²⁶ This is referred to the illegal conduct of many financial institutions before and during the 2007/2008 financial crisis. For a detailed examination see N. Ryder, *The Financial Crisis and White Collar Crime – the perfect storm?* (Edward Elgar: Cheltenham, 2015).

²⁷ Barlow Clowes went into liquidation in 1988 after amassing £190m after misleading 20,000 investors. Peter Clowes was eventually convicted of fraud and sentenced to ten years imprisonment.

²⁸ BCCI is the most infamous banking collapses in the UK when it went into liquidation in 1991 following allegations of fraud and money laundering.

²⁹ The collapse of Barings Bank is associated with the illegal activity of the ‘rogue trader’ Nick Leeson who was convicted of fraud for his role in the collapse of the then UKs oldest merchant bank in 1995.

³⁰ Market manipulation is associated with the LIBOR and FOREX scandals following the 2007/2008 financial crisis and have resulted in many financial institutions being heavily fined in the US and UK. It has also resulted in a number of low-level traders being convicted for fraud. See *R v Tom Alexander William Hayes* [2015] EWCA Crim 1444.

³¹ In January 2017 Deutsche Bank was fined £163.1m by the FCA for a breaching its money laundering regulations. See Financial Conduct Authority ‘FCA fines Deutsche Bank £163 million for serious anti-money laundering controls failings’, January 31 2017, available from <https://www.fca.org.uk/news/press-releases/fca-fines-deutsche-bank-163-million-anti-money-laundering-controls-failure>, accessed August 2 2017.

laundering and terrorist financing.³² The evolution of the doctrine of corporate criminal liability by the US judiciary is discussed and how the DoJ initially prosecuted the employees of corporations and how they moved towards targeting prosecuting corporations. This culminates in a review of the impact of the acquittal of Arthur Andersen, which resulted in the DoJ prioritising DPAs as opposed to corporate prosecutions. The appropriateness of DPAs is questioned in light of the actions of HSBC and the final part of this section moves on to analyse the use of financial sanctions.³³ The second part of the paper critically compares the approach towards corporate financial crime in the UK with the US and highlights the restrictive judicial interpretation of the doctrine of corporate criminal liability. The paper then critiques the evolution of the failure to prevent bribery offences created under the Bribery Act 2010 and the use of DPAs by the Serious Fraud Office (SFO). The next section discusses the enforcement stance of the Financial Conduct Authority (FCA) and notes that the Senior Managers and Certification Regime SMCR could go some way as the rectify the problems associated with the identification doctrine.

The United States of America's Approach to Corporate Prosecution

The US has adopted an aggressive stance towards financial crime. In particular, it has been at the forefront of the global fight against money laundering as part of the 'War on Drugs' and it played an integral part in the evolution and implementation of the 'Financial War on Terrorism' following the al Qaeda terrorist attacks in September 2001. Additionally, the US has also embraced a robust enforcement policy towards fraudulent activities as illustrated following the Savings and Loans Crisis, the collapse of several corporations due to fraud and financial crime associated with the 2007/2008 financial crisis.³⁴ The latter of which resulted in the Securities and Exchange Commission (SEC) and the Federal Bureau of Investigation (FBI) securing record financial penalties and convictions for fraudulent behaviour. Examples would include the Ponzi fraud convictions of Bernard Madoff and over 1,100 convictions for mortgage fraud. Nevertheless, it is the evolution of its efforts to criminalise the conduct of corporations that is of significance here.

³² See generally N. Ryder, *Financial Crime in the 21st Century* (Edward Elgar: Cheltenham, 2011)

³³ In December 2012 HSBC entered into a DPA with the DoJ after it admitted breaching the US reporting obligations under the Bank Secrecy Act 1970 and the US sanctions regime.

³⁴ See Ryder, above n. 26.

The Doctrine of Corporate Criminal Liability in the US

The US approach can be traced back to the seminal decision of the Supreme Court in *New York Central & Hudson River Railroad Company v. US*.³⁵ The key issue in this case was whether the defendant corporation could be held liable for the illegal acts of its agent, who was acting within the scope of his authority. Here, the defendants, in conjunction with an agent of the company, were convicted for breaching the Elkins Act 1903,³⁶ which proscribed the payment of rebates. In its unanimous opinion, the Supreme Court boldly declared that “the old and exploded doctrine that a corporation cannot commit a crime” was no longer appropriate.³⁷ Specifically, the Supreme Court held that a corporation could be held criminally responsible for the illegal acts of its agent. The US judiciary have adopted the *respondent superior* model to deal with the doctrine of corporate criminal liability.³⁸ This is a variation of the vicarious liability doctrine, and it allows the extension of civil liability on employers for the actions committed by their agents.³⁹ It is important to note that the Supreme Court in *New York Central* did not offer any specific guidance in what circumstances this model could be imposed. The decision of the Supreme Court has since been broadened to comprise the actions of agents of corporations who are acting without authority or breaching specific directions.⁴⁰ Therefore, a corporation could be held liable for the conduct of “low-level employees who acted contrary to the corporate policy and to the compliance program of its firm”.⁴¹

The Prosecution of Corporations

The instigation of criminal proceedings in financial crime cases initially concentrated on persons and not corporations. This was illustrated following the 1980s Savings and Loans Crisis, which resulted in the collapse of over 2,100 financial institutions and losses exceeding

³⁵ 212 U.S. 481 (1909).

³⁶ 32 Stat. 847.

³⁷ 212 U.S. 481 (1909) at 495 per Justice Day.

³⁸ See generally *Marbury Management Inc v Kohn* (2d Cir 1980) 629 F 2d 705; *Wood, Walker & Co v Marbury Management Inc* 449 US 1011; *Sharp v Coopers & Lybrand* (3d Cir 1981) 649 F 2d 175 *cert denied* 455 US 938 (3d Cir 1981) as cited in N. Poser ‘Chinese wall or emperor’s new clothes? Part 3.’ (1989) 9 Company Lawyer 207.

³⁹ The evolution of this doctrine has been heavily influenced by three distinct theories that the US judiciary have developed regarding the corporate identity: the artificial theory, the aggregation theory and the real entity. A full discussion of these theories is beyond the scope of this article but see generally D. Millon ‘Theories of the corporation’ (1990) 2 Duke Law Journal 201.

⁴⁰ See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

⁴¹ E. Lederman ‘Corporate criminal liability: the second generation’ (2016) 46 Stetson Law Review 74.

\$150bn⁴² and resulted in over 1,000 senior executives being convicted of fraud and receiving lengthy custodial sentences.⁴³ However, it was not until the later that decade that the DoJ began to indict corporations for breaches of financial crime legislation. For example, in 1987, the stock brokerage firm EF Hutton, which was initially accused of ‘check kiting’,⁴⁴ revealed that some of the firm’s brokers had laundered money for the Patriarca Crime Family.⁴⁵ In light of this disclosure, EF Hutton was indicted and eventually convicted of 2,000 counts of mail and wire fraud.⁴⁶ As a result of the conviction, EF Hutton entered into a plea bargain with the DoJ and it was “forced to merge with a competitor”.⁴⁷ Interestingly, none of the employees of EF Hutton were prosecuted and only the company was held criminally responsible.

Whether this move away from the prosecution of individuals towards the prosecution of corporations is merited needs to be ascertained in light of the impact of such prosecutions. The prosecution of the investment-banking corporation Drexel Burnham Lambert undoubtedly illustrates well the impact of a corporate conviction. After the firm’s managing director, Dennis Levine, who had a history of illegal conduct, pleaded guilty to several insider-trading charges,⁴⁸ the US Attorney for the Southern District of New York launched an investigation into Drexel Burnham Lambert under the Racketeering Influenced and Corruption Organisations Act 1970.⁴⁹ As a result of the threat of prosecution, Drexel Burnham Lambert entered into an ‘Alford plea’⁵⁰ for several market manipulation charges

⁴² S. Smith ‘Reforming the law of adhesion contracts: a judicial response to the subprime mortgage crisis’ (2010) Fall Lewis & Clark Law 1060.

⁴³ For the definitive commentary of the Savings and Loans Crisis and its association with control fraud see W. Black, *The best way to rob a bank is to own one – how corporate executives and politicians looted the S&L industry* (University of Texas Press: Texas, 2005).

⁴⁴ Check kiting is a form of fraud that involves taking advantage of a float to make use of non-existent funds in a bank account. See *Williams v United States* 458 U.S. 279 1982.

⁴⁵ C. Golumbie and A Lichy ‘The too big to jail effect and the impact on the Justice Department’s corporate charging policy’ (2014) 65 Hastings Law Journal 1301.

⁴⁶ See generally Committee on the Judiciary House of Representatives Hearings before the Subcommittee on Crime of the Committee on the Judiciary House of Representatives on H.R. 3500 and H.R. 3911: Major Fraud Act of 1988 (Committee on the Judiciary House of Representatives: Washington DC, 1989).

⁴⁷ See Golumbie and Luchy, above n 45 at 1301-1302.

⁴⁸ Levine was given a two-year custodial sentence and ordered to pay a fine of \$362,000. See T. Lueck ‘Levine gets 2-year jail term’, February 21 1987, available from <http://www.nytimes.com/1987/02/21/business/levine-gets-2-year-jail-term.html>, accessed November 10 2017.

⁴⁹ Public Law 91-452 and 18 USC ss 1961-1968.

⁵⁰ An Alford plea is where a defendant submits a guilty plea but at the same time asserts their innocence. See *North Carolina v Alford* 400 U.S. 25 (1970).

and agreed to pay a fine of \$650m to the SEC.⁵¹ In consequence, Drexel Burnham Lambert was forced to close several of its departments which resulted in the loss of 5,000 jobs. This illustrates the far-reaching consequences of a corporate conviction, almost to the point of a corporate death penalty.

The move towards DPAs

A DPA is a contractual agreement between a financial regulatory agency or government agency and a corporation, who is under investigation for breaching the law. The main purpose of a DPA is to permit the offending corporation to illustrate good conduct, to co-operate with the investigating agencies, pay a fine and improve its internal corporate governance procedures. Additionally, DPAs have imposed substantial financial compliance costs for offending companies of £30m in some cases.⁵² DPAs are granted for a number of years and once the corporation is able to demonstrate that they have complied with the terms of the DPA, the charges are dropped. Conversely, if a corporation breaches the terms of the agreement the investigation will be restarted. One way to mitigate the impact of corporate conviction is by using DPAs, which was illustrated by the '1990s Treasury Bond scandal'. Here, the investment banking corporation Salomon Brothers was investigated for breaches of the False Claims Act 1986⁵³ and the Sherman Act 1890 for making unlicensed bids for Treasury bonds.⁵⁴ The corporation submitted to a DPA where it agreed to pay a large fine,⁵⁵ to continue assisting investigators and to introduce a new compliance structure.⁵⁶ This was followed by the imposition of another DPA on Prudential Securities Incorporated which defrauded 400,000 investors of \$8bn.⁵⁷ Prudential Securities Corporation agreed to pay a \$330m fine, continued to cooperate with the investigation and made several corporate governance alterations including the appointment of an independent director.⁵⁸ Here, the aim of DPAs was to discipline the offending corporations and eliminate the financial advantage

⁵¹ K. Eichenwald 'The collapse of Drexel Burnham Lambert; Drexel, symbol of Wall St, era, is dismantling; bankruptcy filed', February 14 1990, available from <http://www.nytimes.com/1990/02/14/business/collapse-drexel-burnham-lambert-drexel-symbol-wall-st-era-dismantling-bankruptcy.html?pagewanted=all>, accessed November 10 2017.

⁵² Binham, C. 'Fraud deals set to cost companies £30m', October 23 2012, available from <https://www.ft.com/content/dcc42e06-1d10-11e2-abeb-00144feabdc0>, accessed February 26 2018.

⁵³ Public Law 99-562, 100 Stat. 3153.

⁵⁴ 26 Stat. 209 15 USC ss 1-7.

⁵⁵ United States Department of Justice 'Department of Justice and SEC enter \$290m settlement with Saloman Brothers in Treasury Securities Case', May 20 1992, available from https://www.justice.gov/archive/atr/public/press_releases/1992/211182.htm, accessed November 10 2017.

⁵⁶ See *US v Saloman Brothers Incorporated* 92 Civ 3200 1992.

⁵⁷ Also see Securities and Exchange Commission 'Prudential to pay \$600 Million in Global Settlement of Fraud Charges in Connection with Deceptive Market Timing of Mutual Funds', August 28 2006, available from <https://www.sec.gov/news/press/2006/2006-145.htm>, accessed November 10 2017.

⁵⁸ Above n. 45 at 1302.

derived from the illegal conduct. If the financial penalty imposed as part of the DPA is too high or excessive, that the corporation folds the impact is then on employees, customers and supply chain. This has been referred to as the collateral consequences (as outlined below) of a corporation losing its licence. These two cases can clearly be contrasted with the damaging impact of the corporate convictions of EF Hutton and Drexel Burnham Lambert.

Undoubtedly the use of DPAs is fraught with legal, ethical and political concerns. It was not until the conviction of Arthur Anderson LLP, one of the ‘Big Five’ accounting firms, that the DoJ reconsidered the indictment of corporations and fully used DPAs.⁵⁹ Arthur Andersen had acted as an outside accountant for Enron, which collapsed in 2001 due to wide scale fraudulent activities.⁶⁰ Arthur Andersen was accused of shredding audit documents during the DoJ investigation into Enron’s conduct and subsequently agreed to surrender its practicing license as a Certified Public Accountant following its conviction for obstruction of justice. It is important to note here, that the DoJ didn’t seek to impose a DPA on Arthur Andersen. As a result, Arthur Andersen filed for bankruptcy and approximately 30,000 employees were made redundant. The impact of the conviction on Arthur Andersen was catastrophic and “there was nothing left of the firm to be salvaged”.⁶¹ Subsequently, the Supreme Court overturned the conviction of Arthur Andersen in 2005 due to inaccurate jury instructions by federal prosecutors.⁶² On the other hand, “Andersen was at least negligent of ... fraudulent accounting”⁶³ and it had previously been subject to several fines for similar schemes by the SEC.⁶⁴

⁵⁹ Between 2000 and 2016 a total of 457 DPAs were imposed by the DoJ and SEC. See Gibson Gunn ‘2017 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)’, July 11 2017, available from https://www.gibsondunn.com/2017-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/#_ftn3, accessed February 26 2018.

⁶⁰ Two of Enron’s directors, Kenneth Lay and Jeffrey Skilling were convicted on multiple counts of securities, wire fraud, money laundering and insider trading. Lay was convicted and sentenced to 45 years in prison, although he died before commencing his sentence. Skilling was sentenced to 24 years imprisonment, which has since been reduced to ten years on appeal. See *Skilling v United States* (No. 08-1394) 554 F. 3d, 529.

⁶¹ V. Rajah ‘Prosecution of financial crimes and its relationship to a culture of compliance’ (2016) 37 Company Lawyer 123.

⁶² Indeed the Supreme Court unanimously noted that “jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing”. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

⁶³ G. Markoff, ‘Arthur Andersen and the myth of the corporate death penalty: corporate criminal convictions in the twenty-first century’ (2013) 15 University of Pennsylvania Journal of Business Law 804.

⁶⁴ See Securities and Exchange Commission ‘The SEC Enforcement Division’s Focus on Auditors and Auditing: Andrew Ceresney, Director, Division of Enforcement’, September 22 2016, available from <https://www.sec.gov/news/speech/ceresney-enforcement-focus-on-auditors-and-auditing.html>, accessed November 29 2017.

In the wake of this judgment, the DoJ decided to rethink its use of corporation prosecution and increase its use of the safer, generous and more flexible option, the DPA with a view to minimising the impact of corporate death.⁶⁵ To ensure consistency in the use of this option, the Deputy Attorney General published the Federal Prosecution of Corporations or ‘Holder Memo’.⁶⁶ The Holder Memo (later amended by the ‘Thompson Memo’,⁶⁷ the ‘McNulty Memo’⁶⁸ and most recently the ‘Filip Memo’⁶⁹) contained factors that prosecutors are required to consider before deciding to commence criminal proceedings against a corporation,⁷⁰ one of which being that, the potential ‘collateral consequences’ must be considered before any financial crime charges are brought against corporations.⁷¹ This includes the likely impact of a prosecution on employees, investors and the economy more generally.⁷² However, not all commentators are convinced by the collateral consequences argument. For instance, Clarkson noted:

“With regard to the argument that punishing companies amounts to punishment of innocent shareholders and creates risks of redundancies, it must be borne in mind that such persons are not themselves subject to the stigma of conviction and criminal punishment. Those who take the benefits should also shoulder the burdens. A company should not be permitted to cut corners in its desire to make profits for its shareholders, and in particular it must not cut overhead costs at the expense of safety”.⁷³

⁶⁵ See Grasso, above n. 21 at 393.

⁶⁶ United States Department of Justice ‘Bringing Criminal Charges Against Corporations’, June 16 1999, available from <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>, accessed November 29 2017.

⁶⁷ United States Department of Justice ‘Principles of Federal Prosecution of Business Organisations’, January 20 2003, available from https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp_authcheckdam.pdf, accessed November 29 2017.

⁶⁸ United States Department of Justice ‘Principles of Federal Prosecution of Business Organisations’, n/d, available from https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf, accessed November 29 2017.

⁶⁹ United States Department of Justice ‘Principles of Federal Prosecution of Business Organisations’, August 28 2017, available from <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>, accessed November 29 2017.

⁷⁰ The factors are the significance of the offence, the frequency of illegal conduct in the company, any history of comparable behaviour, the voluntary revelation of misconduct, the competence of the company’s compliance regime, the corrective activities of the company, collateral consequences and the appropriateness of civil remedies. See United States Department of Justice ‘Bringing Criminal Charges Against Corporations’, June 16 1999, available from <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>, accessed November 29 2017.

⁷¹ S. Fredericksen and G. Husisian ‘The future of white collar enforcement under the Trump administration’ (2017) 23(2) International Trade Law & Regulation 78.

⁷² R. Cheung ‘Money laundering - a new era for sentencing organisations’ (2017) 1 Journal of Business Law 29.

⁷³ C. Clarkson ‘Kicking corporate bodies and damning their souls’ (1996) 59 Modern Law Review 563.

Whilst there are obvious merits to the view of Clarkson, the economic reality is that the DoJ is hesitant to seek revoke the operating licence of a corporation due to the collateral consequences as outlined above. Therefore, it is recommended that an alternative approach towards tackling corporate financial crime must be implemented in the.

Despite this questionable use of DPAs US federal prosecutors are too scared to indict corporations following the collapse of Arthur Andersen. The way HSBC was treated is an excellent point in case. In December 2012, the DoJ announced that it had reached an agreement with HSBC for violating US anti-money laundering (AML) laws, the United Nations sanctions regime and related criminal offences.⁷⁴ In particular, HSBC admitted to breaching the Bank Secrecy Act 1970,⁷⁵ the International Emergency Economic Powers Act 1977⁷⁶ and the Trading with the Enemy Act 1917.⁷⁷ The DoJ noted that “HSBC’s blatant failure to implement proper AML controls facilitated the laundering of at least \$881m in drug proceeds through the US ... [its] willful flouting of US sanctions laws ... resulted in the processing of hundreds of millions of dollars in OFAC-prohibited transactions”.⁷⁸ Therefore, HSBC was described as “the preferred financial institution for drug cartels and money launderers”.⁷⁹ HSBC entered into a five year DPA, agreed to pay a financial penalty of \$1.92bn, introduced a series of measures to improve its compliance procedures and offered an apology.⁸⁰ In December 2017, the DoJ announced that it was seeking the dismissal of the charges brought against HSBC and had filed a petition with the US District Court for the Eastern District of New York.⁸¹ HSBC responded by announcing that the five year DPA had expired and the DoJ charges have been deferred.⁸²

⁷⁴ See United States Department of Justice ‘HSBC Holdings Plc and HSBC Bank USA N.A Admit to anti-money laundering and sanctions violations, forfeit \$1.256bn in deferred prosecution agreement’, December 11 2012, available from <https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>, accessed August 3 2016.

⁷⁵ This is also referred to as the Currency and Foreign Transactions Reporting Act, Public Law 91-508.

⁷⁶ Public Law 95-223 91 Stat 1626.

⁷⁷ 40 Stat. 411 12 USC ss 95a and b, 50 USC App ss 1-44.

⁷⁸ United States Department of Justice, above n. 74.

⁷⁹ Ibid.

⁸⁰ Above, n. 74. Also see HSBC ‘HSBC announces settlements with authorities’, December 11 2012, available from <http://www.hsbc.com/news-and-insight/media-resources/media-releases/2012/hsbc-announces-settlements-with-authorities>, accessed December 6 2017.

⁸¹ M. Arnold ‘US DoJ seeks dismissal of HSBC deferred criminal charges’, December 11 2017, available from <https://www.ft.com/content/874f90e9-0098-37c6-ba00-10574f66ab65>, accessed February 21 2018.

⁸² HSBC ‘HSBC Holdings plc Expiration of 2012 Deferred Prosecution Agreement’, December 11 2017, available from <http://www.hsbc.com/news-and-insight/media-resources/media-releases/2017/hsbc-holdings-plc-expiration-of-2012-deferred-prosecution-agreement>, accessed December 18 2017.

There are two factors which contributed to the DoJ agreeing a DPA in this instance and both relate to the wider consequences of corporate prosecution. Firstly, HSBC was not indicted because a criminal conviction would weaken an already fragile financial system that was still recovering from the most recent financial crisis. This factor was acknowledged by the former Attorney General Eric Holder who stated that a prosecution “will have a negative impact on the national economy, perhaps even the world economy”.⁸³ In this regard the prosecutors followed the Holder Memo that required them to examine the collateral consequences. Secondly, HSBC was not prosecuted due to unprecedented levels of political interference from the UK. The House of Representatives Committee on Financial Services published several correspondences from the FSA and HM Treasury who pleaded with the DoJ “against a prosecution, [because] it was clear they were very concerned about the reverberations such an action could have within the financial system”.⁸⁴ Their report continued “an official in the UK government reached out to a US official to complain that US regulators were taking aggressive action against UK banks in an effort to make British banks a less attractive place to do business”.⁸⁵ Remarkably, again the justification of the wider consequences of corporate prosecution was used, though by the UK, as a way to block indictments.

One of the aims of punishment is deterrence. HSBC, like Arthur Andersen, was a repeat offender who had previously been sanctioned by law enforcement agencies in France,⁸⁶ the UK,⁸⁷ Switzerland,⁸⁸ the US⁸⁹ and Hong Kong.⁹⁰ Therefore, it could be suggested that DPAs

⁸³ As cited in D. Douglas ‘Holder concerned megabanks too big to jail’, March 6 2013, available from https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html?utm_term=.24ad57729bdc, accessed July 31 2017.

⁸⁴ US House of Representatives *Too big to jail: inside the Obama Justice Department’s decision not to hold Wall Street accountable* (Republican Staff of the Committee on Financial Services, US House of Representatives, 2016) at 13 and appendix 2.

⁸⁵ Ibid., at 24 and appendices 28-29.

⁸⁶ In November 2017 the Cour d’appel de Paris approved the use of a DPA against HSBC for money laundering and tax evasion charges. See Ministère de la Justice ‘Convention judiciaire d’intérêt public between the National Financial Prosecutor of the Paris first instance court and HSBC Private Bank (Suisse) SA’, November 14 2017, available from https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_English_version.pdf, accessed December 6 2017.

⁸⁷ Financial Conduct Authority ‘Final Notice HSBC’, November 11 2014, available from <https://www.fca.org.uk/publication/final-notices/final-notice-hsbc.pdf>, accessed December 6 2017.

⁸⁸ J. Titcomb ‘HSBC to pay £28m after money laundering investigation’, June 4 2015, available from <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11652093/Swiss-authorities-fine-HSBC-after-money-laundering-investigation.html>, accessed December 6 2017.

⁸⁹ Federal Reserve ‘Federal Reserve Board fines HSBC Holdings plc and HSBC North America Holdings Inc. \$175 million for unsafe and unsound practices in FX trading’, September 29 2017, available from <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20170929a.htm>, accessed December 6 2017.

are an inadequate enforcement tool against corporations for financial crime offences because they do not prevent future breaches by these offending corporations.

Interestingly, Eric Holder noted that “the greatest deterrent effect is not to prosecute a corporation ... [it] is to prosecute the individuals in the corporations that are responsible for those decisions”.⁹¹ In spite of this, the DoJ has declined to prosecute any employee or agent of HSBC since entering the DPA and comparisons can be drawn with the collapse of Arthur Andersen as outlined above, where no prosecutions were brought against any of its employees either. Conversely, there are some instances of corporations entering into a DPA and the DoJ instigating criminal proceedings and securing convictions of the corporations employees. For example, in 2005 KPMG entered into a DPA after the firm “admitted that it engaged in a fraud that generated at least \$11bn in phony tax losses”.⁹² In 2013, Michael Parker pleaded guilty to conspiracy to defraud and was sentenced to 54 months imprisonment for his role in the KPMG tax fraud,⁹³ yet a majority of the indictments brought against KPMGs employees were thrown out by the courts.⁹⁴ The use of criminal proceedings against employees has been questioned because an individual’s conviction will “seldom affect the way the corporation ... will behave itself”.⁹⁵ The indictment of employees or agents of a corporations must be used in conjunction with a DPA if they are to act as a deterrent for future misconduct. The combination of these two forms of punishment would present a stronger deterrent than if they were used separately. The DoJ has been crippled, not by ineffective legislation, but by its weak enforcement stance and the “fear of that the collateral

⁹⁰ The Securities and Futures Commission ‘HSBC Private Bank (Suisse) SA fined HK\$400 million for systemic failures in selling structured products’, November 21 2017, available from <http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=17PR138>, accessed December 6 2017.

⁹¹ Transcript: Attorney General Eric Holder on ‘Too Big to Jail’, American Banker (online), March 6, 2013, http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html, as cited in A. Chinsky ‘Modern Approaches to Financial Crime: Judge Rakoff, The Financial Crisis, DPAs, and Too Big to Prosecute’ (2014) 8 Harvard Law and Policy Review 13.

⁹² Department of Justice ‘KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case’, August 29 2005, available from https://www.justice.gov/archive/opa/pr/2005/August/05_ag_433.html, accessed December 6 2012.

⁹³ Department of Justice ‘Virginia investment firm officer sent to prison in KPMG tax shelter case’, May 20 2013, available from <https://www.justice.gov/opa/pr/virginia-investment-firm-officer-sent-prison-kpmg-tax-shelter-case>, accessed December 6 2017.

⁹⁴ B. Masters ‘US judge drops charges in KPMG case’, July 17 2007, available from <https://www.ft.com/content/a5a1ae5a-33f8-11dc-9887-0000779fd2ac>, accessed December 6 2017.

⁹⁵ G. Stessens ‘Corporate criminal liability: a comparative perspective’ (1994) 43 International & Comparative Law Quarterly 518.

consequence would have on the economy”.⁹⁶ The evidence is clear, the rattling of sabres by the DoJ merely amounts to no more than entering into high profile and media-friendly DPAs with corporations for breaches of financial crime legislation.

The DoJ can make use of a variety of other measures to punish corporations for failing to abide by the law. First, it can impose financial penalties in pursuance of the Sentencing Reform Act and second, it can instigate civil proceedings under the Financial Institutions Reform, Recovery and Enforcement Act 1989. It is argued that a combination of criminal prosecution, possibly using DPAs, as well as use of these measures is likely to yield the most appropriate results in terms of deterring illegal conduct by corporations.

Civil Sanctions

An alternative form of enforcement mechanism to tackle corporate financial crime, the Sentencing Reform Act was introduced, as part of the Comprehensive Crime Control Act of 1984.⁹⁷ The Act allows law enforcement and financial regulatory agencies to impose civil financial penalties on corporations for a wide range of criminal activities. With this in mind, the SEC has imposed a record number of financial penalties.⁹⁸ The Commodities and Futures Trading Commission (CFTC) have adopted a similar enforcement strategy since the introduction of the Sentencing Reform Act 1984.⁹⁹ The introduction of the Sentencing

⁹⁶ S. Foster ‘Too big to prosecute: collateral consequences, systemic institutions and the rule of law’ (2015) 34 Review of Banking and Financial Law 658.

⁹⁷ Pub.L. 98–473.

⁹⁸ For example, in 2012 the SEC announced that it had “obtained orders in fiscal year 2012 requiring the payment of more than \$3bn in penalties and disgorgement for the benefit of harmed investors”. In 2015, the SEC filed over 800 enforcement actions and “obtained orders totaling approximately \$4.2bn in disgorgement and penalties”. A year later the SEC announced that it had filed over 860 enforcement actions and obtained orders totalling more than \$4bn. More recently, the SEC has obtained 754 enforcement activities and has imposed financial penalties totalling \$3.8bn. See Securities and Exchange Commission ‘SEC’s Enforcement Program Continues to Show Strong Results in Safeguarding Investors and Markets’, November 14 2012, available from <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171485830>, accessed August 11 2013; Securities and Exchange Commission ‘SEC Announces Enforcement Results For FY 2015’, October 22 2015, available from <https://www.sec.gov/news/pressrelease/2015-245.html>, accessed December 18 2017; Securities and Exchange Commission ‘SEC Announces Enforcement Results For FY 2016’, October 11 2016, available from <https://www.sec.gov/news/pressrelease/2016-212.html>, accessed December 18 2017 and Securities and Exchange Commission ‘SEC Enforcement Division Issues Report on Priorities and FY 2017 Results’, November 15 2017, available from <https://www.sec.gov/news/press-release/2017-210>, accessed December 18 2017.

⁹⁹ In 2013 its Division of Enforcement filed 82 enforcement actions including financial penalties of \$1.5bn. In 2015, the CFTC stated it had filed 69 actions which included financial penalties exceeding \$3bn. In 2017, the CFTC announced that it had filed 49 financial actions and imposed financial penalties totalling £413m. See Commodities Futures Trading Commission ‘CFTC Releases Enforcement Division’s Annual Results for 2013’,

Reform Act 1984 has permitted law enforcement and financial regulation agencies to impose a number of large financial penalties on corporations who have breached financial crime legislation. This is the most frequently used enforcement power against corporations in the US and it is regularly used in association with a DPA, as was illustrated in the HSBC case outlined above.

Another important legislative measure that has been used against corporations is the Financial Institutions Reform, Recovery and Enforcement Act 1989.¹⁰⁰ The Act was introduced as a response to the Savings and Loans crisis in the 1980s and permits law enforcement and financial regulatory agencies to instigate civil proceedings against corporations for a wide range of financial crimes. This includes mail fraud, wire fraud, providing false statements and bank fraud. The 1989 Act provides that prosecutors are only required to illustrate a civil burden of proof and not a criminal burden in order to impose civil liability on the offending corporation.¹⁰¹ This civil measure has been used by the DoJ on numerous occasions for corporate financial crime offences and it has generated billions of dollars in financial penalties and compensation for victims where identifiable. For example, the DoJ reached an agreement with Bank of America who settled the “the largest civil settlement (\$16.65bn) with a single entity in American history” under the 1989 Act.¹⁰² Other examples include the largest settlement for robo-signing,¹⁰³ fair lending settlements with Countrywide Financial Corporation¹⁰⁴ and Wells Fargo Bank.¹⁰⁵ The importance of the 1989 Act is further

October 24 2013, available from <http://www.cftc.gov/PressRoom/PressReleases/pr6749-13>, accessed December 18 2017; Commodities Futures Trading Commission ‘CFTC Releases Enforcement Division’s Annual Results for 2015’, November 6 2015, available from <http://www.cftc.gov/PressRoom/PressReleases/pr7274-15>, accessed December 18 2017 and Commodities Futures Trading Commission ‘CFTC Releases Enforcement Division’s Annual Results for 2017’, November 22 2017, available from <http://www.cftc.gov/PressRoom/PressReleases/pr7650-17>, accessed December 18 2017. The Federal Trade Commission has imposed large financial penalties on firms who have participated in predatory lending practices which includes and Ameriquest, Household International, Bear Stearns and EMC Mortgage. A full list of the enforcement activities of the Federal Trade Commission can be found at Federal Trade Commission ‘Enforcement’, n/d, available from <https://www.ftc.gov/enforcement>, accessed December 19 2017.

¹⁰⁰ Pub.L. 101-73.

¹⁰¹ Financial Institutions Reform, Recovery and Enforcement Act 1989, s, 951.

¹⁰² United States Department of Justice ‘Bank of America to pay \$16.65 billion in historic Justice of Department settlement for financial fraud leading up to and during the financial crisis’, August 21 2014, available from <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>, accessed August 7 2017.

¹⁰³ Department of Justice ‘\$25 Billion Mortgage Servicing Agreement Filed in Federal Court’, March 12 2012, available from <http://www.justice.gov/opa/pr/2012/March/12-asg-306.html>, accessed October 2 2013.

¹⁰⁴ Department of Justice ‘Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation’, December 21 2012, available from <http://www.justice.gov/opa/pr/2011/December/11-ag-1694.html>, accessed October 2 2013.

¹⁰⁵ Department of Justice ‘Manhattan U.S. Attorney Files Mortgage Fraud Lawsuit Against Wells Fargo Bank, N.A. Seeking Hundreds of Millions of Dollars in Damages for Fraudulently Certified Loans’, October 9 2012,

illustrated by figures published by the DoJ in December 2016 when it announced that it had collected more than \$15.3bn in civil sanctions.¹⁰⁶

The introduction of financial penalties and civil proceedings are to be broadly welcomed as these measures have imposed some form of liability on corporations for financial crime breaches. Then again, the impact of financial penalties on corporations is negligible as they are often smaller than administrative actions and related civil actions and therefore did little to prevent misconduct.¹⁰⁷ Similarly, Jones noted that “corporate fines are both ineffective and ill-conceived ... the sanctioned firms are so wealthy that even a fine running into the hundreds of millions of dollars is often viewed as a mere cost of doing business”.¹⁰⁸ It is recommended that financial penalties and civil proceedings should be used in conjunction with DPAs to act as a greater deterrent against corporations.

Conclusion

The criminal liability of corporations in the US has evolved since the Supreme Court decision in *New York Central*. However, the application of the *respondent superior* doctrine in financial crime cases has not fully materialised as the DoJ tended to favour prosecuting the employees of corporations. Subsequent attempts to indict corporations have resulted the DoJ abandoning efforts to impose the corporate death penalty and moving towards a negotiated settlement via DPAs. The impact of DPAs on corporate behaviour has been queried because they had done little to repeat further financial crime breaches, such as those committed by Arthur Andersen and HSBC. The DoJ must not use DPAs in isolation and they must be used with financial penalties, civil litigation and the prosecution of errant employees. The next part of the paper moves on to discuss the approach adopted in the UK and seeks to determine if any lessons could be learned from the US experience.

The United Kingdom’s Approach to Corporate Prosecution

available from <http://www.justice.gov/usao/nys/pressreleases/October12/WellsFargoLawsuitPR.html>, accessed October 2 2013.

¹⁰⁶ United States Department of Justice ‘Justice Department collects more than \$15.3bn in civil and criminal cases in fiscal year 2016’, December 14 2016, available from <https://www.justice.gov/opa/pr/justice-department-collects-more-153-billion-civil-and-criminal-cases-fiscal-year-2016>, accessed August 7 2017.

¹⁰⁷ See Markoff, above n. 63 at 803.

¹⁰⁸ R. Jones ‘Unfit for Duty: The Officer and Director Bar as a Remedy for Fraud’ (2014) 82 University of Cincinnati Law Review 444.

The UK's legislative efforts to tackle financial crime came to fruition with the enactment of the Prevention of Fraud (Investments) Acts of 1939 and 1958. Previous legislative efforts included the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906, whilst the common law criminalised conspiracy to defraud and the offences of bribing and accepting a bribe. It was not until the creation of the SFO via the Criminal Justice Act 1987 that there was a concerted effort to tackle financial crime.¹⁰⁹ Its establishment was sandwiched between the Financial Services Act 1986 and the Banking Act 1987 during an unprecedented era of banking deregulation,¹¹⁰ which contributed towards increasing the UK's exposure to financial crime.¹¹¹ Efforts to tackle financial crime were revisited following the introduction of the Financial Services and Markets Act 2000 and the statutory objective of the Financial Services Authority (FSA) to reduce financial crime.¹¹² This, combined with their investigative and enforcement powers, was an innovative attempt to tackle financial crime that arose from, within or targeted the financial corporations. In 2002, the Proceeds of Crime Act 2002 was introduced, a piece of legislation that effectively codified the existing AML legislations contained within the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1993. In 2006, the fraud legislation was overhauled by the introduction of the Fraud Act 2006 and this was followed by the extension of the enforcement powers of the new city regulator, the FCA, by the Financial Services Act 2012. The measures tackled financial crime committed by individuals and not corporations. The only mechanism to tackle corporate financial crime was the unsatisfactory doctrine of corporate criminal liability. In order to address this problem, the Bribery Act 2010 and the Criminal Finances Act 2017 have introduced two new corporate criminal offences: failing to prevent bribery¹¹³ and failure to prevent the facilitation of tax evasion.¹¹⁴ This section begins by outlining the development of the doctrine of corporate criminal liability.

The Doctrine of Corporate Criminal Liability in the UK

¹⁰⁹ Criminal Justice Act 1987, s. 1.

¹¹⁰ See generally R. Dale. *International Banking Regulation: The Great Banking Experiment* (Wiley-Blackwell: London, 1992).

¹¹¹ See R. Bosworth-Davies 'Investigating financial crime: the continuing evolution of the public fraud investigation role – a personal perspective' (2009) 30 *Company Lawyer* 195.

¹¹² Financial Services and Markets Act 2000, s. 6.

¹¹³ Bribery Act 2010, s. 7.

¹¹⁴ Criminal Finances Act 2017, s. 44.

The doctrine of corporate criminal liability has attracted a great deal of criticism from within the existing literature, most of which has been directed at the common law rules that have considered the imposition of corporate criminal liability. The courts began to consider the restrictive application of criminal law to companies in the nineteenth century, which included cases involving public nuisance, criminal libel and breach of statutory duty.¹¹⁵ The doctrine was further extended by three Court of Appeal decisions in 1944, which concluded that a corporation could be held directly accountable, as opposed to vicariously liable, for the actions of their employees. For example, in *DPP v Kent and Sussex Contractors Ltd* the Court of Appeal concluded that a company could be held criminally liable where it had produced false documents and provided false information.¹¹⁶ The Court of Appeal reached a similar conclusion in *R v ICR Haulage Co Ltd*, where it held that a company could be held criminally accountable for conspiracy to defraud by the acts of one of its directors.¹¹⁷ The final case was *Moore v Bresler Ltd* where the secretary of the company, who was also the general manager of a branch of the company, was accused of defrauding the company. Here, the company was found criminally liable because one of its officers was acting within the scope of his responsibilities.¹¹⁸

The leading authority on the doctrine of criminal liability of corporations is the House of Lords of decision in *Tesco Supermarkets v Natrass*.¹¹⁹ This decision has become synonymous with the evolution of the identification doctrine, yet this had already been considered by the House of Lords in *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd*,¹²⁰ where the court concluded that the owner of a vessel was the “directing mind and will of the company” because “he was the alter ego of the company”.¹²¹ In *Tesco Supermarkets v Natrass* the House of Lords concluded that a company is allowed to provide a defence to a prosecution under the Trade Descriptions Act 1968 provided the company had established an effective procedure to avert a the commission of a criminal offence. Whilst giving the leading opinion, Lord Diplock stated that when the court considers how it will identify who has the directing mind of the company it can refer to its memorandum and articles of

¹¹⁵ See Ministry of Justice, above n. 10 at 11.

¹¹⁶ [1944] 1 K.B. 146.

¹¹⁷ [1944] K.B. 551.

¹¹⁸ [1944] 2 E.R. 575.

¹¹⁹ [1972] A.C. 153. See Law Commission, Criminal Liability in Regulatory Contexts, (Law Com No 195, 2010) para, 5.34.

¹²⁰ [1915] A.C. 705 HL.

¹²¹ *Ibid.*, at 715.

association, thus also to the directors of the company and other senior company officers.¹²² Therefore, in order for a company to be found guilty of a criminal offence, a person who has the directing mind of the company and the self-determination of the company must also have criminal intent. This decision in *Tesco* resulted in the creation of the ‘identification doctrine’, the test to determine whether corporations are to be held liable for breaches of criminal law.

It is argued that this test has become the principal reason that prevents prosecutors bringing criminal proceedings against corporations.¹²³ It has been correctly asserted that the identification doctrine “does not reflect modern corporate practice, particularly in larger companies. The doctrine ignores the reality of modern corporate decision-making”.¹²⁴ For example, the restrictive interpretation and the nature of large corporations have been highlighted by several subsequent cases including the Herald of Free Enterprise,¹²⁵ the Clapham rail disaster,¹²⁶ the Transco gas explosion,¹²⁷ the Hatfield Disaster¹²⁸ and the sinking of the Marchioness.¹²⁹ As a result, the Corporate Manslaughter and Corporate Homicide Act 2007, which criminalised harm that leads to a person’s death, was adopted.¹³⁰ However, the impact of the Act is negligible as there have only been 19 criminal charges brought under the 2007 Act between 2008 and 2016.¹³¹ The decision in *Tesco* and the subsequent judicial interpretation as well as the lack of success of the 2007 Act were unsatisfactory and resulted in the publication of a consultation paper by the MoJ which

¹²² [1972] A.C. 153, at 198.

¹²³ Above n. 10 at 7.

¹²⁴ Clarkson above, n. 73 at 561.

¹²⁵ *R. v P&O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72 (Central Crim Ct).

¹²⁶ The British Rail Board admitted vicarious liability but there was no corporate manslaughter prosecution. See generally Hidden, A. *Investigation into the Clapham Railway Junction Railway Accident* (Department of Transport: London, 1989).

¹²⁷ Transco were fined £15m for breaches of the Health and Safety at Work Act 1974. The Appeal Court in Edinburgh rejected the charge of ‘culpable homicide’, the Scottish equivalent of the corporate manslaughter offence. See *Transco Plc v HM Advocate (No.3)* 2005 1 J.C. 194; 2005 S.L.T. 211; 2005 S.C.C.R. 117; 2005 G.W.D. 4-40.

¹²⁸ Here, the directors of Network Rail were acquitted of corporate manslaughter but Balfour Beatty Rail was convicted for breaching s. 3 of the Health and Safety at Work Act 1974. See *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586.

¹²⁹ Prosecutions were ruled out by the Crown Prosecution Service in 1989 due to insufficient evidence and two separate prosecutions for negligence (failing to keep an adequate lookout) of the captain of the Bowbelle, Douglas Henderson, also failed as the two juries were unable to reach a verdict. See generally House of Commons *Thames safety inquiry: final report by Lord Justice Clarke*, Cm 4558, February 2000.

¹³⁰ Corporate Manslaughter and Corporate Homicide Act 2007, s. 1.

¹³¹ Crown Prosecution Service Corporate manslaughter statistics: Freedom of Information Act 2000 Request (Crown Prosecution Service: London, 2016) at 2-3.

presented five options for reform,¹³² which additionally seeks to build on the failure to prevent offences under the Bribery Act 2010.

The Success of the Bribery Act 2010

This section concentrates on providing a brief discussion of the aim of s. 7 of Bribery Act 2010 and notes that the offence has resulted in a number of prosecutions. The Bribery Act 2010 introduced a new form of corporate criminal liability where a corporation can be found guilty of an offence if a person associated with the organisation bribes another, intending to obtain or retain business or a business advantage for that organisation.¹³³ In essence, it creates an additional direct rather than alternative vicarious liability, when the commission of a s. 1 or s. 6 bribery offence has taken place on behalf of an organisation. However, for there to be any liability, the organisation must be stipulated as a “relevant commercial organisation”.¹³⁴ An “associated person” is seen as an individual who “performs services for or on behalf of” the organisation,¹³⁵ with the person being, for example, the organisation’s agent, subsidiary or employee.¹³⁶ This has been stated to be a “matter of substance rather than form”,¹³⁷ with it being necessary for all surrounding circumstances to be taken into account, although a presumption will exist if the associated person is an employee of the organisation. The scope of s. 7 is broad, so as to encompass the whole range of individuals who may be committing bribery on behalf of a third party organisation. To be held as an ‘associated person’, “the perpetrator of the bribery must be performing services for the organisation in question and must also intend to obtain or retain business or an advantage in the conduct of business for that organisation”.¹³⁸ Section 7 has been described as a significant move “away from the current [identification doctrine] approach”,¹³⁹ with the MoJ stating that under this section “a commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation”.¹⁴⁰ Moreover, the existence of the s. 7 offence does not affect

¹³² Above n. 10 at 14.

¹³³ Bribery Act 2010, s.7.

¹³⁴ Bribery Act 2010, s. 7(5).

¹³⁵ Bribery Act 2010, s. 8(1).

¹³⁶ Bribery Act 2010, s. 8(3).

¹³⁷ Ministry of Justice Bribery Act 2010, Circular 2011/05 (Ministry of Justice: London, 2011) para. 23.

¹³⁸ Ibid.

¹³⁹ T. Pope, and T. Webb ‘Legislative Comment – the Bribery Act 2010’ (2010) 25 Journal of International Banking Law and Regulation 482.

¹⁴⁰ Ministry of Justice The Bribery Act 2010 – guidance (Ministry of Justice: London, 2011) 15.

the common law principle which governs the liability of corporate bodies for criminal offences. Under this provision, prosecuting bodies must prove a *mens rea* or fault element in addition to the *actus reus* or conduct element. This common law principle, also known as the identification principle should still be used instead of s.7 where it is possible to prove “that a person who is properly regarded as representing the ‘directing mind’ of the body in question possessed the necessary fault element required for the offence”.¹⁴¹

Interestingly, the introduction of the failing to prevent bribery offence has been enforced by the SFO which has used DPAs by virtue of the Crime and Courts Act 2013.¹⁴² According to the SFO, DPAs only apply to corporations, they are concluded under the supervision of the judiciary and they seek to avoid expensive and time consuming trials.¹⁴³ Therefore, the UK’s adoption of DPAs can be contrasted with that in the US where DPAs were used to avoid the negative consequences, or collateral consequences, of prosecuting corporations. The UK is largely using DPAs for their expediency.

Although s. 7 of the Bribery Act 2010 was introduced to address the limited application of criminal law to corporations it has resulted in the use of DPAs, which as discussed above is questionable as such. The SFO obtained its first DPA for breaches of the failing to prevent bribery offence against *Standard Bank Plc*, which were “ordered to pay financial orders of \$25.2m and required to pay the government of Tanzania a further \$7m in compensation”.¹⁴⁴ This was followed by a second DPA against *XYX Ltd* who agreed to “pay financial orders of £6.5m, comprised of a £6.2m disgorgement of gross profits and a £352,000 financial penalty”.¹⁴⁵ In 2017, Rolls Royce agreed to enter into a DPA that “involve[d] payments of £497m ... [and] Rolls-Royce [were] also reimbursing the SFO’s costs in full”.¹⁴⁶ In April

¹⁴¹ Ministry of Justice, above n. 137 at para. 18.

¹⁴² Crime and Courts Act 2013, schedule 17. The Coalition Government announced its intention to introduce DPAs in October 2012 and stated that they will “give prosecutors an effective new tool to tackle what has become an increasingly complex issue ... this will ensure that more unacceptable corporate behaviour is dealt with including through substantial penalties, proper reparation to victims, and measures to prevent future wrongdoing”. See HM Government ‘New tool to fight economic crime’, October 23 2012, available from <https://www.gov.uk/government/news/new-tool-to-fight-economic-crime>, accessed August 5 2017.

¹⁴³ Serious Fraud Office ‘Deferred Prosecution Agreements’, n/d, available from <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>, accessed August 5 2017.

¹⁴⁴ Serious Fraud Office ‘Standard Bank PLC’, December 10 2015, available from <https://www.sfo.gov.uk/cases/standard-bank-plc/>, accessed August 5 2017.

¹⁴⁵ Serious Fraud Office ‘SFO secures second DPA’, July 8 2016, available from <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>, accessed August 5 2017.

¹⁴⁶ Serious Fraud Office ‘Rolls-Royce PLC’, September 11 2014, available from <https://www.sfo.gov.uk/cases/rolls-royce-plc/>, accessed August 5 2017.

2017, the SFO announced that it had entered into a DPA with *Tesco* which was required to pay a fine of £129m for over stating its profits.¹⁴⁷ The MoJ asserted that the s.7 offence has provided a “powerful incentive for the inclusion of bribery prevention procedures as a component of corporate good governance. Its utility as an enforcement tool has been recently demonstrated”.¹⁴⁸ Interestingly, in each of the four DPAs obtained by the SFO, no criminal prosecutions have been brought against any of the offending corporation’s employees or agents, thus drawing similar comparisons with the US approach as outlined above. This is not surprising given the initial lack of enthusiasm shown by the SFO and Crown Prosecution Service towards prosecuting individuals under the Bribery Act 2010. It is somewhat disappointing that no prosecutions have been brought in each of the four DPAs agreed between the corporations and the SFO, thus similarities exist between the approach in the US and UK. If prosecutions were pursued against the employees or agents by the SFO for breaches of the Bribery Act 2010 it would represent an additional form of deterrent and would go some way to avoid any more ‘profound apologies’. The UKs approach towards DPAs can be differentiated from their use in the US. In the UK, DPAs have been because they are cost effective and avoid lengthy trials. Another similarity between the use of DPAs in the UK and US is that no employees of the offending corporations have been prosecuted for related offences. Therefore, the same recommendations applies to the UK, when a DPA is agreed with the SFO, prosecutions should also be pursued in conjunction with the DPA.

Financial Regulation

The final section of the paper provides a critical review of the enforcement powers of the FCA towards corporations who have breached financial crime legislation. This is important and necessary due to the regulators statutory objective to reduce financial crime. As a result of the Financial Services Act 2012, the FSA was replaced by the FCA, and its statutory objective to reduce financial crime now forms part of its integrity objective.¹⁴⁹ This section concentrates on the ability of the FCA to impose financial penalties for breaches of its financial crime rules and the obligations under the SMCR. The most frequently used power against corporations for financial crime breaches by the FCA are financial penalties. For example, in January 2017, the FCA imposed a record financial penalty of £163m on Deutsche

¹⁴⁷ Serious Fraud Office ‘SFO agrees Deferred Prosecution Agreement with Tesco’, April 2017, available from <https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/>, accessed January 18 2018.

¹⁴⁸ Above n. 10 at 6.

¹⁴⁹ Financial Services Act 2012, s. 1D(2)(d).

Bank for failing to maintain an adequate AML laundering system.¹⁵⁰ Specifically, the FCA determined that Deutsche Bank had performed inadequate customer due diligence, had deficient AML policies and procedure and it concluded that the “failings of Deutsche Bank are simply unacceptable”.¹⁵¹ The decision by the FCA to impose this record financial penalty can be contrasted with the stance of its predecessor, the FSA, towards HSBC when the regulator decided not to take any action. This must be questioned and criticized given the contrasting content of each case. For instance, HSBC flouted US AML laws and the UN sanctions regime, which resulted in no enforcement action by the FSA. Conversely, Deutsche Bank who were fined £163.1m for not having adequate AML rules as proscribed by the FCA Handbook, even though there was no evidence of any money laundering. The FCA has imposed large financial penalties for breaches of its money laundering rules, even though there was no evidence of money laundering. For examples, such fines were imposed on Turkish Bank (UK) Ltd,¹⁵² Habib Bank AG Zurich¹⁵³ and Coutts & Company.¹⁵⁴ Writing in 1996 Clarkson concluded that “it is the individuals within the company that are most amenable to deterrence and that in order to deter a company the fines would need to be massive. A company will only be deterred if its expected costs exceed its expected gains”.¹⁵⁵ It is also interesting to note, that in none of these cases did the FCA pursue any prosecutions for breaches of the Proceeds of Crime Act 2002 against any employee. In fact, the FCA has only instigated criminal proceedings for money laundering under the Proceeds of Crime Act 2002 on one occasion.¹⁵⁶ Another example of the ineffectiveness of financial penalties was the £72m fine imposed on Barclays Bank in November 2015. Here, the FCA stated that the banks “senior management ... had failed to oversee adequately Barclays’ handling of the financial crime risks ... and that it was unclear which senior managers were in charge of

¹⁵⁰ Above, n. 31.

¹⁵¹ Ibid.

¹⁵² Financial Services Authority ‘Turkish Bank (UK) Ltd: Decision Notice’, July 26 2012, available from <http://webarchive.nationalarchives.gov.uk/20130202000754/http://www.fsa.gov.uk/static/pubs/final/turkish-bank.pdf>, accessed August 3 2017.

¹⁵³ Financial Services Authority ‘FSA fines Habib Bank AG Zurich £525,000 and money laundering reporting officer £17,500 for anti-money laundering control failings’, May 15 2012, available from <http://webarchive.nationalarchives.gov.uk/20130201230641/http://www.fsa.gov.uk/library/communication/pr/2012/055.shtml>, accessed August 2017.

¹⁵⁴ Financial Services Authority ‘Coutts fined £8.75 million for anti-money laundering control failings’, March 26 2012, available from <http://webarchive.nationalarchives.gov.uk/20130201230628/http://www.fsa.gov.uk/library/communication/pr/2012/032.shtml>, accessed August 3 2018.

¹⁵⁵ Above, n. 73 at 562.

¹⁵⁶ See *R v Rollins* [2010] UKSC 39.

doing so.”¹⁵⁷ The FCA concluded that “Barclays ignored its own process designed to safeguard against the risk of financial crime and overlooked obvious red flags to win new business and generate significant revenue.”¹⁵⁸ Despite the imposition of financial sanctions by the FCA for breaches of its AML rules, the regulator decided against imposing any further sanctions such as a prosecution of the banks senior management or the money laundering reporting officer. The ability to impose financial penalties in the UK against corporations can be contrasted with the approach in the US approach. It is my contention that the UK legislative should introduce legislation that is based on the provisions in the Financial Institutions Reform, Recovery and Enforcement Act 1989. This legislation could provide the FCA and the SFO with another mechanism to target corporations who have breached financial crime related legislation.

The introduction of the SMCR by the FCA presents an opportunity to possibly overcome the problems associated with the identification doctrine, as highlighted above. The SMCR has two objectives: to encourage all staff within the financial services sector to take responsibility for their actions and that authorised firms and employees can clearly illustrate where the responsibility lies.¹⁵⁹ The introduction of the SMCR was heavily influenced by the recommendations of the Parliamentary Commission for Banking Standards that had been asked to investigate how standards could be improved following the market manipulation scandals of LIBOR and FOREX.¹⁶⁰ The SMCR provides that a corporation’s senior management is responsible for the policies, systems and controls that are designed to reduce the threat posed by financial crime. Therefore, the SMCR places the obligation of the regulated corporations to limit the risk posed by financial crime on its senior management. The FCA stated that “the extension of the SMCR is key to driving forward culture change in firms ... this is about individuals not just institutions ... the regime will also ensure that senior managers are accountable both for their own actions, and for the actions of staff in business areas they lead”.¹⁶¹ The FCA is attempting to improve the culture within firms and

¹⁵⁷ Financial Conduct Authority ‘FCA fines Barclays £72 million for poor handling of financial crime risks’, November 26 2015, available from <https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A372-million-poor-handling-financial-crime-risks>, accessed August 2 2017.

¹⁵⁸ Ibid.

¹⁵⁹ Financial Conduct Authority ‘Senior Managers and Certification Regime’, July 7 2015, available from <https://www.fca.org.uk/firms/senior-managers-certification-regime>, accessed November 29 2017.

¹⁶⁰ Parliamentary Commission for Banking Standards *Changing banking for good – Report of the Parliamentary Commission on Banking* (Parliamentary Commission for Banking Standards: 2013).

¹⁶¹ Financial Conduct Authority ‘FCA outlines proposals to extent the Senior Managers and Certification Regime to all financial services firms’, July 26 2017, available from <https://www.fca.org.uk/news/press->

is clearly placing the burden on senior managers to limit the risk posed by financial crime. Such efforts are to be welcomed, yet the extension to make senior managers accountable for a firm's financial crime obligations are from innovative and this 'new' initiative duplicates the existing obligations under the FCA.¹⁶² Nonetheless, financial crime related breaches of the SMCR by senior managers would enable the FCA and potentially prosecutors, to identify a corporation's senior management who could meet requirements of the identification doctrine. This form of combined financial regulatory and criminal law response to financial crime breaches by corporations can be classified as a 'hybrid' approach and it would go some way to resolving the problems associated with the identification doctrine. This would be a novel step in the UK's efforts to tackle corporate financial crime, but it would require a more joined up approach between the FCA and prosecutorial agencies.

Conclusion

This paper is situated in an era of unprecedented scrutiny of the relationship between the corporations and financial crime and the US is generally regarded as a role model in the prevention, detection and prosecution of financial criminals. The paper has illustrated there the US approach towards corporate financial crime has a number of flaws, yet it still merits a model that must be explored by the UK. The US judiciary has adopted a flexible and innovative approach towards the doctrine of corporate criminal responsibility, which can be contrasted with the UK. The DoJ initially targeted prosecuting employees rather than corporations as illustrated following the Savings and Loans Crisis and have subsequently secured the conviction of several corporations for fraud. However, each case has illustrated the collateral consequences of obtaining a criminal corporate conviction. These collateral consequences resulted in the DoJ abandoning its prosecution of corporations in favour of DPAs. DPAs are aimed at preventing collateral consequences but they have done little to deter future criminal misconduct by corporations as illustrated by HSBC. The DoJ declined to prosecute any staff in either HSBC or Arthur Andersen, who had been associated with major financial crime breaches committed by both of these companies. Therefore, DPAs must be used in conjunction with the prosecution of employees who are responsible for the implementation of corporation's financial crime obligations. The additional value presented by financial penalties is minimal because they are often less than the illegal gain made by the

[releases/fca-outlines-proposals-extend-senior-managers-certification-regime-all-firms](#), accessed November 29 2017.

¹⁶² FCA Handbook, SYSC 6.3.8.

corporation. This situation was partly rectified by the introduction of the Financial Institutions Reform, Recovery and Enforcement Act 1989, which has resulted in the imposition of larger financial penalties by the DoJ, the SEC and the CFTC. It is recommended that the DoJ combines the DPA, with the prosecution of employees and the financial penalty provisions of the Financial Institutions Reform, Recovery and Enforcement Act 1989 to tackle corporate financial crime. These combined measures would act as a greater deterrent than their current isolated use.

UK efforts to tackle financial crime concentrated on targeting individuals as opposed to corporations, thus adopting a similar model to the US. The unsatisfactory nature of this stance, led to the introduction of the failure to prevent bribery corporate offence. This has secured several DPAs against corporations, but there have been no related prosecutions and UK authorities have adopted a similar approach to their counterparts in the US. This position is unsatisfactory. DPAs must be used in conjunction with criminal proceedings against employees and/or agents of corporations if they are to have a deterrent effect to reduce future misconduct. The introduction of the SMCR by the FCA is the most significant mechanism that could be used to overcome the restrictive interpretation of the doctrine of corporate criminal. By placing the management of financial crime control within the remit of a corporations 'senior management' this will allow the courts to identify the person who within a corporate structure meets the controlling mind test. The ability to recognise the person who has the controlling mind could go some way to redress this problem. However, in order for this approach to be adopted it would require the FCA to liaise with the SFO and other prosecutors to implement this innovative mechanism. The ability of the FCA to instigate financial penalties draws unfavourable comparisons with the provisions in the US and it is recommended that the UK should introduce legislation based on the Financial Institutions Reform, Recovery and Enforcement Act 1989. Such a move would provide the FCA and other related enforcement agencies with the ability to pursue a series of civil actions against corporations for financial crime. The window of self-reform is closing and I hope that corporations will learn to self-regulate. However, the evidence presented in this paper suggests otherwise and corporations will continue to operate in an ecosystem of deviance.