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To the Issue of Legal Persons` Criminal Liability in New York State

Pavel Biriukov

Voronezh State University, Russian Federation
Dr. (Legal), Professor

Abstract

The article deals with the aspects of legal persons` liability in New York State (USA). The author outlines contemporary criminal legislation of New York State. The main attention is given to the description of existing types of legal persons and to the order of legal persons state registration.

Keywords: criminal liability of legal persons; US law; New York State; law of New York State; criminal liability of legal persons; an accounting in New York State.

Introduction

In the USA there is no federal law for the establishment of legal entities; the legislation of each state determines specific requirements. Each state has its own system of registration of legal entities, so the procedure of the registration is not the same everywhere. For example New York City has its own registration of legal persons in addition to the registration scheme of the state[*]. There is no federal database of legal entities.

Types of legal entities in USA: general provisions

The USA law provides several types of legal entities: business corporations, partnerships, limited liability companies, non-for-profit associations, etc.

Legal entities in the United States can be private or public. Public entities are created through the issuance of shares, available for virtually any subject.

In the United States business corporations, limited partnerships, limited liability companies and limited liability partnerships are registered.

"Corporations" are the most common entities in the USA. A corporation in the United States means a "legal entity distinct from the individuals who constitute it." General partnerships and sole proprietorships must also meet the requirements of registration[†].

The USA adopted their own forms, which are presented to the State Secretary filled according to the laws of the state where a legal entity is created. Some states may require registration in the state before a legal entity is engaged in business activities.

[*] http://www.ci.nyc.ny.us
[†] http://www.dos.state.ny.us

The following information is represented in a registering authority: the name of the corporation, the purpose of business, office location, the structure of shares, the name, the address and signature of the parent corporation. Before the corporation is registered, the information is verified using the available information (e.g. "black lists" of companies involved in crimes). The company/founders are also responsible to provide the registering authority with all the current changes (a new address, the participants, etc.).

A certificate of incorporation is issued in a period of one week to one month after resort (in urgent cases for additional fee - within 24 hours). Particulars of registration are available through the Internet.

The USA law provides certain restrictions for positions in legal entities. Thus, the court may prohibit an individual convicted of a crime to be a corporate executive member, a member of the board of directors, etc.

In addition, federal agencies may not be allowed to contract with certain entities (if these corporations are controlled by persons accused of crimes). So, if a person is convicted of health care fraud-related charges, the court shall prohibit the delivery of medical equipment and medicines to the organizations, receiving compensation from the Federal health care programs. The Department of Defense may prohibit the relationships with the corporation, which is headed by a person charged with a felony*.

In the USA the Securities and Exchange Commission† operates and it is the federal authority. Its jurisdiction includes verification of compliance with the rules of joint-stock companies to disclose relevant information about legal entities, thus providing security for investors. The Commission has wide powers‡. In particular, it may issue an order prohibiting an individual who violates securities laws to be a public servant or director of a public company§. The federal agencies that regulate banking activities have similar authorities.

In accordance with the Federal law legal entities in the United States may be responsible for the criminal acts of their agents**. The US Code uses the terms "a person" or "whoever" which also include persons and legal entities.

"A corporation may be responsible for the actions of agents, committed within the limits of its power, even though the agent's behaviour may be contrary to the actual instructions or contrary to the established corporate policies"†† . Criminal responsibility may be applied to the entity, where the lack of control over an individual who has a leading position in the company, facilitates the commission of active bribery, trading with influence and money laundering.

The term "trading with influence" makes no provision for the USA law. Depending on a manifestation type of such a criminal behaviour different federal acts are applied: Federal Fraud Mail and Wire Fraud Act‡‡; Federal Extortion Act§§; Violation of Federal Transport Act ***; violation

* Under U.S.C. law: a felony - an enormous offence, a misdemeanor - criminal infraction.

† http://www.sec.gov.us

‡ Commission meets annually around 600 enforcement actions against individuals and companies that violate securities laws (including trade with the insider Information, trading through a broker-dealer and managed by communities and fraud).

§ The Commission often uses this power (about 200 times a year).

** See: United States v. McDonald & Watson Waste Oil Co., 933 F.2d 35, 42 (1st Cir. 1991); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 US 1021 (1990); United States v. Gold, 743 F.2d 800, 822-23 (11th Cir. 1984), cert. denied, 469 US 1217 (1985); United States v. Cinciotta, 689 F.2d 238, 241-42 (1st Cir.), Cert. denied, 459 US 991 (1982); Boise Dodge, Inc. v. United States, 406 F.2d 771, 772 (9th Cir. 1969); Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995). See United States v. Carter, 311 F.2d 934, 941-42 (6th Cir.), Cert. denied sub nom. Felice v. United States, 373 US 915 (1963). See: United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979).

†† See: United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979).

‡‡ Federal mail and wire fraud violations, including honest services fraud (§ 1341, 1343, 1346 section 18 USC).

§§ 10 Federal extortion offenses (§ 1951 section 18 U.S.C.) // http://uscode.house.gov/uscode-

*** Federal Travel Act Violations (§ 1952 section 18 U.S.C.) // http://uscode.house.gov /uscodecgi /fastweb.exe?getdoc+uscview+t17t20+939+79++%28Federal%20Travel%20Act%20Violations%20%29

violation of the federal prohibition against interstate transportation or receiving of property stolen or taken by fraud*.

Under federal precedent law the fault can be expressed in a willful blindness or willful ignorance and may be sufficient to accuse a legal entity†.

A real benefit does not need to be obtained to accuse a legal entity in active bribery, trading with influence and money laundering. In the "internal" bribery and trading with influence for the incurrence of liability it is sufficient to join, where "active bribery" or "trading with influence" have been made with the intent of the briber to receive benefit.

In addition, according to the Act on "The Foreign Corrupt Practices" (the FCPA)‡ offers, payments, promises to pay or money orders at any price or offers, gifts, promises to give or sufferance for something valuable are punishable. This Act was a result of the investigation conducted by a special commission, which found out that in the mid 70s of the twentieth century about 400 large American companies allowed illegal payments to officials of foreign governments, politicians and political parties in the amount of $ 300 million§.

According to the practice of the Supreme Court of the United States a corporation may be criminally liable for violations of "The Interstate Commerce" Act**.

A legal entity can be charged with criminal violations even in cases where an actual person was not accused. During the investigation the corporation management may be suspended. The new administration of a legal entity can admit its guilt and provide with the documentation and evidences that will facilitate the further identification and prosecution of individuals. According to "The Foreign Corrupt Practices" Act organizations and related to them individuals "personally" and "independently" are responsible for corruption (Chapter 15, the United States Code, Section 78dd-1 et seq.).

Criminal prosecution of individuals who are executors, instigators or accessories of active bribery, trading with influence and money laundering, does not exclude criminal liability of the organization. The question of bringing to the legal responsibility the legal entity and the individual as well belongs to the discretion of the prosecution. The prosecution also decides in the same or in different trials to consider the responsibility of individuals and organizations. Thus, the prosecution of the company may be preceded by the prosecution of individuals involved into the same crime, including individuals through which a legal entity acted.

Federal authorities within prosecutorial discretion may enter into Deferred Prosecution Agreement (the DPA)†† with the company. The Government agrees not to prosecute a corporation, provided that it confessed the offense, took the program of conciliatory measures and compliance with the terms of the agreement. The DPA procedure often includes monitoring of the company by an independent supervisory authority. The DPA is used as an alternative to prosecution in cases where such a prosecution can cause a substantial damage to innocent shareholders, employees, etc.

"The Principles of Federal Prosecution of Business Organizations" in 1999 (as amended 2003)‡‡ is a guide for prosecutors in the prosecution of corporations. According to one of the Principles "corporations must not be treated more gently because of their nature, nor be a subject to more abrupt attitude". According to another Principle, "the filling accusation to a corporation does not mean that directors, officers, employees or shareholders can not be accused".

In addition to the federal level, the criminal responsibility of corporations is provided by the law of each state. Particularly various criminal law standards can be used to prosecute bribery in the private sector (where public officials are not involved). "Corrupt business practices" is a crime

* Federal violations of the prohibition against interstate transportation or receipt of property stolen or taken by fraud in violation (§ 2314, 2315 section 18 U.S.C.).

† United States v. Walker, 191 F.3d 326, 337 (2d Cir.1999) (quoting United States v. Gabriel, 125 F.3d 89, 98 (2d Cir.1997) (quoting United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1195 (2d Cir.1989).

‡ The Foreign Corrupt Practices Act 1977 // Pub. L. 95-213, title I, Dec. 19, 1977, 91 Stat. 1494.

§ Hearing before the Subcomm. on finance and hazardous materials of the Comm. on commerce, House of Representatives, 105th Congr., 2nd sess. on H.R.4353, Sept.10, 1998. - Wash.: Gov. print. off., 1999. III, 45 p.

** The Inter-State Commerce Act 1887 // http://www.u-s-history.com

†† Deferred Prosecution Agreement (further - DPA).

‡‡ Principles of Federal Prosecution of Business Organizations (1999, updated in 2003) // http://www.justice.gov/dag/cftf/corporate_guidelines.htm

under the state legislation, but it can also be considered as the part of federal offence. Thus, the deception, which is partly based on the bribe paid to another person in violation of the state legislation, may be prosecuted as a violation of criminal state legislation. Bribery in the private sector can also be prosecuted under the laws of fraud with mail and communications.

As regards sanctions for legal persons, they are distinct. Organizations may be allowed to do business and make deals with federal authorities, they may be denied to get import license, etc.[*] Legal entities may also be punished by fines and confiscations (as in criminal and civil procedure).

The USA law includes alternative sentencing conditions for the organizations. These conditions may provide a higher maximum fine in many cases.

Section 3571 of Chapter 18 of the USC runs that the fine for an organization may be different: 1) it is defined by the law under which the sentence was passed, 2) it may be in a double amount of profit or loss (where the offense results in pecuniary loss to the individual); 3) it may be $ 500,000 if convicted of a felony.

A legal entity charged with a criminal offense - bribery of public officials and witnesses - may be subjected to maximum fines, or alternatively, in triple amount of property, that was proposed or received as a bribe (§ 201 of Title 18, the USC).

Regarding crimes listed in § 203 - 209 of Chapter 18 of the USC, the United States Attorney may seek an injunction for the entity or the individual to take part in criminal conduct in the future (§ 216 (b), Chapter 18).

The criminal responsibility of legal entities in New York State

New York State legal entities and citizens over the age of 18 are entitled to found a corporation by filling an application for a certificate to the New York Department of State. To register a business organization is required to give only basic information (the name/the name of the founder, the address of the corporation and its general purpose – "all the statute-allowed procedure of work")[†].

Criminal penalties for corruption in the State of New York include imprisonment and / or fines. The choice of penalty depends on various factors: if the crime is a felony or a misdemeanor; if crimes were committed before; if there are extenuating circumstances etc. The criminal penalty may be added with the results in the form of the ban to hold public functions.

The provisions on anti-money laundering assume criminal fines up to $ 500,000 or a double amount of the involved capital for a legal entity. Moreover, a fine may be levied in civil law (§ 1956, 1957 of Chapter 18 of the USC).

FCPA provides both criminal and civil penalties for legal entities. In case of the prosecution a legal entity can be fined up to $ 2,500,000 for a violation of the FCPA rules of the accounts and $ 2,000,000 for a breach of conditions, listed in the articles of FCPA towards bribery. According to "The Alternative Fines Act"[‡] the actual fine may be applied at a doubled amount of loss of the victim or the defendant's profits, which he sought to gain illegally. The Securities and Exchange Commission has a right to charge in civil justice with violating the FCPA. The SEC tries to achieve the return of gain, got in dishonest way and also to use civil financial penalties[§].

Sentences, given by the courts, may include provisions prohibiting organizations to perform certain acts. Thus, a legal entity may be sentenced to a term of probation. According to § 3551 (c) of Chapter 18 of the USC the company is required as a condition for testing, to refrain from committing any crime during a term of probation. Furthermore, on the basis § 3563 (a) (l), (b) (22) of Chapter 18 of the US Code additional conditions can be laid on the company. Government

[*] Бирюков П. Н. О получении доказательств в США // Журнал международного частного права. 2004. № 4. С. 3–7. (Biriukov P. How to obtain the evidence in the USA // Journal of International Private Law. 2004. № 4. P. 3–7).

[†] See: Бирюков П. Н. Вопросы уголовной ответственности юридических лиц в США // Право и политика. 2008. № 9. С. 2188-2193. (Biriukov P. The issues of criminal liability of legal persons in the United States // Law and Politics. 2008. № 9. P. 2188-2193).

[‡] The Alternative Fines Act // 18 U.S.C. 3571.

[§] Lacey K.A., George B.C. Expansion of SEC authority into internal corporate governance: the accounting provisions of the Foreign corrupt practices act (a twentieth anniversary review) // Journal of transnational law & policy. Tallahassee, 1998. Vol. 7. № 2. P. 119-155.

organizations* control actions of a legal entity, impose additional administrative fines and sanctions and control the administrative personnel of a company in order to guarantee that any limitations entrusted on such persons are executed.

There is no federal registration for convicted organizations in the USA. However, the account of legal entities pleaded guilty of corruption and other serious crimes is made by the government and private entities. For example, the federal government is forbidden to deal with the companies pleaded guilty of serious federal crimes. The General Services Administration of the USA conducts the list of the corresponding companies and individuals and declares this list on the Web page "system of the calculation of Excluded Parties List System"†. Other government offices use them in order to avoid the attempts of the disqualified persons to create the new ones in the entrepreneurial activity.

The Securities and Exchange Commission, other institutes which regulate trade in securities and federal bank regulated agencies also conduct lists of individuals which are forbidden to apply for company management. With the introduction of the Sarbanes-Oxley‡ Act of 2002 joint stock companies are checked at the federal level and their registration properly reflects the company's business and discloses the required information regarding finances and governing.

Besides, private businesses and various information credit agencies make such a record. However, federal barriers are not always effective on the state level. Various systems on the state level are similar to "federal" ones. In other words there are no any centralized files for all sentenced legal entities. At the same time there is a system of "black-listed" corporations, which were sentenced in crimes. The "black listed" companies in the state practically are excluded from further business with governmental authorities of this state. However including a company into the "black lists" doesn't obligatory apply in other states. There is no any mechanism of information exchange between states.

In the USA there is a great number of additional systems to prevent illegal actions of shady corporations. In case of concluding a public contract agencies may require more information or use different sources of information. There are public and private systems of "black lists" for companies which have business with public authorities on federal, state and local levels. Besides, certain establishments (the Defense Department systems, the Health Department) collect their own information about companies using outsourcing.

Legal entities in the United States may be liable and for violation of tax law. Payments made directly or indirectly in violation of federal law or state law cannot be "deducted" from the federal income tax§. Chapter 13: Publication 535 (2004), the Internal Revenue Service** emphasizes that participation in the payment of bribes or rewards is a serious crime that can lead to criminal prosecution of a company. Any payment, which is produced (directly or indirectly) to the employee of any government organ or agency or auxiliary government services, is not recouped from the income and it is the disturbance of law.

The investigations conducted by the IRC play the main role in the detection of the facts of corruption and money laundering. With the conducting of the investigation the IRC usually interacts with other federal agencies. Very frequently the investigations are given by the special groups created for the management of the so-called "Federal grand jury". The part of the procedures of the investigation of the Service of internal taxes and collections is the transfer of the cases of the tax offenses, which include corruption facts, for the examination of the corresponding office of the legal prosecution to the Tax Division of the Department of Justice. The attorneys who investigate tax matters are authorized to report to other attorneys of the department about the crimes in other regions in order to ensure legal prosecution.

The access to information on tax questions is affected on the basis of section 6103 (h). The usage of the information released to public is limited to its application in the proceeding for tax

* Securities and Exchange Commission (SEC), federal bank regulators, General Services Administration (GSA), Heath and Defense Departments.

† http://www.epls.gov.us

‡ The Sarbanes-Oxley Act 2002 // Pub. L. 107-204 (7/30/2002).

§ See : § 162 (c) (1) Internal Revenue Code - (26 U.S.C. § 162 (c)(1)) // http://frwebgate.access.gpo.gov/cgibin/usc.cgi?ACTION=BROWSE&title=26usc

** http://www.IRS.gov.us

offense. The access to the investigation of other possible disturbances of federal criminal laws is permitted according to the procedures, formulated in section 6103 (i). The US Secretary of the Treasury[*] is authorized to reveal the evidences in the cases of federal crimes for the Department of Justice staff pursuant to section 6103 (i) (3) (A). The Department of Justice may also refer to the Federal District Court for a warrant to reveal for the benefit of federal criminal investigation (section 6103 (l) (A)).

The Sarbanes-Oxley Act establishes requirements for the custody of reports and bookkeeping calculation. Section 1520 of Chapter 18 of the US Code forbids the destruction of corporate reports prior to the expiration of the duration of five years, earlier than it is permitted by the Securities and Exchange Commission under the threat of imprisonment for the period up to 10 years, by fines or both. Recently the SEC has increased the period of storage for corporate reports of up to seven years for the specific reports suitable for the audit and the survey made by the financial department.

The rules established by the Securities and Exchange Commission are applied for public legal entities, audit companies, account dealing companies, including broker dealers and investment advisors. Furthermore, the adjustable organizations (federal financial institutions, including saving banks and loan offices) must store financing and booking items, superimposed by the federal regulated agencies (e.g. "Comptroller of the currency", "Federal Reserve Board"). Moreover, the specific types of the organizations which run a business with the Federal Government, e.g. the contractors of the Defense Department are obligated to keep strict reports of bookkeeping and to make them accessible for government agencies. A lot of types of associations are subordinated to the voluntarily entrusted responsibilities to its members which make these associations keeping bookkeeping records and books. Finally, federal income and corporate tax obligations of legal entities and other information are stored usually for three years (under certain circumstances – for six years).

The Sarbanes-Oxley Act provides criminal punishments for destruction or concealment of reports of bookkeeping by public companies and bookkeepers. Section of 802 of the Act adds section 1519 to Chapter of 18 of the United States Code. Now destruction, change, concealment or the falsification of reports during federal investigations and bankruptcy records are considered to be a felony and punished by the imprisonment for the period up to 20 years or fines, or both.

Furthermore, the Sarbanes-Oxley Act requires specific corporate employees to certify personally the accuracy of released to public results of the checking, made by the Securities and Exchange Commission. If the released information is substantially incomplete or false, these officials can be pursued criminally according to the section 1350 of Chapter 18 of the US Code. The General Director and the Chief financial officer of the applicant confirm that the periodic reports, which contain financial information, completely correspond to the requirements of sections 13 (a) and 15 (d) of Securities Exchange Act of 1934[†], and that information is exact. If an official attests the information, knowing that they do not correspond to requirements § 1350, it is punished by fines of 1.000.000 $ and imprisonment up to 10 years. The intentional distortion is punished by the fine of 5.000.000$ and deprivation of liberty up to 20 years.

In the USA there are also criminal acts on fraud to prosecute individuals and legal entities that are involved in fraud schemes by mail or by private delivery services or communications. These conditions are in Chapter 18, the United States Code (sections 371, 1341 and 1344). These positions permit legal prosecution of those who arrange to commit any other federal crime; they ensure the wide range of instruments to pursue the use of invoices or any other documents of bookkeeping and accounting statements, containing false either incomplete information or double counts.

Private companies do not fall under conditions of the FCPA Act control and they are not within the jurisdiction of the Securities and Exchange Commission. However, according to federal tax acts, tax acts of the state, and state acts on corporations such companies are obliged to keep accounting and records sufficient to estimate taxes. If a legal entity drives a business, regulated by a federal agency, the agency can also demand from the organization to keep certain types of records

[*] http://www.ustreas.gov

[†] The Securities Exchange Act 1934 // http://www.sec.gov/about/laws/sea34.pdf

and obey the rules of bookkeeping. Banks, the structures working in the field of national safety, etc. belong to such organizations.

Conclusion

Thus, the USA rules for registration of legal entities differ depending on the state. The access to the recorded information is not centralized, that makes registration of legal entities (apart from covered once by the rules of the Securities and Exchange Commission) a weak instrument to prevent legal entities to carry out illegal activities. A legal entity may be prosecuted under federal law for tampering, bribery, trading with influence, money laundering, tax crimes and crimes in the sphere of accounting. The US Code also assumes corporate criminal liability.

The range of sanctions and measures in relation to legal entities is quite wide. Criminal fines may be imposed on companies in accordance with different rules. In particular, the criterion can be used by the size of "gains" or "loss" of a crime.

In the USA there is no central database of organizations accused of committing crimes. However, this kind of information is available in the courts (both at the federal level and in the states), as well as in private databases. In addition, public institutions have their own "black lists" of legal entities to avoid contracting with companies implicated in the crimes.

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