CONSTRUCTION LAWLETTER

For Industry Professionals, Directors, Officers, Managers, Agents, Trades and Suppliers

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CRIMINAL LIABILITY-TARGET CORPORATIONS

Corporations and their principal management officials have been in the news recently, charged with serious criminal violations of Federal laws, many resulting inconvictions and severe prison sentences.

There may be some valid defense where such activities and violations were inadvertant and unintentional.

Federal Sentencing Guidelines for Organizations, now modified, sets mandatory penalties for organizations convicted of most federal felonies and Class A Misdemeanors. High on the list of violations are: **(1) tax evasion, (2) corporate misstatements to stockholders, and (3) overbilling on federal or federally funded contracts.**

Parallel laws apply to similar corporate conduct and misdeeds involving state and municipal programs. Still other laws deal with similar criminal activity by individuals.

Corporate compliance programs required to avoid or mitigate criminal liability charges and sentencing, should be immediately implemented. To qualify as a valid defense, each program **must**:

1. Be in place and operative before an offense is committed (or detected);
2. Address specific activities most likely to result in misconduct, depending upon the nature and makeup of the organization;
3. Have an appropriate degree of formality, with larger companies having the most formal, detailed programs with oversight;
4. Be comparable to programs of other, similar companies within the same industry; and
5. Show due diligence in detection, prevention and, where indicated, in prosecution of criminal conduct by employees and their agents or accomplices.

While there are no guarantees that the establishment, implementation, or existence of these factors will serve to mitigate in every circumstance of corporate criminal activity as charged, the value of such programs, in place and supported by corporate management action, should prove invaluable, for the consideration of the Court as the sentencing authority in granting any leniency permitted under applicable law and sentencing guidelines.* * *

CORPORATE ASSET TRANSFERS MAY BE FRAUDULENT

Transfer of corporate assets to avoid creditors may be fraudulent. Ccontrolled by the Ohio Uniform Fraudulent Transfer Act, Chapter 1336 of the Ohio Revised Code ("R.C."), this Act, at Section 1336.05 R.C. provides:

(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. (Emphasis added.)

Accordingly, a debtor may not be permitted to transfer any corporate assets without receiving **fair value** for them. Section 1336.07 R.C. provides creditors with remedies for fraudulent transfer, including having such transfer declared void and attaching the transferred assets.

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All experience is an arch to build upon.

Henry Brooks Adams 1838-1918.

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