

# Research on the Application of Unit Crime from the Perspective of Criminal Compliance

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**Abstract:** Criminal compliance is a new governance approach for corporate crimes, allowing enterprises to regain vitality by paying a price. As this reform gradually enters the "deep water zone," some new difficult and controversial issues have emerged. These issues are mainly manifested in the applicable objects of "non-prosecution for compliance," the feasibility of separate prosecution for corporate crimes, the relationship between compliance inspection models and third-party supervision and evaluation, and other matters. Resolving these difficult and controversial issues is a necessary prerequisite for further deepening the reform of corporate compliance in cases and exploring the formation of amendments to criminal legislation.

**Keywords:** Criminal Compliance, Prosecutorial Suggestions, Compliance Inspection, Compliance Supervision

## 1. Introduction

Under the global trend of compliance reform and based on China's need to optimize the business environment and strengthen the protection of private enterprises, China has successively carried out batches of pilot projects for corporate compliance reform in cases. In March 2020, the Supreme Procuratorate launched pilot projects for "criminal compliance" in six grassroots procuratorates in Shanghai, Jiangsu, Shandong, and Guangdong. In April 2021, the Supreme People's Procuratorate the "Work Plan for Carrying Out Pilot Projects of Corporate Compliance Reform," initiating the second phase of pilot projects in 10 provinces, involving 27 municipal procuratorates and 165 grassroots procuratorates. In June of the same year, the Supreme People's Procuratorate, along with eight other departments including the Ministry of Justice, Ministry of Finance, and Ministry of Ecology and Environment, jointly issued the "Guiding Opinions on the Third-Party Supervision and Evaluation Mechanism for Corporate Compliance in Cases (Trial)." In the practice of criminal compliance for enterprises involved in cases in China, it not only draws on international compliance experience but combines China's national conditions, while also facing a series of localized issues.[1] These include the applicable objects of compliant enterprises, the separation of prosecution between enterprises and entrepreneurs, the application of compliance plans and compliance suggestions, and the supervisory bodies for compliant enterprises. This article will discuss the criminal compliance of enterprises involved in cases around the above issues, hoping to provide a reference for compliance reform and development.

## 2. Applicable Objects of Criminal Compliance

### 2.1 Whether Criminal Compliance Applies to Serious Crimes

From the current pilot practices, the first round of criminal compliance was limited to minor crimes punishable by up to three years of imprisonment, with serious crimes often excluded from the scope of compliance considerations. The second round of pilots also saw significant controversy over whether the application of criminal compliance should include serious crimes.

However, as the pilots progress, the author believes that the applicable objects of criminal compliance should include serious crimes, for the following reasons: Firstly, as a new non-prosecution system, criminal compliance should be distinguished from the existing non-prosecution systems in China's Criminal Procedure Law. According to the second paragraph of Article 177 of China's Criminal Procedure Law, if the circumstances of a crime are minor and do not require a criminal punishment or the punishment can be waived according to the Criminal Law, the People's Procuratorate may decide

not to initiate a prosecution. "Minor circumstances of a crime" are generally considered in judicial practice as punishable by up to three years of imprisonment. [2] If the scope of application of criminal compliance is also limited to "minor circumstances of a crime," then the procuratorial organs can directly apply the existing provisions of the Criminal Procedure Law when handling cases, without the need to apply criminal compliance. Secondly, most corporate crimes are "administrative offenses," which violate national administrative regulations and further constitute crimes on the basis of such violations. "Administrative offenses" differ from traditional "natural offenses" in that they do not inherently carry strong moral condemnation. "Administrative offenses," which differ from traditional "natural offenses" in that they do not inherently carry strong moral condemnation, make it unlikely that applying the criminal compliance system to some more serious "administrative offenses" will provoke public discontent or doubts about judicial fairness. Moreover, it can demonstrate the procuratorial organs' "strict supervision" and "lenient treatment" of enterprises, which is conducive to rescuing private enterprises that are significant to economic development. Thirdly, the focus of compliance considerations should not be on the circumstances of the crime but on whether prosecution would bring positive effects to society. Criminal proceedings against enterprises often involve not just the enterprises themselves. Especially for large enterprises, being prosecuted often affects the interests of investors, employees, customers, and other groups, and may even impact the operation of the entire industry chain, leading to consequences such as business failures, unemployment, and industry chain collapse. To avoid the "ripple effect" arising from criminal prosecution of enterprises, some more serious crimes should be included in the consideration of criminal compliance, which is also in line with the policy intention of China's procuratorial organs to "optimize the business environment and protect private enterprises." Of course, including serious crimes in the scope of criminal compliance does not mean that all corporate crimes can undergo compliance. For some crimes involving national security and major public safety, they should be excluded from the scope of compliance when formulating legislation.

## ***2.2 Whether Criminal Compliance Applies to Individual Entrepreneurs***

From the perspective of compliance systems in foreign countries such as the United States, Britain, Canada, and Singapore, the objects of compliance only include enterprises while excluding entrepreneurs, i.e., "letting enterprises off and punishing responsible individuals." The United States Attorneys' Manual stipulates that when deciding to reach a pretrial diversion agreement with an implicated enterprise, prosecutors must give priority to considering whether the prosecution of individuals directly responsible for the enterprise's illegal conduct is sufficient. [3] However, from the perspective of China's compliance reform practices and the "Opinions on the Third-Party Supervision and Evaluation Mechanism for Compliance of Implicated Enterprises (Trial)", [4] China's procuratorial organs can also apply the criminal compliance system to criminal cases closely related to production and operation committed by the actual controllers, management personnel, and key technical personnel of entities and companies. [5] The application of criminal compliance to responsible individuals by procuratorial organs is mainly based on considerations for the protection of private enterprises and economic development. Unlike large enterprises with complete organizational structures and operational systems, there is not a strong reliance on individual entrepreneurs. For a large number of small and medium-sized private enterprises in China, "entrepreneurs" are the core driving force for their development, and the fate of "entrepreneurs" is often deeply intertwined with the fate of the enterprise. If the approach of "arresting and prosecuting entrepreneurs once they commit a crime" is adopted, it will undoubtedly be a huge blow to the enterprise, easy to leading to a situation where "the case is handled, but the factory collapses." This contradicts the original intention of protecting private enterprises in China. However, in cases where only "entrepreneurs" are guilty, applying criminal compliance to "entrepreneurs" by requiring them to rectify the enterprise in order to obtain an opportunity to avoid conviction is questionable. The criminal compliance system itself focuses on protecting implicated enterprises, and its introduction into China was originally intended to distinguish between corporate responsibility and individual responsibility. When an enterprise has not been prosecuted, lenient treatment of "entrepreneurs" on the grounds of enterprise compliance violates the principle of a legally prescribed punishment for a specified crime and may easily lead to public doubts of judicial fairness. Therefore, in cases involving "entrepreneurs" committing crimes, we should distinguish from the following aspects: Firstly, whether the actions of the "entrepreneur" are based on the common will of the enterprise. For individuals who violate enterprise compliance requirements without being based on the common will of the enterprise, not only must the procuratorial organs prosecute them according to law, but the enterprise must also take disciplinary measures such as dismissal and salary reduction against them. Even if the "entrepreneur" is the actual controller of the

entity, they should still be punished by separating ownership from management. This approach not only assigns criminal responsibility to individuals but also improves the management structure of the enterprise, better leveraging the deterrent function of the criminal law. Secondly, it is necessary to examine whether the actions of the "entrepreneur" are for the pursuit of the common interests of the enterprise. For cases involving entities where the "entrepreneur" pursues personal interests, we still need to pursue the personal responsibility of the "entrepreneur" while proposing compliance recommendations and requiring the entity to undertake compliance rectification.

### **3. Handling Modes of Criminal Compliance**

#### ***3.1 Procuratorial Suggestion Mode***

From the application of criminal compliance worldwide, most criminal compliance is applicable to large and medium-sized enterprises of a certain scale, and there is no requirement for compliance plans for some small enterprises. For example, France's "Sapin II Act" stipulates that enterprises meeting the following conditions shall establish a compliance system: one is that the number of employees is 500 or more, or they are affiliated with a company headquartered in France with 500 or more employees; the other is that the relevant operating income exceeds one hundred million euros. [6]The main reason why the Act does not require small enterprises to establish a compliance system is based on the consideration of compliance costs. A successful compliance program needs to have a complete crime prevention mechanism, crime identification mechanism, and crime response mechanism. These all require significant investment in human and financial resources. After the Siemens bribery case, the company hired a compliance team of up to 620 people, which is inconceivable for small enterprises. However, we cannot exclude small enterprises from China's compliance efforts solely because of high compliance costs. On the contrary, for China's current situation, a large number of corporate crimes are committed by small and medium-sized enterprises. These small and medium-sized enterprises provide a significant amount of tax revenue and jobs to local areas. These enterprises also have a demand for compliance reforms and hope to eliminate the "institutional genes" of their own illegal and criminal activities through compliance reforms. Therefore, for these small enterprises, when they are unable to bear the high compliance costs, procuratorial organs can carry out compliance reforms through procuratorial suggestions.

When reviewing and prosecuting criminal enterprises, procuratorial organs can propose procuratorial suggestions for management loopholes identified in the production and operation processes of criminal enterprises based on factors such as the nature and circumstances of the criminal acts committed by the criminal enterprise and the primary responsible person, the consequences of the criminal acts, the criminal suspect's remorse and attitude of confession and acceptance of punishment, and their willingness for compliance reforms. These suggestions require the criminal enterprise to establish a corresponding compliance management system and rectify the loopholes. Unlike compliance plans that require criminal enterprises to establish a complete compliance system covering crime prevention, identification, and response, with a certain probation period, procuratorial suggestions, as a flexible judicial system, have the advantages of a short issuance time and flexible targets. [7]Procuratorial organs can propose compliance procuratorial suggestions during the review and arrest stage or during the review and prosecution stage, while compliance plans are usually completed during the review and prosecution stage. Procuratorial suggestions do not specify a probation period for compliance targets. This is because the crimes involved in small enterprises where procuratorial suggestions are applicable are generally relatively simple, their internal management structures are relatively clear, and the difficulty of rectification is not high, so there is no need to waste valuable procuratorial resources on strict compliance inspections. On the other hand, procuratorial suggestions can be made not only to criminal enterprises but also to other involved enterprises. When procuratorial organs discover compliance management deficiencies in involved enterprises during law enforcement, even if these enterprises have not committed crimes, they can also suggest compliance rectifications to help them achieve compliant and lawful operations. [8]Of course, the procuratorial suggestion mode also has its own deficiencies, such as low binding force and insufficient professionalism. To address these issues, procuratorial organs can issue procuratorial suggestions to administrative organs while making them to enterprises, allowing administrative organs to assist in supervising enterprise compliance efforts. Compared to procuratorial organs, administrative organs generally have a better understanding of the relevant fields of the involved enterprises and also have certain supervisory and management responsibilities in those fields.

### **3.2 Compliance Examination Model**

Compared to the procuratorial suggestion model commonly adopted in the first batch of typical cases of corporate compliance announced by the Supreme People's Procuratorate, the second batch of typical cases marks a significant shift, adopting entirely the compliance examination model, also known as the conditional non-prosecution model. [9] This is because, in practice, procuratorial organs have found that, although compliance examination lacks the flexibility of procuratorial suggestions, it is more effective in addressing corporate compliance gaps and eliminating criminal factors. A comprehensive compliance program includes not only crime prevention, identification, and response mechanisms but also core elements such as compliance organizations, compliance culture, compliance training, compliance risk identification, compliance risk assessment, compliance risk management, compliance auditing, compliance investigations, compliance reporting, accountability and disciplinary measures, and continuous improvement. These elements provide effectiveness criteria for compliance supervision. Additionally, the compliance examination model, based on the compliance program, requires the implicated enterprises to repair the damaged legal interests, reform the implicated business operations, and bear costs in terms of accepting supervision and engaging in social welfare activities. For large and medium-sized enterprises, due to their complex internal management structures involving numerous shareholders, investors, and employees, and their significant impact on the industry chain, the ripple effect of punishing them is pronounced. Mere procuratorial suggestions cannot meet the requirements for corporate compliance rectification. At this point, through the compliance program, implicated enterprises are required to take measures such as forfeiting illegal gains, paying back taxes and overdue fines, paying fines, submitting compliance plans, and accepting compliance supervision, as substitutes for criminal penalties. Replacing criminal penalties with economic consequences is not only beneficial for protecting enterprises but also avoids negative impacts on investors, shareholders, employees, and related enterprises in the upstream and downstream industry chains due to corporate criminal penalties. At the same time, for enterprises pursuing their own economic interests, the deterrent effect is not less than that of criminal penalties. This approach exerts both the protective and punitive functions of criminal penalties.

Unlike "procuratorial suggestions," for the compliance construction of implicated enterprises, a certain probation period should be stipulated, requiring enterprises to complete the requirements in the compliance program within a specified timeframe, targetedly eliminating criminal factors in their business models, operating models, and management models, and completing the "decriminalization" transformation. Regarding the probation period, some scholars argue that it should be more than one year and less than three years outside the statutory prosecution period, while others advocate a probation period of more than six months and less than five years. The author believes that for some uncomplicated compliance cases, the probation period can be more than six months and less than one year, while for larger enterprises with more compliance gaps, the probation period should be more than one year and less than three years. Meanwhile, the probation period can also be determined through consultation with the implicated enterprise and relevant administrative units, fully respecting the opinions of both the implicated entity and the administrative units. Respecting the implicated enterprise's opinion on the compliance period can mobilize the enterprise's enthusiasm for compliance, preventing the compliance enterprise from lacking motivation to effectively identify, rectify, and eliminate its own gaps due to the probation period being too short or too long. This prevents the enterprise from merely going through the motions to complete compliance tasks and obtain a "non-prosecution" outcome, resulting in the compliance program remaining on paper.

### **4. Third-Party Supervision in Criminal Compliance**

Establishing a comprehensive compliance system requires not only a deep understanding of the enterprise's operational structure and possession of certain business management skills by the leaders, but also a solid knowledge of compliance-related laws and regulations. However, prosecutors in China are typically trained in legal disciplines and may lack practical experience in business management. Furthermore, given the limited judicial resources in China, it would impose considerable pressure on judicial authorities to allocate substantial resources to the establishment and maintenance of corporate compliance systems. Therefore, to assist enterprises involved in cases in establishing effective compliance systems, procuratorial organs have drawn on overseas compliance supervision experiences and proposed a third-party supervision model, which is built upon the existing procuratorial supervision system. Third-party supervision refers to a third-party supervision and evaluation organization composed of compliance experts, lawyers, relevant administrative staff, and other professionals. These

third-party agencies, authorized by the procuratorial organs, exercise some of the compliance supervision responsibilities over enterprises involved in crimes on behalf of the procuratorial organs. Compared to procuratorial organs, third-party regulatory bodies possess more extensive experience in compliance supervision and are more proficient in the legal provisions and business management practices involved in compliance matters. Therefore, they can conduct more thorough, comprehensive, and detailed investigations, assessments, supervision, and inspections of the compliance rectification activities undertaken by enterprises involved in cases. The relevant conclusions and recommendations provided by these third-party agencies can serve as important references for procuratorial organs in making informed decisions, including whether to arrest, prosecute, or offer non-prosecution, whether to modify compulsory measures, and making appropriate sentencing recommendations or procuratorial suggestions and opinions. However, as the primary law enforcement agency responsible for handling cases, even with the participation and assistance of third-party supervision and evaluation organizations, the procuratorial organ should bear the ultimate responsibility for overseeing the compliance rectification process of the enterprise involved in the case.<sup>9</sup> It not only has the authority to supervise the enterprise's compliance rectification efforts but also has the power to oversee the performance and conduct of the third-party supervision and evaluation organization. That is, the procuratorial organ retains the final decision-making authority regarding whether the enterprise involved in the case has successfully completed the compliance rectification process.

## 5. Conclusion

The reform of compliance for enterprises involved in cases in China has entered a critical "deep-water zone." To further deepen this reform, ensure effective compliance rectification measures for enterprises involved in cases, and enable them to truly exert substantive sanctions that transcend traditional penalties and achieve meaningful crime governance effects, it is imperative to promptly formulate and implement comprehensive measures for promoting enterprise compliance reform through collaboration among public security organs, procuratorial organs, and courts. This includes clarifying the precise connotation and scope of the compliance leniency system, determining its specific range of application, and formulating clear and detailed supervision and evaluation standards for compliance rectification efforts. Only by taking these steps can the reform of compliance for enterprises involved in cases gain greater adequacy, legitimacy, and consensus within society. This will ultimately promote the development and improvement of China's unique enterprise behavior regulation system, contributing to the advancement and modernization of the national governance system and governance capacity.

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