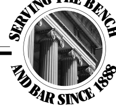
New York Law Journal



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VOLUME 229—NO. 41

TUESDAY, MARCH 4, 2003

WHITE-COLLAR CRIME

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Principles of Federal Prosecution of Business Organizations

THE GOVERNMENT'S decision to prosecute Arthur Andersen for its role in the Enron debacle amounted to the imposition of the corporate death penalty on that venerable accounting firm. While its treatment of Arthur Andersen was heavy-handed, the Justice Department's previous hands-off approach to prosecuting corporations can only have contributed to corporate America's belief that it was somehow above the law.[1]

Shocked to find that corporate crime was going on under our noses, Congress and the Sentencing Commission responded, somewhat predictably, with more laws and tougher sentences. But some have noted that if pre-Enron statutes had been more aggressively enforced, they would have been sufficiently punitive to deter a great deal of the corporate wrongdoing that has since come to light. How then should prosecutors balance concerns about overly lax enforcement against corporations that run afoul of the law, with concerns for the broad reaching and often devastating consequences of obtaining a criminal conviction against a business organization? Should a prosecutor take into account the impact that prosecution of a corporation will have on innocent employees, pension holders or shareholders in deciding whether to indict?

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Justice Department Answer — Maybe

The answer, according to the Department of Justice, is ... maybe. That guidance is contained in a document released last month entitled "Principles of Federal Prosecution of Business Organizations" (the principles). In a memorandum accompanying that document, Deputy Attorney General Larry L. Thompson touts these principles as a revision to the 1999 Memorandum of then Deputy Attorney General Holder entitled "Bringing Criminal Charges Against Corporations." In fact, with only a few exceptions dealing with assessing the adequacy of corporate compliance programs and the authenticity of cooperation efforts, the revised principles are nearly identical in substance to those laid out in the Holder Memorandum. However, the reissuance of these principles, in this manner and at this time, sends a clear message to prosecutors that they are to give meaningful consideration to prosecuting corporations as well as individual wrongdoers.

Now that federal prosecutors have their marching orders, it is more important than ever that white-collar defense attorneys know what factors a prosecutor will consider in deciding whether to charge a business, and what steps the organizational client should take at the earliest signs of trouble and throughout any ensuing investigation to ward off a potential indictment.

Factors for Prosecutorial Discretion

The principles provide that prosecutors should consider the same factors for charging a business entity as they would in reaching a charging decision for an individual, including the sufficiency of the evidence, the likelihood of success at trial, the deterrent value and consequences of conviction and the adequacy of non-criminal approaches. Because of the nature of the corporate "person," the Department of Justice directs that prosecutors consider nine additional factors with respect to a corporate target.

1. Nature and Seriousness of Offense

The first of those additional factors is the nature and seriousness of the offense.

The principles state that this factor is of primary importance, noting that it may warrant prosecution regardless of any other factors. In addition to the extent of the harm caused or threatened by the offense, prosecutors are also instructed to take into consideration whether policies and priorities of particular agencies or divisions of the Department of Justice militate in favor of or against prosecution.[2]

2. Pervasiveness of Wrongdoing Within the Corporation

The second factor focuses on the extent to which wrongdoing pervades the affected business entity. Thus, even where criminal conduct is relatively minor, the principles instruct that it may be appropriate to charge the corporation where the misconduct was pervasive and "undertaken by a large number of employees or by all the employees in a particular role within the corporation." The role of management weighs heavily in this analysis. The principles stress that even though the acts of low-level employees may result in criminal liability, "a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged."

3. The Corporation's Past History

A corporation with a past history of criminal, civil or regulatory enforcement actions against it based on similar misconduct faces an uphill battle. The principles note that "[a] corporation, like a natural person, is expected to learn from its mistakes" and that such a history may be probative of a corporate culture that encouraged or, at least condoned, such conduct. The Department of Justice observes that a corporation's past history of similar wrongdoing may override the palliative effects of a corporate compliance program, which in other circumstances may figure prominently in the charging equation.

4. Cooperation and Voluntary Disclosure

One of the few substantive changes in the newly configured principles is the increased scrutiny required of a corporation's attempts to cooperate. The principles recognize that the assistance of the corporation is often essential to an investigation and to that end may require granting immunity, amnesty or pretrial diversion. But the Department of Justice is sending a clear message: an entity that pays lip service to cooperation, but holds back in any significant way should be denied credit for its efforts. It instructs that "in gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection."

[T]he Department of Justice's concern is determining [if] a compliance program has teeth or is merely a "paper program."

Area of Controversy

One of the most controversial features of the Justice Department's principles is their emphasis on a corporation's willingness to waive the attorney-client privilege and work-product protection. The commentary explains that access not only to a company's internal investigation materials, but also to communications between specific officers, directors and employees and counsel provide the prosecution with access to valuable evidence without having to negotiate individual cooperation or immunity agreements. In an empty nod to critics of this policy, the department claims that it "does not ... consider waiver of a corporation's attorney-client and work-product protection an absolute requirement," but hastens to add that "prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation."

Another much criticized aspect of the department's method of assessing a corporation's cooperation is the extent to which the company is seen to be protecting culpable employees, either through the promise of support by advancing attorney's fees, through retaining culpable employees without sanction, through providing information to the employees about the government's investigation pursuant to a joint defense agreement or, even, through a corporation's willingness to plead guilty in an effort to shield its employees from liability. The principles recognize that some corporations are required by law to indemnify corporate officers, and acknowledge that compliance with such obligations should not be considered a failure to cooperate. Significantly, they do not accord the same respect for obligations that maybe imposed by contract or pursuant to a company's by-laws, leaving many corporations in the unenviable position of choosing between their commitments to employees (prior to any determination of guilt) and satisfying the prosecutor that their efforts at compliance are complete and sincere.

One factor included in the commentary to the new principles not found in the Holder Memorandum is consideration of whether a company, "while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction)." The Department of Justice, lists as examples of such conduct the overly broad assertion of corporate representation of employees or former employees; directions to employees not to cooperate openly and fully with the investigation; making misleading or incomplete presentations or submissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

Corporate Compliance

5. *Corporate Compliance Programs*

Another way in which a corporation's good citizenship is measured is through its compliance programs, although the Department of Justice is quick to note that such programs do not offer talismanic immunity from prosecution. Its primary concern is determining whether a compliance program has some teeth, or whether it is merely a "paper program."

According to the principles, the critical factors in evaluating any program include "the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action and revisions to corporate compliance programs," as well as whether the corporation made timely disclosure and is cooperating with the investigation. Among the newly added factors prosecutors are to consider are whether "the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations"; whether directors are provided with sufficient information to exercise independent judgment; whether internal audit functions are conducted so as to ensure their independence and accuracy; and whether the directors have an information and reporting system sufficient to allow management to reach informed decisions regarding the organization's compliance with the law.

6. *Restitution and Remediation*

Observing that a corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur, the Sixth factor outlined by the principles is whether the corporation has taken meaningful remedial measures, such as employee discipline and full restitution, prior to initiation of criminal charges.

7. *Collateral Consequences*

Even under the Holder Memorandum, prosecutors were permitted to take into account the collateral consequences of a corporate criminal conviction (a factor that should have weighed heavily against a decision to prosecute Arthur Andersen). The commentary in both versions of the principles acknowledges that severe consequences to a corporation's officers, directors, employees and shareholders — many of whom may have been completely uninvolved in and unaware of the criminal conduct and wholly unable to prevent it — may militate against prosecution. But the commentary also cautions that "virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation." Prosecutors are therefore to balance the severity of the consequences against other factors, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs.

Prosecution Adequacy

8. *The Adequacy of the Prosecution of Responsible Individuals*

The principles add one new factor not contained in the Holder Memorandum: the adequacy of the prosecution of individuals responsible for the corporation's malfeasance. Interestingly, this is the only factor for which there is no explanatory commentary, although the introductory comments recognize that because corporations can only act through individuals, "imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing." Presumably, this factor, in tandem with the corporation's willingness to offer up its culpable employees to the prosecutor would counsel against prosecution of the corporate entity if all responsible individuals had been called to account.

Other Than Prosecution

9. *Non-Criminal Alternatives*

The final factor enumerated in the principles is the availability of noncriminal alternatives to prosecution, such as civil or regulatory enforcement actions. In evaluating whether such alternatives would meet the goals of deterring, punishing, and rehabilitating a corporation that has engaged in wrongful conduct, the Department of Justice directs its prosecutors to consider the available alternate sanctions and whether they are likely to be imposed and the effect of noncriminal disposition on federal law enforcement interests.

Obviously, no corporation can be assured that it will escape prosecution no matter how strongly any of these factors weigh in its favor. But they do provide a framework for the discussion between prosecutor and defense counsel, and they also highlight some of the pitfalls that a company should avoid in running its business and conducting itself once it has discovered wrongdoing within its ranks.

(1) The United States Sentencing Commission's statistics indicate that for the five years leading up to corporate America's moment of reckoning during Fall 2001, nationwide prosecution rates for business organizations hovered somewhere between 200 and 300 cases per year, and actually declined precipitously, from a high of just over 300 cases sentenced under the organizational sentencing guidelines in 2000 to only 238 such cases in 2001. United States Sentencing Commission, 1997-2001 Sourcebooks of Federal Sentencing Statistics. See also, Elkan Abramowitz & Barry A. Bohrer, "A Decade with the Organizational Sentencing Guidelines," N.Y.L.J. May 7, 2002.

(2) For example, the antitrust division has a firm policy of prosecuting all but the first company to come forward in an antitrust investigation, whereas the tax division has a strong preference for prosecuting responsible individuals rather than entities for corporate tax offenses.

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