

WHITE-COLLAR CRIME

Expert Analysis

## Convicted Corporations Aren't Really Bad Boys

In 2002, Arthur Andersen went from a thriving, respected “Big Five” accounting firm that employed over 100,000 people worldwide to a defunct entity that surrendered its license to practice accounting after being convicted of obstruction of justice in the investigation of its client Enron. In the wake of Andersen’s collapse and its short-lived criminal conviction, the government wisely became wary of bringing criminal cases against large corporations because of the collateral damage such cases could cause, commonly referred to as the “Andersen effect.” Criminal indictments in such cases were considered the equivalent of the “corporate death penalty.”<sup>1</sup>

In a 2005 New York Times op-ed article, Joseph A. Grundfest, a professor at Stanford Law School and former commissioner of the Securities and Exchange Commission, wrote that “Andersen’s demise did serve as a stern reminder to corporate America that prosecutors can bring down or cripple many of America’s leading corporations simply by indicting them on sufficiently serious charges. No trial is necessary.”<sup>2</sup>

Apparently the government has overcome its fear. On May 20, 2015, four major international banks—Citigroup, JPMorgan Chase, Barclays, and Royal Bank of Scotland—pleaded



By  
**Robert J.  
Anello**



And  
**Richard F.  
Albert**

guilty to the manipulation of foreign exchange rates (Forex).<sup>3</sup> Another international financial institution, UBS, which previously had entered into a non-prosecution agreement in connection with the manipulation of London Interbank Offered Rate (LIBOR), admitted to breaching that agreement by participating in the Forex misconduct. Its prior agreement was torn up and the bank entered a guilty plea for its LIBOR conduct.<sup>4</sup>

The Justice Department’s press release announced: “Five Major Banks Agree to Parent-Level Guilty Pleas,” emphasizing the rare nature of guilty pleas by a parent company rather than a subsidiary subject to less risk of devastating collateral impact. Although the department characterized the pleas as “historic resolutions,” in truth the government made significant efforts to blunt the effects of the criminal convictions by granting waivers to rules that would have restricted the banks’ ability to continue doing business in the United States—so-called “bad boy” provisions.

Insofar as corporate entities cannot be jailed, “bad boy” provisions imposed after a felony conviction normally impose collateral consequences that have a significant impact on large corporations. The multi-agency plea deals crafted by the government in the Forex investigations demonstrate the lengths the government will go to avoid a repeat of the Andersen debacle. These resolutions also highlight just why criminal law concepts designed to punish human beings—bad boys and girls—are ill-suited to corporate beings. Indeed, because corporate criminal prosecutions are so often accompanied by duplicative agency enforcement actions (which are part of a regulatory scheme particularly designed for the business entity), one may reasonably question the motives behind these government actions.

### Foundation of Liability

American courts first established the rule imputing criminal liability to a corporation in 1909, relying on the tort law doctrine of respondeat superior to hold that corporations should be deemed to have the knowledge and purpose of the agents and officers through whom they act.<sup>5</sup> Courts also have recognized that corporations should be held accountable for a corporate culture that encourages misconduct or for the failure to establish internal policies sufficient to prevent misconduct.<sup>6</sup>

The United States is unique in its longstanding approach to corporate criminal liability. The application of criminal liability to corporations—no doubt as a

ROBERT J. ANELLO and RICHARD F. ALBERT are partners at Morvillo Abramowitz Grand Iason & Anello P.C.. GRETCHAN R. OHLIG, an attorney, assisted in the preparation of this article.

result of the high-profile nature of some of these cases and perhaps the large fines they generated—did not begin to take hold outside the United States until the 1990s. Like the United States, the basis of liability in other countries hinges on the argument that the acts of certain employees can be attributed to the corporate entity.<sup>7</sup>

In the United States, the decision whether to prosecute a corporation for a federal crime rests with the Justice Department, guided by its “Principles of Federal Prosecution of Business Organizations” and is influenced by numerous factors, including the corporation’s cooperation, timely and voluntary disclosure, and the collateral consequences likely to be suffered as a result of the prosecution.<sup>8</sup> Whenever the government pursues criminal charges, it may seek large fines under the Alternative Fines Act (AFA), which allows a sentencing court to impose a fine equal to twice the gross gain or loss resulting from the offense.<sup>9</sup> This provision often gives the government extraordinary leverage against a corporation.

Although a corporation is treated like a “person” for purposes of criminal liability, courts have rejected the idea that corporations stand on fully equal footing with individuals in terms of the criminal justice protections provided to “persons” in the Bill of Rights. Corporations do maintain the benefit of the Fourth Amendment’s protection against unreasonable searches and seizures and are able to assert the Fifth Amendment’s due process and double jeopardy clauses and the notice, speedy trial and assistance of counsel guarantees of the Sixth Amendment. However, corporate entities have been denied the Fifth Amendment’s right against self-incrimination.<sup>10</sup> This important limitation leaves a corporation with almost no ability to avoid producing vast quantities of emails and other documents in response to a government subpoena, after which the corporation may have little practical ability to defend itself.

The filing of a criminal indictment, of course, is not the only option available to the government when it seeks to use the criminal justice system to impose sanctions. Corporate entities rarely go to trial, and typically make known their desire to negotiate a resolution during the investigative phase, prior to the filing of any charge. In recent years, corporations have often sought to negotiate a non-prosecution or deferred prosecution agreement to resolve allegations of

---

‘Bad boy’ provisions imposed after a felony conviction normally impose collateral consequences that have a significant impact on large corporations.

criminal wrongdoing. This option offers both the government and the institution a resolution without the expense and uncertainty associated with a criminal trial. Such agreements may require the corporation to terminate certain employees, initiate or enhance compliance programs, agree to the installation of a government monitor for a period of time, and cooperate with the government’s further investigation of the alleged wrongdoing. Typically, corporations agree to pay substantial fines as well, which in recent years have resulted in the recovery of multi-billions of dollars by the government.<sup>11</sup>

In most significant corporate criminal cases, multiple investigations and enforcement actions are conducted simultaneously. Notably, the financial sanctions available in the civil and regulatory arenas are typically of the same magnitude as the fines and monetary penalties available in a criminal case. Although parallel actions that result in the same outcome allow multiple government agencies to take credit for its pursuit of corporate wrongdoing, the duplication of enforcement resources is subject to question where the main goal appears to be to extract money and

to reform the entity’s behavior through compliance oversight.

### ‘Bad Boy’ Provisions

A “bad boy provision” is a statutory or regulatory clause that prohibits certain persons from involvement in certain business activities based on their having been the subject of an adverse legal determination resulting from their prior conduct. For instance, the SEC may place limitations on the activities, functions, or operations of, suspend for up to one year, or revoke the registration of an individual as a result of a criminal conviction.<sup>12</sup> A convicted felon also may be barred from participating in federal contracts or programs, as well as ineligible to obtain or maintain certain state licenses.<sup>13</sup> Waivers of or exemptions from these disqualification provisions may be sought and granted where there is evidence that the individual to whom it applies is “unlikely to abuse that relief through fraudulent or other improper conduct.”<sup>14</sup>

Application of these “bad boy” provisions have been extended to convicted corporate entities. In the Forex case, for example, as a result of their criminal convictions, the banks would have been unable to issue new securities quickly, to continue business activities involving the sale of private securities or to continue to deal with mutual and exchange-traded funds and pension and retirement plans. There also may be foreign or state level “bad boy” provisions that serve as a lurking threat to corporate entities.

### Construct Does Not Work

“Bad boy” provisions might be considered a part of the “shaming” and “shunning” effects of a criminal conviction. Criminal convictions differ from regulatory and other civil penalties in the sense that society has found that a criminal has engaged in significant wrongful and shameful conduct. As a result, society might be reluctant or unwilling to engage in commerce or other activity with that person. However, this logic does not hold in the

corporate context because it is not the entirety of the entity itself that has engaged in the misconduct resulting in the conviction; it might be just a handful of employees.

It is impossible for any large organization to avoid having at least some personnel who break the rules, particularly in light of the multiplicity of criminal laws and other regulations governing business conduct today. Society recognizes these differences between individual and corporate criminal liability, as evidenced by the public's continued willingness to buy the valuable goods and services provided by entities that have suffered criminal convictions.<sup>15</sup>

The government's waiver of some

instance, Citigroup Inc. will pay \$925 million as part of its guilty plea, while JPMorgan Chase was fined \$550 million. These penalties look very much like the remedies imposed under civil statutes and regulatory schemes.

Given the similar outcome in criminal versus civil and regulatory cases brought against corporations, the only apparent benefit to the government in pursuing a criminal case is the additional reputational or moral weight a criminal sanction carries. This benefit seems compromised, however, when one considers the machinations the government is properly willing to undertake to avoid serious consequences that are ordinarily a part of what it means to be convicted of a crime.

The government's waiver of some applicable "bad boy" provisions in the Forex case is an implicit acknowledgment that the current construct does not work. The SEC issued an order granting each financial institution a waiver from disqualification under some of the applicable bad boy provisions.

applicable "bad boy" provisions in the Forex case is an implicit acknowledgment that the current construct does not work. The SEC issued an order granting each financial institution a waiver from disqualification under some of the applicable bad boy provisions.<sup>16</sup> The banks also intend to file applications for a prohibited transaction exemption with the Department of Labor which also would allow them to continue to be qualified to work with pension and retirement savings plans. The government has agreed to postpone sentencing in the Forex cases pending the review and ruling of these applications, which allows the banks to continue to work with pension and retirement plans until a decision is issued.<sup>17</sup>

Once the "bad boy" provisions are removed from the government's settlement with corporate entities, the primary impact is a financial one. For

## Conclusion

All of which begs the question—what is the advantage of the current system of corporate criminal liability in the United States? The primary financial penalties imposed in a criminal case also can be obtained through civil or regulatory action. Duplicative enforcement is not only wasteful of taxpayer money and government resources, but often can cause unproductive turf battles among agencies. If the current regulatory scheme is lacking in any way, it can be given added teeth either through the imposition of appropriate additional consequences specifically designed to impact a company's future conduct.

The extraction of ill-fitting teeth from the criminal process in the most recent corporate convictions—wisely done to avoid catastrophic outcomes—illus-

trates a basic mismatch between the criminal process and corporations. By formally relieving corporations of "bad boy" provisions that impose shunning by rule, these recent government actions by necessity undermine what makes a criminal conviction unique and powerful. Although the government can boast success in securing the guilty pleas of parent global financial institutions, the practical impact of its prosecutions is hard to differentiate from a regulatory action. Quite simply, the framework for corporate criminal liability that has developed in the United States is of dubious utility.

- .....●●●.....
1. Andrew Weissman & David Newman, "Rethinking Corporate Criminal Liability," 82 *Ind. L. J.* 411, 426 (2007).
  2. "Over Before it Started," *The New York Times* (June 14, 2005).
  3. Karen Freifeld, David Henry and Steve Slater, "Global Banks Admit Guilt in Forex Probe, Fined Nearly \$6 Billion," *Reuters* (May 20, 2015).
  4. Press Release, "Five Major Banks Agree to Parent-Level Guilty Pleas," Justice Department (May 20, 2015).
  5. *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481, 494-95 (1909).
  6. Robert J. Anello, "Corporate Criminal Liability: When is Enough Too Much?" *Business Crimes Bulletin* (February 2013).
  7. Elidiana Shkira, "Criminal Liability of Corporations: a Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries" (2013) (available at: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2290878](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290878)).
  8. *United States Attorneys' Manual* §9-28.000 et seq.
  9. 18 U.S.C. §3571.
  10. Charles Doyle, "Corporate Criminal Liability: An Overview of Federal Law," Congressional Research Service Report (Oct. 30, 2013).
  11. Robert J. Anello, "The Year in White-Collar Crime: A Look Back Helps Us See Ahead," *The Insider Blog*, *Forbes.com* (Jan. 7, 2015).
  12. See, e.g., 15 U.S.C. §§80b-3(e)(2), (e)(3), (f).
  13. See, e.g., 10 U.S.C. §2408(a); 48 C.F.R. 252.203-7001.
  14. Thomas O. Gorman, "SEC Commissioner Gallagher, The Bad Boy Provisions and Remedies," *Lexis/Nexis Legal Newsroom Securities Law Blog* (Feb. 23, 2015).
  15. An example is Credit Suisse, a financial institution that continues to operate successfully after pleading guilty to helping clients engage in tax evasion. See Ben Prottess and Jessica Silver-Greenberg, "Credit Suisse Pleads Guilty in Felony Case," *The New York Times* (May 19, 2014).
  16. See, e.g., Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer, *In the Matter of Citigroup*, Release No. 9779 (May 20, 2015). All the SEC waiver orders are available on the SEC website.
  17. See Plea Agreement, *United States v. Citicorp* at p. 13-14 (May 20, 2015); David Henry and Sarah N. Lynch, "SEC Grants Waivers to Banks After Guilty Pleas," *Reuters News* (May 20, 2015).