

We Need to Indict Them

Deferred prosecution agreements won't deter enough corporate crime.

BY RANDALL D. ELIASON

Whatever happened to corporate criminal liability? It's tough to find a corporate criminal defendant these days. Of the major corporate scandals over the past few years, almost none has resulted in an indictment of the company itself.

Now we are in the midst of investigations into the subprime mortgage fiasco and other potential financial crimes. But no matter what is uncovered, recent history suggests we are very unlikely to see any corporations in the dock.

Corporate criminal liability has fallen out of favor, replaced by a Justice Department policy of deferred prosecution or nonprosecution agreements for corporate defendants. Under these agreements, a corporation may agree to pay fines and restitution, cooperate in ongoing investigations, hire outside monitors, and take other steps, in exchange for avoiding criminal liability.

The agreements sound good in theory, but their excessive use is undermining the criminal justice system. We need to resurrect the corporate indictment.

UNIQUELY POWERFUL

For most of the 20th century, corporate criminal liability was an important weapon in the battle against white-collar crime. Prosecuting companies places responsibility for the crime on the entity most likely to benefit from it and encourages corporate monitoring and compliance programs. But the most important benefit is deterrence: making other corporate officers think twice before engaging in similar misconduct.

A criminal conviction still carries with it a greater stigma than any other penalty—certainly far greater than any

associated with merely reaching an agreement with the government to settle allegations. It's bad for business to be seen as a crook. Fines and negotiated agreements may be portrayed as business as usual, but it's hard to spin a federal indictment. The moral condemnation of the community that accompanies a criminal conviction makes these sanctions a uniquely powerful deterrent.

When you see how mightily corporations will struggle to avoid a conviction, you know this deterrent is real.

FEARS OF ANDERSEN

But now the benefits of corporate criminal liability are in danger of being lost—ironically, in part because of the fallout from the Enron scandal. The recent aversion to charging corporations can be traced to the Arthur Andersen debacle. The accounting giant was indicted in 2002 for obstruction of justice based on a handful of employees who shredded Enron-related documents. The Supreme Court ultimately threw out the conviction, but not before the firm had been driven out of business and nearly 30,000 people had lost their jobs.

Andersen has made everyone gunshy about corporate indictments. The Justice Department maintains that deferred and nonprosecution agreements are good policy because indicting a company may result in a “corporate death sentence” as it did in Andersen. Similarly, corporate executives and their counsel, fearful of suffering Andersen's fate, feel tremendous pressure to agree to the Justice Department's demands for a deal.

But the fears from the Andersen case are overblown. After all, it was not typical for companies to go out of business when convicted (back in the days when we used to convict companies). Exxon, Tyson Foods, General Electric,



Genentech—these and scores of other corporations have been convicted of crimes and are still going strong.

Andersen was in a unique situation. The nature of the charges, going directly to its core business, and the general post-Enron hysteria of the time made it impossible for Andersen to survive.

But the moral should not be that we dare not charge corporations for fear of driving them out of business. Most companies will not go belly-up if indicted.

Nevertheless, the cry of “remember Arthur Andersen!” has provided a generally pro-business administration with the cover to adopt a policy of generally not indicting corporations (with an occasional exception for antitrust or environmental offenses).

THE DISCIPLINE OF TRIAL

In recent years, as corporate indictments have dwindled, the number of deferred and nonprosecution agreements has risen dramatically. Witnesses before Congress recently testified that there were 35 such agreements last year, up from only five in 2003.

These agreements are not free from controversy. Congress recently held hearings to investigate possible abuses, such as when the U.S. attorney in New Jersey awarded a no-bid corporate monitor contract worth up to \$52 million to his old boss, former Attorney General John Ashcroft. The Justice Department recently amended the U.S. Attorney’s Manual to impose new restrictions on these agreements and the awarding of contracts to monitors, and Congress is considering legislation.

But rather than further codifying and solidifying the use of these agreements, we instead should focus on whether they are really in the public interest.

Deferred and nonprosecution agreements ease the prosecution’s burden by allowing it to obtain substantial remedies without devoting the time and resources necessary to indict and try the company. But the knowledge that allegations never have to be proved at trial may result in the inappropriate pursuit of marginal cases.

Investigating a case in the grand jury, planning how to establish proof beyond a reasonable doubt at trial, and obtaining an indictment require a more disciplined assessment of the case. The process has a way of weeding out matters not truly worthy of criminal sanction. When there is a deal rather than an indictment, some of that discipline is lost.

Similarly, in a criminal trial, the jury tests the government’s allegations. If there is a conviction, a neutral third party—the judge—fashions the appropriate sentence. These checks on prosecutorial power also are lost when a case is resolved through these agreements, the terms of which are

dictated by prosecutors and may not even be made public.

For the company’s part, the danger is that executives will leap at the chance for an agreement to avoid even a small risk of conviction. Cases that may merit a vigorous defense instead end up with the company capitulating.

In short, routine use of deferred and nonprosecution agreements replaces our system of criminal justice—and its built-in checks and balances—with a quasi-regulatory regime administered by prosecutors with virtually no oversight.

Aren’t there already enough regulatory agencies policing corporate behavior?

REAL DETERRENCE

But the most serious problem is the loss of the deterrent force of criminal prosecution.

With the threat of criminal liability effectively off the table, corporate executives may be more willing to skate aggressively close to the line—or to jump over it. If the prospect of real criminal sanctions against the company is removed, then engaging in criminal activity becomes just another dollars-and-cents decision. The moral condemnation aspect of a criminal conviction is lost—and with it the unique deterrent value of criminal law.

The Justice Department should move away from its heavy reliance on deferred and nonprosecution agreements. The excessive use of them sacrifices the moral authority of the criminal law to efficiency and expediency.

Corporations, for their part, should get over the Arthur Andersen case and develop some backbone. A number of cases resolved through an agreement may not have been pursued if the company had called the Justice Department’s bluff and said “see you in court.” An indictment—if it comes—will be bad, but need not be the end of the world, or of the company. And it may not come at all. Accepting an onerous agreement in a marginal case may not be in the company’s best interest.

We don’t want truly good companies charged based on aberrant actions of rogue employees. But there are some companies that deserve to be indicted. Current policy wrongly allows even the most serious corporate offenders effectively to buy their way out of criminal liability, which erodes the moral force of the criminal law. This is a serious problem, but one remedied relatively easily.

It’s nothing that a good corporate indictment or two couldn’t fix.

Randall D. Eliason is the former chief of the public corruption and government fraud section at the U.S. Attorney’s Office for the District of Columbia. He teaches white-collar criminal law at George Washington University Law School and American University’s Washington College of Law.