

BY JOHN F.X. PELOSO AND BEN A. INDEK

## Corporate Criminal Responsibility

**T**HE ANDERSEN case and recent events should prompt us to re-examine the question of when is it appropriate to charge a corporation criminally for activities performed by employees, particularly when the severe consequences of indictment will heavily impact many employees and shareholders, who were neither aware of nor involved in the criminal activity.

Historically, there was a time when a corporate entity was not regarded to have the mens rea necessary to perform a criminal act. But in this country that has not been so for many years. Almost 100 years ago, the United States Supreme Court held that corporations could be held accountable for the criminal activities of their agents and employees. *New York Central and Hudson River Railroad v. United States*, 212 U.S. 481 (1909). See also *United States v. Union Supply Co.*, 215 U.S. 50 (1909); *United States v. A&P Trucking Co.*, 358 U.S. 121 (1958).



John F.X. Peloso



Ben A. Indek

### Corporation Answer Criminally?

But there has always been a difficult question as to whether the corporation should answer criminally for any criminal act by any corporate employee, or whether, for the entity to be appropriately charged, there should be some evidence of complicity or acquiescence by high corporate officers or corporate management, and whether the corporation benefited from the criminal act. While the issue is troublesome and the decisions not entirely uniform, see, e.g., *Continental Baking Company v. United States*, 281 F.2d 137 (6th Cir. 1960), it is generally the law, at least in the federal system, that a corporation is answerable in a criminal court for the criminal activities of its employees performed in the course of pursuing the corporate business. *United States v. Koppers Company, Inc.*, 652, F.2d 290, 298 (2d Cir. 1981). It is not necessary that the actions be those of a high corporate officer. *United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) cert denied, 464 U.S. 956, (1983). Nor is it necessary that the corporation have derived benefit from the illegal activities. Indeed, the corporation may have responsibility even when the criminal activities contravene promulgated corporate policy. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972).

However, most courts will require that the actor have been pursuing activities that were designed to benefit the corporation at least in part, which is another way of saying that the employee or agent was acting in the course of his employment. As the Sixth Circuit said in *Continental Baking Co.*, supra, "the courts have held that so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to per-

form, the corporate principal is liable for the criminal act also."

There are however other views. For example, various state laws may differ in their approach, and the Model Penal Code of the American Law Institute suggests a hybrid aspirational model. The ALI Code would hold the corporation responsible for the acts of any corporate employee acting within the scope of his employment only for statutory offenses plainly imposing liability on corporate entities, subject to a due diligence defense. For common-law crimes, the activities would have to have been "... authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment." By comparison, New York penal law provides that corporations may also be convicted for acts by any agent that constitute a "misdemeanor or a violation." McKinney's Penal Law §20.20. In both the ALI Code and the New York Penal law, therefore, there is a

qualification to outright respondeat superior liability.

The securities laws are less ambiguous. For example, §32 of the Securities Exchange Act of 1934 criminalizes willful violations of any provisions, and corporations are included in the definition of "person" in §3 of the act. Moreover, §20(a) imposes vicarious liability on control persons subject to a due diligence affirmative defense. Similar provisions are contained in the Securities Act of 1933, the Investment Company Act of 1940 and the Investment Advisors Act of 1940. Courts have no difficulty finding corporate criminal responsibility using this arsenal. See, e.g., *United States v. Victor Teicher & Co.*, 726 F.Supp 1424 (S.D.N.Y. 1989), aff'd 987 F.2d 112 (2d Cir. 1993). And based upon recent media reports, prosecutors appear to be willing to be aggressive in pursuing criminal actions against corporations in the securities arena.

### New York State

In New York, the statute under which securities law violations would be brought by the State Attorney-General is the Martin Act that prohibits any "person, partnership, corporation, company, trust or association," or any "agent or employee" thereof, from using any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale, from making any promise that is "beyond reasonable expectation or unwarranted by existing circumstances" or making any intentional or negligent misrepresentation to "induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities[.]" Gen. Bus Law §352-c.

All this having been said, the practical question lawyers face in counseling clients is what factors are likely to be considered by prosecutors in deciding whether to charge the corporate entity. The Andersen case has heightened our consciousness to the tension that exists in weighing the need to charge the corporation for the criminal acts of its employees against the severe consequential effects of the indictment on the life of the enti-

John F.X. Peloso is senior counsel and Ben A. Indek is a partner in the New York office of Morgan, Lewis & Bockius LLP. Natalie M. Holme, an associate in the New York office, assisted in the preparation of this article.

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ty and the lives and careers of its employees who had no part in the criminal conduct.

**DOJ Memo on Prosecutions**

An instructive analysis of these issues is contained in the 1999 United States Department of Justice Memorandum regarding Federal Prosecution of Corporations put together by an ad hoc group from the DOJ and the United States Attorneys' offices. See [www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00162.html](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.html).

The Memorandum makes clear that these are merely guidelines to be considered in any DOJ decision to prosecute a corporation. There is no requirement that the factors considered be referenced in a particular case or to document the weight given to any factor in arriving at the prosecutorial decision.

For general principles, the Memorandum advises prosecutors: (a) not to treat a corporation more leniently or more harshly because of its "artificial nature"; (b) to be aware of the public benefit from indicting the corporation, such as, the consequential remedial steps that lead to deterrence on a massive scale and perhaps a change in corporate culture; (c) to not use the corporate indictment to excuse culpable individuals; and (d) generally to apply the doctrine of respondeat superior where the agent or employee was acting within the scope of his duties and the actions were intended, at least in part, to benefit the corporation, even if the main purpose was personal gain and the corporation does not reap the benefit.

The Memorandum also provides that, as a general matter, the same factors relevant to a decision whether to bring criminal charges against individuals should be applied in the corporate context namely: "the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative and other consequences of conviction and the adequacy of noncriminal approaches."

Beyond these general principles, in determining whether to initiate charges against corporations, prosecutors are advised to consider the eight factors described below.

The first consideration is the nature and seriousness of the crime, including any harm to the public. In conducting this analysis, consideration should be given to priorities in the context of current areas of

focus and the goals of other federal agencies.

Second, pervasiveness of the wrongdoing should be examined. The Memorandum suggests that charges against a corporation may be appropriate where even minor misconduct by a large number of employees has occurred. On the other hand, where the corporation has a credible compliance program and the wrongdoing was an isolated act of a rogue employee, a different decision might be made. In examining this issue, consideration should be given to the role of management, which is responsible for creating a corporate culture that either encourages or discourages criminal misconduct.

The third factor is the corporation's past history of similar conduct, including prior warnings, administrative sanctions or charges. A corporation's history may be probative in determining whether it fosters a culture that either encourages or con-

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done misconduct despite the existence of any compliance program.

Next, a corporation's cooperation and voluntary disclosure of its misconduct should be evaluated. In this regard, a corporation's willingness to (a) identify culprits within the entity (including senior executives); (b) make witnesses available; (c) disclose the complete results of its own investigation; and (d) waive the attorney-client privilege or work-product protection should be examined. With respect to the waiver issue, the Memorandum indicates that prosecutors should not "consider waiver of a corporation's privileges an absolute requirement." Whether the corporation seems to be protecting culpable employees is an additional factor in evaluating cooperation. This may include payment of attorney's fees, retention of employees without sanction, or providing information to employees about the investigation through a joint defense agreement.

The fifth factor is the development and sufficiency of a corporation's compliance program. While the DOJ encourages the establishment of corporate compliance programs, the existence of such a program "is not

sufficient, in and of itself, to justify not charging a corporation for the criminal conduct undertaken by its officers, directors, employees or agents." Indeed, the occurrence of criminal activity in spite of the existence of a corporate compliance program may suggest that management has been lax in enforcing the program. In evaluating the effectiveness of a corporate compliance program, the issues to be examined include (a) the comprehensiveness of the program; (b) the extent and nature of the misconduct; (c) the number and stature of the employees involved; (d) the seriousness, length and frequency of the acts; and (e) the remedial activities taken, e.g., restitution, disciplinary sanctions and modifications to the program.

The corporation's remedial actions are the sixth factor to be considered. This includes efforts to (a) establish a corporate compliance program or enhance an existing program; (b) change management; (c) discipline employees; (d) pay full restitution; (e) disclose the wrongdoing to the government; and (f) cooperate with any investigation.

Seven, consideration may be given to the collateral consequences of a criminal charge against a corporation. Prosecutors may bear in mind the substantial consequences to a corporation's officers, directors, shareholders and employees who have played no role in the criminal conduct and were completely unaware and/or unable to prevent it. In determining whether to prosecute, attention should be paid to any nonpenal sanctions that flow from an indictment or conviction (e.g., suspension of professional licenses and bars from obtaining government contracts).

Lastly, the Memorandum permits prosecutors to consider the adequacy of noncriminal alternatives to prosecution, including civil or regulatory actions.

**Conclusion**

It would appear that the DOJ's guidelines reflect and incorporate an amalgam of the existing case law on the question of corporate criminal responsibility and make clear that, while the department has discretion to apply that law, or not, in any given circumstance, the doctrine of respondeat superior will be the cornerstone of its approach. The guidelines also make clear that the existence and implementation of a credible compliance program within a corporate culture that rejects inappropriate activity, is, at the end of the day, the best defense to potential criminal liability.