

THE PRACTICE

Businesses Should Brace for DOJ's Assault

The U.S. attorney general's criminal prosecutions against corporations threaten a tepid economy.

BY GEORGE J. TERWILLIGER III

The U.S. attorney general recently took pains to characterize an auto manufacturer's alleged "defrauding the public" as not just a crime (a "crime," by the way, recently invented by prosecutors rather than passed by the legislature), but as a "reprehensible" course of conduct. The crime the company had to admit, per the Justice Department: insufficient attention to what prosecutors—not auto-safety regulators—decided was a product defect related to automobile accelerators. Thousands of cars were voluntarily recalled to fix what has not even been established conclusively as a defect, let alone one that caused accidents. "Reprehensible." Really?

Likewise, Associate Attorney General Tony West touts great prosecutorial success in using a civil statute designed to protect banks, and merely alleging—not proving—predicate crimes, to shake down financial institutions for huge penalties. The predicate crime alleged? Selling securities derived from toxic mort-



TOUGH BUSINESS: U.S. Attorney General Eric Holder is pursuing more criminal prosecutions against big corporations—but at what cost?

gages—mortgages that were written because government policies demanded a garage for every car, even if it meant shelling out mortgage money to clearly under-qualified borrowers.

A frontal assault on U.S. businesses using criminal law as a weapon is in full swing. Why? Are there cases in which corporations merit criminal sanctions? Certainly. But the case resolutions out-

lined above, and many others like them, are outside loosely defined but traditionally critical parameters that the Justice Department has utilized to define corporate crime. The critical distinction traditionally applied has been—and should remain—one that turns on an objective assessment of corporate culture and intent. A business that becomes in essence a criminal enterprise—one that utilizes

illegal means to pursue lawful business or, conversely, one that engages in illegal enterprise even through lawful means—often merits a measure of criminal sanctions. But now, legitimate businesses engaged in lawful enterprise using legal means are being charged with crimes and excoriated publicly because they have allegedly transgressed somehow one of the myriad dense federal regulatory standards that govern commerce today, which regulations themselves offer little certainty as to their requirements and are often fodder for interpretive debates among experts.

This chosen course may make for good politics in some quarters, a consumer's champion whacking big bad businesses with the criminal club, for example. Some earmarks of political objectives in these cases are: bank settlements over mortgage-derivative issues that fund community organizers (one of the current president's previous endeavors and perhaps, therefore, favored by the political ranks at DOJ); huge dollar recoveries that can be used to proclaim record penalties as capital is transferred from productive corporate use to deposit in the treasury of a government that is broke because of excess spending; and hyperbolic, politically charged rhetoric used to condemn corporate conduct that

isn't really a crime (there is no such crime under the wire and mail fraud statute of "defrauding the public"). The price being paid for this political success, or perhaps better, excess, is expensed against both sound legal and economic policy.

Turning products liability issues into federal—and criminal—cases is bad policy because it cheapens the currency of a criminal sanction, distorts the operation of carefully balanced regulatory mechanisms and greatly overreaches objectively reasonable bounds for the exercise of prosecutorial discretion. That last is particularly harmful because overreaching and criminalizing regulation invites the legislature to curb prosecutors' considerable discretion, the reasonable exercise of which, without political interference from the legislative branch, has served us well for a very long time. Justice Department leadership ought to better appreciate that tradition and give more weight to the principle that just because one can does not mean one should.

The outsized overuse and abuse of criminal enforcement also is a millstone around the neck of an already sick economy. A nation whose economy should be flourishing, driven, as others have well noted, by abundant energy resources, a population that has willingly and

for a long time been the most productive in the world and a middle class yearning to be freed to find upward mobility, would be better served by criminal enforcement policies that encourage and support legitimate enterprise, and the jobs it brings, and that concentrates on policing markets to keep them fair and honest. Instead, we are seeing enforcement policy driven by the quest for record penalties brought against companies that cannot abide the potential collateral consequences of a fair fight in court, so they become forced to capitulate to invented regulatory "crimes."

Is there a way to stop this continued slide into bad policy and economic harm? First, businesses can do a better job of fighting back, taking appropriate cases both to court where necessary and to the public as needed. Second, Congress has a role in oversight to question enforcement policy and to make the case that job-killing enforcement initiatives are part of the economic problem. Last, but least likely, cooler, less political heads ought to prevail more in the DOJ ranks. Politics and the law can make bad bedmates generally, but politics and criminal enforcement just don't even belong in the same house together.



GEORGE J. TERWILLIGER III is the global co-chairman of the white-collar litigation and government-investigations practice at Morgan, Lewis & Bockius. He served for 15 years in the Justice Department, including as the acting attorney general and as deputy attorney general. The views expressed are his own.