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Mixed Messages from Justice

The Ashcroft Memo and Corporate Criminal Exposure

By Brien T. O'Connor and Peter L. Welsh

The very public prosecution of Arthur Anderson LLP demonstrated the willingness of the Department of Justice (DOJ) to bring criminal charges against organizations no matter how large and prominent or how severe the collateral consequences. Under the doctrine of *respondeat superior*, moreover, the government has breathtakingly broad power to convict an organization based solely on misconduct by even just one employee. So, the reality is that corporate counsel must assess the potential criminal exposure of the entire corporation in nearly every government investigation of an employee.

Assessing exposure has, in recent years, involved the factors set forth in the Holder and Thompson memos (June 16, 1999 and Jan. 20, 2003) on the "Principles of Federal Prosecution of Business Organizations." Recent pronouncements by the DOJ, however, cast some doubt on the continued significance of the Thompson Memo and have made it harder to assess a corporation's criminal exposure.

The PROTECT Act

In 2003, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (the "PROTECT Act"). In what is known as the Feeney Amendment to the PROTECT Act, Congress imposed certain limitations on the discretion of federal judges to depart downward from applicable sentences under the U.S. Sentencing Guidelines. The Feeney Amendment "requires the courts of appeals to review, *de novo*, all [downward] departures. The [Amendment] bars the U.S. Sentencing Commission from promulgating additional grounds for downward departures until May 1, 2005, and reduces the number of judges on the Commission. The Sentencing Commission also is required, within 180 days of enactment, to modify the guidelines and policy statements to 'substantially reduce' the number of downward departures in all cases." "Downward Departures Debate Continues," *The Third Branch: Newsletter of the Federal Courts*, Vol. 35, No. 8 (August, 2003). The Feeney Amendment also requires Assistant U.S. Attorneys to report all downward departures and requires Main Justice to report them to the House and Senate.

The Ashcroft Memo

On Sept. 22, 2003, Attorney General Ashcroft issued a memorandum on "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges and Sentencing" (the "Ashcroft Memo"). The Ashcroft Memo praises the Feeney Amendment as helping "to ensure greater fairness and eliminate unwarranted disparities" in sentencing. It explains that the goals of the Amendment "cannot be fully achieved without consistency on the part of federal prosecutors." To ensure such consistency, the Memo imposes drastic restrictions on prosecutorial discretion.

The General Requirement

The Ashcroft Memo requires that "in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case … "It specifies that "the most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence." The Memo also explains that "[a] charge is not 'readily provable' if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government's ability readily to prove a charge at trial." Once charges are filed, moreover, "the most serious readily provable charges may not be dismissed except to the extent permitted" by the Memo.

The Exceptions

The Ashcroft Memo provides for very limited exceptions. Federal prosecutors may avoid charging the most serious offense *only* when two requirements are met. First, the case must fall into one of six specified exceptions:

- Sentence Unaffected. A prosecutor may decline to charge or pursue the most serious, readily provable offense "if the applicable guideline range from which a sentence may be imposed would be unaffected." Where the most serious count involves a mandatory minimum sentence that exceeds the applicable guideline range, however, the count must be charged.

- Fast-Track. A federal prosecutor may charge a lesser offense as part of a fast-track disposition of a case. Such charges are to be "exceptional and will be warranted only when clearly warranted by local conditions within a district." Moreover, any such charging must comply with the Department's "Principles for Implementing An Expedited Fast-Track Prosecution Program."
- Substantial Assistance. The Ashcroft Memo grudgingly provides that "in rare circumstances, where necessary to obtain substantial assistance in an important investigation or prosecution … a federal prosecutor may decline to charge or pursue a readily provable charge as part of [a] plea agreement that properly reflects the substantial assistance provided by a defendant in the investigation or prosecution of another person."
- Statutory Enhancements. An Assistant Attorney General, U.S. Attorney, or "designated supervisory attorney" may "authorize a prosecutor to forego the filing of a statutory enhancement," but only in the context of a negotiated plea agreement and subject to additional limitations set forth in the Memo.
- Post-Indictment Reassessment. Where "post-indictment circumstances cause a prosecutor to determine in good faith that the most serious offense is not readily provable, because of a change in the evidence or some other justifiable reason (*eg*, the unavailability of a witness or the need to protect the identity of a witness until he testifies against a more significant defendant), the prosecutor may dismiss the charges …"
- Other Exceptional Circumstances. Prosecutors may decline to charge or pursue the most serious offense where certain exceptional circumstances relating to "the practical limitations of the federal criminal justice system" counsel in favor of a plea agreement or dismissal. Such circumstances primarily concern resource limitations facing the office handling the case.

Second, in addition to satisfying one of the foregoing six exceptions, the prosecutor must obtain specific authorization to refrain from charging the most serious readily provable offense from an Assistant Attorney General, United States Attorney or designated supervisory attorney.

Whether and when to charge a corporation with any criminal offense — let alone the most serious, readily provable one — is dealt with at length in the Thompson Memo …

The Ashcroft Memo and the Thompson Memo

Does the Ashcroft Memo apply to charging organizations? The Memo does appear intended to apply only to individuals. When invoking the provisions of the Sentencing Guidelines regarding "substantial assistance," for example, it cites only to those provisions concerning individuals and ignores the Guideline's provision concerning substantial assistance by an organization. Nevertheless, on its face, the Memo expressly applies in "all federal criminal cases." It therefore could be read to require federal prosecutors to charge the "most serious, readily provable offense" that may be brought against a corporation.

Whether and when to charge a corporation with *any* criminal offense — let alone the most serious, readily provable one — is dealt with at length in the Thompson Memo, which provides nine factors that prosecutors should consider in deciding *whether* and how to charge a business organization: 1) the nature and seriousness of the offense; 2) the pervasiveness of the offense; 3) the corporation's past history; 4) whether the corporation has cooperated with the investigation and/or voluntarily disclosed the offense(s); 5) whether the corporation has had in place an effective compliance program; 6) the corporation's willingness to make restitution; 7) the collateral consequences of charging the corporation; 8) the adequacy of charging individuals; and 9) non-criminal alternatives to charging the organization. This nine-factor analysis is entirely incompatible with any requirement that prosecutors charge "the most serious, readily provable offense" in every case. Mandatory prosecution of corporations would make the Thompson Memo a dead letter.

Although the Ashcroft Memo explicitly states that "it supersedes all previous guidance" about charging criminal targets, one would expect an explanation of why DOJ was abandoning an important policy statement like the Thompson Memo if that's what the Attorney General had in mind. It's unlikely that the Attorney General intended such a fundamental policy shift solely by implication.

Were DOJ to apply the Ashcroft Memo to corporate criminal cases, moreover, it would lead to the unwarranted charging of countless corporations and would potentially decimate regulated industries. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for any criminal act of an employee taken within the scope of employment and intended, at least in part, to benefit the corporation. As a practical matter, therefore, a corporation is almost always vicariously liable for the criminal conduct of its employees. Were prosecutors to adopt a policy of charging corporations with the most serious, readily provable offense, countless corporations would be subject to potential criminal prosecution

Brien T. O'Connor is a partner and **Peter L. Welsh** is an associate with the law firm of Ropes & Gray, LLP in Boston. They represent corporate clients in government investigations and complex civil litigation.

based on nothing more than the conduct of one rogue employee. Where a corporation operates in a regulated industry (government contracting, securities, health care, *etc.*), moreover, it could be barred automatically from conducting its core business by debarment, license revocation and the like as a result of a single employee's misconduct.

The Ashcroft Memo cannot possibly have intended such extreme consequences. In light of DOJ's mixed messages, however, the Department would do well to clarify its policy on charging business organizations.

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