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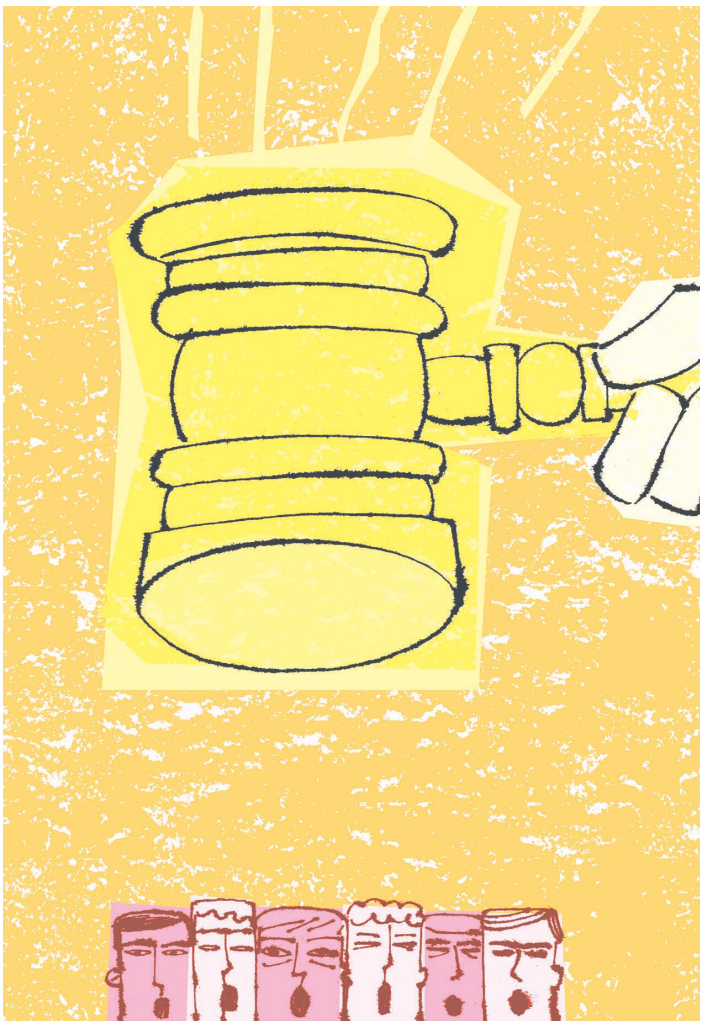
Stop the Business-Busters

Corporate liability for criminal misconduct reaches much too far.

BY JOAN MCPHEE



Behind the weekly headlines of corporate guilty pleas and multimillion-dollar corporate criminal resolutions lies a back story—little known, less well understood—that challenges the core of what those headlines pronounce. In a peculiar, 21st century phenomenon, guilt or innocence has become largely beside the point for corporations defending themselves against aggressive federal prosecutors and allegations of criminal wrongdoing.

How else to explain the non sequitur in the advice that seasoned white-collar counsel often give to their Fortune 500 clients: While the evidence is strongly in the company's favor, and there are excellent legal and constitutional defenses to the alleged misconduct, the company nevertheless should consider admitting to criminal wrongdoing and entering a plea of guilt.

Such advice, widely followed, has led to some notably incongruous results, with companies pleading guilty only to see their individual employees—upon whose alleged misconduct the company's conviction was premised—later acquitted of any criminal wrongdoing in a jury trial. TAP Pharmaceutical Products Inc., with its $875 million criminal resolution and string of individual employee acquittals, is illustrative of the reality that companies face today.

Such anomalous results are more than a mere curiosity. They open a window onto a deeper, more elemental concern: Corporations facing criminal charges cannot afford to exercise their right to a jury trial and must instead resolve

their disputes with the government short of the courthouse steps. It's time to address this denial of due process.

ONE LONE EMPLOYEE

The problem is rooted partly in the doctrine of corporate criminal liability, which now extends so far as to hold that a corporation may be held criminally liable as an entity—no matter if it has 10 or 10,000 or 100,000 employees, and without regard to the strength of its compliance policies and programs—based upon the single isolated act of a low-level employee, even where the employee is acting largely for personal benefit and in direct contravention of corporate policy. The current framework for imposing corporate criminal punishment only exacerbates the company's predicament, and exponentially so, by authorizing, and frequently mandating, draconian punishment based upon what may be *de minimus* conduct in the overall corporate context. For companies in highly regulated industries—such as government contractors and health care providers—the landscape is more treacherous still. The government can wield the ultimate penalty of disqualification from doing business upon the mere allegation of—and without any conviction for—criminal wrongdoing.

In this framework, the risk of abuse of government power is unacceptably high—and there is no assurance of just and credible results. If the government's legitimate interests in corporate criminal accountability are to be met without compromising accepted standards for principled dispute resolution, consideration must be given to restoring to the American corporation a meaningful form of adjudicative process through which the company, without threat of corporate death, can test the government's proof and legal theories.

WHOSE GUILTY MIND?

There are two avenues for reform. One approach focuses on the doctrine of corporate criminal liability and the types of conduct for which the corporation as an entity should be held criminally responsible. This approach begins with a return to the basic questions of whose actions and intent—those of which officers, directors, and employees—should provide a sufficient predicate for imposition of criminal liability on the company, and whether a showing of good-faith compliance efforts should absolve the company of criminal liability for the wrongful acts of its employees.

The Model Penal Code, adopted by the American Law Institute in 1956, provides a logical starting point. Under the Model Penal Code, the criminal liability of a corporation for the conduct of its agents is limited to circumstances where the conduct was directed or recklessly tolerated by the board of directors or one or more high managerial agents acting on behalf of the corporation. In adopting this provision, the drafters of the code sought to limit vicarious corporate criminal liability to situations in which the conduct was performed or participated in by agents sufficiently high in the hierarchy to make it reasonable to assume that their actions were "in some substantial sense" reflective of corporate policy.

This more-circumscribed approach better accords with traditional notions of criminal responsibility. The corporation may not be found to have acted with moral culpability and may not be held criminally responsible unless it can be shown that the corporation—through the actions and intent of high-level agents deemed to be capable of "thinking" for the corporation—acted with a "guilty mind."

This approach is also more consonant with the importance otherwise placed on compliance programs as a means of voluntary corporate self-policing. In the current model of corporate criminal liability, a company's efforts to ensure compliance with the law are legally irrelevant to the issue of its guilt. This disconnect, in turn, undermines the deterrent goals of the criminal law.

By contrast, permitting good-faith compliance efforts to shield a corporation from vicarious criminal liability would not only better accord with the basic principles and goals of the criminal law, but also help to restore some balance to corporate prosecutions. No longer would an otherwise compliance-conscious company be subject to potentially severe punishment based upon the isolated misconduct of a single employee. The wrongful conduct of such an employee would lose the extraordinary power it now possesses to force disproportionate and unfair resolutions.

TAILORED TO THE HARM

A second approach to harmonizing the interest in corporate accountability with the need for principled dispute resolution looks to the existing legal framework for imposition of corporate punishment. The concern here arises from the government's current ability to impose draconian punishment—including the ultimate penalty of disqualification from continued business operations—based upon what may be *de minimus* conduct in the overall corporate context. This solution therefore focuses on reining in the more extreme features of these penalties—particularly, the exclusion, suspension, and debarment provisions applicable to government contractors and companies in highly regulated industries.

While these remedies may help to protect the government from companies that do not have a satisfactory record of business ethics and integrity, they ultimately reach too far. Where a proposed exclusion or suspension is predicated upon wrongdoing by individual corporate employees, the government should be required to establish that the criminal misconduct in fact occurred—through a conviction, not simply an allegation—and that the conduct was sufficiently harmful and pervasive to warrant imposition of the severe remedy of disqualification.

No rational government official should take the position that a company ought to be suspended, debarred, or excluded over the isolated acts of a single employee who may have been acting primarily for personal purposes and contrary to corporate policy. No official should argue that such action—as distinct from termination (and prosecution) of the employee who committed the wrongful act—is necessary to protect the government's interests. A legal framework that not only permits but purports to require

such a result is fundamentally unsound. Remedies should be tailored to address identified harms, and not more.

HIGH STAKES

While neither of these two approaches offers a clear pathway to a sustainable jurisprudence of corporate criminal prosecutions, together they draw into focus the central issue. The stakes—for businesses and their innocent shareholders—are exceptionally high. Corporate criminal disputes in America today are being resolved through a process that is devoid of any of the attributes upon which the American legal system, and we as a society, have come to rely on for the achievement of just and credible results. There is another way, simple and time-honored: Corporations, like all other accuseds, must have a meaningful opportunity to test the government's proof and hold it accountable through the traditional safeguards and protections of a criminal trial.

The Justice Department predictably will object to any effort to limit its power to prosecute and punish. The government will maintain that it can be trusted to exercise its judgment wisely and that full power and full discretion are required, both to ensure that wayward corporations are brought to justice and to deter others from similar conduct. But the government's argument extends too far.

With the proposed reforms, government power to prove criminal wrongdoing and to impose proportionate punishment is left undisturbed. There is no reasoned argument for anything more. And with the threat of billion-dollar "conference room" criminal dispositions in the wind, and nothing less than the integrity of our system of criminal justice on the line, inattention is not an option. Our most serious legal disputes are all reserved for courts of law. Corporations and their shareholders are entitled to nothing less.

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