Criminalizing The Boardroom

by Richard S. Levick

Expanding criminal and regulatory law. Increasingly vague, subjective legal definitions. Ambitious prosecutors and regulators. Combine these, and we have all the ingredients for an explosion in criminalizing civil business law. With corporations and their executives paying multi-billion dollar fines (or going to jail) for what were once minor civil infractions, what can your board do?

Today, the legal concept of *mens rea* seems to be noticeably absent from far too many prosecutions. Board members are increasingly reluctant to serve, for fear of liability. The trend of CEOs exiting after a few years with Midas-sized golden parachutes is the new normal. Can you blame them?

It was fascinating to speak with an alumnus from a fine federal correctional institution on one of the highest profile prosecutions of the last decade. He said, "Every step of the way, I received advice and counsel from the best law and accounting firms; it was fully transparent and deliberate."

Yet serve considerable time he did, not because he intended to defraud, illicitly profit, or break the law, but because he was diligently trying to abide in its labyrinth. This has become an apparent requirement for prosecutorial promotion, like a beat officer with ticket quotas. We now wonder if the rule of law is not just being subverted by those who would seek to avoid its clenches, but also those sworn to uphold it.

Companies that commit acts of malice or willful neglect deserve punishment, including jail time for malefactors, if justified. However, what happens when corporate executives or board members are wrongly accused of perpetrating crimes or end up being prosecuted for the routine administration of their duties? Unwarranted prosecutions are happening with alarming frequency in today's America.

Given the catastrophic consequences that can come with high-profile litigation (loss of livelihood and reputation, collapse of market share, permanent damage to a company's brand, *et al.*), is there anything that can be done to avoid disruptive prosecution?

The rule of law is what separates democracy from mob rule. Yet within the "rule of law" are endless gray areas and the opportunity for misuse, as much by a bad acting CEO or nonfeasant board member as an overly ambitious prosecutor, or worse.

The rule of law banner may make us feel superior to past civilizations, but it is the cookbook, not the feast. A lot gets confused in the cooking. We either apply it fairly, or we are just as lost as repressive societies.

The challenge from a communications perspective is, "Which office do I go to to get my reputation back?" as famously uttered by Raymond Donovan, the former Labor Secretary under President Reagan, after being acquitted (along with six other defendants) in a contracting award case.

"Normal" corporate behavior is now being criminalized, a trend that could trigger unsettling consequences for the U.S. economy.

From a communications perspective, there are three challenges:

☐ Once the investigation is leaked or charges have been made, how do we protect the brand and communicate with key audiences, from employees to shareholders, customers, and other potential regulators both foreign and domestic?

☐ How do we communicate during the trial or public charges phase?

☐ How do we rebuild the brand and recover the reputation?

There is no shortage of corporations that have committed abhorrent crimes and deserve whatever punishment they have gotten. If a company maliciously defrauds investors and clients (look no further than Bernard L. Madoff Investment Securities), or

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Guilty Of "Deliberate Indifference"?

Over-Prosecution In Action

The business legal climate remains precarious. To lessen the risks, companies should study the crisis mitigation strategies outlined below.

In 2007, a raid was conducted by 200 FBI and state law enforcement agents at the Tampa offices of WellCare, a Florida Medicaid health maintenance organization. Several executives, including CEO Todd Farha, the CFO, and general counsel, were indicted on healthcare fraud charges based on the government's interpretation of Florida's Medicaid law.

Under Florida's so-called "80/20 Statute," Medicaid providers who expend less than 80 percent of Medicaid funds for the provision of behavioral healthcare services were required to pay back the difference to Florida's Agency for Healthcare Administration (AHCA). WellCare, with advice of their counsel and the former head of AHCA, had interpreted the ACHA statute and contract to allow the inclusion of funds paid to an affiliate behavioral healthcare organization that provided the services.

There were no clarifying AHCA regulations that prohibited this reasonable interpretation of the law and contract. In this case, there were no hidden companies, overbilling, or medically unnecessary procedures; nor were there any claims of substandard health care or fictitious patients as there are in typical healthcare fraud cases. Rather, the case boiled down to a legal interpretation of a statute and contract.

Nevertheless, federal prosecutors claimed that funds paid to an affiliate should not have been included as part of the 80 percent expenditure formula, despite the lack of any controlling regulations or other legal authority.

Although Department of Justice prosecution guidelines urge prosecutors to use administrative and civil remedies for regulatory disputes of this sort, in this case prosecutors abused their discretion and instead filed felony fraud charges. This was in sharp contrast to the way the government handled another Medicaid provider which had similarly counted funds paid to its affiliate as part of the 80 percent calculation as did WellCare. That company was sued in civil court and Florida settled the case without obtaining any rebate!

The trial lasted three months and the jury deliberated for weeks before reaching a verdict. It acquitted CEO Todd Farha on most of the charges, was hung on others, but found him guilty of one count of healthcare fraud, even though he was acquitted of a false statement count regarding the same financial submission that formed the basis of the healthcare fraud count.

The appeal centered on the level of *mens rea* or criminal intent that the government must prove beyond a reasonable doubt in criminal cases. Instead of proving "knowing and willful" knowledge of the alleged fraud as the statute requires, the Eleventh Circuit approved a water-down level of *mens rea* that it could find him guilty of healthcare fraud if he was "deliberately indifferent" to the truth or falsity of the alleged false submissions.

As a practical matter, this allows a jury to convict based upon negligence or recklessness, rather than the criminal intent or "guilty knowledge" needed for a false-statement conviction. This sets a dangerous precedent for any executive making decisions in a regulated industry where legal and regulatory interpretations are required.

deliberately lies about the dangers of its products (Takata and Volkswagen Group), then tears need not be shed about the censure it receives.

Yet too many corporate officers, directors, and managers these days find themselves subject to jagged inquiries. "Normal" corporate behavior is being criminalized, a trend that could trigger unsettling consequences for the U.S. economy.

"When corporate executives are being hounded by the belligerent enforcement of arcane regulations or obscure laws, it is bad for the rule of law and bad for capitalism," says Scott D. Marrs, of law firm Akerman LLP and a corporate litigation specialist, who serves on the board of directors of the Texas General Counsel Forum. "Too many companies face unwarranted indictments, untenable fines, costly court appearances, and a stinging loss of reputation in the marketplace."

In my experience, when a company is criminally charged, outsiders (including customers and shareholders) assume guilt. After all, by definition, a criminal charge is more lethal than a civil infraction. Indeed, the negative narrative is even more pronounced because it is the first thing that most people have heard about the company.

Individual executives caught up in these allegations

face increasingly harsh prison sentences, not to mention fines and loss of livelihood. It all adds up to what Marrs calls a business environment beleaguered by "coercive regulatory enforcement."

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Add to the mix state attorneys general, who often see high-profile charges against corporations as ways to raise their political profile. There is a reason people joke that "AG" stands for "aspiring governor."

I know several current and former state and federal AGs. Good persons all. Still, the formula for rising political fortunes on the wings of high-profile cases—often at the expense of business—is just too much of a professional booster to resist. Business and government should not be a zero-sum game.

The DOJ and other enforcers have become increasingly aggressive by expanding their definitions of criminal liability, diminishing the role of *intent* in white collar prosecutions while dismissing the utility of voluntary corporate compliance programs.

Further, we are seeing greater application of what lawyers call the "FCPA (Foreign Corrupt Practices Act) standard." In other words, corporate executives are being held liable for their supply chain vendors and for *what they should have known*.

Factor in the lightning speed of business; the perfect record-keeping of emails, texts, and video that capture nearly every utterance, no matter if out-of-context; online and employee activism; and the rise of activist investors who pressure companies to make ever-higher margins, and it leads to a dangerous business climate.

U.S. prosecutors' "formula," as *Economist* magazine has put it, "is simple: Find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges in a secret settlement (so nobody can check the details). Then repeat with another large company."

This is the perfect dodge for cash-strapped states and a federal government loath to raise taxes. However, justice should not hinge on hounding big companies into financial settlements just so they avoid the specter of a public trial.

Economists worry that the trend toward criminalizing "normal" business conduct throws off corporate planning, retards growth, and discourages foreign entities from investing in the U.S. All of this undermines America's global competitiveness.

"Left unchecked, this trend is bad for the rule of law and unhealthy for a business community that strains to compete in international markets," says Marrs. "Board members in charge of mitigating risk increasingly find themselves at wit's end."

The consequences of unwarranted criminalization are profound; They run far deeper than just one prosecution. It is tough enough for American corporations to compete with foreign companies that are often heavily subsidized by their national and local governments. When U.S. companies start getting prosecuted for the conduct of regular business, it puts everyone at risk—executives, board members, workers, and shareholders.

The burden of over-enforcement extends beyond taxpayers. As Marrs puts it: "Not many clients have the unlimited resources and thickness of skin to get into a nasty trial climate. Often the percentage move is to agree to a settlement—even if the client hasn't done anything unlawful. That's not a healthy situation for anyone."

It also may not be healthy that certain corporations have taken to hiring former prosecutors to help them avert unfair prosecutions. These former prosecutors appear to be preaching *voluntary* disclosure—urging companies to be as upfront and transparent as possible. The fewer corporate activities seen as furtive, the greater the likelihood that prosecutors will look elsewhere. Transparency always carries a degree of risk, but the risk associated with opacity is, in this instance, far greater.

"As far as deciding which firms to prosecute," observes Professor Eugene Soltes, an associate professor of business administration at Harvard Business

Limit Your Social Media Exposure

What Is Discoverable And Admissable?

Sameer Somal, co-founder of Blue Ocean Global Technology, believes that potential defendents must limit their exposure on social media or be confronted with dire consequences.

"Our dependence on the Internet for information and communication underpins the paradigm shift in how we approach creating, repairing and monitoring our digital reputations," he argues.

Social media evidence is discoverable and admissable. What you post online, both prior to and during a legal proceeding, may hurt you in court. Anything you type or is posted about you can be used as evidence. We advise attorneys and their clients that everything shared online is accessible by the plaintiff's legal team. Expect that you will be asked when your social media accounts were created and if you have posted something directly or indirectly related to the lawsuit, which includes instances labeled "private" or restricted from a public audience.

☐ *Do not delete your accounts or past social media posts.* Courts have established precedence of admitting social media content in favor or against your case. While controlling who can see your information is acceptable, courts have found erasing content suspicious and may consider it destruction of evidence. Adjust privacy settings, but do not delete social media posts. Even information that is thought to be deleted permanently is often recoverable through forensic and cloud storage methods.

☐ *Text messaging and all digital communication are discoverable.* Even self-incriminating messages sent privately through direct text or via an app, such as WhatsApp or Facebook Messenger, may be requested by the opposing party. Prosecutors can serve defendents with disclosure notices that require them to reveal private correspondence and password protected devices.

☐ *Win by not losing and limit your social media exposure.* Recognize that other people in your network may share content that can affect your legal proceeding. Unguarded moments may reveal material information. Where appropriate, notify colleagues, family and close friends. Photos that you publish, or those published by someone else without your consent, are admissable. Comments made by others can adversely impact your case and provide evidence against your direct defense. Ensure that when you are tagged by someone else, your settings do not automatically syndicate the original post to your profile or social media news feed.

☐ *Consider a virtual private network (VPN), which provides an alternative IP address to every email or website you engage with.* A VPN allows you to send and receive data as if you were directly connected to someone rather than leaving a public fingerprint. Never respond to messages from people you do not recognize. Avoid clicking on a link that cna be dangerous, downloading a questionable app, or even visiting websites of dubious authenticity.

☐ *Preservation of social media data responsibilities also apply to both the plaintiff and opposing legal team.* Review of electronically stored information applies to the defendants but may also be an opportunity for your legal team to ensure that plaintiffs are held to the same standards. When the plaintiff fails to produce electronically stored information, especially emails, your legal team may seek dismissal of claims and even monetary sanctions.

☐ *Tools are available for monitoring and researching social media.* Recommend that your litigation team search and monitor the Internet for anything that can undermine the plaintiff's credibility or claims. The best defense may benefit from proactively verifying all information and analyzing each social media account, profile, activity and related commentary.

Source: John Lauro, counsel to WellCare executives.

School, "I think the biggest shift has been around voluntary disclosure, especially in the context of the FCPA. Firms that bring such issues to prosecutors can qualify to not be charged if they are fully transparent. This is an important shift in policy and changes the calculus about how firms approach some of these issues."

Achieving a level of voluntary disclosure that might dissuade a prosecutor from launching an investigation is easier said than done. What other steps can companies take to try and inoculate themselves?

First, the CEO and the general counsel need to dictate from day one that the fewer non-transparent activities, the better. Sure, there are proprietary initiatives and secret-sauce recipes that cannot be exposed to sunlight, but they should be few and far between.

Second, do not wait until something unsavory happens—move now, during peacetime. Once the

charge has gone public, it is too late. Too many stakeholders, customers, and constituents conflate accusations with guilt.

Third, and this requires some collective action, join with associations, law professors, former prosecutors, and think tanks, as well as others known for their free enterprise and judicial fairness views, and articulate the need for balance. Produce videos to help dominate the search engines so that the challenge of overzealous prosecution becomes a national cause more than the sound and fury of a single victim.

The overregulation argument is an old saw that has lost a lot of its firepower because it was used for decades as an argument against all regulation. Show the negative impact on jurisprudence, business, the public trust or public policy, not just the potential negative impact on a single company or executive. The larger the risk to other audiences, the more likely the issue is to gain traction and sympathy.

Finally, collect and publicize the most egregious examples. Rather than allowing selfish prosecutors to dominate headlines, try to engage the public square with capitalism's reliance on fairness, not intimidation, as the lodestar. Applaud proper prosecutions and argue for some regulation. Change the national dialogue to address the discretion and intimidation that have become prosecutorial weapons rather than scales of justice.

This strategy was adopted a few years ago by the FCPA defense bar, which substantially changed the national dialogue. Amid the FCPA debate, DOJ and SEC lawyers increasingly saw a "don't over-prosecute" message every time they searched the Internet. If you want to impact collective behavior, there is no more powerful way than to influence search results. Videos do that faster than anything. Coordinate this with other companies, former prosecutors, thought leaders, business executives, and law professors. No one company can do this alone.

Require quarterly reporting to the board regarding compliance and regulatory matters as a preventative step. Also establish relationships with all relevant regulatory bodies.

What else can U.S. companies do to inoculate themselves from potentially devastating legal and regulatory probes? There are no sure-fire remedies, but smart corporations should consider:

☐ *Establishing a corporate compliance framework* that is endorsed by the board and embraced by all senior-level executives and managers. Ideally, the framework should outline a corporate code of conduct, investigation protocols, clear punishment for violations of company policies, regulations and the law, and a crisis mitigation plan.

☐ *Developing a communications strategy* that captures the corporate commitment to good governance, embraces transparency, strengthens the company's commitment to corporate social responsibility, cultivates prominent third parties, and encourages "authenticity" at the top.

☐ *Devising a crisis mitigation plan* including cross-functional participants, outside counsel and advisors, in preparation for any crisis that might arise.

☐ *Insisting on compliance benchmarks* in annual performance reviews for all levels of employees, including managers and executives.

☐ *Requiring quarterly reporting* to the board regarding compliance and regulatory matters.

☐ *Establishing relationships with all regulatory bodies* with oversight responsibility for your company, including providing regular updates to regulators on key issues.

☐ *Retaining outside counsel specifically for the board* in instances where a legal, regulatory or compliance matter involves a member of senior management, so as not to put the general counsel in an untenable position.

Even if a company takes these preventative steps, it is still difficult to make decisions in the "gray area," where an action may be technically legal, but can be interpreted in different ways, sometimes leading to prosecution. All companies must make decisions in this gray area, but executives tend to underestimate the risk associated with these decisions, sometimes naively believing that a legal or audit opinion will protect them.

Special software now exists that enables companies to identify when seemingly benign risks become

dangerous. Companies using KeenCorp software liken it to a "check engine light" for legal, accounting, and social media risk.

The more you have a trusted team, clear facts, sympathetic narrative, and an understanding of what is next, you can survive and make the best decisions.

The trend toward over-criminalization and over-prosecution shows little sign of abating in corporate America. Prosecutors at every level of government are incentivized to target companies and push for settlements.

More than nine out of ten legal actions launched by prosecutors end up settling, which only serves to encourage more and more prosecutions. Through transparency and voluntary disclosure, there are best practices that companies can contemplate to inoculate themselves.

☐ ***Gather the facts.*** One of the most challenging aspects of accusations is the "bust the trust." Suddenly, we do not know what or whom to believe. It calls into question everything. Even though this is a factual and legal analysis, it feels like an existential one, because it makes you question everything you knew or thought you knew.

☐ ***It is about the team.*** The team you are about to put together will make all the difference. Legal, communications, internal, etc. Your team has to focus on fact gathering and not a predetermined outcome. Much as it is painful to realize, people are naturally self-preservationists and will tell you the best version of the "facts" if it will make them or their department look better. Question everything. When you hear opinions, recommendations, and facts, read them back. "To be clear, you are saying…" When permitted by counsel, codify it. Memories are fleeting and there is no more lonely feeling than being the sole heir to ugly facts.

☐ ***Take control.*** The best way to take control is to develop a full chronology of the facts and a calendar of future events. These are the upcoming activities, from legal deadlines and investor relations requirements to public hearings and industry events which are likely to spark media interest. Your entire team must agree on this recitation. The more you understand what is going to happen, the easier it is to take control of the public narrative, your internal moral debate, and your own emotions.

☐ ***Emotions matter.*** Confidence grows when you know your facts, which is why the chronology and calendar are so critical. Being a target is an incredibly difficult thing. The more you have a trusted team, clear facts, sympathetic narrative, and an understanding of what is next, you can survive and make the best decisions.

☐ ***It is not about "fairness."*** While you can argue victimhood and bias, it is usually a waste of precious resources and clear thinking to spend time on how unfair the prosecution is. It may be true, but audiences are unsympathetic, and it prevents you from your best thinking. If there is a fairness argument to make, have other parties do it for you. They will be believed.

Is reckless prosecution clouding the future of corporate boards?

Kristin Calve, the publisher of the *Corporate Counsel Business Journal,* worries that the specter of being unfairly prosecuted is keeping eminently qualified people from seeking board directorships.

"Too many individuals who would make superb additions to corporate boards are declining the opportunity. They're concerned about being caught up in a nasty prosecution that ends up costing them money and brings risk to their reputation," Calve says. "The last thing someone coming onto a corporate board ought to be worried about is their susceptibility to a reckless prosecutor—but many are declining the opportunity to serve. There's little question that, left unchecked, these fears will have an adverse impact on the effectiveness and diversity of corporate boards." ■