

Questioning Corporate Criminal Liability

Michael Volkov, Partner, Mayer Brown LLP

The controversy surrounding corporate criminal liability is not just limited to FCPA prosecutions. It is an age old debate and it is worth reviewing the issue, especially as the Department of Justice continues to mount large-scale prosecutions against companies for FCPA violations, health care fraud, off-label marketing and other aggressive enforcement initiatives.

The doctrine of *respondeat superior* is the theoretical underpinning for holding companies criminally liable for actions of a single or a few employees, even when such actions are taken contrary to the company's compliance program. Under the doctrine, corporations can be held criminally liable for an employee's act so long as the act is committed in the scope of employment and with any intent to benefit the company. This well-established common law doctrine is relied on by federal prosecutors to hold company's accountable for the actions of its employees. In the face of employee misconduct, a company has no defense against prosecution when a single employee commits a crime. In most cases, companies have no choice but to resolve the criminal case and prosecutors know that companies have no choice but to settle the case.

Some have argued that the government should rely only on civil penalties against companies and avoid criminal prosecutions except against individual officers and employees. Opponents of criminal liability contend that criminal prosecutions only hurt the innocent shareholders of the company. No one would ever claim that a company should not have to pay some type of civil penalty and be subject to civil prosecutions. However, it is a different matter for a company to be held criminally liable for the actions of a single or even a few employees, despite the existence of a well-established compliance program. The current criminal system promotes equal treatment of companies, one of which has a comprehensive compliance program and another which has a non-existent or minimal compliance program.

While the United States continues with its aggressive prosecution of corporations, more countries are adopting similar laws and prosecution strategies. There are other ways in which to hold companies accountable and promote compliance without imposing criminal liability and collateral consequences. Companies that seek to comply with the law are, in effect, held to a strict liability standard when an employee commits a criminal violation. As an alternative, a company that takes reasonable steps to comply with the law could still be held civilly liable rather than criminally prosecuted.

Some argue that since a corporation cannot be imprisoned, there is no difference between a civil penalty and a criminal fine. But the argument really cuts both ways – if there is no difference then why should anyone care if a company pays a civil penalty or a criminal fine. If the collateral consequences of a criminal conviction are significant and society chooses not to impose such consequences, the collateral consequence laws could always be changed.

The power of the prosecutors is not just confined to threats of FCPA criminal cases against companies but extends to every aspect of our criminal justice system. Companies have no choice but to settle and cooperate with the government.

Prosecutors have even greater leverage in today's environment. It is no surprise that the Justice Department with company cooperation has developed deferred-prosecution and non-prosecution agreements as a way to avoid indictment. Almost every corporate case is now resolved through DPAs or NPAs which are negotiated with federal prosecutors and not subject to any meaningful judicial review (NPAs are not submitted for court review since there is no court action to defer).