

OPINION

■ NONPROSECUTION AGREEMENTS

They are useful devices

By *Andrew Weissmann* SPECIAL TO THE NATIONAL LAW JOURNAL

IT IS GOOD NEWS for thousands of innocent employees and shareholders across the country that the U.S. Department of Justice is increasingly offering deferred prosecution and nonprosecution agreements to resolve corporate criminal investigations, rather than the all-or-nothing choice between indictment and no charge at all. Yet this trend has lately provoked some to conclude that the federal government has gone soft on white-collar crime.

The fact is that such agreements are useful weapons against corporate misconduct. They avoid what may be an unwarranted “death sentence” while providing plenty of deterrent impact and punishment that is proportional to the conduct at issue. Indeed, many criticized DOJ’s decision to charge Arthur Andersen, after it turned down a deferred prosecution agreement, precisely because the indictment was viewed as causing the company to go out of business and exacting a toll on so many who had nothing to do with the charged conduct.

As the director of the Justice Department’s Enron Task Force overseeing the investigations of individuals and organizations growing out of the Enron scandal (and having spent 15 years in the Justice Department), I have firsthand knowledge of the competing and valid considerations that must be brought to bear in any decision to criminally prosecute a business.

At the outset, it is a very complex undertaking to determine whether an entire business

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should be prosecuted for committing a crime. For an individual, we look at whether the person committed a “bad act” (actus reus) and whether that person had the “bad intent” (mens rea) to perform the act. By contrast, under current federal case law, an entire business can be automatically liable for the actions of any single, low-level employee, even if the employee acted in contravention of a clear company policy. A company may try to deter such conduct through a robust compliance program, but no company can control completely the actions of the employees for whom it could always be held criminally liable.

As a result, having alternatives to indicting a whole company is extremely important. Deferred prosecution and nonprosecution agreements are alternatives that meet law-enforcement goals. The former results in a public charge against the organization, but commits the government to dismiss the charge if the defendant complies with the agreed-upon requirements during a set period of time, ranging typically from 18 to 36 months. A nonprosecution agreement works in much the same way, except that charges are not filed, but can be brought if the company does not comply with the terms of the agreement.

These agreements avoid the risks of trial and the expenditure of considerable prosecutorial resources. They usually result in payment of fines and restitution that can be orders of magnitude higher than those awarded after conviction. Deferred prosecution agreements can be used to achieve results that are rarely imposed following a trial and conviction, including the appointment of corporate monitors who oversee a company’s reforms and report to the government.

Despite what some critics think, no corporate chief executive officer wants an independent outsider with a direct pipeline to law enforcement agencies to be privy to all of the company’s affairs. Nonetheless, some have contended that CEOs are now likely to be more willing to violate federal law because they will expect to get away with a “mere” deferred prosecution agreement, rather than a criminal conviction. Both prosecutors and potential defendants would take issue with this assessment, since the choice between indictment and one of these agreements is a choice between a rock and a hard place.

The use of deferred prosecution and nonprosecution agreements, which have been available to individuals for decades, has of course grown in the business setting since Enron. But that is largely a result of DOJ’s increased focus on corporate crime in the wake of corporate scandals since Enron’s implosion in December 2001—not a result of a decrease in the seriousness of DOJ in combating white-collar crime.

Critics of deferred prosecution and nonprosecution agreements are correct in one regard. The use of monitors to oversee a company’s compliance with the terms of such agreements needs to be better regulated within DOJ. Creating pre-screened panels of qualified potential monitors, as is done with respect to criminal defense counsel assigned to represent indigent defendants, would help eliminate the actual or perceived unfairness of the current process. But fixing that problem should not entail eliminating the fair and salutary benefits of such agreements in corporate investigations. **NLJ**

They do not mean DOJ is going soft on crime.

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