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Reexamining the notion that public companies cannot fight criminal charges

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It is a well-understood maxim of US criminal practice that publicly-traded companies cannot risk indictment. This stems from the widespread belief that the collateral impact – from debarment, credit rating downgrades, reputational injury and investor uncertainty – is just too great. Knowledge of this axiom permeates the air around the negotiation table like the silent gorilla – prosecutors know it and so too do defence attorneys and their clients. Therefore, when corporate counsel cannot persuade prosecutors to decline a matter, their job typically shifts to negotiating the best deal they can. Of course, without a credible threat of putting the government to its burden of proof, the corporate defendant's leverage is significantly lessened. But two recent cases invite a reexamination of this convention.

PG&E and FedEx indictments

On 1 April 2014, publicly-traded Pacific Gas & Electric Company (PG&E), one of the largest combination natural gas and electric utilities in the United States, was indicted on 12 counts of violating safety standards set forth in the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. § 60123, and associated regulations. The charges stem from a



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multi-year investigation into PG&E's safety practices following a tragic 2010 pipeline explosion that left eight dead, scores injured and dozens of homes destroyed in San Bruno, California. The PG&E indictment has since been superseded to a total of 27 counts, now including a charge of obstructing the regulatory investigation that followed the San Bruno incident.

Several months later, on 17 July 2014, publicly-traded common carrier FedEx Corporation (FedEx) was indicted on 15 counts of conspiracy to traffic in controlled substances and misbranded drugs. The government alleges that between 2000 and 2010, FedEx conspired with certain internet pharmacies to ship and thereby distribute prescription drugs to persons who did not have a valid physician's prescription. The FedEx indictment also has recently been superseded, upping the charged counts to 18, to now include money laundering conspiracy charges.

Interestingly, both the PG&E and FedEx cases are being prosecuted by the US Attorney's Office for the Northern District of California (USAO). Whether this evidences a different approach to corporate criminal enforcement in this one of the 94 federal districts, or no more than coincidence, is at this point unclear.

How did PG&E and FedEx reach the

point of indictment

So what is it about the PG&E and FedEx cases that led these prominent companies into the seldom-explored space of post-indictment corporate defence? With experienced and skilful counsel on each side of the respective bargaining tables, how were settlement agreements not reached here as they are in the many other criminal cases brought against publicly-traded companies each year? The authors have no first-hand knowledge of these cases, but any trial lawyer will tell you that the cases most likely to go to trial are those in which the parties not only have different perspectives on the appropriate outcome, but view the case through fundamentally different prisms. Corporate criminal cases leading to and beyond indictment are no different. A comparison of the various press statements released following the indictments bears this out.

In announcing the PG&E indictment, the USAO first referred to the tragic San Bruno explosion and then reeled off a series of headline-grabbing quotes about PG&E's alleged failure to follow "minimum safety standards" and "disregard for the safety of [its] community". Numerous federal and state officials provided cameo statements on the importance of "providing justice for the individuals, families and community devastated" and "holding PG&E criminally

responsible" for the explosion. By contrast, PG&E has emphasised in public statements and court filings that the San Bruno pipeline explosion, while a "terrible accident", was not causally related to the alleged safety and obstruction violations with which PG&E is charged. Further, PG&E has already paid more than \$500m to victims in civil litigation arising from the explosion, as well as implemented substantial safety enhancements to prevent a future event. There thus appears to be a fundamental disconnect between PG&E and the USAO as to whether the alleged criminal conduct is related to – and therefore should derive its penalty from – the fatal San Bruno explosion.

With respect to FedEx, the government's allegations go to the core of the company's business model as a common carrier. The USAO's press release ties FedEx to a wide-ranging narcotics conspiracy whereby fly-by-night online pharmacies delivered controlled substances to "dealers and addicts". FedEx, for its part, has made crystal clear what it believes is at stake in this case: "The privacy of our customers is essential to the core of our businesses. This privacy is now at risk, based on the charges by the Department of Justice... [T]he government is suggesting that FedEx assume criminal responsibility for the legality of the contents of millions of packages that we pick up and deliver



every day. We are a transportation company – we are not law enforcement”.

As stated above, where the parties cannot even define the prism through which the conduct at issue should be viewed, it can be difficult to craft a mutually acceptable resolution between them.

Early signs point to only a modest impact from the PG&E and FedEx indictments

Without question, the indictments hang heavily over PG&E and FedEx and will continue to do so until the charges are resolved. But the companies appear to be bearing the weight thus far.

Because the focus of this article is on publicly-traded companies, it is natural to begin the assessment with the effect on each company's stock price in the aftermath of indictment. An examination of stock prices reveals that the bottom did not drop out of the trading for either PG&E's or FedEx's stock post-indictment. After a small 2.8 percent drop on the day of the indictment, PG&E's stock was up 1.8 percent one week after indictment, up 4.9 percent one month after indictment, and up 11.3 percent currently, at the time of writing. FedEx's stock also dipped following the indictment, though not precipitously – the farthest FedEx's stock has dropped is just over 5

percent, but as we write the stock has recovered and is currently right where it was pre-indictment. It must be noted, however, that the initial decline resulted in a shareholder derivative lawsuit, with activist shareholders alleging that the board members “stubbornly refuse to take responsibility” for the company's alleged misdeeds.

Another key risk most significant companies (publicly traded or not) facing conviction must assess is that of debarment from federal, state or municipal contracts and programs. With significant control over the natural gas pipelines and power grids of northern California, PG&E faces considerably less debarment risk than most companies of comparable stature. PG&E has stated publicly that it foresees no “negative impact” on its “ability to serve [its] customers”. FedEx, a significant provider of services to the federal government, including as by far the largest contractor of the US Postal Service, has announced no debarment impact in the early days of post-indictment operations.

The public relations impact of the indictments has seemed muted in the early goings. PG&E's “bad press days” came much earlier, in the immediate aftermath of the tragic explosion. The company's decision to put the USAO to its burden of proof in the ensuing criminal case does

not appear to have had a material impact on public opinion. FedEx also has not experienced significant public backlash from the announcement of federal charges. Indeed, the Wall Street Journal's Editorial Board has penned multiple Op-ed pieces critiquing the USAO (not FedEx) for “turning the screws with a goal of browbeating FedEx into settling the case”, while lauding FedEx “for not rolling over”.

Conclusion

To be sure, it is difficult to draw broad conclusions from the PG&E and FedEx indictments. These are but two of thousands of companies whose stock is listed on a US exchange and, sample size aside, it is very early in the post-indictment proceedings with substantial motion practice ongoing. Still, the fact that two blue chip companies have followed a different course and put prosecutors to their burden of proof is remarkable in its own right.

Defence counsel must evaluate each case on the strengths and weaknesses of its facts and the law, as well as the specific collateral risk profile of each client. But these cases may ultimately demonstrate that there are circumstances when the government must be put to its burden of proof – even for publicly-traded companies. This would be a welcome development indeed. ■