

Holding Corporations Accountable for Their Crimes

Four things have to happen if we are going to change corporate behavior:

- 1.—We need to increase the chance that corporate crimes will be revealed;
2. We need to increase the assurance that corporate crimes are punished;
- 3.—We need to make sure that the right bad actors are punished;
- 4.—We need to make the penalties fit the crime.

How does the False Claims Act fit into this matrix?

The core idea behind the False Claims Act is that if we incentivize integrity, we will get more of it. By incentivizing integrity, we can get more people to come forward with better information to win fraud cases. In addition, because the FCA calls for up to treble damages, plus statutory fines, plus the possibility of corporate exclusion from future government contracts, the penalty can be ramped up enough to deter bad behavior.

The idea of incentivizing integrity has been spectacularly successful: over \$31 billion in civil recoveries under the federal False Claims Act since 1987, plus another \$9 billion or so in state civil recoveries and criminal fines associated with False Claims Act cases. The success of the FCA has spawned other whistleblower programs at the state level, as well as with the SEC, the IRS and the CFTC.

The bad news is that the False Claims Act has never been solely about recovering stolen money. It's also been about getting companies to change the way they do business.

Have we been successful there? Not entirely. The problem is that when the modern False Claims Act was first framed in 1986, we thought corporations engaged in fraud for money, and they would stop engaging in fraud for money. All we had to do was hit them hard enough in the pocketbook. Treble damages, plus the possibility of additional statutory damages, plus the possibility of companies being excluded from participation in future government programs, would surely be enough pain to force change.

The problem in our thinking was that we did not understand that corporations do not commit crimes -- *people do*. And, to be clear, people do it for private profit: quick promotion, large quarterly and annual bonuses, lucrative stock options, and jaw-dropping golden parachutes.

When frauds are found out, none of these personal profits are ever clawed back. Everyone gets to keep their bonuses, their promotions, their stock options, and their golden parachutes. Almost no one ever goes to jail. The big companies are never excluded because they are too big to fail. The only thing that happens is that a few numbers on a Big Board on Wall Street flicker for a few minutes, and then everything moves forward, perhaps under a new fraud scheme.

This is the PP-CC game where profits are privatized (PP) and costs are commonized (CC). In the PP-CC game, if a fraud is not caught, then taxpayers pay, and if it is caught, then stockholders pay. Either way, the benefits of the fraud stay inside the pockets of those inside the building, while the costs are externalized to nameless, faceless people.

So how do we end this game? The answer is personal exclusion of key bad actors. Personal exclusion means the person excluded can never work in a management position in any company that bills the U.S. government. To be clear, personal exclusion from management does not necessarily have to extend to the CEO or CFO – it fact, going for such a trophy might be more trouble than it's worth. What if we simply excluded the regional managers or the project managers who knew all about the fraud? These are the folks who operationalized the scam on a daily basis, but chose not to be whistleblowers.

If we ramp up a solid administrative exclusion program for key bad actors, these folks will now have to decide if they want to go along with the scam and eventually be out of work and out of money when it found or, or whether they want to stand-up and lawyer-up to become whistleblowers, and perhaps get rich rewards in the process.

People can choose pain, or they can choose gain, but either way it's going to be *personal*, and by making it personal we can change corporate behavior much faster and at a deeper level.

