

## When It Absolutely, Positively Has to Be Indicted Overnight: How to Prevent Future Debacles Like the FedEx Prosecution

Monday, August 22, 2016 at 8:28AM

Paul E. Pelletier in Chabra-Smooley Organization, Federal Express, Yates Memo



Against the backdrop of years of unprecedented monetary penalties imposed through DOJ civil settlements and deferred prosecution agreements with financial institutions embroiled in the 2008 financial meltdown, the DOJ came under withering criticism for perceptibly treating scrutinized corporations simply as cash cows rather than addressing the actual criminal conduct of the corporations and their executives.

As a tacit acknowledgement of the merits of this perception, the DOJ took steps to reinforce the obligations of prosecutors when addressing corporate wrongdoing. From the Yates Memo's prescriptions relating to executive liability to **recent criminal pleas** tendered by financial institutions, the DOJ has sought to fortify its reputation for responsibly addressing corporate malfeasance. The recent failed FedEx prosecution, however, has exposed inherent flaws in DOJ's approach and has the potential to exact a crippling blow to these efforts.

Nearly two years after federal prosecutors in Northern California touted a sensational but otherwise precarious **drug trafficking indictment** of FedEx Corporation and two subsidiaries, prosecutors quickly raised the white flag on the second day of trial, when they conceded that evidence did not exist to sufficiently support the charges. This concession was not the product of a "new" revelation, like a witness gone south, but simply the product of an all too late admission that the evidence to indict the corporation was insufficient from the start.

Now, Brian Stretch, the U.S. Attorney in San Francisco, has commissioned an internal review of the actions that caused this frightful scenario to unfold.

While potentially laudable, this review should focus on procedural fixes that will ameliorate both the internal and external institutional failures, rather than an approach that would serve to only scapegoat the prosecution team. If recent past is prologue, rather than identifying and solving the actual problem, any after-action report likely will pillory line prosecutors and spare both supervisors and DOJ policy of scrutiny. Fixing the inherent systemic flaws that inevitably facilitated the FedEx prosecution will require a thorough and dispassionate analysis. While this review is pending, it is fair to ask how so flawed a prosecution passed the presumed DOJ litmus test of sound judgment.

Even a cursory review of **the FedEx indictment** (pdf) reveals readily obvious and potentially fatal deficiencies that deserved rigorous pre-charging analysis.

First, in its "summary" of FedEx's alleged criminal conduct, the prosecution outlined "no less than six" times in the prior *10 years* that FedEx had been "informed" that "illegal Internet pharmacies were using its shipping services to distribute controlled substances and prescription drugs."

Next, the prosecution identified two of these illegal internet pharmacies as “the Chhabra-Smoley Organization” and “Superior Drugs,” a putative “illegal fulfillment pharmacy.” As such, the government set forth its burden as having to establish that FedEx -- being generally aware of the problem of internet pharmacies’ illegal distribution of controlled and prescription drugs -- knew and understood that specific deliveries actually contained “illegally” prescribed drugs *and*, as part of an illegal agreement, purposely made these deliveries in cahoots with either the Chhabra-Smoley Organization or Superior Drugs.

For a **business with more than 400,000 employees** that makes more than 12 million deliveries every day, meeting the burden posed by this evidentiary intent ladder would be manifestly difficult to even the casual observer.

The substantive counts of drug trafficking also amplify the steep evidentiary challenges faced by the prosecutors. The indictment charged FedEx with illegally delivering eight separate packages of “controlled substances” on five separate days in July 2007 “knowing” that these particular “distributions” were “outside the usual course of professional practice and not for a legitimate medical purpose.” While the recipient of the packages was not identified in the indictment, presumably the government would have had to establish that FedEx also knew and understood that the recipient was a member of the otherwise notorious “Chhabra-Smoley Organization.” Absent direct evidence in a form similar to undercover tapes, it is difficult to imagine the government ever meeting its burden here.

Given the case laid out in the indictment, it is unsurprising that the government quickly folded when called to meet its evidentiary burden. Whatever the motivation of the prosecutors and supervisors who saw fit to allow this problematic indictment to proceed, the DOJ must prevent such debacles in the future. Appropriate remediation must include a focus on providing training to prosecutors, promoting qualified supervisors and ensuring adequate review of decisions to prosecute public corporations.

*Training.* The profound evidentiary and legal hurdles lurking in the FedEx indictment should have been obvious to any sound white collar prosecutor. From 2002 to 2009, during the existence of the Corporate Fraud Task Force, DOJ made a concerted effort to train prosecutors in the methods of effectively prosecuting culpable corporations and their executives. These training courses were routinely offered at DOJ’s National Advocacy Center. Unfortunately, from 2009 through at least 2013, these training sessions largely disappeared.

The dearth of training coincided with the nationwide departure of droves of experienced white collar prosecutors from DOJ. It is against this backdrop that the efficacy of the FedEx investigation and indictment should be measured. Corporate prosecutions require the participation of thoughtful, well-trained prosecutors. Absent sufficient experience and training, potential disaster looms around every corner, and the FedEx indictment is a prime example. As such, the DOJ must redouble its efforts to provide adequate training to its prosecutors and agents, especially in the area of complex corporate frauds.

*Supervision.* Supervising the charging decisions of line prosecutors, especially white collar prosecutors, requires both experience and expertise in the subject matter. Again, the recent mass exodus of experienced white collar prosecutors has served to deplete the depth of experience required for promotion to DOJ’s supervisory ranks. Bolstering and training the new supervisory ranks will most certainly require a concerted effort. The primary requirement, of course, is

objectivity. An ability to dispassionately review and distill the legal and factual efficacy of the charges is a fundamental skill that is especially essential in the review of complex corporate charging decisions. This does not require that government supervisors be principally rejective. Experienced and supportive supervisors understand that working with prosecutors to build strong cases necessarily involves killing the bad ones.

Line prosecutors intuitively appreciate the *bona fides* of such a process. While cultivating and promoting capable and experienced white collar prosecutors as supervisors can be a tedious slog, DOJ must make a concerted nationwide effort to diligently identify and promote from its ranks worthy candidates capable of fulfilling that vital function.

*Review.* Traditionally, upon request, “Main Justice” components would review corporate charging decisions of U.S. Attorneys’ offices prior to the filing of the charging instrument or indictment. This review, while not mandated by any written DOJ policy, would include a thorough review of the merits of the charging decision by the Chief or Principal Deputy Chief of the relevant component. For most corporate fraud charging decisions, the Fraud Section would be the appropriate component conducting the review. Upon review, the component would make either formal or informal recommendations to the Assistant Attorney General for the Criminal Division, who would then make a recommendation to the Deputy Attorney General, which would be communicated to the relevant U.S. Attorney’s Office.

During my time at Justice, I participated in many of these reviews and, with few exceptions, generally recommended authorizing the corporate prosecution, sometimes with modest adjustments. Arguably that process is flawed in its informality; it is not mandatory and does not require a written synopsis of DOJ’s views. Whether or not Main Justice was asked to weigh in on the legal or factual validity of the FedEx indictment, it is now readily evident that such reviews should be formal and mandatory. There is little, if any, downside to such a procedure.

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Charging a publicly traded corporation, given the potential breadth of harm to investors, employees and reputation, is an endeavor that requires the exercise of a great deal of deliberative, sound judgment. Rarely is the decision to charge a corporation one that needs to be made rapidly. Reflection and review are almost always appropriate. The propriety of these corporate charging decisions demands formal review by DOJ. Indeed, the Yates Memo requires a written justification supporting a prosecutor’s decision to *not* prosecute a corporate executive. With the potentially irretrievable consequences attendant to a corporate indictment, it seems obvious that there ought to be a formal written authorization by DOJ when the decision is one *to* prosecute a corporation.

In the aftermath of the FedEx prosecution a key unanswered question is whether the DOJ can find its way back to the successful strategies that it employed in the previous decade to credibly bring to justice to notorious corporate malfeasors. Recognizing the critical roles that adequate training, competent supervision and informed review play in an effective corporate enforcement program is a key step toward bringing the program back on course. Corporations and their employs simply should not have to suffer the consequences of a prosecutive rush to judgment. A thoughtful and concerted approach by the DOJ can prevent future injustices like the ill-timed delivery of the FedEx prosecution.

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