

The three-legged stool of corporate governance reform

by Jayne Barnard



Jayne Barnard

In March 1998, the London Stock Exchange issued some proposed changes to its Listing Rules. This document incorporates what has become known as the 'Combined Code' of corporate governance practices, a project of the Committee on Corporate Governance ('the Hampel Committee').

The Combined Code seeks to assemble in one place a code of best practice on corporate governance matters, the substance of which has previously been articulated in three separate documents, the Cadbury Committee Report (1992), the Greenbury Committee Report (1995) and the Hampel Committee Report (1998).

The Stock Exchange's publication of the Combined Code, together with proposed changes in the Listing Rules, was part of a deal reached with the Hampel Committee – the objective is to have a uniform understanding of what the corporate governance of public companies should look like (the Combined Code) and to have a mechanism of persuasion by which public companies that do not observe the agreed-upon best practices can be shamed into moving in the right direction (the Listing Rules). In a nutshell, the proposed Listing Rules would require listed companies to report on any areas in which they fail to observe the best practices prescribed in the Combined Code (para. 12.43A(b)). In addition, listed companies must provide a narrative summary of the ways in which they have sought to fulfil the general principles set forth in the Hampel Committee Report (para. 12.43A(a)).

laudatory effort at self-regulation by corporate leaders. Self-regulation, earnestly embraced, can go a long way towards changing behaviour. But it is fair to question whether self-regulation alone, or self-regulation as abetted by essentially benign Listing Rules, can provide the stimulus necessary to ensure that public companies achieve the desired measure of reform.

My scepticism is based, in part, on a tradition of multiple sources of persuasion. In the US, self-regulation (and self-correction generated by adverse press coverage) forms just a small piece of the web of influences that has helped shaped corporate governance practices in American public companies. More significant are a triumvirate of influences which are virtually non-existent in the UK:

- (1) shareholder enforcement devices;
- (2) direct regulation by the government; and
- (3) corporate criminal responsibility.

A number of other, less salient, devices also influence corporate governance in the US. These 'mechanisms of deputization' include a number of statutes that empower various constituencies – employees, customers, competitors, outside accountants, and even random citizens – to play a role in corporate governance reform.

What follows is largely a recapitulation of these sources of influence, together with some commentary on how they have contributed to the successes of corporate governance in the US. I do not take the position that the US model provides exclusive guidance for other markets in attempting to implement corporate governance reform. It is helpful, however, to consider how the mechanisms we will examine in these pages can:

- (1) compound the simple influence that self-regulation provides;
- (2) empower shareholders and others to play a more active role in the improvement of corporate governance practices; and

on the internet

www.brtable.org/pdf/corpgovpdf

See the Business Roundtable, statement on corporate governance, for more information on US projects concerning corporate governance reform.

The theory behind this structure is that peer- and shareholder-pressure will stimulate those companies that fail to comply with the Combined Code's prescriptions to improve their governance profile. There is some evidence that this mechanism has been effective in the past, particularly as regards growing compliance with the Cadbury Committee's recommendations (see Alice Belcher, 'Regulation by the Market: The Case of the Cadbury Code and Compliance Statement', 1995 *J Bus L* at p. 321).

The Cadbury, Greenbury, and Hampel projects and the Combined Code, like similar projects in the US, represent a

- (3) create an environment of ‘multiple awarenesses,’ in which corporate executives and non-executive directors are constantly attuned to the expectations under which they are supposed to operate.

The reader can decide for him/herself whether these sources of multiple awareness are so confining as to interfere with the profit-making objectives of the corporate governance enterprise. (The Hampel Committee has cautioned that attention to ‘compliance’ and keeping out of trouble may in some cases inhibit risk taking and the appropriate pursuit of profit, see Hampel Committee Report para. 3.7.) The fact that US corporate profits and stock market prices are at an all-time high suggests, but does not compel, a contrary conclusion.

SHAREHOLDER ENFORCEMENT

The first source of reinforcement that self-regulators can turn to in the US is the powerful and ubiquitous shareholders’ derivative suit. Accommodated by every state statute under which American companies are incorporated, and facilitated in federal courts by the Federal Rules of Civil Procedure (Federal Rules of Civil Procedure 23.1), the shareholders’ derivative suit is the primary mechanism by which the traditional norms of directorial behaviour – the duties of due care, loyalty and attention – are enforced. Most of the more notorious (and sometimes troubling) examples of the use of this mechanism come to us from the state courts of Delaware: four cases in particular, *Smith v Van Gorkom* 488 A 2d 858 (Del 1985); *MacAndrews & Forbes v Revlon Inc* 506 A 2d 173 (Del 1985); *Paramount Communications Inc v QVC Inc (In re Paramount Communications Inc Shareholders’ Litigation)* 637 A 2d 34 (Del 1994) and *In re Caremark International Inc Derivative Litigation* 698 A 2d 959 (Del Ch 1996), define the genre and its reach.

In *Smith v Van Gorkom*, the Delaware Supreme Court reviewed the slipshod practices of a prestigious board in Chicago and concluded that the haste with which they had approved a \$715m take-over bid failed to comply with the minimum requirements for ‘due care’. Noting that the board had spent less than three hours considering the terms of the deal, had discouraged alternative bidders and had failed to employ an investment banker to ratchet up the price of the company, the Supreme Court found that the company’s individual directors – both executive and non-executive – could be held personally liable for the difference between the sale price actually achieved for the company and some higher, ‘fairer’ price. The case was ultimately settled for (and the shareholders ultimately received) an additional \$23.5m (\$18m of which is said to have been paid to the plaintiffs’ attorneys).

The *Revlon* case involved a hostile take-over attempt by Pantry Pride Inc (whose CEO (Chief Operating Officer), Ronald Perelman, was regarded as a parvenu by the target’s incumbent management) of the cosmetics giant, Revlon Inc. Thwarted by Revlon, Pantry Pride and some of Revlon’s shareholders sued the company and the Supreme Court held that, where the sale of a company is inevitable, the incumbent board must permit an auction to occur, even if management prefers one of the bidders. To do otherwise would violate the directors’ duty to the shareholders. The *QVC* case reaffirmed the *Revlon* decision. In this case, also involving the efforts of a target corporation to fend off the advances of a so-called unsuitable bidder, the Supreme Court ruled once again that, where a change of control is

inevitable, the incumbent board’s only duty is to secure the best value reasonably available to the stockholders. (Both *Revlon* and *QVC* involved requests for direct judicial intervention into the decisions of a corporate board. By contrast, *Smith v Van Gorkom* and *Caremark* involved requests for monetary compensation.)

Caremark arguably represents the high-water mark of judicial control over directorial functions. The case involved a provider of medical services charged with multiple felonies. Specifically, Caremark was charged with violating federal and state laws prohibiting providers from paying any form of kickback to physicians for referring Medicare patients. The company ultimately settled these charges by paying \$29m in criminal fines, \$130m in civil damages, and \$5.5m in miscellaneous charges. (Caremark also entered into an agreement with the US Department of Health and Human Services to create a modern compliance program. It later paid an additional \$98.5m to reimburse private insurers.)

USEFUL DETERRENT

Imposing criminal liability on corporate defendants, as opposed to the individuals responsible for the crime, is not without its critics in the US (see, e.g., Jeffrey S Parker, *The Blunt Instrument* in *Debating Corporate Crime* (WS Lofquist, MA Cohen and GA Rabe, eds 1997); Jennifer Arlen, ‘The Potentially Perverse Effects of Corporate Criminal Liability’, 23 *J Legal Stud* 833 (1994)). Also, it is not a foolproof way to ensure that corporate governance practices are improved. Nevertheless, without the possibility of criminal prosecution and the substantial fines that can result from conviction, many more corporations would undoubtedly engage in clandestine illegal acts.

The question in the derivative suit was whether Caremark’s directors could be held liable to the shareholders for any portion of these payments. In fact that question was never specifically decided, because the case was settled and the court was asked merely to confirm, as required by law, that the settlement was ‘fair and reasonable’. The settlement did not involve any monetary payment, other than attorneys’ fees. The heart of the settlement was the creation of a board-level Compliance and Ethics Committee and some other prophylactic gestures. In deciding that the answer was ‘yes’, Chancellor Allen (*in dictum*) stated that:

‘[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and . . . failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.’

Though this language has been dismissed as ‘not a statute or rule, not a holding of the Supreme Court, not on appeal, not scary and not necessarily right or wrong’ by Delaware Chief Justice Norman Veasey, quoted in ‘Corporate Compliance Issues After Caremark’, *Corp Off & Dir Liability Lit Rep*, 11 June 1997, it has had a powerful impact. In fact, together with the US Sentencing Guidelines discussed below, the *Caremark* decision has brought about a revolution in board attitudes towards in-house compliance programs. Companies have scrambled to establish credible compliance procedures. Consultants have devised ‘best practices’ for the creation of a compliance program. Not surprisingly, experienced compliance officials are now able to command ‘top dollar’.

The derivative suit is not an unfettered right, and shareholders are often frustrated by the procedural and doctrinal impediments which are frequently placed in their way. Two of the most recurring vexations are the necessity of making a pre-litigation demand (see *Marx v Akers* 88 NY 2d 187; 666 NE 2d 1034 (Ct App NY 1996)) – exploring the history of the demand requirement and its varying applications in a number of states – and the pre-emptive capacity of ‘special litigation committees’ (committees comprised of disinterested board members who are authorised to request the court dismiss the suit, where it is thought not to be in the best interests of the corporation) (see *Cuker v Mikalauskas* 547 Pa 600; 692 A 2d 1042 (Pa 1997) – exploring the use of special litigation committees and adopting the guidelines set out by the American Law Institute (ALI) for determining when the requests of a special litigation committee should be honored. The business judgment rule itself (giving a presumption of validity to most directorial decisions) and especially the application of that rule to decisions regarding executive compensation (see *Zupnick v Goizueta* 698 A 2d 384 (Del Ch 1997) – dismissing a complaint alleging that a grant of stock options represented ‘corporate waste’ – are two other impediments that often limit shareholders’ ability to implement the owners’ will.

Even with all of its shortcomings, however, it is hard to imagine what the state of corporate governance in the US would be today were the derivative suit not available as a backdrop against which most corporate governance decisions are made. Certainly the anticipation of litigation shapes many board practices today. Moreover the emerging willingness of institutional investors to serve as lead plaintiffs in shareholders’ derivative suits gives those investors an important new weapon to use in the enforcement of governance norms. Which is, of course, as it should be. Back room cajoling, high-stakes negotiating, and even the publication of ‘non-performing targets’ lists can only go so far in achieving behavioural reform. The possibility of personal liability, or direct court intrusion into specific governance decisions, is the single most effective tool in enforcing directors’ fiduciary duties in American corporations today.

GOVERNMENT ENFORCEMENT

In the US, the direct enforcement of directors’ common law duties comes via the shareholders’ derivative suit. There are other, indirect, forms of enforcement, however, that originate with the Securities and Exchange Commission (SEC). The SEC’s authority, like that of any federal agency, is circumscribed by its enabling legislation. This means that the SEC cannot directly require companies to alter their corporate governance practices – in the US, corporate governance is a matter of state, not federal law (see *Business Roundtable v SEC*, 905 F 2d 406 (DC Cir 1990)). But by regulating the public disclosures of public companies and occasionally by intervening in disputes regarding proxy solicitation, which is also within its jurisdiction, the SEC has some powerful tools with which it can influence governance of public companies. This is certainly true of companies in the financial services industry, over which the SEC has expanded powers. It is also true, however, of garden variety public companies whose directors have been slacking on the job.

For example, in September 1997, the SEC issued a widely-discussed report censuring the directors of WR Grace & Co for

failing to insure that the company had adequately disclosed some remarkable features of the former CEO’s compensation package (see *In the Matter of WR Grace & Co*, SEC Exchange Act Rel 34-39157, 1997 SEC LEXIS 2038).

Specifically, the former CEO was given the use of a company-owned apartment with a market value of \$3m and provided with a cook, driver, secretaries, nurses, and the use of the corporate jet. The value of these perquisites, when ultimately disclosed, was over \$3m per year. According to the SEC, the directors, both inside and outside, who signed off on the company’s annual report, were required to make sure that these items were adequately disclosed. (The SEC has imposed detailed requirements regarding disclosure of executive compensation schemes. See SEC Exchange Act Rel 34-31327 (Executive Compensation Disclosure) (1992) describing in detail how executive compensation decisions are to be communicated to shareholders). By failing to interrogate the company’s disclosure counsel, ‘telling counsel exactly what they knew about the benefits, and asking specifically whether the benefits should be disclosed,’ WR Grace’s directors ‘did not fulfil their obligations under the federal securities laws’. Explicit in the SEC’s recitation of this matter was a condemnation of WR Grace’s ‘corporate culture’ and the excessive influence the former CEO held over the board. Implicit in the SEC’s report, moreover, was a criticism of WR Grace’s executive remuneration practices.

on the internet

<http://www.manifest.co.uk/hampel.htm>

An executive summary of the Hampel Committee’s report can be found at the Manifest site above.

In 1994, the SEC issued a similar report reviewing charges that the CEO and other top executives of The Cooper Companies Inc, a medical supply manufacturer, had illegally used the company’s funds to engage in securities fraud (*In the Matter of The Cooper Companies Inc*, as it relates to the conduct of Cooper’s board of directors, Exchange Act Rel 34-35082, 1994 SEC LEXIS 3975). Commenting on the failure of Cooper’s board to respond adequately to these charges – indeed, the board appointed one of the wrongdoers to serve as CEO, and gave him an off-site office from which he continued to run the company – the SEC concluded that Cooper’s board had failed to take ‘immediate and decisive corrective action.’ The message was clear: when directors harbour defrauders, they, too, can be held liable for violations of federal law.

The SEC has issued reports like these only sparingly, but they do capture the attention of top business leaders and their lawyers. A public castigation from the SEC, even when unaccompanied by a specific enforcement action, has a powerful impact. The impact is even greater, of course, when the SEC uses its full range of enforcement powers to seek a cease-and-desist order against a company and its executives (see, e.g., *In the Matter of Lee Pharmaceuticals*, Exchange Act Rel 34-39843, 1998 SEC LEXIS 691), or to seek injunctive relief (including an order of restitution) against corporate top executives in a federal court proceeding (see, e.g., *SEC v Eddie Antar* 54 F 3d 770 (3rd Cir 1995)).

In short, the SEC has a wide range of tools – from its bully pulpit to its power to fine and sanction – that are employed in

the cause of corporate governance reform. Without the presence of a vigilant SEC, the vast array of public companies in the US (now totalling close to 20,000) would be far more prone to egregious lapses by their managements than is now the case.

CRIMINAL LIABILITY

One might think it odd to refer to the federal criminal law as a mechanism of corporate governance reform, especially in a culture that does not recognize corporate criminal liability. In the US however, criminal liability itself and especially the existence of the US Sentencing Guidelines both have a profound, if often belated, impact on the ways in which companies are governed. For example, in recent years, a number of public companies have been prosecuted criminally (or threatened with prosecution) in ways that had a direct impact on the companies' corporate governance practices and also on their personnel. In addition to the *Caremark* case, discussed above, two other recent examples – perhaps the best, but by no means the only ones – give a sense of how this mechanism can work. In each case, the criminal law violations were clearly symptomatic of systemic management problems and a lack of effective leadership at the top.

Archer Daniels Midland Co

In June 1995 the FBI raided the Decatur, Illinois, headquarters of Archer Daniels Midland Co (ADM), looking for evidence of price fixing. ADM, an international leader in processed foods, was later charged with conspiracy to fix prices in the lysine and citric acid markets. When the dust had settled, ADM had paid \$100m in criminal fines plus another \$100m to settle civil lawsuits (including a shareholders' derivative suit brought against the directors for their negligence). On the plus side, the company's autocratic chairman and CEO, Dwayne Andreas, had been forced to retire as the CEO; his 'heir apparent', son Mickey Andreas, had been removed from the order of succession (he had, after all, been indicted in the price-fixing scheme); institutional investors had been activated and, at the October 1995 shareholders' meeting, had made a strong showing in opposition to the re-election of the board. By 1996, the board had been reduced from 17 to 12 members, of whom three were new and ostensibly independent and a new CEO had been appointed. Finally, by 1997, ADM was no longer the lowest-scoring company in *Business Week's* annual 'best and worst of the boards' league table. As part of the settlement of a shareholders' suit, ADM agreed that only outside directors who were not on the board at the time of the price-fixing scandal, could nominate the 1997 slate of directors.

Columbia/HCA Healthcare Corporation

In the summer of 1997, word leaked out of a federal investigation of grievous overcharges against state and federal funders by Columbia/HCA Healthcare Corporation, an American corporate giant owning 380 hospitals. The allegations suggested that Columbia/HCA had falsified thousands of reimbursement submissions, 'upcoding' the levels of care provided and requiring unnecessary tests. All this had occurred in an environment of intensive growth and expansion. The driven CEO of Columbia/HCA, Richard L Scott, had set profit growth targets of 15–20% per year. This had resulted in deep cost cutting with resulting allegations of frequent faulty treatments. Rumours suggested that the amount of the

overcharges might total as much as \$500m. Together with criminal penalties, Columbia/HCA's exposure could be more than twice that much.

Suddenly Scott and the company's president resigned and a new CEO was appointed. Within a few days, Scott's successor, Dr Thomas F Frist Jr, called for 'a complete overhaul of the aggressive culture established by Mr Scott', noting that, as a director, he had never been informed that there were any concerns relating to the company's Medicare reimbursement submissions. Frist promised to revamp the relationship between the CEO and Columbia/HCA's board. Within a few weeks, Columbia/HCA had appointed a full-time senior vice president for ethics, compliance and corporate responsibility. A few months later, the new CEO appointed three new outside directors to Columbia/HCA's board. The point, Frist emphasized, was to get away from Scott's old cronies and to appoint directors with a level of maturity and experience that reflected Columbia's size and role in the health care industry. The company also announced a corporate reorganisation plan that would include a significant spin-off. 'The Government actually did us a favour', allowed Frist, 'because it let us address an underlying issue, and that was the way you go about running this kind of company'.

UK CONTRASTED

In the UK, a business environment which, on the surface at least, looks much like that in the US, many of the mechanisms upon which we rely in the US are weak or non-existent. This suggests two possibilities:

- (1) British business leaders are less rapacious and better behaved than American business leaders and do not require the web of enforcement mechanisms that Americans require to keep them on the right course; or
- (2) British business leaders are just as self-serving and/or negligent as American business leaders but, because there are so few mechanisms by which their misconduct can be detected, are getting away with a great deal of improper conduct.

I doubt that either is entirely the case. Still, the differences in the systems are striking. It is fair to wonder if these differences are the result of historical quirks or of genuine cultural differences.

Imposing criminal liability on corporate defendants, as opposed to the individuals responsible for the crime, is not without its critics in the US (see, e.g., Jeffrey S Parker, 'The Blunt Instrument' in *Debating Corporate Crime* (WS Lofquist, MA Cohen and GA Rabe, eds 1997); Jennifer Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability', 23 *J Legal Stud* 833 (1994)). Also, it is not a foolproof way to ensure that corporate governance practices are improved. Nevertheless, without the possibility of criminal prosecution and the substantial fines that can result from conviction, many more corporations would undoubtedly engage in clandestine illegal acts. This is because the more conventional mechanisms for enforcing managerial norms – the shareholders' derivative suit and routine directorial monitoring – are unlikely to be effective in most areas of corporate crime because:

- (1) shareholders have little access to the necessary information;
- (2) there is little incentive for shareholders to act when the criminal conduct is profitable;

- (3) in the absence of some reward mechanism, shareholders' lawyers also have no incentive to convey a report of corporate crime; and
- (4) these same infirmities largely apply to members of the board of directors. Absent a stringent compliance program specifically involving the board (see below), directors are unlikely to be effective law enforcement agents.

In addition to the existence of corporate criminal responsibility, a related influence on corporate governance in the US is the US Sentencing Guidelines for Organizations, adopted in 1991 (USSG ch 8). These guidelines which govern the way in which corporations are sentenced (e.g. they determine the amount of the fine to be paid) include a number of incentives for companies to take prophylactic action to avoid prosecution. The strongest of these incentives is the provision that enables a company that has adopted 'an effective program to prevent and detect violations of the law' (in the vernacular, a 'compliance program') to receive a substantial reduction in any criminal fines incurred (USSG s. 8C2.5(f)). The elements of an effective program – including the appointment of high-level executives to ensure that it is being observed from the 'top down' – are clearly set out in the Sentencing Guidelines (USSG s. 8A1.2, App note (k)). The result of this provision, together with the impact of the *Caremark* case, discussed above, has been a dramatic increase in corporate compliance programs, many of which involve the board of directors. In addition a number of recent criminal cases have been resolved by the company agreeing:

- (1) to fire key individuals and/or give them up for individual prosecution; and
- (2) to create a strong compliance program, sometimes under monitoring by the court.

In these cases, too, the board has often been involved. Legal advisors to corporations have recognised that the single best way to avoid corporate misconduct, with its attendant exposure to significant fines and adverse publicity, is to involve executives – including the directors – in the process of detection and deterrence. The sentencing guidelines have encouraged this awareness.

MECHANISMS OF DEPUTIZATION

There are several other, less direct, sources of influence over corporate governance practices. These include statutory and common law provisions, but each provides a mechanism by which non-participants in corporate governance activities can play an important role in unveiling misconduct, and can often be compensated for their services. The theory, if there is one, is that shareholders, being distanced from the decisions that give rise to corporate misconduct, cannot alone be empowered to bring wrongdoing executives to heel. Consigning detection of wrongdoing to the government, either at the SEC or through investigation of criminal charges, is also insufficient, even in an administration committed to pursuing corporate crime. Rather, a complex web of law enforcement mechanisms, with a wide range of incentives and persons authorized to initiate them, is the best guarantee that executives (and non-executives) will honour their societal obligations. In a nutshell, these mechanisms, and the people who have standing to activate them, include:

- *False Claims Act* activated by any person (typically an employee);
- *Private Securities Litigation Reform Act* activated by public accountants;
- Federal antitrust statutes activated by any injured person (typically a competitor but sometimes a consumer);
- Federal anti-discrimination statutes activated by any person believing themselves to be aggrieved (usually an employee but sometimes a person denied employment);
- Federal environmental statutes with 'citizen suit' provisions activated by any person (typically a special interest law firm); and
- Product liability actions activated by injured consumers.

on the internet

www.dii.org/annualreport.html

See the 1997 Annual Report to the Public and the Defense Industry, (describing annual 'best practices' forums, an industry-wide code of ethics and other efforts at improving government contracting).

The *False Claims Act* (31 USC s. 3729ff.) applies to government contractors and anyone who submits 'claims' (typically invoices) to the federal government. The act has been applied to defence contractors, providers of services funded by Medicare, and drillers of oil on government land, among others. The key to its role in improving corporate governance is the 'whistleblower' provision which permits 'any person' with knowledge of overbilling:

- (1) to bring a suit against the company to recover the government's overpayment; and
- (2) to receive a percentage (ranging from 15–30%) of the total amount recovered.

In recent years, individual plaintiffs have been responsible for the recovery of nearly \$2 billion by the federal government. In addition, their actions have brought to light systemic failures of management supervision at dozens of government contractors. The result has been the creation of the *Defense Industry Initiative on Business Ethics and Conduct* (a consortium of defense contractors committed to maintaining effective compliance programs); the establishment of top (vice president) level compliance posts at most major government contractors; widespread changes in contracting practices and the replacement of CEOs and others at the companies with the most egregious records.

The *Private Securities Litigation Reform Act* includes a potent provision that requires that outside auditors for a public company include in their audit procedures specific procedures designed to detect illegal acts (15 USC s. 78j–1 *Securities and Exchange Act*, s. 10A). Where an illegality is detected, it must, unless it is 'clearly inconsequential', be reported to the appropriate level of management and also to the board's audit committee. Where, in the case of significant illegality, management fails to take appropriate corrective action, the auditor must then go directly to the company's full board. In turn, the board has one business day to convey the information to the SEC; if it fails to do so, the auditor must then contact the SEC itself. Though this provision has not yet been tested, it has the potential not only to 'force the auditor to take his role in the identification and reporting of fraud more seriously' and to

make the auditor ‘the public’s fraud detective’, but also to engage board audit committees in addressing illegal activities at a far earlier stage of development than otherwise would have been the case.

The federal antitrust laws, too, can play a role in improving corporate governance, as suggested by the discussion (above) of the ADM case. Under US antitrust law, interlocking directorships are prohibited (see 15 USC, s. 19; *Clayton Act*, s. 8) and price-fixing – with its exposure to treble damages – can also result in loss of position for those who run non-complying companies. Recently, for example, Ucar International Inc, a manufacturer of graphite electrodes, replaced its CEO and several top-level executives, shortly before pleading guilty to a massive international price-fixing conspiracy and paying a record \$110m fine.

Similarly, the federal anti-discrimination laws have proven to be influential in shaping corporate cultures and provoking personnel changes even at the highest levels of governance. Both at Mitsubishi (US) and Texaco Inc, for example, allegations of pervasive discrimination against women (in the case of Mitsubishi) and African-Americans (in the case of Texaco), have resulted in major policy overhauls as well as reassignments at the top. The saga at Astra USA – a pharmaceutical company at which the CEO plundered the corporate treasury for his own (sometimes criminal) uses, committed personal and corporate tax fraud, and presided over a corporate culture that included the procurement of prostitutes as ‘rewards’ for top sales producers, rampant sexual harassment of female employees, discharge of ‘older’ women and women who became mothers, and diversions of funds for executives’ personal use – became public solely because of a handful of employees who sought to sue for sexual harassment. The CEO, now in prison, was belatedly removed by his board of directors and the entire senior management staff was replaced. Without the aggressive efforts of the Equal Employment Opportunity Commission together with the efforts of *Business Week*, which broke the story, the mismanagement at Astra might have gone undetected for years.

Finally, the ‘citizen suit’ provisions of US environmental laws and product liability suits under common law, also can have an impact on corporate governance practices, though this impact has rarely been felt. Citizen suits permit individuals to prosecute polluters and, in effect, ‘stand in the shoes of the government’. Product liability actions permit injured individuals to sue manufacturers of dangerous products, recovering both actual and punitive damages. Occasionally, each type of suit has resulted in policy and personnel changes.

THE BOTTOM LINE

Though there are certainly some critics, a majority of Americans have concluded that multiple sources of influence, including regulatory statutes, statutes providing incentives for employees and others to blow the whistle on their bosses, shareholders’ derivative suits, corporate criminal liability and, occasionally, direct government intervention, can collectively generate better corporate citizenship and better corporate governance than a rudimentary system of self-regulation.

on the internet


<http://www.corpgov.net>

The Corpgov site is designed to provide a springboard for explorations and discussions concerning the movement to enhance wealth by creating more democratic forms of corporate governance. It provides a library, news pages and useful links to other sites of interest.

By contrast, in the UK, a business environment which, on the surface at least, looks much like that in the US, many of the mechanisms upon which we rely in the US are weak or non-existent. This suggests two possibilities:

- (1) British business leaders are less rapacious and better behaved than American business leaders and do not require the web of enforcement mechanisms that Americans require to keep them on the right course; or
- (2) British business leaders are just as self-serving and/or negligent as American business leaders but, because there are so few mechanisms by which their misconduct can be detected, are getting away with a great deal of improper conduct.

I doubt that either is entirely the case. Still, the differences in the systems are striking. It is fair to wonder if these differences are the result of historical quirks or of genuine cultural differences.

Whatever the case let me close this review with an observation: as the Labour government considers a retreat from *Foss v Harbottle*, the possibility of codifying corporate manslaughter, and a possible revision of company law, there will be many opportunities to create mechanisms designed to strengthen corporate governance in Britain. Each mechanism has its costs; each imposes another layer of expectation on corporate managers. As always, the question is one of balance. 

Jayne W Barnard

Professor of Law, The College of William & Mary, Williamsburg,
VA 23187 USA

jwbarn@facstaff.wm.edu

