

Corporate Executives in the Cross Hairs: U.S Department of Justice Amps Up Quest for Individual Accountability for Corporate Misdeeds

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This month, the United States Department of Justice issued an unambiguous directive to its army of white-collar prosecutors – hold individuals accountable. By publishing its “new” internal policies to the New York Times, it appears that the Justice Department is taking aim to shift increasing public perception that the government spares corporate executives regardless of the carnage left in the wake of their wrongdoing. Although many of the memo’s directives simply provide a re-boot of existing policies, some new measures are specifically designed to prevent culpable individuals from escaping the consequences of their corporate misconduct.

The September 9, 2015 memo reflects the recommendations of a DOJ working group tasked with identifying ways to more effectively pursue individuals when investigating corporate transgressions. The mandate that likely packs the most punch provides corporations may not receive any cooperation credit unless they reveal all facts related to every employee or officer involved in the matter. This new requirement complements other guidelines that require individual cases to be resolved in conjunction with the corporation’s disposition and not held until later, in the hope of extricating individuals from the harshest penalties. The memo further directs that culpable actors should not be released from responsibility in resolving the matter against the corporation. The logic: *Unless individuals are held personally accountable, corporate crime will not be deterred.*

“Six key steps” for DOJ investigators probing corporate malfeasance are expressly enumerated:

1. To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.
2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
3. Criminal and civil attorneys handling corporate investigations should be in routine communication with each other.
4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

The precise impact of DOJ’s battle plan remains to be seen. Law enforcement probes into corrupt businesses are inherently difficult and many of these directives may be far easier to articulate than to effectuate. Yet the takeaway is unmistakable—the Government is reinvigorating its pursuit of individual white-collar wrongdoers making it more difficult for guilty actors to hide behind the companies they misuse and injure. Those employees in the cross-hairs must be aware of heightened corporate incentives to identify and turnover potentially culpable individuals. Companies must likewise understand that the quality of their internal investigations into their own conduct and the effectiveness of early negotiations and cooperation with DOJ are critical and can make all the difference to survival or demise of the business in the end.

Practices

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