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## doj sets its sights on directors and officers

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*MSK Client Alert*

September 2015

Whether publicly traded or privately held, corporate boards have been put on notice – the Department of Justice (Justice or DOJ) is after you! On September 9th, DOJ issued a memo entitled: *Individual Accountability for Corporate Wrongdoing*. In it, Main Justice made clear to all offices that any activity which involves the potential for liability on the part of a corporation can and must also focus on the potentially culpable individuals.

Deputy Attorney General Sally Quillan Yates signed the memo which sets out six (6) criteria the U.S. Attorneys' Offices are to consider when investigating a case, and all of them deal with exacting the greatest penalty possible – accountability by individuals. The memo goes so far as to say, don't stop just because the individual does not appear to have sufficient assets to satisfy a possible assessment. A civil judgment alone may be sufficient, under the right circumstances.

This policy is couched in terms of fighting "corporate fraud and other misconduct" but, in many ways, it beefs up the policy already in effect in many individual DOJ offices. Following the 2008 financial meltdown, many Americans questioned why so few individuals suffered the consequences of the financial beating they were seen as having caused. Individual U.S. Attorneys took that to heart and began pursuing individuals, but still, not many are individually prosecuted, even today. The greatest number, beside outright criminal cases, seem to involve Foreign Corrupt Practices Act and False Claims Act violations, but even those are but a handful of cases.

What this policy states is that prosecuting individuals deters future illegal activity, incentivizes changes in corporate behavior, ensures the proper parties are held responsible and promotes public confidence in the justice system. Specifically mentioned is the "culpability" of high-level executives.

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corporate & business transactions  
international trade  
labor & employment  
regulatory



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Following the recommendations of a working group of senior attorneys, the following guidance was laid out:

1. To qualify for cooperation credit, corporations must provide to DOJ "all relevant facts relating to the individuals responsible for the misconduct";
2. Criminal and civil investigations should focus on individual liability from their inception;
3. Criminal and civil attorneys handling corporate investigations should routinely communicate with each other;
4. Absent "extraordinary circumstances or approved departmental policy," DOJ will not release individuals when resolving matters with corporations;
5. DOJ attorneys are not to resolve matters with corporations without a "clear path" to resolving the related cases against individuals; and
6. Civil attorneys should also "consistently" focus on individuals and corporations, and evaluate bringing suit against an individual "based on considerations beyond that individual's ability to pay".

What this means for any corporation under investigation is be prepared to identify the wrong doers, and turn over all the related evidence. If a corporation fails to do so, it will be denied credit for cooperation during the charging and sentencing stages of a case, and this is true whether the underlying case involves a criminal prosecution or one of a civil nature.

Years ago, DOJ demanded corporations waive the attorney-client and work product privileges and refuse to defend individual employees in the face of claims of serious violations in order to obtain cooperation credit. That stopped when the courts found such actions to be overreaching. Has this latest effort gone too far? The goal stated in the memo is to "obtain from the company as much information as possible about responsible individuals before resolving the corporate case". It remains to be seen how individual prosecutors will respond in the face of submissions which stop short of "fingering the guilty party". Put another way, "the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to [DOJ] all facts relating to that misconduct".

Criminal and civil attorneys are now expected to focus on individual wrongdoing while also evaluating corporate malfeasance. Frankly, this is not much of a change in practicality. When law enforcement conducts an investigation, the investigating officer routinely seeks to convince lower level staff to implicate higher-ups. The difference now is the leverage DOJ is directed to bring when deciding charges and/or during sentencing. If the company is seen as not doing enough, the charges could well be more serious and the fines much greater, plus now, in the face of this just released guidance, the careers of individual directors, officers and managers is more directly at risk.

The guidance makes clear the goal is to: "hold wrongdoers accountable and to deter future wrongdoing." As noted, even if an individual cannot pay the likely fine, his or her example is seen as a means to change the behavior of others and serves as "long-term deterrence". The factors to consider are whether the misconduct was serious, is actionable, whether admissible evidence will be sufficient to obtain and sustain judgment and whether



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pursuing the action reflects an important federal interest. Also to be considered are the individual's misconduct, past history and the overall circumstances of the given case.

Of particular interest to many will be the sentence in the memo which states: "Consultation between the [DOJ]'s civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies ... and promotes the most thorough and appropriate resolution in every case". In short, it is reasonable to expect that agency attorneys will consult closely with DOJ attorneys much earlier in the process than typically happens now. Today, generally, the manner in which a prosecution occurs is the agency conducts its investigation and brings it to the attention of the attorneys working for that agency while the case itself is only later referred for enforcement to DOJ (whether criminal or civil). Given this newly minted guidance, it is likely agency investigators and attorneys will consult with DOJ sooner, and more closely coordinate their efforts.

In the international trade context, it is routine to see individual liability applied. For example, in *United States v. Trek Leather*, 2011-1527, Court of Appeals for the Federal Circuit, 2014 U.S. App. LEXIS 17746, September 16, 2014 Decided, the appellate court found the President of the company liable for gross negligence in circumstances where he knew the value being declared at time of entry was too low, submitted the documents himself or through third parties to the customs broker, and never corrected the entries despite the under declarations being brought to his attention. Serious violations of the Dept. of State export regulations commonly result in criminal prosecutions or fines in the tens of millions of dollars. Similarly, last week, the Dept. of Commerce imposed a \$3.5 million penalty on a company and its affiliates, including the Chairman and CEO of one entity and the President of another to settle charges they sold U.S. goods without licenses in violation of U.S. export laws.

What does all of this mean for Boards and C-suite occupants? The first question is, when was the last time your company's compliance efforts were thoroughly evaluated? Are you bench-marking to make sure what you are doing compares favorably with others in your industry? In the face of Sarbanes-Oxley's requirement that CEOs and CFOs attest to the accuracy of the company's financial statements, are your compliance efforts sufficient? Will they uncover situations where two invoices are issued? What about the propriety of any commissions being paid? Are your trademark or copyright license agreements in good order and royalties fully paid? Are you accurately and completely declaring your imported or exported goods? Are you in full compliance with the rules and regulations of all the agencies which have jurisdiction over your business operations? When was the last time your company underwent a complete and thorough review of all of its business operations to confirm everything was in order? When was the last time the Board voted against increasing the company's compliance budget? Are you sure the employees in charge of compliance really know their jobs?

If Boards and executives do not get ahead of the compliance issue, the company could find itself with a number of headaches, such as:

1. Really bad press which calls into question the ethics, fundamental philosophy and reputation of the company;



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2. Replacement of key senior management personnel;
3. Establishment of an outside monitor to oversee your operations;
4. Forced revisions and improvements to the company's compliance program;
5. Enhanced compliance training for responsible employees;
6. Completion of a targeted audit to review the company's current overall state of compliance; and
7. Potentially very significant fines and other enforcement consequences.

Are you ready for any of that? What will your shareholders say? What does this do to employee morale?

All too often we have seen DOJ find one bad apple in an industry, and then assume everyone else exercises the same bad behavior! How does your company stack up against the legal and regulatory requirements and the other activities that go on in your industry? How easily can you establish your company is one of the "good guys"? Now is the time. Are you sure your company is ready?