

Legal Alert

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QUESTION: SERIOUSLY, THE FEDS ARE PROSECUTING ME PERSONALLY?!

ANSWER: FEDERAL PROSECUTORS HAVE BEEN TOLD TO PURSUE INDIVIDUALS IN CASES OF BUSINESS MISCONDUCT!

You mean my job can earn me a striped uniform?

Federal prosecutors have now been told to specifically target individuals in cases of business wrongdoing. “Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing,” according to the U.S. Attorneys’ Manual, as revised by the U.S. Justice Department in November 2015.

Federal prosecutors are to “maximize the likelihood that the final resolution will include charges against culpable individuals and not just the corporation.” Prosecutors have been told to focus early in business investigations on potentially responsible individuals and “all efforts should be made . . . to prosecute culpable individuals”

If prosecutors choose to resolve investigations against the business entities without bringing criminal or civil charges against individuals, the prosecutors must get approval by the U.S. Attorney or Assistant Attorney General or their designees. In other words, prosecutors will need to explain why individuals have not been pursued and get approval from their high-level supervisors.

Why is everyone blaming me?

The Feds want a business to seek leniency by “offering up its directors, officers, employees, or agents.” The revised “Principles of Federal Prosecution of Business Organizations” (Section 9-28.700 of the U.S. Attorneys’ Manual) sets new rules for corporations to try to have penalties reduced. The business entity is now required to “throw the individuals under the bus” to be eligible for any reduction in sentencing. “In order for a company to receive any consideration for cooperation under this section, 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 the Department all facts relating to that misconduct.” Companies must now “cooperate completely as to individuals” in order to be “eligible for consideration for cooperation credit.”

Now that the government has increased the emphasis on individual liability in business cases, internal business investigations will be trickier. The rewards for pointing fingers at others have increased significantly. The government will now give separate consideration to “prompt disclosure” in deciding upon leniency.

Providing prompt and complete information about the involvement of individuals in business wrongdoing is now a “threshold hurdle” to any credit for cooperation in the sentencing phase.

Everyone has a whistle!

Almost any individual can be a protected “whistleblower.” The laws already provide huge incentives for whistleblowers. The new prosecutorial guidelines now make it advantageous to be the first to blame others.

Those who “point the finger” are protected if they “reasonably believe” wrongdoing has occurred. Imagine the potential mischief from unhappy employees with nothing to lose!

Beware the Feds!

The dangers of doing business with the federal government have increased. Under statutes such as the Forfeiture of Fraudulent Claims Act, the False Claims Act, the Anti-Kickback Act, and others, “specific intent to fraud is not required.” *Morse Diesel International, Inc. v. United States*, 74 Fed. Cl. 601 (2007).

Some of this is not new. Back in 1975, the U.S. Supreme Court noted that the liability of managerial officers in some cases “did not depend on their knowledge of, or personal participation in, the act made criminal by the statute.” Under many statutory schemes, people can be prosecuted where “an omission or failure to act was deemed a sufficient basis for a responsible corporate agent’s liability.” *United States v. Park*, 421 U.S. 668, 671 (1975).

What has changed, however, is that federal prosecutors have now been told explicitly to go after individuals. Prosecutors have been directed that they can only fail to pursue individuals after justifying those decisions to high-level supervisors. Those prosecutors may be from the federal government, but they are not here to help you!

Be cautious of the Feds and call if you need help!