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A Better Approach To Environmental Prosecution?

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David M. Edelstein

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David Edelstein, an associate in the Vorys Cincinnati office and a member of the finance, energy and real estate group, authored an article, titled "A Better Approach To Environmental Prosecution?," for *Environmental Law360*. The full text of the article is included below.

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A Better Approach To Environmental Prosecution?

As the U.S. economy continues to rebound from the economic crisis of 2008, one of the issues that has come to the forefront is the lack of individual prosecutions for the wrongdoing that led us to the brink of collapse. In response to this criticism, the U.S. Department of Justice is attempting to strengthen its stance against individuals who engage in corporate malfeasance.

The response of the DOJ has been to issue new rules and sweeping "guidance" for federal prosecutors going forward. These rules will apply in all investigations of corporate wrongdoing, including investigations of environmental wrongdoing.

The Department of Justice's Position

Deputy Attorney General Sally Yates issued a memorandum containing new guidance in a September 2015 document titled "Individual Accountability for Corporate Wrongdoing." The document provides a set of comprehensive guidelines that federal prosecutors should follow, and it gives federal prosecutors potent new tools to use in prosecuting individuals who are implicated in corporate misconduct. The memorandum sets forth six protocols that must be followed when investigating corporate misconduct. (See "Individual Accountability for Corporate Wrongdoing")

What are the Six New Protocols?

The first directive is aimed at corporations. If a company wants “cooperation credit” against fines and penalties, it must now provide the DOJ with all relevant facts relating to the individuals who are responsible for the actual misconduct. This applies to both criminal and civil investigations.

The second protocol directs federal prosecutors to now focus their investigations on individuals from the outset when investigating criminal or civil corporate wrongdoing. The purpose of this is to encourage employees with knowledge to provide information about those who are senior to them, to increase the number of persons subject to prosecution.

The third protocol requires civil investigators and criminal investigators to now share information regularly. The DOJ wants civil and criminal cases developed in tandem, to enhance overall enforcement.

The fourth directive states that when a corporation enters into a settlement with the DOJ, individual wrongdoers will not be released from criminal or civil liability as part of the settlement unless “extraordinary circumstances” are present.

The fifth protocol is again aimed at the DOJ attorneys. DOJ resolution of a corporate investigation must include a plan to resolve investigations of individuals. If the attorneys decide not to press charges or seek civil penalties against an individual, the reasons for that decision must be put in writing and approved by either the attorney general or the deputy attorney general.

Finally, in the sixth directive, DOJ attorneys in civil enforcement are instructed to focus on individuals, not just the company, and to consider factors other than the wrongdoer’s ability to pay when deciding whether to bring suit against the person.

This new guidance document was incorporated (it’s a single promulgation) into the U.S. Attorney’s Manual, updated in November of 2015 to include a directive to prosecutors on all corporate prosecutions and individual prosecutions for corporate wrongdoing. The manual instructs federal prosecutors to focus on individual wrongdoing from the outset of any corporate misconduct investigation. According to the manual, holding the proper individuals accountable for corporate malfeasance will serve many purposes: (1) it will act as a deterrent to future wrongdoing; (2) it will incentivize corporate change; (3) it will hold the actual wrongdoers responsible; and (4) it will restore public confidence in the justice system.

This New Focus Applies to Environmental Crimes

The DOJ also announced in December of 2015 that efforts to enforce environmental and safety laws will be intensified. This will be accomplished by adding environmental criminal counts to prosecutions related to worker safety. Because worker safety issues are often classified as misdemeanors, adding environmental crimes will allow the DOJ to impose greater penalties, thereby theoretically increasing the deterrent effect.

Furthermore, although the September 2015 DOJ memorandum appears to have been aimed at the banking industry, it will likely be applied to environmental violations as well. We may now see an increase in prosecutions against persons for environmental crimes. These cases often create dilemmas for corporate compliance officers, who may find themselves caught in the middle between higher-level management and the personnel directly involved in the environmental violations.

In environmental prosecutions, like elsewhere, bright-line rules, applied broadly across an entire industry or nation, provide difficult results. Hopefully, the DOJ memorandum and updated manual for U.S. attorneys will not result in cut-and-dried outcomes no matter the facts of the case. One hopes there will still be room for pragmatic problem solving and flexibility when resolving environmental investigations.

Key Factors Going Forward

The strong wording in the DOJ September 2015 memorandum, coupled with the updated U.S. Attorney's Manual and December 2015 environmental announcement, suggests that senior management and corporate employees should be prepared for federal criminal investigations into environmental violations. Corporations will no longer be able to enter into global settlement agreements, which resolve liability on behalf of the company and also cover all of the company's employees, officers and directors, except under the most extraordinary circumstances. This means that individuals accused of wrongdoing will need to resolve their cases directly with the DOJ, as their charges will not be settled when the corporation settles its part of the case.

How Can Corporations and Employees Protect Themselves?

It is the job of corporate compliance officers to have effective programs in place which will prevent and also detect misuse of corporate funds, improper discharge of pollutants, or any other corporate wrongdoing. To ensure that the compliance system functions properly, senior management should review and update the compliance policies and programs and provide adequate training on revised programs. All new employees should be properly trained as well.

Corporate compliance officers must act swiftly and properly to respond to reports of potential misconduct or violations. There should be standardized procedures in place for responding to such claims. These protocols should help the corporation determine what level of internal investigation is necessary, who is responsible for conducting the initial investigation, and the role of legal counsel. The protocols should also account for what happens once the investigation is over and include compliance restoration work.

Community Service as an Aspect of Environmental Sentencing

When an organization is convicted of a crime, the Federal Sentencing Guidelines allow for organizational community service to be a part of the sentence. A novel approach to reaching a settlement with the government in cases involving environmental crimes is to propose a community service project that is related to the environmental impacts. By way of example, if water was polluted from a contaminant release, some or all of the damage may longer be remedied.

However, a community service project aimed related to the streams' condition could be considered when a company proposes a community service that would benefit the victim community, on the agreement that the plea would "wrap up" the case, the DOJ's policies should not cost the community this benefit simply to pursue misdemeanor investigations against individuals in that organization.

How To Respond to an Environmental Investigation

The new focus on individual wrongdoing does not mean there is no longer room for effective negotiation if your company and/or individual employees become the target of an investigation. To be in a position of strength to negotiate a settlement, it is important to maintain a good relationship with the proper regulatory agencies.

An enforcement official is more likely to allow violations to be corrected without starting civil or criminal enforcement when the corporation and compliance individual(s) in question have a history of responsiveness and cooperation with regulatory officials and requests. This also means that if a notice of violation is received, it should be corrected immediately, and the correction should be fully documented. Advising the regulator of the correction can help avoid additional enforcement.

If you receive a regulatory inquiry related to an environmental violation, you should seek legal advice prior to responding. Criminal enforcement will now become more commonplace in light of recent DOJ guidelines.