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Is DOJ violating its own policy?

George B. Newhouse Jr. is a former federal prosecutor and partner with Dentons.



The Department of Justice's timing was perfect - if not ironic. Literally days after announcing DOJ's "new" corporate prosecution guidelines, designed, the DOJ contends, to encourage the prosecution of individual defendants involved in corporate fraud, another big settlement with an errant, but large corporation was announced.

General Motors and U.S. Attorney Preet Bharara of the Southern District of New York announced payment of a significant fine in the context of a settlement of a criminal investigation which revealed that GM concealed potentially deadly safety defects affecting vehicle ignition switches from its regulator, the National Highway Traffic Safety Administration (NHTSA).

GM's misconduct persisted over several years, from the spring of 2012 through February 2014, and adversely impacted the safety of thousands of GM cars. In fact, GM has admitted that the faulty ignition switches caused 15 deaths (some say 124 deaths were caused) and a large number of serious injuries. To resolve its criminal issues, GM agreed to pay a \$900 million fine, endure a independent monitor who will review its safety policies and - hold on - admit its wrongdoing in a deferred prosecution agreement (DPA), meaning that the company will not actually suffer a criminal conviction. It will never be called before a federal judge to be sanctioned for its crimes. Nor apparently will any of GM's employees be prosecuted.

How does one reconcile that settlement with the so-called Yates Memo? The week before, on Sept. 9, in a memorandum issued by Deputy Attorney General Sally Q. Yates, the DOJ heralded a sea change in policy, encouraging federal prosecutors go tough on corporate crime by focusing on, if not indicting, individual executives. Corporations, after all, cannot commit crimes. Individuals commit crimes and corporations are derivatively liable for those actions.

In the wake of several widely publicized post-2008 (i.e., the financial meltdown) corporate prosecutions that left individuals unprosecuted, while the DOJ rang up record "fines" typically implemented through DPAs or NPAs (nonprosecution agreements) against erring corporate offenders, the DOJ made changes to the Principles of Federal Prosecution - comprising key DOJ policy and directives guiding federal prosecutorial decisions.

The import of the Yates Memo, and presumably its motivation, is to refocus prosecutors' targets on the persons who are ultimately responsible for corporate misconduct: executives and key management employees. The "new" guidelines require corporations to investigate, determine and identify responsible individuals in order to receive any cooperation credit, directing that DOJ's civil and criminal lawyers work together early and often, presumably ending the practice of releasing culpable individuals from civil or criminal liability when resolving a matter with a corporation.

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Questions and Comments

NEWS RULINGS VERDICTS

Thursday, September 24, 2015

Litigation

Judges' panel to decide if Volkswagen class action is tried in the state

Class actions filed against Volkswagen over emissions cheating may end up in the Central District of California, say attorneys involved in the litigation.

U.S. Court of Appeals for the 9th Circuit 9th Circuit upholds temporary restraining order against anti-abortion group

A temporary restraining order blocking the release of videos shot by an anti-abortion organization was upheld Wednesday by the 9th U.S. Circuit Court of Appeals after a federal judge filed a rare brief defending his decision.

Corporate

Is DOJ violating its own policy?

Days after introducing 'new' corporate prosecution guidelines encouraging the prosecution of individuals, the DOJ announced another big settlement with an errant, but large corporation. By **George B. Newhouse Jr.**

U.S. Court of Appeals for the 9th Circuit Appellate court keeps Batmobile off the streets

In a blow to caped crusaders without a license from DC Comics, the 9th Circuit ruled that a mechanic runs afoul of copyright law in sale of his replica Batmobiles.

Litigation

California last in its treatment of class actions

California ranked dead last nationwide in its treatment of class action lawsuits and damages in a survey released by the U.S. Chamber of Commerce, with the survey's administrators calling the state "ground zero" for lawsuit abuse.

Mergers & Acquisitions Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Judicial Profile

Kristi Culver Kapetan

Superior Court Judge Fresno County (Fresno)

Litigation

'Happy Birthday' copyright ruled invalid, damages may follow

Films and television shows have historically paid to feature the song "Happy Birthday to You" in their works, but a federal judge ruled Tuesday that

errant, but large corporation was announced.

The Yates Memo established four key policies intended, so they say, to "strengthen [DOJ's] pursuit of individual corporate wrongdoing." Corporations wishing to mitigate criminal liability must do the following: (1) to obtain "any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct" - the corporation must be prepared to "name names." (2) "[C]riminal and civil investigations must focus on individuals "from the inception of the investigation." (3) "[A]bsent extraordinary circumstances" or established exceptions (like the Antitrust Division's amnesty policy which grants immunity to the first whistleblowing antitrust offender to run through DOJ's door), "the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation" - no more free passes in connection with deferred prosecution agreements DPAs or NPAs. And finally, (4) DOJ prosecutors should not settle with the Corporation "without a clear plan to resolve related individual cases." Clear policy, and a return to past principles.

With those targets in mind, let's see how the GM settlement stacks up against the new DOJ "policy."

1. To receive "cooperation" credit the corporation must identify all individual responsible for the misconduct through a timely internal investigation.

First, the policy speaks in terms of "cooperation credit" which, in a criminal context, normally implies that the defendant is being prosecuted - that is, indicted or charged in an information with a crime - after which "cooperation credit" mitigates the penalty. It does not normally mean no conviction. Prosecutors are fond of saying that your cooperation will be told the judge, but you must see the man "in the robes." In this case, however, any prosecution of the corporation is being deferred - in actuality, a deferral is only a delayed pass. It's a "get out of jail free card" -- with a high price tag.

Second, GM would be required to identify all individuals who caused the lies to be told to NHTSA about GM's defective ignition switches. According to the U.S. attorney, this in fact was done because the corporation "terminated" the wrongdoers. Termination is good; what about prosecuting them? There is no way of determining, of course, whether the persons "identified" by GM as having caused the serious crimes to be committed are low-level engineers or the higher ranking executive who presumably knew about and blessed this misconduct. So, the GM agreement fails prong one.

2. Criminal and civil investigations must focus on individuals "from the inception of the investigation."

In fairness, this "best prosecutive practice" was only recently announced, so it can hardly be applied to the GM settlement, the result of a lengthy investigation. But, on closer examination, the bullet item is vacuous. All investigations of corporate misconduct must, of necessity, "focus" on individuals. Individuals are the entities who commit acts for which corporations are vicariously liable. An investigation "unfocused" on individuals would be like producing a car without wheels. Even the intrepid would not travel too far. The agreement neither passes nor fails prong two.

3. Absent extraordinary circumstances culpable individuals must not get a pass.

The DPA filed by the U.S. attorney's office on Sept. 17 is silent as to the possible prosecution of culpable individuals (available at www.justice.gov/usao-sdny/file/772301/download). No individuals are promised "immunity" and GM is required to cooperate with any continuing investigation. But are there going to be prosecutions of individuals? This is far from clear from the court documents. Most commentators have assumed not. Tentative conclusion: the GM agreement fails prong three and it is likely that the prosecutors will move on to the next case.

4. DOJ prosecutors should not settle with the corporation "without a clear plan to resolve related individual cases."

The best indication of the government's future plans would be the U.S. attorney's press release. Although there is a detailed description about the fulsome extent of GM's cooperation, missing is the usual statement that the "investigation continues." Prosecutors love to beat this drum. The government did observe that "GM, among other things, conducted a swift and robust internal investigation, furnished the Government with a continuous flow of unvarnished facts gathered during the course of that internal investigation, [providing] ... certain documents and information otherwise protected by the attorney-client privilege, provided timely and meaningful cooperation more generally in the federal criminal investigation." One would think that if a case was going to be brought against individuals, the time would be now. Tentative conclusion: the GM agreement fails prong four.

Warner/Chappell Music Inc. did not own a valid copyright.

Corporate

Software company names newspaper GC as chief legal officer

BlackLine Inc., a financial software developer in Woodland Hills, announced this week the hiring of Karole R. Morgan-Prager as its first chief legal officer.

Litigation

Proposed Riverside County warehouse project faces wave of litigation challenges

A lawsuit challenging how the Moreno Valley City Council approved a massive warehouse project has been filed in Riverside County Superior Court by the Center for Community Action and Environmental Justice.

Health Care & Hospital Law

Statewide condom law ignores reality of industry

Plans to take L.A.'s law requiring condom use in porn productions statewide in 2016 are ill-conceived. By **Chauntelle Tibbals**

Law Practice

Think twice before denying requests for admissions

Last week, the California Court of Appeal underscored the importance of paying close attention when responding to requests for admissions in any state court action. By **Howard Holderness and Katharine Malone**

Environmental

Pope Francis stands up for the environment

As Americans try to get a better sense of the pope during his visit, they will look to his gestures, spontaneous comments, and activities. But one thing is clear: Pope Francis is an ultra-green pope. By **Joseph DiMento**

Corporate Counsel

Christopher A. Riley

General Counsel Machinima Inc. Los Angeles

Environmental

Supreme Court to tackle reach of CEQA

The building industry is squaring off with air pollution regulators over whether CEQA mandates looking at how impacts such as freeway pollution could harm people in a new development.

Elaborating in a speech at New York University Law School the day after the memo was released, but before the GM settlement was announced, Yates termed the change in criminal cooperation policy a "substantial shift from prior practice" and evidence that "the rules have just changed." It remains to be seen how, and to what extent, the Yates Memo will actually be implemented by federal prosecutors. In Los Angeles, the policy of the U.S. attorney's office (one of the largest and traditionally most productive of the federal prosecutors' offices in the country) has long been to vigorously prosecute the responsible corporate officer, when there is evidence sufficient to bring charges against the company.

In any event, the DOJ's failure to adhere to the principles set forth in the Yates Memo has provoked some commentary, such as University of Michigan law professor and former federal prosecutor David Uhlmann, who observed that the DPA with GM "demonstrates how badly the Justice Department has lost its way with regard to corporate crime." He further observed that "over the last year, the Department appeared to be righting itself by insisting on guilty pleas in currency manipulation cases ... but today the Justice Department has reversed course and concluded that criminal convictions are not necessary in the GM case, even though more than 100 people died because of safety flaws that were hidden from the public. Compounding matters, just one week after the department announced a new 'get-tough' approach to individual prosecutions, no individuals will be held responsible. GM's lies cost lives. There is no excuse for the Department agreeing to dismiss its criminal case against GM if the company pays a large fine and cleans up its act."

It would appear that there are at least 900 million reasons why the government gave up further pursuit of the GM faulty ignition switch prosecution. Any 125 reasons why it may have given up too soon.

George B. Newhouse Jr. *is a former federal prosecutor and partner with Dentons.*

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