COLUMN: The pursuit of individual accountability in the UK and United States

Mar 29 2016 Elly Proudlock

Authorities on both sides of the Atlantic are intent on improving individual accountability for financial misconduct. In the UK we have seen the recent introduction of the senior managers regime, while in the United States last year's "Yates memo" revealed the Department of Justice (DoJ)'s focus on the pursuit of individual liability for corporate wrongdoing. Companies and individuals should be sensitive to cultural differences, however, in conducting or responding to any investigation.

UK senior managers regime

The SMR came into force on March 7, 2016. Although the regime is not criminal in nature, its significance for senior bankers should not be underestimated. An important feature is the statutory duty of responsibility, which gives the Financial Conduct Authority (FCA) a brand new cause of action against senior managers. Applications for approval as a senior manager must be accompanied by a "statement of responsibilities", which the FCA will clearly have regard to when bringing enforcement action.

Although we will not see related enforcement action for some time as the regime is not retrospective, in future the FCA will be determined to impose tough sanctions on senior managers when breaches occur on their watch. Since these are non-criminal proceedings, the FCA only has to prove its case on the balance of probabilities.

Senior managers will need to ensure, for their own protection down the line, that they record and communicate any changes to their responsibilities, as well as tightly mapping out their delegations. Recordkeeping will become ever more important, even at an individual level, as matters such as staff training could serve as future evidence that a senior manager has taken reasonable steps to avoid a particular breach.

UK criminal enforcement

Individual accountability has long been a cornerstone of Serious Fraud Office (SFO) criminal enforcement, largely because the high threshold for corporate criminal liability makes it difficult to secure corporate convictions. It is important, however, to distinguish initiatives that are capable of having a real impact on enforcement from the rhetoric and political manoeuvring that often accompany them.

In his last Mansion House speech, Chancellor George Osborne queried why so few individuals guilty of financial misconduct had faced punishment in the courts, and this month a brand new criminal offence of recklessly causing a bank to fail came into force.

Yet the new criminal offence is so riddled with difficulties that it will rarely, if ever, be prosecuted. It is widely considered to be more of a crowd-pleaser than a game-changer. Not only is liability severely limited by the required mental element, in that the senior manager must have been aware at the time that the relevant decision may cause the institution's failure, but the relevant threshold – the failure of the institution – is very high.

Causation will also be a substantial hurdle to overcome – it is difficult to imagine many cases, if any, where it will be possible to prove that the implementation of a single decision has caused the failure of an institution. To that extent, UK criminal enforcement remains largely unaffected by the global shift in emphasis towards individuals.

DPAs and individual culpability

The SFO now has deferred prosecution agreements (DPAs) at its disposal. DPAs do not exist for individuals in the UK, only for corporates. Companies seeking DPAs must not withhold material where to do so would jeopardise the investigation and prosecution of individuals, suggesting that handing over material that assists in the prosecution of individuals is likely to be viewed as a hallmark of cooperation in DPA negotiations. However, DPAs are still in their infancy here and the incentives for self-reporting in the UK remain comparatively low, so we should not expect DPAs to be negotiated with anything like the frequency that they are in the US. The prosecution of individuals arising from DPAs will therefore be a relatively rare occurrence.

U.S. drive

By contrast, individuals stateside are potentially more vulnerable to enforcement action arising out of corporate settlements. The DoJ's US Assistant Attorney General, Leslie Caldwell, has talked of the "surprising number of [internal] investigations where the conclusion is that mistakes were made, bad things happened, all in the passive voice – without identification of who was responsible…". - a perceived problem which the United States is keen to rectify. The Yates memo makes clear that, in the United States, handing over non-privileged information regarding potentially culpable individuals is a prerequisite for cooperation credit in the corporate self-reporting process.

It is understandable, therefore, that in the U.S. criminal context post-Yates, company employees may be more hesitant about cooperating with internal investigations and more likely to insist on independent legal representation, given that the information they provide will almost certainly be transmitted to the DoJ.

Indeed, some commentators have suggested that the standard "Upjohn warning", given to employees at the start of internal interviews, should be updated to reflect the change in approach.

Although the Yates memo is specific to U.S. criminal enforcement, given the long arm of the US criminal law its effects will undoubtedly be felt elsewhere. The Foreign Corrupt Practices Act Unit is hiring 10 new prosecutors this year, increasing its size by 50 percent, having announced a renewed focus on prosecuting individuals.

Internal investigations: cultural differences

While the U.S. DoJ has a clear expectation that companies will leave no stone unturned, particularly when it comes to establishing the culpability of relevant individuals, the SFO has repeatedly expressed concerns about internal investigations "churning up the crime scene". In recent investigations it has increasingly sought to impose restrictions on, and even prevent altogether, the internal interview process.

This difference in approach introduces an additional element of uncertainty and risk for companies seeking to self-report in multiple jurisdictions, with potential implications for how the scope of any internal investigation should be determined. In today's enforcement environment, those tasked with conducting internal investigations are increasingly likely to be faced with competing and sometimes conflicting demands.

When an issue is discovered that warrants investigation, it is now more important than ever to take a step back and carefully consider the scope of the investigation before beginning the substantive work. Where multiple jurisdictions are or may be involved, early engagement with the authorities on the scope and shape of the investigation may also be warranted.

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