
When Will Corporations Be Charged As Criminals?

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A. U.S. Department of Justice Guidelines

1. Introduction

In June, 1999, the U.S. Department of Justice issued guidelines for federal prosecutors to consider when deciding whether to charge a corporation, as opposed to individual directors, officers and employees, with a crime in the United States. The Guidelines resulted from a process of internal deliberations that involved U.S. Attorneys and officials at the Department of Justice in Washington. In a covering memo, Deputy Attorney General Eric Holder referred to the Guidelines as "a useful framework in which prosecutors can analyze their cases" but noted that "prosecutors are not required to reference these factors in a particular case" or "to document the weight they accord[] specific factors in reaching their decisions." Mr. Holder specifically noted that the Guidelines are subject to further review and revision and asked for comments "from the field as to the application of these factors in practice." The Guidelines should be of particular interest in the context of international white collar crimes, where the U.S. Government's ability to obtain the physical presence of foreign nationals to answer criminal charges in the U.S. is limited but its ability to take action against foreign corporations which either do business or have assets in the U.S. may be substantial.

2. The Eight Factors

The Guidelines identify eight factors which a prosecutor "should consider" in deciding whether to bring criminal charges against a corporation:

- "The nature and seriousness of the offense, including the risk of harm to the public";
- "The pervasiveness of wrongdoing within the corporation";
- "The corporation's history of similar conduct";
- "The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents including, if necessary, the waiver of the corporate attorney-client and work product privileges";
- "The existence and adequacy of the corporation's compliance program";
- "The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies";
- "Collateral consequences including disproportionate harm to shareholders and employees not proven personally culpable"; and
- "The adequacy of non-criminal remedies".

3. Department Comments on the Guidelines

In comments accompanying the Guidelines, the Department has highlighted:

- The role of management in approving or condoning illegal practices;
- The appropriateness of considering the history of similar conduct of all of the corporation's "divisions, subsidiaries and affiliates";
- The corporation's "cooperation. . . in identifying the culprits and locating relevant evidence";
Whether the corporation conducted an internal investigation after the problem came to light and disclosed the results of that investigation to the government;
- Whether the corporation "appears to be protecting its culpable employees" by advancing their legal fees or working with them under a joint defense agreement;
- The extent to which the compliance program has been designed to prevent the conduct involved and how conscientiously it has been enforced;
- Whether the corporation "appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government"; and
- The necessity of bringing charges if another jurisdiction will not.

The comments specifically caution that "prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against

individual officers and employees."

4. The Practical Effect of The Guidelines

The Guidelines say, in effect, that a corporation can only escape being charged with a crime if it has no prior history of criminal conduct, takes all reasonable steps to prevent a crime from occurring, and, once the offense has become known, immediately goes over to the Government's side to help bring charges against the individual directors, officers or employees who participated in the misconduct. For international or non-U.S. corporations, the Guidelines may present an impossible standard. Many non-U.S. companies are unfamiliar with the advanced state of U.S. white collar crime enforcement and have no compliance programs (and certainly none designed to avoid violations of U.S. law). It may violate individual contracts or the laws of their home countries for non-U.S. corporations to incriminate their officers and employees, even if doing so will avoid criminal charges being brought against the corporation. And international corporations involved in questionable acts may find themselves subject to different standards of conduct under the laws of the countries in which the acts took place and in which the effects of those acts were felt. It may not be possible, therefore, for a non-U.S. corporation to avoid prosecution in the U.S. and in the country in which it is based or has acted. For all these reasons, the Guidelines appear to impose excessive burdens on any non-U.S. corporation which is faced with investigation by U.S. law enforcement agencies.

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