

It's Time to Name Names

Gray Reed & McGraw Legal Alert

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by Gene Besen

To receive cooperation credit, the Department of Justice now requires companies to certify that they have identified all involved individuals.

Last week, a spokesman for the Department of Justice confirmed to the Wall Street Journal that the Department's Fraud Section is developing a corporate certification process to be used in conjunction with the new cooperation standards announced in the Yates Memo late last year. The developing policy will require companies to certify that they have fully disclosed all information about corporate misconduct and the individuals involved in some way—perhaps in a written statement of cooperation. Whatever form the required certification ultimately takes, corporations are now required to certify that they have turned over all non-privileged information about all individuals involved.

"To ensure that companies understand the importance of this, the Fraud Section now requires that cooperating companies confirm to us that they have, in fact, turned over all non-privileged information about individuals."

—Peter Carr, spokesman for the Department

The intent of the certification process is clear: "Companies cannot just disclose facts relating to general corporate misconduct and withhold facts about the individuals involved. Internal investigations cannot end with a conclusion of corporate liability, while stopping short of identifying those who committed the underlying conduct," said the Department.

Lawyers will conduct internal investigations representing the corporation, and it is the corporation's privilege that protects the communications exchanged within any internal investigation interview. With the Department now demanding information related to implicated individuals in order for the corporation to receive cooperation credit, executives and key employees must recognize—and consider—that their interests can quickly diverge from the corporation's interests.

Simply put, the interests of the corporation, as an entity, will involve finding someone (frequently from the ranks of management) to "throw under the bus". The interests of the

affected corporate executives, of course, lie in not being run over by a bus. Obviously, no single attorney can represent both interests simultaneously. The need for individual counsel is becoming a necessary part of any investigation, whether external or internal.

But there is always some common ground between the corporation and its executives. A corporation that desires credit for cooperation can still assist implicated executives and key employees by providing experienced counsel who are independent, yet sophisticated enough to cooperate with corporate counsel in regard to those issues where common ground can be found. That alternative is far more preferable than forcing company executives into the hands of counsel who will always seek to emphasize the negatives without the slightest thought to implementing a win-win strategy.

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