

# Client Alert

October 1, 2015

## Pay Attention to the Man Behind the Curtain: DOJ Memorandum Adds Further Weight to CPSC Enforcement Efforts Against Corporate Officers

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The United States Department of Justice (DOJ) recently issued a memorandum to various enforcement agencies. The memorandum, available [here](#), focuses on holding individuals accountable for corporate fraud and misconduct.<sup>1</sup> The DOJ has already shown it means business. Just days after the memorandum was published, a former corporate executive was sentenced to an unprecedented 28 years in prison for his role in knowingly shipping salmonella-tainted food products in 2008.<sup>2</sup>

Coupled with the Consumer Product Safety Commission's (CPSC) increased enforcement efforts—evidenced by growing civil penalties<sup>3</sup> and a wave of lawsuits directed at corporations<sup>4</sup>—this new DOJ edict gives CPSC another leg to stand on when dealing with manufacturers, distributors, and retailers alike. As the DOJ and CPSC take steps to delve behind the corporate façade and hold individuals both criminally and civilly liable for their transgressions, corporate actors should take note of the possibility of harsh monetary penalties or, worse, time behind bars.

The DOJ guidance, which applies to civil and criminal proceedings, encourages corporations to essentially self-report individual misconduct by offering corporate “cooperation credit.” This generally means mitigated punishment for corporations that cooperate in investigations or judicial proceedings. Such “cooperation credit” is conditioned on full disclosure of individual actors' wrongdoings. Specifically, the DOJ memorandum states that for a corporation to be eligible to receive any cooperation credit, the company “must completely disclose . . . all relevant facts about individual misconduct.” Only after meeting this requirement will the corporation be eligible for cooperation credit.<sup>5</sup>

<sup>1</sup> Although the measures discussed in the DOJ memorandum are not operative law, they are offered to “guide attorneys for the government in accordance with their statutory responsibilities and federal law.”

<sup>2</sup> See McKay, R. (Sept. 21, 2015) “Former peanut company CEO sentenced to 28 years for salmonella outbreak,” *Reuters*, available at <http://www.reuters.com/article/2015/09/22/us-usa-georgia-salmonella-idUSKCN0RL24H20150922>.

<sup>3</sup> See “CPSC Penalties to Increase Beyond ‘Cost of Doing Business,’” Morrison & Foerster Client Alert, March 3, 2015, available at <http://www.mofo.com/~media/Files/Articles/2015/03/150327CPSCCivilPenaltyTrendContinues.pdf>; and “CPSC Imposed Record-High Penalties in 2014,” Morrison & Foerster Client Alert, Nov. 11, 2014, available at <http://www.mofo.com/~media/Files/ClientAlert/2014/11/141111CPSCImposesRecordHighPenaltiesin2014.pdf>.

<sup>4</sup> See “Recall, Enforce, Repeat! CPSC and DOJ Team Up for Another Enforcement Action,” Morrison & Foerster Client Alert, June 22, 2015, available at <http://www.mofo.com/~media/Files/ClientAlert/2015/06/150622CPSCandDOJ.pdf>.

<sup>5</sup> The extent of the cooperation credit granted will still depend on traditional factors such as timeliness of cooperation, proactive nature of the corporation's actions, and the diligence, thoroughness, and speed of the company's internal investigation.

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CPSC already has self-reporting requirements under the Consumer Product Safety Act (CPSA) that require manufacturers, distributors, and retailers to “immediately inform” CPSC of any potential substantial product safety hazard or unreasonable risks of serious injury associated with their products. 15 U.S.C. § 2064. In addition to these reporting requirements placed on corporations, the DOJ guidance may motivate CPSC to more closely monitor the actions of individuals behind the shroud of the corporate cloak.

The DOJ guidance also encourages attorneys handling separate civil and criminal aspects of corporate investigations to routinely communicate with one another and focus on individual actors “from the inception of the investigation.” The guidance further redirects civil attorneys to police corporate fraud rather than focus on damages and to do so by considering individual actors, not just the company, when determining whether or not to file suit. Factors to consider include, “whether the person’s misconduct was serious, whether it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest.” The guidance admits that these broader considerations may not, “in the short term,” provide a monetary return on enforcement investments. However, the DOJ believes this aggressive stance will ultimately “minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.”

For those within CPSC’s crosshairs during an investigation or judicial proceeding, this may mean (1) more pointed inquiries concerning individual actions related to corporate malfeasance; (2) increased civil penalties for individual wrongdoings; (3) personal liability—civil and criminal—for individuals linked to corporate cover-ups or other offenses; and (4) more concerted suits brought by DOJ and CPSC. Indeed, the CPSA already provides for civil and criminal penalties against individuals. Even before these DOJ guidelines were published, CPSC had brought actions to hold executive level employees individually responsible for their actions under the corporate officer doctrine.<sup>6</sup>

Finally, the DOJ guidance states that, generally, corporate resolution of a dispute will not provide protection, civilly or criminally, for individual actors. Furthermore, corporate cases should not be resolved absent a “clear plan to resolve related individual cases” and delays related to corporate resolutions should not holdup the government’s ability to pursue claims against individual actors. In fact, the DOJ guidance instructs that if no individuals are prosecuted at the conclusion of an investigation, “the reasons for [not bringing individual claims] must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.”

This rigid requirement illustrates the DOJ’s expectation that a typical corporate investigation would yield enough evidence to bring claims against individual corporate actors. Although at this stage it is unclear how these directives will play out, corporate actors should be aware of the potential implications. Corporate actors looking to avoid individual liability should take care to become knowledgeable about legal requirements for their positions and not expect the corporate umbrella to shield them from liability incurred by their own actions.

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<sup>6</sup> See “CPSC Seeks to Hold Former CEO Responsible for Buckyballs® Recall,” Morrison & Foerster Client Alert, May 9, 2013, available at <http://media.mofo.com/files/Uploads/Images/130509-CPSC-Buckyballs.pdf>.

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