Client Update

Provocative DOJ Proposal Aims to Hold Financial Services Executives Criminally Liable, Even Absent Criminal Intent

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On September 17, 2014, Attorney General Eric Holder and Deputy Assistant Attorney General Marshall L. Miller both made speeches emphasizing the U.S. Department of Justice's ("DOJ") aggressive approach to seeking individual criminal convictions in high-profile white collar cases, particularly in the financial services industry.

Holder expressed frustration with DOJ's inability to hold financial services executives criminally liable for alleged misconduct. He proposed several ways to make it easier for DOJ to do so. In addition to increasing financial incentives for whistleblowers to come forward with evidence of fraud––a proposal aimed at improving the odds that DOJ discovers financial crimes––Holder proposed extending the Responsible Corporate Officer doctrine to the financial services industry. Under this doctrine, often called *Park* liability, an individual may be prosecuted criminally under the Food, Drug, and Cosmetic Act ("FDCA") even absent any culpable intent or knowledge of wrongdoing if he or she was in a position to have prevented the wrongdoing and failed to do so.

Holder's proposal to import *Park* liability to financial crimes would require legislative action and is unlikely to gain traction for other reasons. Nevertheless, his statements––together with Miller's emphasis on conditioning "cooperation credit" on companies' efforts to provide DOJ with evidence of individual wrongdoing––demonstrate DOJ's intensifying focus on individual prosecutions in corporate criminal cases.

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HOLDER'S PROPOSAL FOR A "RESPONSIBLE CORPORATE OFFICER" DOCTRINE IN FINANCIAL FRAUD PROSECUTIONS

Holder's speech focused on the financial services industry, expressing concern that:

> "in an age when corporations are structured to blur lines of authority and prevent responsibility for individual business decisions from residing with a single person. . . at some institutions that engaged in inappropriate conduct before, and may yet again, the buck still stops nowhere."

Consequently, Holder questioned "whether the law provides an adequate means to hold the decision-makers at these firms properly accountable."

Holder cited three laws designed to ensure that "the buck needs to stop *somewhere* where corporate misconduct is concerned": (1) "*Park*" liability; (2) the Sarbanes-Oxley ("SOX") requirement that senior executives certify financial statements; and (3) regulatory reforms in the United Kingdom ("U.K.") that will require senior bank executives to file a "statement of responsibilities" with regulators.

Holder suggested considering these approaches and modifying laws "where appropriate." Although Holder said that "[i]t would be going too far to suggest reversing the presumption of innocence for any executive, even one atop the most poorly-run institution," he emphasized that "we need not tolerate a system that permits top executives to enjoy all of the rewards of excessively-risky activity while bearing none of the responsibility."

PARK LIABILITY FOR FINANCIAL EXECUTIVES WOULD REQUIRE LEGISLATIVE ACTION

The *Park* Doctrine

So-called *Park* liability arises out of Section 333 of the FDCA, which criminalizes the distribution of adulterated or misbranded food, drugs, and medical devices in interstate commerce. 21 U.S.C. § 333. A misdemeanor violation under Section 333(a)(1) requires no evidence of intent to defraud or mislead.

In *United States v. Park*, the case for which the *Park* doctrine is named, the U.S. Supreme Court upheld a misdemeanor conviction under Section 333(a)(1) of the President and CEO of a national retail food chain that distributed adulterated products. 421 U.S. 658 (1975). The Court concluded that the FDCA "imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur." Accordingly, guilt can be imputed to anyone who, by reason of his or her position, has the "authority and responsibility" to prevent or correct violations, and fails to do so, even if he or she did not participate in and had no knowledge of the wrongdoing. The only defense to liability recognized by the Court is when a corporate agent was "'powerless' to prevent or correct the violation."

The articulated policy rationale underlying this rare use of strict criminal liability is to deter actions or conditions that may endanger public safety by imposing a high standard of care on those responsible for distributing products for personal use and consumption. Critically, the *Park* doctrine is applicable solely to the FDCA and does not apply to industries not regulated by the Food and Drug Administration.

Financial Fraud Statutes Require Evidence of Knowledge or Intent

The criminal statutes available to DOJ to prosecute financial and white collar crimes each require some form of knowledge or intent by the individual to engage in wrongdoing. These statutes include mail fraud (18 U.S.C. § 1341); wire fraud (18 U.S.C. § 1343); false statements (18 U.S.C. § 1001); bank fraud (18 U.S.C. § 1344); securities and commodities fraud (18 U.S.C. § 1348); securities fraud (15 U.S.C. § 78ff(a)); and the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1963). Even liability under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which is a civil statute used by DOJ to bring multiple cases arising from the financial crisis, is predicated on criminal acts requiring some form of knowledge or wrongful intent (12 U.S.C. § 1833a).[1]

As a result, *Park* liability cannot easily be imported to the criminal laws applicable to financial fraud or even FIRREA. Imposing strict criminal liability would require legislative action to amend these laws or enact a new statute. It is unlikely that Congress will soon create a new category of strict liability crimes, as such crimes raise significant due process concerns and run contrary to the fundamental principle that criminal justice is reserved for intentional wrongdoing. Furthermore, the policy rationale for applying strict liability in the food and drug context––where death can result from improperly stored or

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1 We note that the Fifth Circuit decision in *Harrison v. U.S.*, 279 F.2d 19 (5th Cir. 1960), holding that parts of 18 U.S.C. § 1005 have no intent requirement has not been followed by other courts (*see, e.g.*, *U.S. v. Pollack*, 503 F.2d 19 (9th Cir. 1974)), and has been questioned by the Fifth Circuit itself (*U.S. v. Malone*, 837 F.2d 670, 672 (5th Cir. 1988)).

manufactured products––is unlikely to carry comparable sway for financial crimes.

Holder mentioned two other laws as potential models for holding executives criminally accountable, SOX liability and the U.K. reforms. However, neither law creates strict criminal liability. Criminal offenses relating to false SOX certifications require evidence of wrongful intent by the executive. Similarly, the only criminal offense introduced by the U.K. reforms is limited to executives who make a reckless decision resulting in a bank's insolvency (and requires that the executive be aware that the decision could cause insolvency). Neither law, therefore, provides a roadmap for applying strict liability to financial fraud crimes.

ALTHOUGH *PARK* LIABILITY IS UNLIKELY TO BE APPLIED TO FINANCIAL CRIMES, DOJ'S EMPHASIS SHOWS THAT SENIOR EXECUTIVES REMAIN UNDER SPOTLIGHT

Although it seems unlikely that strict criminal liability will be applied to financial crimes, it is significant that the Attorney General considers such liability for financial executives to be desirable. His comments suggest that because DOJ has found little evidence that senior executives were complicit in criminal activity surrounding the financial crisis, the standard should be lowered to make it easier to charge executives who have no knowledge of misconduct, much less intent to commit such misconduct.

Holder's comments assume even more significance when considered alongside Deputy Assistant Attorney General Miller's comments on the same day.

Miller outlined the lengths to which companies must go to obtain full cooperation credit from DOJ under the so-called "Filip factors," which guide the exercise of prosecutorial discretion about whether to criminally charge a company. Miller stated, "[i]f you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation." Miller urged companies cooperating with DOJ criminal investigations to "make securing evidence of individual culpability the focus of your investigative efforts so that you have a strong record on which to rely." Together, Holder's and Miller's statements reflect an increasing focus on holding senior corporate executives accountable for misconduct within their companies, a focus that will likely continue unabated for the foreseeable future.

Lessons can be drawn from the use of *Park* liability in the health care industry. *Park* prosecutions in fact have been fairly uncommon, and typically defendants have had at least some level of knowledge of wrongdoing, although there are exceptions. Industry has called for the government to be judicious in its use of this powerful weapon, and even the Supreme Court has recognized the role of prosecutorial discretion in preventing abuses.

The practical effect of the threat of *Park* liability has been that many health care companies have strengthened their compliance programs and involved their Boards of Directors more closely in oversight of regulatory and legal issues. Undoubtedly, that is a key motivation behind Holder's comments—to spur companies and executives in the financial services industry to undertake measures to build more robust compliance systems, ensure a free flow of information to senior executives, and involve executives more intimately in overseeing operations at their companies that raise regulatory and legal risks. There are actions that financial companies and executives can take now, even in the absence of statutory change, which should help prevent wrongdoing and also protect executives against DOJ scrutiny if issues occur on their watch.

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Please do not hesitate to contact us with any questions.