



DOJ Puts C-Suite Execs in Crosshairs

DOJ: “While pursuit of criminal and civil remedies against corporations is important, we should always focus on the individuals responsible for misconduct.”

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» In the spring, in its latest effort to make good on its promise to hold individuals accountable for corporate misconduct, the Department of Justice indicted two senior executives of prominent pharmaceutical distributor Rochester Drug Co-Operative (RDC). Breaking from past practices, the U.S. attorney touted the prosecution as the first of its kind: “Executives of a pharmaceutical distributor and the distributor itself have been charged with drug trafficking — trafficking the same drugs that are fueling the opioid epidemic that is ravaging this country,” said Geoffrey S. Berman, the U.S. attorney for the Southern District of New York.



Moreover, RDC ignored several “red flags” identified by its compliance personnel, who determined that pharmacy customers were dispensing opioid drugs to individuals who had no legitimate medical need for them. Prosecutors identified instances where Doud and Pietruszewski participated in conversations with employees in which company customers were described as “very suspicious,” a “DEA investigation in the making” and “like a stick of dynamite waiting for [the] DEA to light the fuse.” These actions resulted in an 800% increase in sales of oxycodone tablets and a 2,000% increase in fentanyl sales from 2012 to 2016.

Furthermore, RDC, at the direction of Doud and Pietruszewski, made the deliberate decision not to investigate, monitor, or report to the DEA pharmacy customers that it knew were diverting controlled substances for illegitimate use, thereby concealing the distribution of controlled substances from law enforcement. Doud also instructed company employees to open new pharmacy customer accounts without conducting due diligence. Prosecutors insisted that RDC declined to file suspicious order

While comparing executives of a public company to drug dealers makes for good press, the real message to executives is that even if the company is engaged in selling an otherwise lawful product, the executives could face jail time while the company is merely fined.

Background

On April 23, 2019, U.S. Attorney Berman and Ray Donovan, the special agent in charge of the New York division of the U.S. Drug Enforcement Administration (DEA), announced criminal charges against RDC, its former chief executive officer, Laurence Doud III, and its former chief

of compliance, William Pietruszewski, for unlawfully distributing controlled substances and conspiring to defraud the DEA. Through this prosecution, the DOJ has placed the pharmaceutical industry on notice that federal prosecutors will not distinguish street-level drug dealers from C-suite executives who distribute illegal drugs from their boardrooms.

Prosecutors alleged that, at the direction of senior management, RDC knowingly and intentionally violated federal narcotics laws by distributing dangerous, highly addictive opioids to pharmacy customers who it knew were selling and using them illicitly.

reports to protect profits and, therefore, impeded the DEA's ability to identify and prevent the illicit dispensing of highly addictive controlled substances.

RDC agreed to pay a \$20 million penalty to settle charges by consent decree. As part of the settlement, RDC made formal admissions to the charges and stipulated to the accuracy of an extensive statement of facts. Further, RDC agreed to reform and enhance its Controlled Substances Act compliance program and submit to supervision by an independent monitor.

The Shift in Focus to Individuals

Stating a nationwide policy, former U.S. Deputy Attorney General Rod Rosenstein made clear the new approach: "While pursuit of criminal and civil remedies against corporations is important, we should always focus on the individuals responsible for misconduct. Cases against corporate entities allow us to recover fraudulent proceeds, reimburse victims, and deter future wrongdoing. But the deterrent impact on the individual people responsible for wrongdoing is sometimes attenuated in corporate prosecutions."

He continued: "The most effective deterrent to corporate criminal misconduct is identifying the people who commit crimes and sending them to prison. Absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability."

Rosenstein's speech and the charges the DOJ filed against RDC

and its officers demonstrate the severe consequences executives face should they fail to prevent or quickly identify misconduct by subordinates on their watch. Under these circumstances, it is critical that executives be able to demonstrate their good-faith belief that their company was acting in an ethical manner and in full compliance with the law at all times.

To that end, executives need to be certain that their companies:

- Have aggressive anti-fraud and anti-corruption measures in place;
- Regularly review and confirm that their procedures adequately facilitate the detection of misconduct by subordinates;
- Act quickly and diligently on any "red flags" brought to their attention; and
- Document compliance with relevant laws, regulations and corporate procedures through traceable forms of communications. (For example, if a government investigation is commenced, it is imperative that senior executives can trace corporate communications and identify any breakdowns in control protocols).

Finally, executives must be aware that their corporate communications, whether with their general counsel or company counsel, are not necessarily privileged. Although it is true that communications with general counsel and company counsel

are likely covered by attorney-client privilege, the company, not the corporate individual, is entitled to the privilege. Therefore, the company may choose to waive its privilege and share all relevant communications with authorities without permission from the individual who made the communications.

Conversely, the executive also needs to be aware that he or she may not reveal privileged advice from company counsel even if it aids in defense, as the executive does not hold the privilege. In certain high-risk situations, the executive should insist that the company provide individual counsel to him or her.

Prosecutors and regulators have the luxury of looking back in time and judging the reasonableness of an executive's conduct in retrospect. Was the issue just a dot on the horizon or a major red flag that was missed? Was it an isolated incident or the beginning of a pattern of misconduct? This may seem unfair, but it is a reality. Accordingly, the best defense does not begin with advocacy in the courtroom but, rather, with compliance in the boardroom. **CFO**

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