

# The DOJ cracks down on white-collar crime. What that means for corporations and executives.

The Department of Justice announced in October that it would redouble its efforts to curb white-collar crime. These efforts include a new squad of FBI agents embedded in the department's fraud section and a combination of prosecutorial boldness and aggressive preventive measures.

Unwanted attention from the Justice Department can damage a company's brand and impede business. It also poses personal risks for employees and company leaders, particularly following a 2015 memorandum that altered department policy to allow increased targeting of individuals.

To learn how the DOJ's new emphasis on white-collar crime is likely to affect businesses and individuals, **Crain's Content Studio** spoke with Brad Simon, a partner at the law firm Windels Marx and a former assistant U.S. attorney for the Eastern District of New York.



**BRAD SIMON**

Partner  
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**CRAIN'S:** What's the context for the Justice Department's recent announcement, and how do you expect corporations to respond?

**BRAD SIMON:** It is intended to signal a return to more aggressive enforcement following the more hands-off policies of the prior administration. White-collar investigations and prosecutions had fallen precipitously during the Trump years, and the recent announcement was intended to send a clear message that corporate malfeasance will not be tolerated.

I would expect that corporations, under the direction of outside counsel, will be re-examining their compliance programs to determine whether they will pass muster with the DOJ's anticipated heightened scrutiny. Among the areas they should be examining are whether there is sufficient companywide training and communication with respect to compliance issues, whether the company's written code of conduct is strong enough, whether sufficient resources are allocated to its compliance program, whether the program is effective enough to spot red

flags, and whether there are sufficient reporting mechanisms in place.

**CRAIN'S:** What specific malfeasance issues do you expect to receive the most scrutiny?

**SIMON:** Foreign Corrupt Practices Act investigations, antitrust issues, securities fraud and environmental crimes are likely to be areas of intense DOJ focus. Companies should make sure that the compliance mechanisms in place can detect malfeasance in these areas effectively and early on. Significant money-laundering indictments have already been handed down this year, and I expect this will be an area of particular interest to the DOJ.

**CRAIN'S:** Does the presence of a compliance program affect how the DOJ treats a specific company?

**SIMON:** The DOJ looks closely at the effectiveness of a company's compliance program

**SIMON:** The DOJ, in its June 2020 Evaluation of Corporate Compliance Programs, encouraged companies to use data analytics to help monitor the effectiveness of their compliance mechanisms. The document directs companies to evaluate whether "compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls and transactions." Data analytics can monitor and flag suspicious transactions, such as possible bribes or kickbacks, often instantaneously. It remains to be seen to what extent corporations will invest in this technology.

**CRAIN'S:** Do you foresee a change in the DOJ's use or enforcement of deferred-prosecution and nonprosecution agreements?

**SIMON:** I believe we will continue to see the vast majority of criminal cases against corporations resolved

emphasis on charging individual wrongdoers — i.e., corporate executives. Boeing is a perfect example. Earlier this year the company entered into a deferred-prosecution agreement to resolve criminal charges, but a Boeing employee, Mark Forkner, was indicted in the Northern District of Texas [on charges of] fraud and wire fraud.

**CRAIN'S:** What should executives who find themselves under investigation do?

**SIMON:** Executives who find themselves under investigation should immediately obtain private counsel and not rely

on company counsel. The corporation's counsel represents the corporation only, and not individual corporate executives. Corporations will be under intense pressure to report allegations of corporate wrongdoing. Thus, it's essential that a corporate executive immediately obtain counsel to represent his or her interests—and his or her interests only. The DOJ has emphasized in recent years that it will pursue individual malfeasors and not just the corporate entity. The earlier an executive obtains counsel, the greater the chances of obtaining a satisfactory resolution. ■

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in determining whether to initiate criminal charges. Companies that have been under investigation and which have robust compliance programs in place have generally been successful in staving off indictments and obtaining much more favorable outcomes, such as deferred-prosecution agreements.

**CRAIN'S:** Does the department's focus on data analytics in identifying potential wrongdoing put pressure on corporations to use the same methods to monitor themselves?

by deferred-prosecution and nonprosecution agreements. Since the demise of Arthur Andersen [following the Enron scandal], the DOJ is sensitive to the impact that a criminal indictment can have, not just on the corporation itself, but on scores of innocent employees who face the loss of their livelihood. A criminal indictment against a corporation is essentially a death knell. Since the 2015 Yates Memorandum promulgated by the Obama Justice Department, there has been an increased

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