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Article

BP Under Investigation

Justice Department launches a criminal investigation into the gulf oil disaster.

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Given the unfathomable magnitude of the ongoing BP oil spill in the Gulf of Mexico, the announcement of a federal criminal investigation didn't come as a particular surprise. As one solution after another failed and the intensity of the catastrophe mounted, the crisis became political as well as environmental—with action from the Justice Department all but inevitable.

"We must ... ensure that anyone found responsible for this spill is held accountable," announced Attorney General Eric Holder in June. "That means enforcing the appropriate civil—and if warranted, criminal—authorities to the full extent of the law."

What form that investigation takes and just how long it lasts are matters of some debate. But like the spill itself, the inquest has the dubious distinction of displacing the financial crisis from the top headlines. The oil spill investigation will face unusual public scrutiny, with proportionate pressure on the DOJ to yield results.

While few companies will ever face a debacle of this magnitude, the case provides in-house counsel with object lessons on criminal environmental liability, crisis management and the growing need to play a greater role on the operations side of corporations.

Polluted Waterways

The Justice Department has jurisdiction in the matter because the spill occurred in federal waters and because the damage crosses state lines. Criminal charges could result from violations of the Clean Water Act, the Oil Pollution Act, The Migratory Bird Treaty Act and the Endangered Species Act, for starters.

"All these laws deal essentially with discharging some type of pollutant in the waterway," says Michael Weinstein, chair of the white-collar practice at Cole Schotz. "They are all strict liability acts, meaning that the government doesn't have to do anything but prove that there was an animal killed, or that there was a pollutant dumped in the water. This isn't a heavy lift."

The threshold for liability under these laws is particularly low: "If the government finds a dead bird floating and it has oil on it," Weinstein says, "it's a fair conclusion that the oil likely caused the bird to die." But criminal charges would hinge on a clear intent to break the law or a consistent disregard for safety in the interest of profits.

"It really depends on the old Nixon adage, 'Who knew what, and when did they know it?'" Weinstein says. "The Justice Department at this point is likely looking at whether the companies had some prior notice of safety issues, whether they knew there was a risk of a spill and they just forged forward regardless of the risk."

Media reports have cited examples of BP pushing ahead on the ill-fated Deepwater Horizon rig, despite both internal warnings and concerns expressed by outside contractors. But that doesn't mean a slam-dunk case for the government.

"It's harder down the road to prove these cases," says Brian Heslin, a partner at Moore & Van Allen. "It's easy to launch an investigation, it's really not that hard to obtain indictments—but you run into problems when you're in a courtroom years down the road trying to prove that criminal intent."

Political Pressure

Sprawling investigations often make difficult cases for federal prosecutors. The sheer volume of evidence can bog down a case. Factor in recent examples of political pressure to get it right and the stakes get higher still. Experts speculate it could take two to five years for the feds to bring a criminal case.

"This investigation will be conducted by several different agencies using their statutory jurisdiction and expertise to look down almost every corridor that could be in any way related to what happened here," Heslin says.

A criminal action could mean massive penalties for BP in a case of this magnitude, but opinions diverge over whether individual executives would be indicted.

Adding Up

The financial impact of the gulf oil spill is growing by the day:

- \$20 billion: the amount set aside by BP to fund claims of economic loss

- \$280 million: the estimated civil penalty, per day, for oil escaping the ill-fated well

- \$62.9 billion: the total legal cost of the spill, including criminal fines, as estimated by Raymond James analyst Pavel Molchanov.

- 1,000 barrels per day: the initial estimate of the spill rate

- 60,000 barrels per day: the estimated spill rate in mid-June

"It comes back to money, as it always does with the government,"

Weinstein says. "Do I think an executive could go to jail? Yes, the potential's there. Do I think it's likely? Absolutely not. You would have to literally show some type of smoking gun—a memorandum saying, 'Environment be damned—we're gonna drill, drill, drill!'"

Michael Diaz, a partner at Diaz Reus, disagrees. He says political pressure for personal accountability could play a pivotal role in bringing individual indictments.

"The federal government can be as creative as it needs to be," he says. "They can lay out a RICO indictment using some of the regulatory framework here, whether it's under the Clean Water Act or the other Comprehensive Environmental Response Act, and then toss in the general obstruction of justice and false statements as predicate acts."

Diaz says there is always an underlying tension when defending executives in environmental cases between the standard white-collar tactic of withholding as much information as possible and cooperating with investigators in a way that will not bring additional obstruction charges.

In this case, the information BP feeds investigators to mitigate criminal risk for the company could ultimately be used to indict executives.

"My suspicion is if they don't get the money that they want, they're going to take it out on somebody higher up in the company," he says. "There's no reason to believe that they can't find a responsible corporate officer to lay an indictment."

Unvetted PR

As in any criminal investigation, the way a corporation handles the crisis can be as significant as the initial problem in determining what charges may ultimately be brought. In addition to the familiar risk of false statements and obstruction, managing public relations can have legal overtones.

Broad criticism of BP's handling of the crisis owes not only to the oil spill itself, but to a series of dismissive statements and bewildering actions by the company's CEO, Tony Hayward. It's a prime example of the way a tone-deaf response can compound an already dire situation.

"To the extent that any executive or representative is going to speak publicly in the wake of a situation like this, whether it has a natural disaster element or not, any statements or predictions need to be very carefully vetted because those statements can be the impetus for criminal liability down the road," Heslin says.

Poor public relations strategy doesn't just fuel media backlash, it invites further government scrutiny and even investor suits. The minute a crisis hits, the legal function must actively engage aspects of the business traditionally beyond its purview to anticipate and minimize actions that have potential to cause legal problems as the situation unfolds.

"It just underscores the need for general counsel to get involved in the operational side or management side of the business," Diaz says. "Document everything that you're doing, get those e-mails out, paper it to death."

The legal department can't undo the environmental damage in a disaster like this, he says, but an active and appropriate response can certainly help prevent making matters worse.