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Protecting Your Executives

GIBSON DUNN

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Current Policy on Prosecuting Individuals

01

Priority: Individuals vs. Companies

The Trump administration's formal policy has been clear: prosecute individuals first; give companies a clearer path to declination.

May 2025	Criminal Division White Collar Enforcement Plan – “The Department’s first priority is to prosecute individual criminals”
Mar. 2026	Department-Wide Corporate Enforcement & Voluntary Self-Disclosure Policy – established declination path for companies that disclose, cooperate, and remediate
Apr. 2026	National Fraud Enforcement Division (NFED) Created – spurring an uptick in internal corporate investigations
Aug. 2026	National Fraud Detection Center (NFDC) – NFDC works with the FBI, Inspectors General, Homeland Security, HHS, and other agencies on data-driven investigations
Oct. 2026	Directives 26-12 & 26-13 – set corporate fraud priorities and methodology: “The Fraud Division has a clear mission: to prosecute fraud in the United States, no matter its size or complexity”

Corporate Self- Disclosures

A clearer path to a declination for companies – but the price of admission is helping DOJ build cases against *individuals*.

- DOJ describes the March 2026 policy as a tool to “quickly pursue culpable individuals . . . while not unduly burdening American businesses.”
- Cooperation means identifying involved individuals and making employees available for interviews.

Takeaway: the interests of the company and its executives can diverge earlier than ever before.

Industries of Particular Focus

- *Healthcare & Life Sciences* – medical devices, pharmaceuticals, and companies that rely on federal health insurance programs or FDA approvals
- *Government Contracting & Procurement* – companies with federal contracts and schemes affecting taxpayer-funded programs and companies
- *Tax & Revenue Evasion*
- *Trade, Tariffs, & Customs*

Fraud Division Directive 26-13

On Oct. 7, 2026, AAG Colin M. McDonald directed Fraud Division prosecutors to use “every available tool” – criminal, civil, forfeiture, and sentencing – to pursue all persons who knowingly enable, facilitate, conceal, or profit from fraud.

Tax

Every case includes a tax review – executives’ personal returns may become part of the inquiry

Securities

Program, contract, and FDA-approval data will be matched against filings and trading

Small Offenses

“Broken windows” approach – data analytics and AI flag small schemes (e.g., false tax returns) that can lead to larger fraud

Asset Seizures

Pre-indictment freezes of bank and crypto accounts, domain seizures, injunctions, and receiverships

Sentencing

Seek every supportable enhancement

For Executives: early asset restraints may reduce funds available for a defense – D&O coverage and advancement become more critical – and the sentencing posture raises the cost of going to trial.

Lessons Learned – Recent Executive Prosecutions

- **Bradley Heppner** (former Chairman, **GWG Holdings**) – convicted by an S.D.N.Y. jury in May 2026 of securities fraud, wire fraud, conspiracy to commit securities fraud and wire fraud, and false statements to auditors in connection with a scheme to fraudulently extract more than \$150 million from GWG. **Gibson Dunn represented a witness.**
- **Charlie Kim and Meghan Messenger** (Co-CEOs, **Next Jump**) – acquitted in May 2026 of charges alleging they had bribed a four-star admiral in the United States Navy to obtain a federal contract. **Gibson Dunn represented Ms. Messenger.**
- **Nader Pourhassan** (former CEO, **CytoDyn**) – sentenced in January 2026 to 30 months for misleading investors about a drug candidate and selling stock at inflated prices.
- **Andrew Wiederhorn** (former CEO, **FAT Brands**) – DOJ dismissed all criminal charges, including wire fraud and tax evasion, related to alleged shareholder loans. **Gibson Dunn represented Mr. Wiederhorn.**

Takeaway: DOJ is still taking executives to trial.

Protecting Executives Before an Investigation

02

D&O Insurance

Key insurance and advancement considerations in the event of a government investigation

D&O Coverage

- **Secure coverage** – do not underestimate the cost of a government investigation.
- **Give timely notice** – including for early, seemingly innocuous subpoenas, whistleblower complaints, informal inquiries, and document requests.

Advancement

- **The law generally favors** executives' right to advancement.
- **Shift** – D&O policies to require companies to indemnify their executives to the fullest extent under the law.
- **Obtain solid undertakings** – to recover advanced fees if an executive is convicted or found liable.
- **Consider limits** – can advancement be capped if the company and executive become adverse?

Messaging Hygiene

- Educate executives on the use of communications in investigations and litigation: words are sometimes read by prosecutors, regulators, plaintiffs, and jurors years later and may be taken out of context.
- Informal, contemporaneous writings often draw the greatest scrutiny – sarcasm, jokes, emojis, and “delete this.”
- Business messages on personal devices and apps are discoverable.
- Deleting messages after a duty to preserve arises creates obstruction risk – often perceived as worse than the underlying conduct.

Build the Program Now: approved channels, retention settings, litigation-hold mechanics, and periodic training for executives.

What the Government Is Seeking

Traditional Requests

- Emails
- Text messages
- Voicemail and call logs
- Calendars
- Shared drives
- Board materials
- Expense and travel records

New Areas of Focus

- Zoom/Teams recordings and auto-generated transcripts
- Employee recordings
- AI meeting-assistant notes
- Slack/Teams messages – including edited and deleted messages, recoverable through audit logs
- Ephemeral apps (Signal, WhatsApp, Telegram) and disappearing-message settings
- Document version histories and comments
- Generative AI prompts and outputs
- Internet search histories
- Personal journals and notes

Case Study:

Issues Posed by AI

United States v. Heppner (S.D.N.Y.)

- An executive under investigation used the consumer version of an AI chatbot to analyze his legal exposure, including information learned from his lawyers.
- The FBI seized AI-generated documents while searching his home.
- U.S. District Judge Jed Rakoff held the documents were not protected by the attorney-client privilege or the work product doctrine.
- The Court suggested the result might differ if counsel had directed the use of the AI tool.

Internal Investigations

03

When Does an Executive Need Separate Counsel?

Company counsel represents the company – not management

Company Perspective

- Get the facts quickly and credibly.
- Earn cooperation credit – requires identifying individuals and making them available.
- Remediate: discipline, clawbacks, separation.
- Preserve the option to waive privilege.

Executive Perspective

- Statements may be turned over to prosecutors.
- Preserve defenses and the Fifth Amendment.
- Protect advancement and indemnification rights.
- Share information under a common interest understanding.
- The attorney-client privilege is narrower than executives assume.

Board Committee Probes – Who Is the Client?

When a board committee charts the investigation, counsel works for the committee – but using the company’s regular counsel invites confusion.

The Broadcom Backdating Case (9th Cir.)

- Broadcom’s former CFO believed committee counsel – which represented him personally in a pending shareholder suit – was acting as his lawyer when interviewed.
- The district court suppressed his statements, finding inadequate *Upjohn* warnings and lack of informed written consent to the dual representation, and referred the firm to the State Bar.
- The Ninth Circuit reversed: the statements were not confidential because the former CFO knew his statements would be disclosed to the outside auditors.

Practical Guidance: give clear, documented *Upjohn* warnings, and tell executives early when they need their own counsel.

Should the Executive Sit for an Interview?

- **Employee Codes of Conduct**
- **Challenging Evidence**
- **Government Use of Interview**
- **Employment Decision-Making**

Government Investigations

04

Knock-and-Talks

Agents may arrive unannounced at an executive's home, hoping to secure an interview before the executive is prepared or has consulted counsel.

Counsel Present	Speak only with counsel present
Right to Decline	Executives may decline questions, end the interview at any time, and request counsel
Truthfulness	Anything said must be truthful – a materially false statement to a federal agent is a crime
Documents	Give counsel any warrant, subpoena, or other document from agents
Notes	Memorialize the agents' questions and answers given

Dawn Raids

– When the FBI Arrives

Search warrants are usually executed early in the morning, at offices and executives' homes at the same time, and are often paired with surprise interviews.

What to Expect

- Multiple agents fan out to secure the premises; the warrant defines premises, devices, and categories of items.
- Imaging of servers and seizure of phones and laptops.
- Agents separate employees for on-the-spot interviews.
- Filter (“taint”) teams for potentially privileged material.

Employee Rights

- Employees may decline an interview or ask to have counsel present.
- If they speak, they must tell the truth; answering procedural – not substantive – questions without a refreshed recollection is usually best.
- The company may inform employees of their rights – but never instruct them to obstruct, delay agents, or hide or destroy documents.

Dawn Raid Protocol and Training

01 Designate a response team (legal, security, IT, communications); call outside counsel immediately

02 Request and copy the warrant; confirm its scope

03 Never obstruct or delay agents – and do not consent to searches beyond the warrant

04 Assert privilege rather than blocking removal; request a filter team; segregate privileged files

05 Keep an independent inventory of what's seized

06 Request copies of business-critical data and devices; unlock devices only if the warrant and law require it

07 Advise executives of their rights regarding interviews

08 Issue a litigation hold; suspend auto-delete settings

09 Plan communications: board, auditors, lenders, disclosure; prepare for civil suits

10 Debrief – and run tabletop exercises at least annually

Determining an Individual's Status

Justice Manual § 9-11.151 defines “target” and “subject,” but an individual’s status is often unclear and can quickly change.

Target

Prosecutor or grand jury has substantial evidence linking the person to the crime; a putative defendant

Subject

Person whose conduct is within the scope of the investigation

Witness

Everyone else – witnesses may become subjects

Reading the Signals

- Target letters and wording of subpoenas
- Which documents are requested and who else has been interviewed
- Whether colleagues have been approached to cooperate
- Ask directly – and ask again; prosecutors may decline to commit, or simply call everyone a “subject”

Proffers – When to Make a Client Available

It always starts with an attorney proffer.

-
- 01 **Attorney proffer** – “If my client said this, would you agree my client is a witness and will not be prosecuted?”

 - 02 **Assess the government’s goal** – e.g., using the client’s account against someone else, deciding whether to prosecute the client

 - 03 **Client proffer only if benefits outweigh risks** – inadvisable if client has real exposure

The Rare Exception: the senior executive who believes he can “talk them out of it.” It is almost always a bad idea – counsel must explain the serious consequences.

Proffer Agreements – Limited Protection

“Queen for a Day” Agreements: designed to give comfort that statements will not be used against the client

- **Direct Use** – the government cannot use the statements in its case-in-chief.
- **Derivative Use** – the government can follow leads from what the client says.
- **Impeachment & Rebuttal** – statements can be used to cross-examine the client and often to rebut defense evidence or arguments.
- **False Statements** – exposure under 18 U.S.C. § 1001 and loss of all protection.
- **Inaccurate Record** – one government agent taking notes, which may be inaccurate or incomplete.

Practical Effect: the client locks in a proffered account that might constrain trial defenses.

Common Interest Understanding

- Allow counsel for the company and individuals to share, without waiving privilege, what they learn about the government's investigation:
 - Who has been subpoenaed
 - What is being asked, key documents
- Requires a common *legal* interest and communications in furtherance of that interest
- *Pitfalls:* a member may begin cooperating – require prompt notice of withdrawal and address cross-examination conflicts.

Themes Worth Considering Today

- *Outside the Priorities*
- *NFED Policy as a Roadmap*
- *Weaponization & Careerism*
- *Overcriminalization*
- *Trial Risk & Priority Interests*

Caution: DOJ leadership has warned against mischaracterizing prosecutorial conduct – and a declination can be revisited.

Declination Advocacy in 2026

- The traditional escalation path still applies: line prosecutors → supervisors → front office → DAG's office.
- New audiences: the Fraud Division's **Corporate Enforcement Section** now participates in corporate fraud matters from intake through resolution.
- Whether to engage lobbyists or consultants – assess risks.
- What leverage to use and when; leadership has urged counsel to be judicious about “what, when, and how” to appeal.
- A declination is not an acquittal: no double-jeopardy protection, and a new prosecutor can reopen the file.

Preparing an Executive to Testify

05

Depositions & Trial

Preparation

- How much is enough?
- Parallel proceedings: civil testimony can be used by prosecutors and regulators.
- Invoking the Fifth Amendment in a civil case risks an adverse inference.

Executives in Charge

- Executives might be used to persuading and leading; the witness must listen and often answer only the question asked.
- Keep answers short, or go on offense?
When, if ever, to volunteer the narrative?

Trial – Should the Executive Testify?

- The right to testify belongs to the defendant; counsel advises – and it is often a game-time decision.
- **Multiple factors**
- **What makes a witness effective?**

Case Study: *United States v. Kim & Messenger*

- **Charges:** bribery and conspiracy. The government alleged that Kim and Messenger gave a lucrative job to a four-star admiral in exchange for Navy business.
- **First trial (2025):** hung jury; Mr. Kim testified; Ms. Messenger did not.
- **Retrial (May 2026):** Gibson Dunn called Ms. Messenger to testify; Mr. Kim did not.
- **Verdict:** unanimous acquittal on all counts after roughly six hours of deliberation.

Questions?

Upcoming
November
Programs

2026/2027
White Collar
Webcast
Series

Date and Time	Program	Registration Link
Wednesday, November 4, 2026 10:30 AM – 11:30 AM PT 1:30 PM – 2:30 PM ET	Export Controls Speakers: Adam Smith, Matthew Axelrod, Melissa Farrar Christopher Timura	Event Details
Tuesday, November 10, 2026 9:00 AM – 11:00 AM PT 12:00 PM – 2:00 PM ET	Board Oversight of Enforcement Investigations Speakers: F. Joseph Warin, John Chesley, Monica Loseman, Bill Savitt	Event Details



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