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Blankenship Case Shows Perils Of Post-Crisis Assurances

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Law360, New York (December 17, 2014, 11:00 AM ET) -- The recent indictment of Don Blankenship, the former chairman and CEO of Massey Energy Co., stands as a warning for company leaders confronting a crisis and raises questions about the continued viability of common approaches for responding to a crisis. The indictment stems from the 2010 explosion at the Upper Big Branch Mine in West Virginia, an incident that killed 29 miners. On Nov. 13, 2014, a federal grand jury in West Virginia charged Blankenship with conspiring to violate safety regulations and to circumvent inspections and with making false statements immediately after the incident. It is unusual to see a chief executive indicted on safety-related charges, but even more notable about the Blankenship indictment is its inclusion of charges based on the public statements made by Massey Energy after the incident.

Don Blankenship is the fourth manager from the Upper Big Branch Mine to face federal charges stemming from the 2010 incident, and his indictment comes less than six months before the expiration of the statute of limitations. The U.S. Department of Justice’s track record on this incident is strong: two managers have pled guilty to criminal charges and a third was convicted at trial. The two managers who pled guilty are probably cooperating with the government, which may help the government prove its case against Blankenship. But, even with this foundation, the U.S. attorney’s office will face some challenges in pursuing conviction on the false statement charges.

The Blankenship indictment contains two false statement-related counts — one a U.S. Securities and Exchange Commission charge and the other based on the general federal false statement provision, 18 U.S.C. § 1001. Both of these counts focus on the following two statements, repeated in nearly identical form in an SEC filing and a later press release: “[w]e [Massey] do not condone any violation of MSHA regulations” and “we [Massey] strive to be in compliance with all regulations at all times.”

It is remarkable to see criminal charges based on such statements. The statements center around the imprecise words “condone” and “strive” — verbs that could be seen as descriptions of subjective mental state rather than of falsifiable, objective fact. It may be difficult for the government to prove what condone and strive mean, let alone that Don Blankenship is guilty of having willfully used these terms falsely.

Just as remarkably, it seems that Blankenship did not write or utter the crucial statements himself. Rather, the indictment alleges that the statements were drafted by other, unnamed “Massey officials.” Allegedly, Blankenship assigned the unnamed officials to draft a message to shareholders after Massey stock dropped 16.8 percent in the two days following the Upper Big Branch disaster. The officials are alleged to have given a draft statement to Blankenship for his review. The indictment alleges that Blankenship reviewed and approved the statement, and that as a result of his approval the statement was released publicly and filed with the SEC. The indictment does not allege that Blankenship told the officials what the statement should say or that he made any edits to the draft statement, and the key language was not attributed to Blankenship.

The indictment further alleges that, following the SEC filing, a public relations consultant retained by Massey drafted a public statement that included language nearly identical to that included in the SEC filing. The indictment alleges that the consultant sent a draft press release to Blankenship “with a message asking him to review the draft release and advising that the consultant wanted to issue the release that day.” Blankenship allegedly “responded in writing, approving the issuance of the release.” This statement, which was not submitted to a government agency, is included only in the SEC count.

Attorneys, executives and public relations consultants would do well to take note of this indictment. It is common, in the wake of a serious, safety-related or similar incident, for a company to issue a public statement which both expresses concern over the incident and reassures the public and stockholders that the company takes safety and overall compliance seriously. Statements like those made by Massey Energy — about striving for compliance and not condoning regulatory violations — could be seen as low-risk simply because they are nonspecific and arguably subjective. The Blankenship indictment shows that, in at least some circumstances, and at least for the executives of publicly traded companies, such statements could be the basis for criminal charges.

It is hard to know what the limits of these types of allegations are. After a serious incident, it is common for companies to declare an intent to cooperate fully with the government. If a company makes such a statement, could a prosecution be based on an allegation that a company did not intend “full cooperation?” How many alleged safety violations must go unaddressed before a company is “condoning” violations?

Criminal charges, of course, are several steps removed from a criminal conviction. Nonetheless, the Blankenship charges are a reminder that counsel providing crisis advice to a company and its management must ensure that all statements made on behalf of a corporation have solid support. Particularly in times of crisis, when key facts are unknown and extreme demands are placed on executives’ attention, it is incumbent on counsel to ensure that public statements are fully vetted for accuracy and can be substantiated. The Blankenship indictment illustrates the risks that corporate managers take when they approve or sign statements — even general ones. There is only so much safety in generality.

But, while the Blankenship prosecution illustrates real risks, one might expect such charges to remain fairly unusual. The Upper Big Branch incident was exceptional, and so it is not entirely surprising that the government’s investigation and prosecution of the incident have been somewhat exceptional, too. The loss of life was heartbreaking, safety violations are alleged to have been long-standing and egregious and the government seems to believe that senior managers — Blankenship prime among them — contributed directly to the dangers underground.

The local U.S. attorney’s office — apparently working without direct involvement from the main justice divisions in Washington, D.C. — seems to have made it a priority to prosecute this incident fully and to target the company’s most senior leadership. In more routine cases, we expect prosecutors will still shy away from charges based on broad, indefinite corporate statements.

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