3 Lessons From Family Dollar's Record $41.7M Guilty Plea

By **Jonathan Porter** (April 16, 2024)


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On Feb. 26, the U.S. Department of Justice announced a guilty plea by Family Dollar Stores LLC in what it called the largest ever monetary criminal penalty in a food safety case, resulting in a fine and forfeiture totaling almost $41.68 million.

The obvious takeaway for companies: Don't let rodents overtake a distribution center where food and drugs are being stored.

But the plea also offers three less obvious takeaways for those practicing in the interconnected fields of compliance, internal investigations and white collar defense.

1. The compliance lesson: Take internal reports seriously.

The Justice Department's Evaluation of Corporate Compliance Programs guidance has three components. A portion of all three components considers whether a company's reporting mechanisms truly work.

To be considered effective in the parlance of the Justice Department's program, there must be adequate mechanisms for reports of shortcomings to make their way to qualified compliance personnel who can and do follow through on the reports.

The factual basis set out in Family Dollar's plea agreement shows that Family Dollar's old compliance program was less than effective.

According to the plea agreement, reports of rodent infestation at a distribution center in West Memphis, Arkansas, which served Family Dollar stores in six states, began in August 2020.

Several months later, Family Dollar stores began complaining that they were finding rodents in their shipments from the distribution center, along with products that were damaged by rodents.

By January 2021, Family Dollar employees were aware that the rodent problem was resulting in adulteration of U.S. Food and Drug Administration-regulated products.

In March and April 2021, state inspectors reported to Family Dollar that they found rodents at the distribution center, and cited Family Dollar for failure to fix the rodent problem.

Maintenance workers at the distribution center began creating spreadsheets showing the extent of the rodents they were finding. One employee even filed an Occupational Safety and Health Administration complaint in mid-2021 complaining that the rodent infestation made the working environment unsafe.

From the plea agreement, it appears that regional compliance specialists investigated the issue and filed a report commenting that "rodent infestation is a major issue," but that report appears to have had no practical impact on the actual problem.

Real action did not take place until January 2022, around 18 months after the first reports of rodent infestation. It was not until FDA inspectors raided the distribution center and sounded the alarm on the extent of the problem that Family Dollar took real action, quickly discontinuing shipments from the distribution center after the FDA's visit, and fumigating the warehouse four days after the FDA's visit. That fumigation resulted in the extermination of over 1,200 rodents.

Cases of corporate compliance failures almost never occur because some corporate decision-maker knew about the problem and decided against remedial action — if the CEO knew about the infestation and chose to not fix it, the Justice Department would have almost certainly insisted on that being in the plea agreement.

Rather, corporate compliance failures occur because the information doesn't arrive to the decision-maker at all. But that is still a shortcoming on the executive level. Corporate leaders must foster a culture of compliance in which internal reports of problems are securely sent to people who can do something about it.

This requires reporting mechanisms, processes for timely investigating of reported problems, and channels for getting verified reported problems to people to take action.

Instead, based on the plea agreement, what happened with Family Dollar was reports that continually fell on deaf ears, followed by a toothless report by disempowered compliance personnel. That is how a run-of-the-mill rodent infestation turned into a record-breaking corporate plea.

When Family Dollar decided to act, it fixed the problem in four days. But that should have happened earlier — before the FDA inspected the facility.

The first and perhaps most important lesson from the Family Dollar corporate plea is that corporations simply must have compliance mechanisms in place that allow for reports to be heard and acted upon. Requests for lenience will be difficult for the Justice Department to grant when reasonable diligence was abdicated before federal authorities showed up.

2. The internal investigations lesson: It's never too late to self-police.

When FDA inspectors arrived at Family Dollar's problematic distribution center, Family Dollar was in a tough position. The FDA would soon learn, if it wasn't already aware, that Family Dollar had received internal reports of the rodent infestation at an increasing pace over the prior 18 months, and had not responded in any meaningful way up to that point.

But from that point forward, Family Dollar, from all appearances, acted in the exact way you'd hope a corporation would act. Family Dollar shut down distributions and fumigated within days of the FDA's inspection. It issued a voluntary recall of certain products that had gone through the problematic distribution center. It overhauled its operating procedures relating to compliance and food safety measures. And it launched a serious internal investigation.

A challenge with defending federal investigations is that the target never truly knows what the investigators know. Investigators gather information through various means, and inevitably develop theories as they gather information. Sometimes those theories are right, but sometimes investigators are led astray by documents taken out of context, by interviews of individuals who are mistaken, or through simple error.

Targets must be in a position to steer investigators away from drawing incorrect conclusions — and publicly levying incorrect allegations that could permanently stain a target's reputation — and the best way to do that is to have information ready to share with investigators, gained through an effective internal investigation.

The other reason why internal investigations are a critical piece of defending federal investigations is the significant leeway Justice Department attorneys are given in resolving cases, and the great potential for gaining cooperation credit in those resolutions.

A substantial portion of the Justice Manual's section on prosecuting business organizations is devoted to cooperation, and for good reason. There are no federal prisons for business organizations — the inquiry is entirely geared toward financial punishment and the level of burden to be placed on the organization going forward.

Showing the Justice Department that the business takes the problem seriously and acts quickly to fix the problem is critical, and you cannot take the problem seriously or fix it without figuring out exactly what the problem is through an internal investigation. Internal investigations are simply expected by the Justice Department, and necessary to obtain cooperation credit.

From the plea agreement, it is clear that Family Dollar launched an effective internal investigation in the aftermath of the FDA's inspection. The plea agreement contained some details of what Family Dollar did to help the government learn of specific facts during the company's internal investigation, and the credit it obtained by so cooperating.

Family Dollar's internal investigation gathered evidence, distilled evidence down to the key facts, and allowed the company to present to investigators those key facts in a helpful way, accompanied by evidence it collected.

Family Dollar made the investigators' jobs easy, and that is the hallmark of a cooperation strategy.

The company benefited from that strategy, too. The plea agreement references that the problematic distribution center was responsible for distributing "at least $41,475,000 in FDA-regulated products" during the applicable time period, meaning that the total could have been more, and the agreed forfeiture amount was at the bottom end of the estimated range.

In addition, the Justice Department did not seek to impose a monitorship on Family Dollar, opting instead for an agreement that Family Dollar abide by the Justice Department's heightened expectations for its corporate compliance program.

In sum, Family Dollar turned a bad situation into a manageable situation by running an effective internal investigation after the FDA's inspection, and using that internal investigation to bargain for an outcome that is better than what others have received.

3. The white collar defense lesson: Give thought to corporate forms and boundaries.

Prosecutions against individuals are typically straightforward in ways that prosecutions against business organizations are not. It's pretty clear that if "John Doe" is indicted, then "John Doe" is the one who controls the defense's core decisions relating to guilty pleas or whether to proceed to trial. That is obviously more complicated with corporate defendants.

Family Dollar was acquired in 2015 by Dollar Tree Inc., and the limited liability company through which Family Dollar operates is an entity under the ownership and control of Dollar Tree.

The question in cases of corporate targets often becomes: Which corporate entity pleads guilty (or agrees to some alternative remedy, like a nonprosecution agreement)?

For Family Dollar, the Justice Department allowed the subsidiary limited liability company to plead guilty, but the department appears to have insisted that Dollar Tree itself agree to the ongoing corporate compliance program portion of the plea agreement.

For attorneys representing corporations in federal investigations, it is critical to identify the boundaries of corporate entities and clearly delineate in any plea agreement, deferred prosecution agreement, nonprosecution agreement or other similar agreement which corporate entity is agreeing to what.

For Family Dollar, its attorneys made clear in the plea agreement that Dollar Tree was a nondefendant signatory undertaking related compliance obligations, and made clear through corporate resolutions who had authority to enter into the plea agreement, and who would be present to plead guilty on behalf of Family Dollar.

These considerations are important with large corporations, but also with smaller businesses, too. With smaller businesses contemplating resolving federal investigations, attention must be paid to the structure of the business to ensure that the right owners, partners or members are approving of the resolution, lest an attorney find themself in the awkward position of realizing late in negotiations that board members or nonparticipating owners disapprove of the handshake agreement with prosecutors.

Conclusion

As a whole, the record-breaking Family Dollar corporate guilty plea offers many lessons. Compliance failures put the company in serious peril, but an effective response and internal investigation regained the company's footing.

As the Justice Department continues to announce incentives to encourage corporate prosecutions, these issues will only become more critical.

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