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THE DOJ'S NEW POSITION ON CORPORATE COOPERATION

In recent speeches, Department of Justice officials have signaled that a corporation under investigation will receive full credit for cooperation only if it provides evidence enabling prosecutors to bring cases against individuals. The author lists some difficult questions the policy raises for defense counsel and notes that its effects may be perverse: employees less willing to cooperate in internal investigations and companies less willing to cooperate in marginal cases when evidence of individual culpability may not exist.

By Matthew E. Fishbein *

In a number of recent speeches, Department of Justice ("DOJ") officials have signaled a new condition to the grant of full credit for a corporation's cooperation with a government investigation: going forward, it appears that full cooperation credit will not be available to a corporation unless it provides evidence enabling prosecutors to bring cases against individuals. According to one senior DOJ official, "[i]f you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation. Make those efforts the last thing you talk about before you walk out."¹

¹ Marshall L. Miller, Principal Deputy Assistant Attorney General for the Criminal Division, Remarks at the Global Investigation Review Program, Sept. 17, 2014, available at <http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html>.

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The DOJ's increased emphasis on cooperation against individuals appears to be at least, in part, a response to the public outcry over the lack of individual prosecutions in the wake of the financial crisis. In February 2015, Attorney General Eric Holder announced that he had given DOJ prosecutors a 90-day deadline to report on whether they would be able to successfully bring cases against individuals for conduct leading up to the financial crisis.² That deadline has passed and no new cases have been announced.

The dearth of individual prosecutions in the wake of the financial crisis has been the subject of widespread debate. How is it that companies enter into settlements with the government (usually Deferred Prosecution Agreements or Non-Prosecution Agreements) in which

² William D. Cohen, *Instead of Wall St. Prosecutions, Holder Delivers a Deadline*, N.Y. TIMES, Feb. 27, 2015, <http://www.nytimes.com/2015/02/28/business/dealbook/instead-of-wall-st-prosecutions-holder-delivers-a-deadline.html>.

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they admit to egregious conduct and pay massive fines, and yet individuals – through whom all companies must act – are rarely charged?

As I have written elsewhere, the lack of individual prosecutions is the inevitable consequence of making a potential criminal case out of every news story where something bad occurs. While the needs and interests of companies often lead them to enter into settlements even where there is little evidence that a crime actually was committed, individuals are more likely to test the government's case – especially if that case rests on questionable footing.³ This article discusses the context in which corporations cooperate with the government and suggests that the DOJ's increased emphasis on cooperation against individuals may undermine corporate defense counsel's ability to obtain or recommend their client's cooperation in the many marginal cases where evidence of criminal conduct is lacking.

THE LACK OF INDIVIDUAL PROSECUTIONS

A number of recent statements by top DOJ officials suggest that their explanation for the lack of individual prosecutions is that companies are largely to blame. The DOJ has suggested that by dragging their feet instead of actively cooperating – for example, by hiding behind over-expansive interpretations of foreign data privacy laws or allowing culpable employees to leave the country – companies effectively have put up roadblocks to the prosecution of individuals.⁴

³ Matthew E. Fishbein, *Why Individuals Aren't Prosecuted for Conduct Companies Admit*, N.Y.L.J., Sept. 19, 2014.

⁴ See, e.g., Miller, *supra* note 1 (stating that “[c]orporations are often too quick to claim that they cannot retrieve overseas documents, e-mails, or other evidence regarding individuals due to foreign data privacy laws”). DOJ officials often have cited last year's guilty pleas by BNP Paribas and Credit Suisse as examples of cases where companies hindered or prevented individual prosecutions. See, e.g., *id* (stating that “BNP Paribas and Credit Suisse paid a historic price not only for their criminal conduct, but also for their insulation of culpable corporate employees”). According to Assistant Attorney General Leslie R. Caldwell, as a result of BNP Paribas “dragging their feet,”

While there may be some examples of companies holding back in their cooperation, a corporation's conduct during the course of a government investigation is rarely the reason that individuals are not prosecuted. Rather, individuals are not prosecuted for the conduct companies admit because, in many marginal cases, there is insufficient evidence that a crime actually occurred. Why would a company enter into a criminal settlement where the underlying conduct does not give rise to a crime? The answer is simple: companies frequently determine that a “bad” settlement may be a better resolution than a drawn out, litigated victory.⁵ And as prosecutors have grown to appreciate the great leverage they hold over corporate entities, they have exercised this leverage in the pursuit of increasingly marginal cases. They do so, in part, because the risk is minimal (the prosecutor's case is unlikely to be challenged in court) and the reward is great (the corporations pay enormous penalties).

Prosecutors have considerably less leverage over individuals, who, facing the possibility of incarceration and financial devastation in the event of a criminal conviction, are more likely to test the government's case and put the government at risk of a high-profile loss.⁶

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the statute of limitations expired before the government could bring charges against individuals. *Dick Carozza, Didn't Comply? Then Fully Cooperate*, FRAUD MAGAZINE, May/June 2015 (interviewing Caldwell), available at <http://www.fraud-magazine.com/article.aspx?id=4294988068>.

⁵ Fishbein, *supra* note 3.

⁶ The BP Deepwater Horizon oil spill case provides a telling example. In 2013, BP pled guilty to 14 criminal counts related to the oil spill and agreed to pay a record \$4 billion in fines. Notwithstanding the company's settlement, the government has brought charges against only one senior BP executive, for obstruction of Congress and making false statement to federal investigators. Recently, a judge dismissed the obstruction charge and a jury acquitted the executive of the false statements charge. See Jenifer Larino, *Jury Acquits BP Exec Accused of Lying About Oil Spill Flow*, THE TIMES-PICAYUNE, June 5, 2015, available at http://www.nola.com/crime/index.ssf/2015/06/david_rainey_acquitted_bp_oil.html.

Given the extreme public pressure to bring charges against individuals in connection with the financial crisis, it stands to reason that if prosecutors could prove cases against corporate executives, they would bring those cases in a heartbeat. Indeed, Attorney General Holder recently acknowledged that the lack of individual prosecutions in the wake of the financial crisis was “not for lack of trying.”⁷

THE DOJ'S POSITION ON CORPORATE COOPERATION

Faced with a largely unsuccessful record in the pursuit of individual prosecutions after the financial crisis, it appears that, going forward, the DOJ is going to try even harder. According to a senior DOJ official, “[t]he prosecution of individuals – including corporate executives – for white-collar crimes is at the very top of the Criminal Division’s priority list.”⁸ Consistent with this goal, a number of DOJ officials have explained that “true cooperation” with a government investigation requires that the corporation identify culpable individuals and provide the government with evidence that implicates them.⁹ Without such evidence of individual culpability, corporations will not receive full cooperation credit, even if they do all of the things that traditionally have been viewed as the hallmarks of robust cooperation such as volunteering information not otherwise known to the government, providing

documents and witnesses outside the government’s subpoena power, and making productions and disclosures in a timely manner.

Although the DOJ’s Principles of Federal Prosecution of Business Organizations (the “Filip Factors”) instruct prosecutors to consider a corporation’s “willingness to cooperate in the investigation of its agents”¹⁰ when deciding whether to bring charges, the DOJ’s recent formulation of its position on cooperation requires corporations to go a step further and affirmatively identify and provide evidence of individual wrongdoing. And although cooperation has always been one of the Filip Factors that prosecutors must consider, recent DOJ speeches strongly suggest that it is now the most important factor.¹¹ Thus, while DOJ officials have presented the Department’s position on corporate cooperation as explanations or clarifications of existing policy (and not as a new development),¹² their recent statements appear to reflect a shift in both what constitutes corporate cooperation and how the DOJ assesses cooperation when deciding whether to bring charges.

IMPLICATIONS FOR DEFENSE COUNSEL

The DOJ’s corporate cooperation policy is in some ways a double-edged sword. In cases where there is clear-cut evidence of wrongdoing, the DOJ’s policy on cooperation makes good sense and should be relatively straightforward in its application: in order to obtain full

⁷ Cohen, *supra* note 2.

⁸ Miller, *supra* note 1.

⁹ Leslie R. Caldwell, Assistant Attorney General for the Criminal Division, Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement, Apr. 17, 2015, available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law> (“The mere voluntary disclosure of corporate misconduct – by itself – is not enough. All too often, corporations expect cooperation credit for voluntarily disclosing and describing the corporate entities’ misconduct, and issuing a corporate mea culpa. True cooperation, however, requires identifying the individuals actually responsible for the misconduct – be they executives or others – and the provision of all available facts relating to that misconduct.”); Sung-Hee Suh, Deputy Assistant Attorney for the Criminal Division, Remarks at the PLI’s 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice, Jan. 20, 2015, available at <http://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities> (“Even the identification of culpable individuals is not true cooperation, if the company intentionally fails to locate and provide facts and evidence at their disposal that implicate those individuals.”).

¹⁰ United States Attorneys’ Manual § 9-28.300(A)(4).

¹¹ Miller, *supra* note 1 (“[W]hen you come in to discuss the results of an internal investigation to the Criminal Division and make a Filip factor presentation – expect that a primary focus will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, and how tireless your efforts were to find the people responsible.”).

¹² See, e.g., *id.* (stating that the DOJ’s requirement that companies provide evidence of individual culpability is not new, but rather is “sometimes given short shrift”). Although Filip Factor 4 addresses only a “willingness to cooperate” in the government’s investigation of the corporation’s agents (United States Attorneys’ Manual § 9-28.300(A)(4)), the commentary provides that one factor prosecutors may consider in assessing cooperation is “the corporation’s willingness to provide relevant information and evidence, and identify relevant actors within and outside the corporation, including senior executives.” *Id.* at § 9-28.700(A). In his September 2014 speech, Marshall Miller cited this commentary as evidence that DOJ’s recently stated position on what constitutes cooperation is not new.

cooperation credit, it makes sense that companies should have to identify and disclose the information relevant to individual misconduct. This requirement is consistent with the government's policy on providing cooperation credit for individuals who substantially assist in the prosecution of others.¹³ However, the policy presents a real dilemma for companies responding to the marginal, gray-area cases described above, where the company may for business reasons want to reach a settlement even where it has strong defenses, but the absence of evidence of individual culpability may preclude it from receiving the benefits of "full cooperation."

In these kinds of cases, defense counsel is left facing a host of difficult questions. If a company should make "securing evidence of individual culpability the focus of [its] investigative efforts,"¹⁴ what is it to do when that evidence does not exist? If a company targets its internal investigation toward developing cases against individuals, should individuals be provided with counsel at the outset? If true cooperation "requires identifying the individuals actually responsible for the misconduct,"¹⁵ can a company "truly cooperate" when there are no such responsible individuals? If, in order to receive "full cooperation credit," a company should emphasize its efforts to obtain evidence of individual culpability, can it still receive "full credit" when those efforts are fruitless?¹⁶ And if securing evidence of individual culpability is a "primary focus"¹⁷ when the government weighs the Filip Factors, will a company be subject to harsher charging decisions or settlement terms simply because no such evidence exists?

Taken together, these questions suggest that a policy designed to incentivize cooperation may have the perverse effect of deterring it: if a company knows that

it cannot receive full cooperation credit, it may decide that it is not worth the effort to try; and if individuals know that companies are incentivized to obtain evidence against them, they may be far less willing to cooperate during internal investigations.

Moreover, under the DOJ's cooperation policy, companies seeking to resolve criminal investigations in marginal cases may actually be penalized when their individual employees did not engage in criminal conduct. In such cases, defense counsel may consider challenging prosecutors to identify what aspect of their investigation was lacking or what evidence of individual culpability should have been uncovered. DOJ officials have said that the government will conduct its own investigations to "pressure test" a company's internal investigation.¹⁸ If the government's test reveals no flaws in the company's investigation, will the government still not provide full cooperation credit?

CONCLUSION

The DOJ's policy on cooperation is unlikely to solve the problem that it was likely designed to address, *i.e.*, the lack of individual prosecutions. Although there may be an increase in individual prosecutions in cases of clear wrongdoing, the DOJ's policy is unlikely to have an impact on the marginal cases, where companies often settle in spite of the evidence – not because of it.

While the needs and interests of companies in reaching settlements have allowed the government to obtain larger and larger settlements in cases where the facts and law likely would not permit them to succeed with a jury, the government must live with the fact that no amount of company cooperation will turn facts that do not provide a basis for individual prosecutions into facts that do. The government either has to accept this – and continue along the path of corporate settlements without individual prosecutions – or stop pursuing investigations and accepting settlements where there are no individuals who have actually committed crimes.

As DOJ officials recently have emphasized, "[c]orporations do not act criminally, but for the actions of individuals."¹⁹ Only time will tell whether the government's practice of settling marginal criminal cases with corporations will realign with this fundamental principle. ■

¹³ See, e.g., Miller, *supra* note 1 ("Mob cooperators do not receive cooperation credit merely for halting or disclosing their own criminal conduct. Attempted cooperators should not get reduced sentences if they refuse to provide testimony or fail to turn over evidence against other culpable parties. A true cooperator – whether a mobster or a company – must forthrightly provide all the available facts and evidence so that the most culpable individuals can be prosecuted.").

¹⁴ *Id.*

¹⁵ Caldwell, *supra* note 9.

¹⁶ Miller, *supra* note 1 ("If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation. Make those efforts the last thing you talk about before you walk out.").

¹⁷ See *supra* note 11.

¹⁸ Caldwell, *supra* note 9; Miller, *supra* note 1.

¹⁹ Miller, *supra* note 1.