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DOJ Corporate Enforcement Guidelines Are Placing Individual Defendants Between a Rock And a Whirlpool

By David S. Krakoff, Bradley A. Marcus and Nadav Ariel

For companies suspected of wrongdoing, cooperating with Department of Justice (DOJ) investigations and self-disclosing their misconduct often appears to be their only option to avoid prosecution and reduce large financial penalties. But, these benefits often come at a price, especially to company employees who are caught in the middle. To gain cooperation credit for voluntary self-disclosure, companies are expected to identify all relevant facts relating to the individuals responsible for the alleged misconduct. And as part of demonstrating their cooperation to the government, companies often pressure their employees to submit to interviews, including with DOJ, or risk losing their jobs and/or indemnification of legal fees. Such scenarios, which have become prevalent in today's corporate enforcement environment, place employees "between the rock and the whirlpool" by arguably coercing their testimony and infringing on their constitutional right against self-incrimination. *See*, *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967).

DOJ's Corporate Enforcement Policies

This situation is a direct result of DOJ's corporate enforcement policy, which has undergone multiple revisions under Deputy Attorney General Rod Rosenstein designed to increase both: 1) voluntary self-disclosures by corporations (thus mitigating their liability); and 2) DOJ's ability to prosecute individual wrongdoers. The Justice Manual (previously known as the United States Attorneys' Manual (USAM)) codifies DOJ's corporate enforcement policy, which is written in the Foreign Corrupt Practices Act (FCPA) context, but serves as non-binding guidance in all criminal cases. (Principal Deputy Assistant Attorney General John P. Cronan delivered **remarks at Practicing Law Institute**(Nov. 28, 2018)). The Manual provides that a company will receive a presumption of non-prosecution absent aggravating circumstances if it fully cooperates by voluntarily self-disclosing misconduct and timely remediating. Full cooperation includes disclosing "all facts related to involvement in the criminal activity by the company's officers, employees, or agents," and, "[w]here requested, making available for interviews by the Department those company officers and employees who possess relevant information," including those located overseas. Justice Manual 9-47.120. In Deputy Attorney General Rod J. Rosenstein's **remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act** (Nov. 29, 2018), he stressed "that any company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct" while making clear that "pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation."

DOJ's current policy follows decades of guidance memos by several Deputy Attorneys General that have continuously increased the benefits for corporations to cooperate with investigations while increasing the pressure and penalties on individuals. Most recently, the 2015 Yates Memo emphasized that "in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct." **Memorandum from Deputy Attorney General Sally Quillian Yates on Individual Accountability for Corporate Wrongdoing (Yates Memo)** (Sept. 9, 2015). The Yates Memo also instructed prosecutors to "focus on individuals from the inception of the investigation," and "not release culpable individuals from civil or criminal liability when resolving a matter with a corporation." In doing so, DOJ sought to "increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy." Current DOJ policy, implemented by Rosenstein, thus built upon these developments by further incentivizing corporations to cooperate by making credit easier to obtain through disclosure on individuals with "substantial involvement" in the wrongful conduct. *Supra*, note ii.

DOJ's Cooperation Policies Outsource Investigations to the Targeted Corporations

The practical consequence of DOJ's corporate enforcement policy is that as

David S. Krakoff is a partner at Buckley LLP and a member of the Board of Editors of *Business Crimes Bulletin*. **Bradley A. Marcus** and **Nadav Ariel** are counsel with the firm.

soon as a company interested in cooperation credit identifies a potential compliance issue, it must go into full cooperation mode. That means hiring outside counsel to conduct an investigation, gathering relevant documents, interviewing witnesses, and providing all pertinent evidence to the government about individuals involved in the conduct at issue. In other words, DOJ incentivizes a targeted company to serve as an unofficial prosecutor — effectively outsourcing the government's investigation — in exchange for a non-prosecution or deferred prosecution agreement.

In particular, to obtain maximum credit, the government encourages companies to provide summaries of interviews by company counsel and to assist in making employees available for DOJ interviews regardless of their employment status or whether they are located overseas and potentially not otherwise subject to U.S. jurisdiction.

Employees May Be Coerced Into Waiving Fifth Amendment Rights

As a consequence of DOJ's corporate enforcement policy, companies may pressure their employees to cooperate with DOJ's investigations by directing them to submit to company and DOJ interviews or otherwise face termination. The Supreme Court recognized this duress in *Garrity v. New Jersey,* where it held that the government violates public employees' Fifth Amendment right against self-incrimination when it presents them with a choice between submitting to a government interview and job forfeiture — placing them "between the rock and the whirlpool." 385 U.S. at 496. In *United States v. Stein*, Judge Lewis A. Kaplan in the S.D.N.Y. extended this holding to private employees where DOJ explicitly conditioned a company's cooperation credit on pressuring its employees to submit to DOJ interviews or lose their jobs. 440 F. Supp. 2d 315, 337-38 (S.D.N.Y. 2006). *Stein* involved a criminal prosecution of KPMG employees regarding alleged illegal tax shelters. The Second Circuit affirmed the decision, but only based on the threat to cut off legal fees without reaching the threats to terminate employment. *See*, *United States v. Stein,* 541 F.3d 130, 136 (2d Cir. 2008).

More recently, in May 2019, in *United States v. Connolly*, Chief Judge Colleen McMahon in the S.D.N.Y. applied *Garrity* in the context of interviews by company counsel. (Note: One of the authors of this article represents a cooperating witness who testified in the *Connolly* trial after pleading guilty. Nothing in this article is intended to suggest an opinion by the authors as to whether a *Garrity* violation occurred in the *Connolly* case with respect to any of the individuals interviewed by company counsel in that investigation.) Judge McMahon found that "Deutsche Bank was told by the Government to conduct an investigation into a particular matter, to do so in a particular fashion, to interview particular people (including [defendant]), to share its findings with the Government on a regular basis, and to carry out governmental investigative demands that were generated by its earlier efforts." Memorandum Decision and Order Denying Defendant Gavin Black's Motion for Kastigar Relief. *United States v. Connolly,* No. 16 Cr. 370 (CM) (S.D.N.Y May 2, 2019), ECF No. 432. Accordingly, Judge McMahon concluded that the government's close nexus to the "internal" investigation violated *Garrity* because defendant's choice was between submitting to an interview with company counsel or face termination of employment. Nevertheless, the Judge declined to grant the defendant post-trial relief because the government did not make direct or indirect use of the coerced statements at trial. Notably, the Judge was "deeply troubled" by the suggestion that the Government "is routinely outsourcing its investigations into complex financial matters to the targets of those investigations, who are in a uniquely coercive position vis-à-vis potential targets of criminal activity."

Individual Defendants Should Be Wary of Cooperation

Facing pressure to cooperate with the company's investigation — which the company may turn over to the government to obtain cooperation credit — many executives and employees understandably focus on keeping their jobs to the detriment of their legal rights. Moreover, employees frequently make this decision early in an internal investigation before the company has obtained counsel for them. Legal consequences seem remote while current employment is tangible and crucial to people's lives. And, of course, cooperating does not preclude the termination of employment. Companies and the government will argue that under *Upjohn Co. v. United States*, it is enough to advise employees that company counsel does not represent them and that the company is free to disclose the interview to the government. 449 U.S. 383 (1981). But, in fact, employees simply do not appreciate the ramifications of cooperating with their own companies.

The practical reality of DOJ's current corporate enforcement policy is that individual employees are often placed "between the rock and the whirlpool." Companies fully understand it is in their interest to obtain cooperation credit by providing employee interviews to the government, and to encourage employees to make themselves available for DOJ interviews. The pressure may be subtle and implicit, but it is real. Consequently, courts should recognize these circumstances and carefully scrutinize the relationship between prosecutors and company counsel to ensure that the government does not violate an individual's Fifth Amendment privilege against self-incrimination through a company's internal investigation.

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