

KIRKLAND ALERT

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U.S. Department of Justice Official Urges Companies to Provide Evidence Against Their Employees to Obtain Cooperation Credit

The U.S. Department of Justice recently announced an important change in the way it will evaluate whether a corporate defendant or target will receive credit for cooperating with the government in a criminal investigation. This shift in approach will have potential repercussions for any corporation or financial institution involved in a federal investigation.

More specifically, Marshall Miller, a senior leader in the Department of Justice's Criminal Division, recently announced in a New York City speech that "the heart of effective corporate cooperation" with DOJ investigations involves discovering and providing evidence against culpable employees, "as far up the corporate ladder as the misconduct goes."¹ A corporation's identification of potential individual wrongdoers has long been among the numerous factors that the DOJ considers in deciding how to resolve corporate investigations. But the remarks of Mr. Miller, who serves as the Principal Deputy Assistant Attorney General for the Criminal Division (PDAAG), signal that under the new head of the Criminal Division, Assistant Attorney General Leslie Caldwell, whether a company has looked for and disclosed evidence against culpable executives and employees will be a primary factor in measuring corporate cooperation. Furthermore, such steps, according to the government, could be a decisive factor in how a corporate investigation is resolved (that is, through a corporate guilty plea, deferred or non-prosecution agreement, or a declination). Given that the Criminal Division is involved in the majority of large corporate matters, from FCPA violations to financial crimes to money laundering, companies should carefully consider the Criminal Division's expectation that a company will cooperate in this way against its own personnel.

Since the financial crisis, the DOJ has been heavily criticized for failing to prosecute allegedly culpable corporate executives and other individuals, despite reaching larger and larger settlements with financial institutions and other companies. Not surprisingly, the PDAAG made clear that the prosecution of individuals, including corporate executives, is "at the very top" of Assistant Attorney General Caldwell's new priority list. While the DOJ's stated intention to prosecute individuals is not new, the increased emphasis on incentivizing companies to build cases against their own people is an important development. Conducting a thorough internal investigation to uncover the relevant facts, voluntarily disclosing potential wrongdoing, and providing the results of the investigation and relevant documents may no longer be sufficient, in the DOJ's eyes, to obtain full cooperation credit if such efforts do not

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allow the DOJ to pursue individual prosecutions. “True cooperation,” according to Mr. Miller, requires companies “to locate and provide facts and evidence at their disposal that implicate [culpable] individuals.”

Under the traditional analysis as articulated in the Principles of Federal Prosecution of Business Organizations (the so-called “Filip factors”), cooperation is just part of one of nine factors that DOJ prosecutors must consider in making corporate charging and resolution decisions. Others include the nature and seriousness of the offense, any corporate history of similar misconduct, whether the company had an effective pre-existing compliance program, whether it voluntarily disclosed to the government the conduct, its remedial actions, and collateral consequences. Nevertheless, according to the PDAAG, when the DOJ discusses the Filip factors with companies, “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, how tireless your efforts were to find the people responsible.”

To demonstrate how such “true cooperation” — or a lack thereof — can affect corporate charging and penalty decisions, Mr. Miller pointed to several widely reported corporate cases. The failure of BNP Paribas and Credit Suisse timely and completely to cooperate, “which effectively frustrated the pursuit of individual prosecutions,” was a “tipping point” leading to the guilty pleas and multi-billion-dollar penalties, according to Mr. Miller. In contrast, Mr. Miller stated, “a prime motivating” and “critical” factor in the 2012 Morgan Stanley FCPA matter — “the paradigmatic case involving a declination” — was the fact that Morgan Stanley secured and provided evidence that allowed the DOJ to obtain a guilty plea from an individual executive.²

Implications for Business Community

Mr. Miller’s remarks signal that under Assistant Attorney General Caldwell, the DOJ’s Criminal Division will seek to leverage corporate cooperation to bring more prosecutions against individuals. To do so, the DOJ may well demand that companies actively seek and provide evidence against their executives and employees so the DOJ is able to consider prosecuting those individuals. Companies that fail to do so may not receive “full cooperation credit” from the DOJ, notwithstanding other efforts to cooperate. And even though cooperation is one of many factors that DOJ prosecutors consider in making corporate charging and resolution decisions, the PDAAG’s remarks suggest that whether a company “fully” cooperated in an investigation likely will be among the most important factors in such DOJ deliberations.

In this regard, cooperating companies should expect even more probing DOJ scrutiny of how they conduct internal investigations. While urging companies to make “extensive efforts” to obtain evidence against their employees, the PDAAG warned that the DOJ will conduct its own parallel investigation “to pressure test” a company’s efforts. This means that the DOJ will conduct its own interviews, seek evidence from other sources, and use the full panoply of investigative tools at its disposal. If the DOJ concludes through its own investigation that internal investiga-

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tion interviews “spread corporate talking points rather than secure[d] facts related to individual culpability,” companies will “pay a price when they ask for cooperation credit.” And if the DOJ must seek evidence abroad through formal mutual legal assistance channels due to “inaccurately expansive interpretations” of foreign data protection laws, cooperation credit will be “at great risk.” In short, companies should consider, among other factors, the DOJ’s likely perception of how particular investigative steps and decisions affect its pursuit of individual prosecutions when structuring and conducting internal investigations.

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- 1 Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program (September 17, 2014).
 - 2 On other occasions, including in its press release announcing the declination, the DOJ has highlighted Morgan Stanley’s robust pre-existing compliance program as leading to the corporate declination. The fact that DOJ now highlights Morgan Stanley’s cooperation against its executive underscores the apparent shift in emphasis under the new Assistant Attorney General.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following attorneys or your regular Kirkland contact.

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