A RANDOM WALK THROUGH WHITE-COLLAR CRIME: WHY IT IS GETTING HARDER TO PROSECUTE EXECUTIVES FOR CORPORATE MISCONDUCT

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The Department of Justice has made it a priority in corporate criminal investigations that companies identify those within the organization responsible for any wrongdoing. In a memorandum issued in September 2015, the Deputy Attorney General, Sally Q. Yates, drew a line in the sand for determining whether a corporation would receive credit for cooperating in an investigation: “In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct.” Ms. Yates defended the policy more recently by asserting that “[o]ur goal is not to collect corporate heads.” But that has to be the hope, because otherwise the focus on individual liability will be perceived as just a publicity stunt that will fail to police organizations for the harms they cause.2

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Former Attorney General Eric Holder and other federal prosecutors have long touted how strongly the government has cracked down on corporate crime. They extracted settlements from Bank of America for $16.65 billion, Citigroup for $7 billion, and JPMorgan for $13 billion related to the packaging and sale of residential mortgage-backed securities during the run-up to the financial crisis in 2008. Prosecutors obtained guilty pleas from the foreign subsidiaries of Rabobank and Royal Bank of Scotland for their role in manipulating the London Interbank Offered Rate, or Libor, while BNP Paribas pleaded guilty and paid $8.9 billion for violations of trade sanctions laws prohibiting transactions on behalf of companies in Sudan, Iran, and Cuba.

Perhaps these settlements were done to help overcome Holder’s response at a Senate hearing in 2013 that some banks had become “so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy.”

Holder tried to take back his statement, claiming two months later that it had been “misconstrued” and that “[b]anks are not too big to jail.” A few months after that, in announcing the settlement with Bank of America, Associate Attorney General Tony West said, “By filing this lawsuit today, we reaffirm an important principle – that everyone must play by the same set of rules, and no institution is too big to escape appropriate enforcement.”

direction, many commentators have pointed out that they are simply a restatement of the DOJ’s already longstanding policy of targeting individuals. Indeed, some have even gone so far as to state that the new rules are merely symbolic public messaging.”


5 Press Release, U.S. Dep’t of Justice, Department of Justice Sues Bank of America for Defrauding Investors in Connection with Sale of Over $850 Million of Residential Mortgage-Backed Securities, Aug. 6, 2013, available at
But no amount of jawboning has changed the public perception that “too big to jail” took ahold of federal prosecutors looking at potential prosecutions arising from the financial crisis.⁶ As Professor Brandon Garrett pointed out, “These billions of dollars in fines imposed in recent years are not all that they appear. The staggering fines . . . are dominated by a handful of blockbuster cases, and should not suggest that federal prosecutors have necessarily become more aggressive across the board.” ⁷

Even as the drumbeat of large settlements marched on, the ground shifted to a new critique of the response to the financial crisis. Corporate fines and disgorgement, along with purported relief to distressed borrowers, was no longer good enough. The punishments were akin to paying a parking ticket – albeit a sizeable one – with no one inside the company held accountable for wrongdoing perpetrated through the organization. There were crimes, so we have been told, but apparently no one to point the finger at except the corporate logo. Whether there was in fact widespread criminality is open to question, but when it comes to public opinion facts do not often seem to matter.⁸

Does the shift to emphasizing individual culpability mean there will be an upsurge of prosecutions of corporate executives who oversee companies that engage in misconduct? The short answer is no. One reason is that the new – or perhaps renewed – emphasis on pursuing individuals is not a real change in the Department of Justice’s policy. Prosecuting individuals has always been a priority, from the insider trading prosecutions of Ivan Boesky and Michael

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⁶ See BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 83-84 (2014).
⁸ See Daniel C. Richman, Corporate Headhunting, 8 HARV. L & POL’Y REV. 265, 268 (2014) (“Once we put bad analogies aside and squarely try to figure out whether widespread criminal misconduct drove – or was even associated with – the financial crisis, we face one of the classic accountability problems in federal criminal law: since a financial collapse is not itself evidence of criminal conduct, and white collar criminal activity is rarely revealed with any clarity except by those responsible for prosecuting crimes, how does one assess the adequacy of those prosecutorial efforts?”).
Milken in the 1980s to the Savings and Loan Crisis in the early 1990s to the accounting scandals that brought down companies like Enron and WorldCom in the early 2000s. The companies were far less important than going after individuals, especially when the enterprise was wiped out by the misconduct of its leaders.

Why the need for Yates to defend the policy by proclaiming that federal prosecutors are not looking for “corporate heads” when that is its express purpose? Perhaps this is a means to build a handy excuse to explain why companies might continue to receive the typical deferred (or non-prosecution) agreements to settle cases, even without any individual prosecutions. That explanation can be reinforced by the oft-repeated contention that pursuing cases against individuals is difficult in order to forestall criticism due to the absence of further prosecutions of corporate officials. Yates noted in her recent speech that “[b]lurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme.” In other words, we are not to blame for the lack of prosecutions, it is the fault of these complex organizations.

So despite the hope of generating more individual prosecutions, the Department of Justice seems to be hedging its bets at the outset — and for good reason. What is becoming increasingly apparent is that prosecuting cases against corporate employees, and especially executives, which has never been easy, is getting harder. Companies have adopted increasingly extensive compliance programs that give management a basis to claim that they were unaware of any wrongdoing, or at least sought outside guidance before embarking on a course of conduct, evidence that can help establish good faith. The Fraud Section in the Department of Justice’s Criminal Division, which is responsible for a number of corporate prosecutions, even hired a compliance “guru” to help advise on how well a company is working to prevent and detect violations.\(^9\) For cases under the Foreign Corrupt Practices Act, there

\(^9\) According to a press release issued in November 2015, the hiring of Hui Chen as an adviser to the head of the Fraud Section heralded a new approach to evaluating corporate compliance:
is a one-year pilot program to offer an extra benefit to companies that self-report and fully cooperate, including a 50% discount on any recommended fine – almost like a “Black Friday” or “Cyber Monday” sale. So pursuing individual prosecutions will not be any easier as corporations become more savvy at playing the cooperation game.

As companies get larger, there is even less chance someone from the C-suite will have any actual involvement in day-to-day decisions which generate the damning emails and instant messages that provide the fodder for an individual prosecution. It is left to the mid-level managers to bear the brunt of the Department of Justice’s focus on individual liability for corporate misconduct. Nor is it just a matter of how difficult it can be to prove an executive committed a crime. The courts are more attuned to arguments that statutes are being applied too aggressively by prosecutors trying to make ordinary conduct into something criminal – a claim that few drug dealers or gang members could ever advance.

Chen will provide expert guidance to Fraud Section prosecutors as they consider the enumerated factors in the United States Attorneys’ Manual concerning the prosecution of business entities, including the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing.


10 U.S. Dep’t of Justice, Crim. Div., The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance, April 5, 2016, available at https://www.justice.gov/opa/file/838386/download. Like any program that seeks cooperation, prosecutors are unlikely to announce that it was a failure after the one year test. So we should expect the program to become a permanent feature of FCPA cases, perhaps with a few tweaks.

11 See Brandon L. Garrett, The Corporate Criminal as Scapegoat, 101 Va. L. Rev. 1789, 1791 (2015) (“Most prosecuted individuals were not high-up officers of the companies, but rather middle managers of one kind or another.”); Yockey, supra note __, at 414 (“At the threshold, with high-level managers likely to remain insulated from indictment-inducing activities, lower-level employees must now be favorites to emerge as the most frequent targets under the Yates protocol.”).
[After this introduction, I plan to discuss recent cases and legislative proposals that are making it more difficult to pursue charges against those in the executive suite. I make no claim to any unified theory about the future of white collar prosecutions, nor do I propose any solutions, if there are any to be had. Instead, these are developments to watch that may well result in prosecutions of senior management becoming a thing of the past. Whether that is good or bad I leave to others to decide.]