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ESSAY

THE CORPORATION AS SNITCH: THE NEW DOJ GUIDELINES ON PROSECUTING WHITE COLLAR CRIME

*Elizabeth E. Joh** and *Thomas W. Joo***

INTRODUCTION

VOLKSWAGEN, the world's largest auto maker, acknowledged in September 2015 that it had equipped its cars with software designed to cheat diesel emissions tests. Eleven million of its cars contained “defeat devices” that initiated full emissions controls only during emissions testing, and not under normal driving conditions.¹ The VW scandal may become the first major test of the Department of Justice's recently announced guidelines that focus on individual accountability in white collar criminal investigations.² Criminal investigations into safety defects at two other leading car makers, General Motors and Toyota,

* Professor of Law, U.C. Davis School of Law (eejoh@ucdavis.edu).

** Professor of Law, U.C. Davis School of Law (twjoo@ucdavis.edu).

¹ At a Glance: Which VW Brands Are Involved in the Scandal, Associated Press: The Big Story (Sept. 29, 2015, 9:40 AM), <http://bigstory.ap.org/article/2fa99fe9d9814ffa959474a4af543446/glance-which-vw-brands-are-involved-scandal>, archived at <http://perma.cc/94D2-VADQ>; Coral Davenport & Jack Ewing, U.S. Orders Major VW Recall Over Emissions Test Trickery, N.Y. Times, Sept. 19, 2015, at A1, available at <http://nyti.ms/1iC8AD6>. A group of researchers at West Virginia University first noticed the unusually high emission patterns of VW vehicles in a study of diesel powered cars. Bill Vlasic & Aaron M. Kessler, It Took E.P.A. to Pressure VW to Admit Fault, N.Y. Times, Sept. 22, 2015, at A1, available at <http://nyti.ms/1V6VF7V>.

² See generally Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], available at <http://www.justice.gov/dag/file/769036/download>, archived at <http://perma.cc/A9RM-6HDD> (describing the Department of Justice's new policy of individual accountability).

yielded no criminal charges against any individuals.³ But in a recent speech announcing the new guidelines, Deputy Attorney General Sally Yates stated, “Crime is crime,” whether it takes place “on the street corner or in the boardroom.”⁴ “The rules have just changed.”⁵

The most significant policy change in the new Yates memo states that “to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue.”⁶ Deputy Attorney General Yates referred to this as an “all or nothing” policy toward cooperation.⁷ This tough talk about individual corporate agents is probably at least in part a short-term political move. The guidelines were announced with great fanfare one week before the DOJ announced the GM settlement, which deferred the prosecution of criminal charges against the corporation and charged no individual officers or employees. According to U.S. Attorney Preet Bharara, GM received credit for cooperating with the investigation.⁸

As many commentators have already observed, holding individual corporate agents accountable is nothing new.⁹ The DOJ’s official policy has long stated that if identifiable corporate agents are culpable, the De-

³ See, e.g., Jerry Hirsch, Prosecutors, Not Regulators, Are the New Enforcers of Automotive Safety, *L.A. Times* (Sept. 17, 2015, 5:54 PM), <http://www.latimes.com/business/autos/la-fi-general-motors-fine-20150917-story.html>, archived at <http://perma.cc/TMQ2-6C6H>.

⁴ Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks at New York University School of Law (Sept. 10, 2015) [hereinafter Yates Remarks], available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>, archived at <http://perma.cc/KVM6-JU3A>.

⁵ *Id.*

⁶ Yates Memo, *supra* note 2, at 3. The Yates Memo further states that investigations of corporate misconduct should focus on individuals from the start; that civil and criminal attorneys should communicate with each other throughout the investigation; that the resolutions of corporate investigations will not include protections for individuals absent extraordinary circumstances; that corporate cases should not be resolved without plans to resolve cases against individual defendants; and that the decision whether to bring civil actions against individual defendants should take into account more than the individual’s ability to pay. See *id.* at 3–6.

⁷ Yates Remarks, *supra* note 4.

⁸ Associated Press, General Motors to Pay \$900 Million for Faulty Ignition Switches Linked to At Least 169 Deaths, *N.Y. Daily News* (Sept. 18, 2015, 10:01 AM), <http://nydn.us/1FjQXl6>.

⁹ See, e.g., Daniel P. Chung, Individual Accountability for Corporate Wrongdoing, *Harv. L. Sch. F. on Corp. Governance and Fin. Reg.* (Sept. 21, 2015), <http://corpgov.law.harvard.edu/2015/09/21/individual-accountability-for-corporate-wrongdoing>, archived at <http://perma.cc/6JJK-RE7G>; The Yates Memo, FCPA Professor (Sept. 11, 2015), <http://www.fcpaprofessor.com/the-yates-memo>, archived at <http://perma.cc/R5YD-L35B>.

partment will prosecute those individuals, and not just the corporation.¹⁰ In the GM case, however, the DOJ charged only the corporation with fraud and false statements to regulators,¹¹ even though the Information charging the corporation describes numerous acts by individuals¹² that might have formed the basis for charges against them.¹³ In her September 10, 2015 speech, Yates declared, “Americans should never believe, even incorrectly, that one’s criminal activity will go unpunished simply because it was committed on behalf of a corporation.”¹⁴

It is troubling that individuals have avoided prosecution in so many large corporate criminal investigations.¹⁵ But it is not clear that the new cooperation policy will increase individual charges. Even if corporations provide complete information about their agents’ conduct, individual charges may be stymied by the fact that harmful conduct is often caused by the acts of multiple agents who lack criminal intent and are unaware of each other’s acts. Indeed, U.S. Attorney Bharara specifically blamed

¹⁰ “Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers,” even if corporate-level liability is established. U.S. Dep’t of Justice, U.S. Attorneys’ Manual § 9-28.200(B) (2008) [hereinafter U.S. Attorneys’ Manual], available at <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>, archived at <http://perma.cc/4GCF-ENHL>.

¹¹ Information, Exhibit B to the Deferred Prosecution Agreement, at 4, 6, United States v. Gen. Motors Co., No. 1:15-cv-07342 (S.D.N.Y. Sept. 17, 2015), available at <http://www.justice.gov/usao-sdny/file/772261/download>, archived at <http://perma.cc/YNS7-94Y4>.

¹² On two occasions after it became publicly known that a defect was preventing the deployment of airbags, “GM personnel” gave the National Highway Traffic Safety Administration (“NHTSA”) “the misleading impression that GM worked promptly and efficiently to resolve known safety defects, including, specifically, defects related to airbag non-deployment.” *Id.* at 4. “[C]ertain GM engineers knew” that the part in question, a switch, was defective before it went into production, “[b]ut the engineer in charge of the Defective Switch approved its production anyway.” Statement of Facts, Exhibit C to the Deferred Prosecution Agreement, at ¶ 5, United States v. Gen. Motors Co., No. 1:15-cv-07342 (S.D.N.Y. Sept. 17, 2015), available at <http://www.justice.gov/usao-sdny/file/772261/download>, archived at <http://perma.cc/YNS7-94Y4>. Although the Information points to specific acts by specific individuals, it does not give any of their names.

¹³ 18 U.S.C. § 1349 (2012), for example, prohibits attempt or conspiracy to commit mail or wire fraud, and 18 U.S.C. § 371 (2012) prohibits conspiracy to commit any federal offense.

¹⁴ Yates Remarks, *supra* note 4.

¹⁵ Brandon Garrett, who maintains the most complete database on corporate deferred prosecution and non-prosecution agreements, notes that in about two-thirds of cases involving deferred or non-prosecution agreements with public corporations, no employees were prosecuted. See Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* 13 (2014).

that “siloining” effect—the diffusion of responsibility—for the lack of individual charges in the GM case.¹⁶

Moreover, it is unclear whether the new cooperation policy will generate the kind of useful information the DOJ expects. The Justice Department is embracing an informant culture, borrowed from other areas of criminal investigation, to fight white collar crime.¹⁷ In her speech introducing the new DOJ guidelines, Yates compared the new cooperation policy to the use of informants in drug trafficking. Once caught, a drug trafficker can:

decide to flip against his co-conspirators. He can proffer to the government the full scope of the criminal scheme. . . . But if he has information about the cartel boss and declines to share it, we rip up his cooperation agreement and he serves his full sentence. The same is true here. A corporation should get no special treatment as a cooperator simply because the crimes took place behind a desk.¹⁸

We raise questions about this new approach and some of its possible implications. We urge greater consideration of complexity in the corporate setting. This is not a plea for leniency toward corporations or their officers. Indeed, in some cases, the new cooperation policy’s emphasis on individual prosecutions could itself result in leniency: prosecutors may award excessively generous credit to corporations in order to build cases against individuals.

THE CORPORATION AS SNITCH

A street crime enforcement model is a peculiar analogy. The heavy reliance on informants¹⁹ in the street crime context has faced numerous

¹⁶ David Ingram, Corporate ‘Siloining’ an Obstacle to Charging GM Employees: Prosecutor, Reuters (Sept. 17, 2015, 6:38 PM), <http://www.reuters.com/article/2015/09/17/us-gm-settlement-individuals-idUSKCN0RH31B20150917>, archived at <http://perma.cc/PGT5-P9V3>.

¹⁷ The government has used informants in prominent white-collar cases in recent years, including cases involving insider-trading and currency manipulation. See Elizabeth E. Joh & Thomas W. Joo, *Sting Victims: Third-Party Harms in Undercover Police Operations*, 88 S. Cal. L. Rev. 1309, 1313 & n.14 (2015). Other tactics from the “street” crime context have also been imported into white-collar investigations, such as undercover operations and wire-taps. See *id.* at 1313 & n.12.

¹⁸ Yates Remarks, *supra* note 4.

¹⁹ An informant “provides information about someone else’s criminal conduct in exchange for some government-conferred benefit, usually lenience for his own crimes, but also for a flat fee, a percentage of the take in a drug deal, government services, preferential treatment,

questions about its effectiveness and its fairness. Informants in the drug war are “notoriously unreliable.”²⁰ The exchange of benefits for information is a practice roundly criticized for being secret,²¹ largely unregulated, risky,²² harmful to communities,²³ and of questionable effectiveness in controlling crime.²⁴ To be sure, white collar defendants are unlikely to face some of the harms suffered by street informants. But equating corporate misconduct to drug dealing poses problems nevertheless.

A. Corporate Complexity

By transplanting the informant model to the corporate setting, the DOJ seems to underestimate the complexity of misconduct and decisionmaking in the corporate setting, something that previous policy statements have acknowledged. As the U.S. Attorneys’ Manual observes, a corporation cannot literally commit criminal acts, since it can act only through its human agents.²⁵ Individual agents of a corporation are liable for their own criminal conduct, and thus the Manual has stated since 2008 that the threat of individual liability is the best way to deter corporate misconduct.²⁶ Whether a corporation can also be held liable for the acts of its agents is a more difficult legal question.²⁷ Even where

or lenience for someone else.” Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 652 (2004).

²⁰ Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 Mich. L. Rev. 1077, 1077 (2011).

²¹ See, e.g., Delores Jones-Brown & Jon M. Shane, ACLU N.J., *An Exploratory Study of the Use of Confidential Informants in New Jersey* 6 (2011), <https://www.aclu-nj.org/files/1113/1540/4573/0611ACLUCIReportBW.pdf>, archived at <https://perma.cc/X5RR-E7JQ> (“By design, the working relationship between law enforcement agents and confidential informants is shrouded in secrecy.”). This is also true in the corporate setting. See Garrett, *supra* note 15, at 287 (“Much [in corporate prosecutions] remains hidden, including how agreements are carried out, whether compliance is carefully supervised, how fines are calculated, [and] why so individuals are prosecuted.”).

²² See, e.g., Sarah Stillman, *The Throwaways*, *New Yorker* (Sept. 3, 2012), available at <http://www.newyorker.com/magazine/2012/09/03/the-throwaways>, archived at <http://perma.cc/QM68-XVYX>.

²³ See Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 103, 109–112 (2009).

²⁴ See *id.* at 109–11.

²⁵ U.S. Attorneys’ Manual, *supra* note 10, § 9-28.200(B).

²⁶ *Id.*

²⁷ A corporation may be held vicariously liable for the criminal acts of its human agents, but only where express or implied legislative intent supports such liability. See, e.g., *N.Y. Cent. & Hudson R.R. v. United States*, 212 U.S. 481, 494–96 (1909); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

it is supported by law, corporate liability may be inadvisable due to collateral consequences, such as harm to innocent investors, employees, and customers.²⁸ The Manual devotes a twenty-page section, the “Principles of Federal Prosecution of Business Organizations,” also known as the Filip Factors,²⁹ to the policy concerns prosecutors should weigh when deciding whether to charge a corporate entity.

In short, the Filip Factors presume that individual corporate agents will be charged for their own misconduct,³⁰ and provide guidance for the more difficult and less common practice of charging a corporate entity.³¹ The new cooperation policy, however, centers on offering cooperation credit to corporate defendants in exchange for information about individual agents. That is, it presumes a situation in which the corporation faces liability exposure. A recent study has found, however, that prosecutions and convictions of corporations have decreased since the Filip factors were introduced.³² Furthermore, prosecutors will need corporations’ cooperation to gather information about individuals only when prosecutors have been unable to find such evidence on their own. Because corporations can act only through their agents, this is precisely the situation where a corporation has the least risk of liability and cooperation credit is thus least valuable to the corporation. Indeed, by providing information about individuals’ conduct in such a situation, a corporation may give prosecutors a basis for corporate liability that would not otherwise exist.

Sharing incriminating information about individual agents is least risky for the corporation when the agents’ misconduct constitutes rogue

²⁸ U.S. Attorneys’ Manual, *supra* note 10, § 9-28.1000.

²⁹ The Principles underwent a major revision pursuant to a 2008 memo from Deputy Attorney General Mark Filip. See Memorandum from Mark Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, on Principles of Federal Prosecution of Business Organizations to the Heads of Dep’t Components and U.S. Atty’s (Aug. 28, 2008) [hereinafter Filip Memo], available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>, archived at <http://perma.cc/N2GW-DXP4>. Yates referred to them as the Filip Factors in her remarks introducing the newest policies. See Yates Remarks, *supra* note 4. Ironically, Filip’s 2008 memo itself had recommended that the DOJ stop referring to new policies by the name of the issuing official, arguing that the practice made the policies seem politically contingent and temporary. See Filip Memo, *supra*.

³⁰ U.S. Attorneys’ Manual, *supra* note 10, § 9-28.200(B).

³¹ *Id.* § 9-28.300.

³² Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations, Transactional Records Access Clearinghouse (Oct. 13, 2015), <http://trac.syr.edu/tracreports/crim/406>, archived at <http://perma.cc/CK4G-ALPV>.

behavior. Such conduct is less likely to be the basis of vicarious corporate liability,³³ however, and thus the enticement of cooperation credit has less value. A corporation in such a situation is likely to cooperate in order to resolve the scandal and improve its public image, not in order to reduce charges or sanctions.

The drug-dealer analogy is ill-suited to the complexity of the corporate setting and suggests further potential difficulties with the new cooperation policy. In the analogy, the corporation is the informant, a lower-level criminal seeking leniency, and the individuals involved in the corporate misconduct are the more culpable “cartel bosses.” This likens a corporation to an individual on par with, and fully distinct from, its human board members, officers and employees. It also suggests that those human individuals are the true “bosses” and the corporation is a mere lackey. But while a corporation is a distinct legal entity for the purpose of criminal charges and sanctions, whether the corporation cooperates with prosecutors is controlled by the very corporate leaders the DOJ is so intent on pursuing.

The prototypical informant is offered leniency in exchange for implicating someone else: a straightforward appeal to self-interest. The incentive structure is quite different in the corporate context, however. Prosecutors can negotiate with a corporation only indirectly, through its human representatives. A corporation’s legal representatives are its directors.³⁴ The board of directors typically includes the CEO and other top executives of the corporation; indeed, in many large American corporations, the CEO is also the chair of the board.³⁵

³³ Corporate-level criminal charges are more likely if management condoned agents’ criminal conduct. See U.S. Attorneys’ Manual, *supra* note 10, § 9-28.500. They are less likely if a corporation attempted (even though unsuccessfully) to control its agents through compliance mechanisms, see *id.* § 9-28.800, and if individual prosecutions are adequate to address the misconduct. See *id.* § 9-28.300. *United States v. Hilton Hotels Corp.* upheld vicarious corporate liability for Sherman Act violations by agents who defied corporate policy, but the court inferred this unusually strict standard from the Sherman Act context. 467 F.2d 1000, 1006 (9th Cir. 1972).

³⁴ See, e.g., Del. Code Ann. tit. 8, ch. 1, § 141(a) (2014) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.”).

³⁵ See Paul Hodgson, *Should the Chairman be the CEO?*, *Fortune* (Oct. 21, 2014, 12:49 PM), <http://fortune.com/2014/10/21/chairman-ceo>, archived at <http://perma.cc/3MJK-2WKA>. Examples include Disney, Bank of America, and Facebook. See *id.*; Corporate Governance: Board of Directors, Facebook, <http://investor.fb.com/directors.cfm> (last visited Oct. 27, 2015), archived at <http://perma.cc/8SHS-P29M>.

B. Ceding Control to the Corporate Informant

A heavy reliance on informants delegates enforcement discretion to the informants themselves, as many commentators have noted.³⁶ Informants can only identify people they know, and may focus on people they dislike.³⁷ Criminal informants, rather than law enforcement officials, can end up controlling investigations.³⁸ Surely corporations as informants pose similar risks.

Thus, there are at least two ways the new policies may not work as intended. The “all or nothing” approach to cooperation may backfire because it not only allows the corporation to choose “nothing,” but may encourage that choice. If prosecutors will grant leniency only to corporations that implicate individuals, the corporation may choose not to cooperate at all. The board that speaks for the corporation is likely to protect its own. An offer of leniency toward the corporate entity is unlikely to entice CEOs and other board members to incriminate themselves. If corporate leaders implicate anyone at all, they will most likely be lower-level agents.³⁹

In announcing the new guidelines, Yates stated that the Justice Department would not be satisfied if a corporation were to give information incriminating only “the vice president in charge of going to jail,” i.e., a designated sacrificial lamb.⁴⁰ But there is no way of guaranteeing that high-level agents are incriminated. (Indeed, many cases may not involve any high-level misconduct.) If prosecutors are dependent on the corporation for information, they cannot know whether the board has implicated all the true culprits or merely offered up a scapegoat.

In addition, if a board decides not to cooperate in order to protect its own, prosecutors’ refusal to consider leniency may inflict economic harm on innocent shareholders. As the existing Filip Factors point out,

³⁶ Natapoff, *supra* note 19, at 671 (“By relying on informants, law enforcement focuses its resources based on informant information.”).

³⁷ See *id.* at 673–74 (“To put it another way, snitches can only snitch on people they know.”).

³⁸ See *id.* at 674; see also Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *Fordham L. Rev.* 917, 944 (1999) (discussing instances where prosecutors have been duped or manipulated by their cooperators).

³⁹ Former Volkswagen CEO Martin Winterkorn, who resigned shortly after news of the cheating software emerged, stated that the company’s misconduct was the result of “the grave errors of very few” employees. Jack Ewing, *Volkswagen Says 11 Million Cars Worldwide Are Affected in Diesel Deception*, *N.Y. Times* (Sept. 22, 2015), <http://nyti.ms/1V7JHeh>.

⁴⁰ Matt Apuzzo & Ben Protess, *Justice Dept. Sets Its Sights on Executives*, *N.Y. Times*, Sept. 10, 2015, at A1, available at <http://nyti.ms/1UI3xfX>.

corporate-level prosecutions may cause third-party harms;⁴¹ the all-or-nothing cooperation policy may have similar impacts. Those who currently own the company's stock may be victims, not beneficiaries of the corporate misconduct. They may have paid high purchase prices while the conduct was benefiting the corporation, only to suffer investment losses when the criminality was uncovered. Disruption of the corporation's business due to prosecution and conviction may cost innocent employees their jobs, and other companies may lose valuable contracts and business opportunities. Strict punishment of a corporation due to recalcitrance on the part of its directors will only increase such third-party harms.

CONCLUSION

The Justice Department's new focus on individual accountability in the white collar context is laudable, but problematic. The new "all-or-nothing" policy toward corporate cooperation is based on the notion that "crime is crime"—that is, that crime in the corporate context should be treated the same as crime in other contexts. But while corporate wrongdoing may be as harmful as other crimes, the corporate entity and its structure create unique issues. Corporate decisionmaking involves multiple people with potentially conflicting priorities. As a result, the new policy may not yield more information or convictions with regard to high-level officials—those individuals the Department is most interested in investigating.

⁴¹ U.S. Attorneys' Manual, *supra* note 10, § 9-28.1000.