

The DoJ goes to China: re-evaluating corporate cooperation

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Timothy Perry, a former assistant US attorney now at WilmerHale, examines the dynamics of negotiating with the DoJ when investigations reach into China.



In September, Principal Deputy Assistant Attorney General Marshall Miller, one of the Department of Justice's (DoJ) most important voices on criminal matters, threw down a gauntlet of sorts. He strongly criticised corporations that resist requests for "overseas documents," arguing that too many companies are "too quick" to hide behind claims of logistical challenges and foreign law as pretexts for uncooperative behaviour.

Touting the DoJ's "deepening relationships with foreign governments," Miller warned that slow-to-comply companies would face harsh consequences: "[W]hen corporations engaged in wrongdoing choose not to cooperate — which, of course, they have every right to do — the criminal division will make the cases on our own."

While Miller's comments aptly summarised the DoJ's current approach to corporate crime, they also raised questions about the DoJ's ability to back up its public position with action. Can the criminal division independently develop evidence of wrongdoing in overseas jurisdictions? Or is the DoJ totally reliant on the voluntary assistance of its corporate targets?

Of course, the answer depends on the foreign jurisdiction in question. But at least when it comes to China, where the DoJ has focused many large corporate probes, there are significant questions about the DoJ's ability to gather admissible evidence.

True, the US has bilateral treaties governing evidence-sharing with many European and Central and South American countries. But the US currently has no such treaties with China. The DoJ can make requests to China for information, but such inquiries are dealt with on a notoriously slow track, subject to China's diplomatic judgment.

The US maintains an informal treaty-like process with Hong Kong, but Beijing supervises Hong Kong's response and is known to intercede at the faintest whiff of national interest.

Meanwhile, the very techniques that have made the DoJ's recent crackdown on white-collar crime so successful – such as wiretaps, body wires, physical surveillance and border searches – are unavailable to US enforcement authorities on China's soil.

In his speech, Miller cited the conviction of a French citizen who was recorded on a body wire directing a would-be conspirator, who in fact was a cooperating witness, to “destroy everything, everything, everything”.

While many European countries welcome the FBI as partners in law enforcement, China, by contrast, generally does not allow the FBI to interview witnesses or search Chinese servers, offices and homes — let alone conduct wiretaps, run surveillance or induce cooperating informants to wear a wire.

Why does this matter? Certainly, these practical limits do not serve as justification to rebuff the DoJ wholesale in all requests for cooperation in China. Most companies recognise that there are often substantial benefits to cooperating with the authorities, not only with regard to the matter the company may be facing today but for future matters as well. Yet a clear understanding of the DoJ's investigative limits can — and should — affect the negotiations over the nature and terms of any settlement.

To understand how, it is important to understand the DoJ's negotiating strategy in large corporate cases. Generally, the DoJ demands that a company cooperate by internally investigating its employees' misdeeds and turning over the evidence to law enforcement.

At the same time, however, the DOJ shrouds its own investigative efforts in secrecy, leaving the company to wonder whether personal emails have been searched, bank records have been subpoenaed or if the FBI has an informant on the inside — all possibilities that the DOJ has mentioned publicly.

In short, one aspect of the DOJ's negotiating strategy designed to induce favourable settlements for the government may be to maximise the ambiguity of the downside risk. Prosecutors will play up this downside risk, admonishing companies to cooperate, and keep cooperating, or else "the criminal division will make the cases on [its] own".

In a domestic context, the resulting risk calculus may weigh in favour of an early monetary settlement. After all, when the DOJ has a vast informational advantage and the extent of the risk is difficult to discern, it is often prudent to resolve that uncertainty for a known price. But if the DOJ's investigative capacity is limited, should that not lessen the DOJ's negotiating advantage?

As the DOJ continues its focus on China, it may be worth considering whether on-the-ground realities, like the DOJ's current investigative limitations, should alter the traditional risk calculus — and particularly, whether the probability of downside consequences is lower than often assumed. In other words, when the DOJ demands that you settle, or "the criminal division will make the cases on [its] own," there may be cases where it is worth calling that bluff.