

National Borders Create Barriers to Corporate Misconduct Investigations

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On September 9, 2015, Deputy Attorney General Sally Q. Yates issued a [memorandum](#) outlining “six key steps” department attorneys must take in corporate investigations, particularly when handling misconduct. Among these steps, the memorandum made eligibility for any cooperation credit conditional on the corporation providing information that identified individuals in the organization responsible for the violations. Ms. Yates went on to explain the importance of “[deter\[ing\] corporate misdeeds](#), hav[ing] a real impact on corporate culture and ensur[ing] that the public has confidence in our justice system.”

In the last days of the Obama administration, the Justice Department took important steps to show that the new requirement had bite. Many saw the [indictments](#) against executives at Volkswagen, Takata, and three global banks as evidence of the outgoing administration’s efforts to fight white-collar crime more aggressively—a departure from the handling of the 2008 financial crisis, when top bank executives were deemed “[too big to jail](#).”

Unfortunately, this approach has been [thwarted](#) by the fact that the defendants are not in the United States, and it remains unclear whether they can be extradited to face charges. While traders affiliated with the Royal Bank of Scotland, Citigroup, and Barclays living in London will likely be extradited because of a [treaty](#) between the United States and Britain, this is not always the case. If Oliver Schmidt, for example, a Volkswagen executive indicted and ultimately arrested in Miami, were to be allowed to return to Germany, the German constitution would prohibit his extradition to another country. As long as the other five Volkswagen defendants stay in Germany, they can avoid facing charges.

Takata executives, for their part, are subject to an [extradition treaty](#) between the United States and Japan, which gives the Japanese government full discretion in deciding whether to extradite its own citizens. In previous prosecution of Japanese executives, individuals entered guilty pleas and voluntarily returned to the United States. It is unclear whether this would be the case again.

Even if the Justice Department were to successfully acquire Interpol red notices, a kind of international arrest warrant that alerts other nations to hold those who have been charged for possible extradition, some worry that targeting “defendants who may be effectively untouchable” would affect the success of this more aggressive approach. It is worth noting, however, that defendants would live in fear of being extradited to the United States if they leave their home countries. Whether this fear would deter future corporate violations remains to be seen.