

## Cohen Plea Reflects High Bar For Cooperators

By **Sindhu Sundar**

*Law360 (August 22, 2018, 9:36 PM EDT)* -- Michael Cohen's plea agreement notably lacks a cooperation provision that could help reduce the yearslong sentence he faces for tax evasion and campaign finance violations, but former prosecutors say defendants don't always find it in their interest to submit to the intense scrutiny that comes with being a government cooperator.

On Tuesday, Cohen appeared before U.S. District Judge William Pauley in Manhattan to plead guilty, admitting that he intentionally dodged taxes for four years until 2016 by not reporting more than \$4 million in personal income during that time. He also made the remarkable declaration under oath that he acted to influence a federal election by paying two women “at the direction of a candidate for federal office.”

The admission implicated his former client President Donald Trump, and Cohen's attorney, D.C.-based investigations defense attorney and crisis management consultant Lanny Davis, indicated as much in a tweet Tuesday evening, saying, “If those payments were a crime for Michael Cohen, then why wouldn't they be a crime for Donald Trump?” The plea was a culmination of the U.S. Attorney's Office for the Southern District of New York's investigation into Cohen's apparent hush money payments in 2016 to keep two women from speaking publicly about their alleged affairs with Trump.

Despite his admissions and bold public statements before Judge Pauley, Cohen's plea deal does not outline a cooperation provision. Such provisions can be huge gets for defendants looking to significantly reduce or even avoid jail time, former prosecutors said. But the catch is that prosecutors, especially those at the SDNY, impose a high bar to sign a defendant on as a cooperator. They must believe the defendant has useful and credible information they can use to pin down other potential co-conspirators, and that the defendant can submit to long periods of intensive questioning. The notoriously exacting SDNY's office also often requires potential cooperators to come fully clean about any federal crimes, say former prosecutors from that office.

“The SDNY views cooperation agreements as extremely valuable, and as something that a defendant has to earn,” said Elie Honig, a white collar defense attorney at Lowenstein Sandler LLP and a former assistant U.S. attorney at the SDNY until 2012. “They don't give them out easily or out of sympathy.”

Cohen's attorneys Guy Petrillo of Petrillo Klein & Boxer LLP and Davis did not immediately respond to a request for comment Wednesday.

Cohen, who is scheduled to be sentenced Dec. 12, faces a maximum term of 65 years for the charges he's admitted to, if the judge issues consecutive sentences for each count, which judges don't often do. His plea agreement states that the government and defense expect his actual sentence duration to be much closer to somewhere in the three- to five-year range.

Defendants who plead guilty and manage to get admitted as cooperators usually do so for the sometimes coveted "5K" letter by prosecutors, so called in reference to section 5K 1.1 of the U.S. sentencing guidelines. And judges grant deference to 5K letters by prosecutors that recommend a reduced sentence in return for a defendant's cooperation.

"Sentencing is the province of a federal judge, but if a U.S. attorney's office submits that 5K, that can result in a significant reduction in the sentence the defendant receives," said Sarah Hall, a senior counsel at Thompson Hine LLP who previously served in the U.S. Department of Justice's fraud section.

Cohen's plea does also come with valuable reassurances by prosecutors that they won't pursue him for a host of other potential offenses. In the so-called coverage section of Cohen's plea agreement, prosecutors outlined a series of other potential offenses that neither the SDNY nor the DOJ's tax division would pursue him for. Many of them include tax and campaign contribution offenses, but likely represent a broader range of counts than he admitted to, former prosecutors said.

"There's a cost-benefit analysis here for defendants," said Michelle Bradford, who joined Murphy & McGonigle PC this month from the U.S. Attorney's Office in D.C. "Should I be fully honest about everything so that the government gives me a 5K, or maybe I don't have to be fully honest, but I can at least have some certainty about my exposure [to jail time]."

--Additional reporting by Pete Brush. Editing by Pamela Wilkinson and Alanna Weissman.