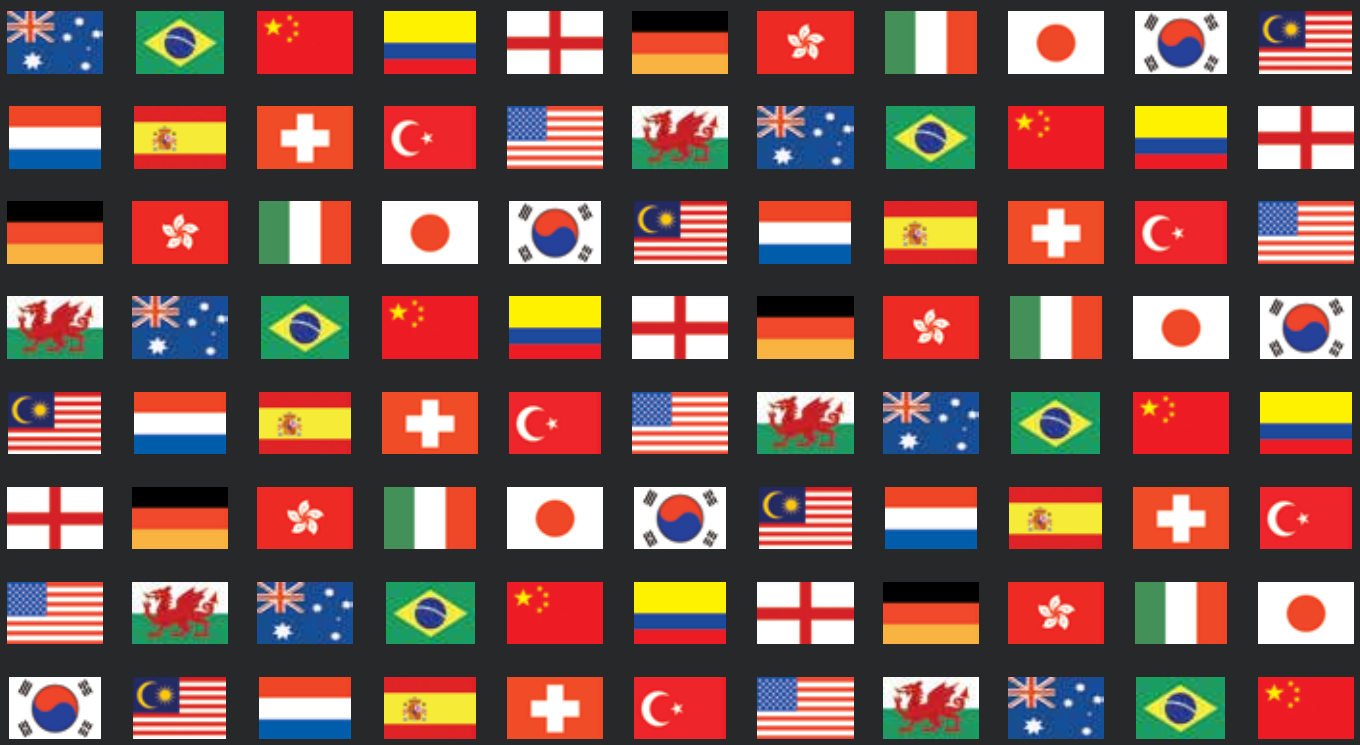
Government Investigations

Contributing editors
David M Zornow and Jocelyn E Strauber



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GETTING THE DEAL THROUGH

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Government Investigations 2018

Contributing editors

David M Zornow and Jocelyn E Strauber
Skadden, Arps, Slate, Meagher & Flom LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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United States

David M Zornow and Jocelyn E Strauber*

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Enforcement agencies and corporate liability

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The United States Department of Justice (DoJ) has primary responsibility for enforcing US criminal law, including laws relating to securities fraud, commodities fraud, bank fraud, tax fraud, antitrust, wire and mail fraud, and corrupt practices, including bribery of foreign and local officials. The DoJ principally prosecutes these cases through the US attorneys' offices in the 94 federal judicial districts and the DoJ's criminal division in Washington, DC.

The Securities and Exchange Commission (SEC), through its division of enforcement, has responsibility for civil actions involving violations of the securities laws. The Commodity Futures Trading Commission (CFTC), through its division of enforcement, has responsibility for civil actions involving violations of laws relating to the commodities and derivatives markets.

Though not discussed here, there are other federal agencies that serve both a regulatory and enforcement function with respect to the types of businesses within their areas of expertise. In addition, there are state and local agencies – such as state attorney generals' offices and district attorneys' offices – that can also bring civil or criminal enforcement actions against businesses.

2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

The DoJ has the authority to enforce the civil and criminal laws of the US against businesses and individuals; the SEC and CFTC have similarly broad authority with respect to the civil laws and regulations that they enforce. All three entities can, and often do, bring actions against corporations and against individuals.

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Government entities can and often do simultaneously investigate the same target business in parallel investigations. There is no requirement that the investigations be coordinated, though some coordination may increase efficiencies for both the government agencies involved and the target business.

The DoJ, SEC and CFTC investigations are presumptively non-public, but each entity is generally authorised to share information with other investigating agencies or regulatory agencies under certain circumstances. Where the DoJ has obtained information through a grand jury subpoena, dissemination of that information is subject to further restrictions. Target companies can – and typically do – request that materials made available to the government be given confidential treatment. However, such requests do not necessarily preclude the sharing of information among law enforcement entities, and such sharing is generally not disclosed to the target corporation.

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

The DoJ can bring both civil and criminal charges in the US federal district court in the district in which the alleged conduct occurred. The SEC and CFTC can bring civil actions in federal district courts or before an administrative law judge (ALJ). ALJs are independent judicial officers who are authorised to adjudicate allegations of securities law or commodities law violations in public administrative proceedings instituted by the SEC or the CFTC, respectively. ALJs can issue decisions and impose monetary penalties and other sanctions. Their decisions are appealable to the respective commissions, and the commissions' decisions in turn can be appealed to the federal courts of appeal.

5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

US law deems corporations to be legal persons capable of committing crimes. Under the doctrine of respondeat superior, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees and agents. To hold a corporation liable for such illegal acts, the government must prove that the acts were 'within the scope' of the agent's duties and intended, 'at least in part [...] to benefit the corporation' (*United States v Potter*, 463 F.3d 9, 25 (1st Cir. 2006)). A corporate agent is acting within the scope of his or her duties when performing acts of the kind that he or she is authorised to perform. If a corporate agent intends to benefit the corporation, that intention is sufficient to hold the corporation liable, even if the agent had other, personal, motivations as well. A corporation need not profit from the agent's actions, but where an agent's acts are inimical to the corporation's interests or were undertaken with the sole purpose of benefiting the agent (or another third party), the corporation cannot be held criminally liable.

6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

In determining whether to criminally charge a corporation, DoJ policies direct prosecutors to weigh not only the factors normally considered in every case (such as sufficiency of the evidence, likelihood of success at trial, and the deterrent, rehabilitative or other consequences of a conviction), but also a number of factors specific to corporations. Prosecutors maintain substantial discretion, however, in how to apply and weigh these factors. The relevant factors are:

- the nature and seriousness of the offence, including the risk to the public;
- the pervasiveness of wrongdoing within the company and management's complicity in or condoning of wrongdoing;
- the company's history of misconduct, including previous actions against it;
- the company's willingness to cooperate in the investigation and its timely and voluntary disclosure of wrongdoing;
- the existence and effectiveness of the company's compliance programme, prior to the investigation;
- the company's remedial actions, including efforts to implement or improve a compliance programme, replace management,

discipline or terminate wrongdoers, pay restitution and cooperate with the government;
- collateral consequences, including disproportionate harm to shareholders, pension holders, employees and other non-culpable persons;
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
- the adequacy of remedies such as civil or regulatory enforcement actions.

These factors are not exhaustive and need not be weighed equally, particularly if one factor is present to an extent or degree distinct from others. As in all criminal prosecutions, the nature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are the primary factors in determining whether to charge a corporation.

Initiation of an investigation

7 What requirements must be met before a government entity can commence a civil or criminal investigation?

There are no specific requirements for a government entity to commence an investigation, but investigations are typically based, at a minimum, on a suspicion that a crime or legal violation has occurred. The DoJ typically conducts investigations through a grand jury, an independent body with expansive investigative powers. The grand jury's principal function is to determine whether there is probable cause to believe that a particular individual or individuals committed a federal crime. Such determination is the threshold for returning an indictment.

The SEC and CFTC conduct both informal and formal investigations. Subpoenas for documents and testimony are issued in formal investigations; in an informal investigation, the SEC and CFTC can issue voluntary requests for documents and testimony in lieu of subpoenas. A formal order of investigation is issued based on the enforcement staff's recommendation, which explains the basis to believe that the relevant laws have been violated, and that the subpoena power will further the investigation. The threshold for issuing a formal order is relatively low. The formal order describes the nature of the investigation in very general terms and identifies the provisions of the federal securities or commodities laws that may have been violated.

8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

Investigations can be triggered by a multitude of events and information. Referrals from other state and federal government agencies or industry self-regulatory associations, whistle-blower allegations, claims made by a government informant, press reports of corporate or individual wrongdoing, and significant shifts in stock prices coupled with allegations of wrongdoing in civil litigation may all lead to government investigations.

9 What protections are whistle-blowers entitled to?

The Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) provide substantial protection for whistle-blowers employed by publicly traded companies.

The SOX provides whistle-blowers (defined to include those who report wrongdoing to government officials and supervisors, or who participate in SEC or shareholder legal proceedings) with a civil cause of action in the event of resulting discrimination. Whistle-blowers can obtain remedies, including reinstatement, back pay, attorneys' fees and special damages, such as compensation for emotional distress. The SOX also makes it a federal crime to retaliate against a whistle-blower for providing truthful information to a law enforcement officer. Finally, it is a violation of the civil securities laws for an employer to retaliate or discriminate against a whistle-blower. The SOX requires that all publicly traded corporations establish procedures for employees to file confidential internal whistle-blower complaints.

The Dodd-Frank Act expanded on these protections by, among other things, specifically protecting those employees who provide information to the SEC or the CFTC regarding a violation of the securities laws. The Dodd-Frank Act also requires the SEC and the CFTC, pursuant to regulation, to pay any whistle-blower whose information led to an enforcement action a percentage of the sanctions imposed in that action.

10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

It is typical for government entities to refrain from speaking publicly about an investigation until charges are brought or a resolution is announced, though it is not uncommon for information about the investigation to be leaked to the press well before such an announcement is formally made.

A business under investigation will typically request that documents and other information provided to the government be kept confidential, but there is no formal way for a target business to maintain its anonymity. Indeed, as discussed further below, investigations may in certain circumstances give rise to disclosure obligations for public companies. The business will want to think carefully about how to communicate with the press about the investigation and may want to employ an outside public relations firm to advise with respect to press strategy.

Evidence gathering and investigative techniques

11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

There is often a covert phase of the investigation. The length of the covert phase will depend on several factors, including how long the government can successfully deploy covert investigative techniques to further the investigation, prior to approaching the target company or its employees to request information.

12 What investigative techniques are used during the covert phase?

The DoJ typically uses covert techniques to investigate businesses similar to those used to investigate traditional organised crime, including wiretaps, informants and cooperating witnesses. Wiretaps of emails, texts and phone calls can generate powerful evidence; informants and cooperating witnesses can provide historical and proactive assistance in an investigation.

The SEC also conducts regular market activities and analyses market data for anomalies that may evidence improper trading activity as part of its covert investigations. The CFTC also develops information independently that may lead to civil investigations.

13 After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

The business should direct its counsel (whether internal, outside or both) to promptly conduct an internal investigation. The goal is to learn key facts and make determinations about the culpability of the business and its employees, potential defences and the likelihood of negotiating a favourable resolution, so that the business can make important strategic decisions as early as possible. The internal investigation will principally involve the preservation, collection and review of relevant documents and interviews with key employees. Documents can be more quickly reviewed and evaluated if limited to critical custodians and searched using key terms. In certain circumstances, and particularly where the target business is cooperating in the government's investigation, it may be prudent to give the government an opportunity to supplement the list of key terms. After reviewing the relevant documents, counsel can conduct interviews of relevant personnel. Depending on the complexity of the subject matter and potential allegations, counsel may wish to engage experts to assist in analysis of the relevant facts.

14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

A duty to preserve evidence, including electronically stored and hard copy information, generally arises when litigation – or civil or criminal

government investigations – is reasonably anticipated. This threshold is met in the event of a civil or criminal complaint, information or indictment, grand jury subpoena or other request for documents. It is prudent, however, for a company to begin preservation efforts as soon as it is aware of allegations that are likely to lead to a government investigation. Counsel should institute a litigation 'hold' for all potentially relevant hard copy, electronic and audio materials.

15 During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

Government entities can compel the production of corporate documents and records, employee communications over the company's electronic systems and recorded communications if maintained by the company. The DoJ uses grand jury subpoenas to compel production of these materials; the SEC and the CFTC use administrative subpoenas. All three entities can, and often do, also request these materials from target companies on a voluntary basis. A voluntary request is generally preferable for a business from an optical standpoint.

When these subpoenas or voluntary requests call for data that is housed in the US, such data can generally be produced for the government entities that have requested it. While certain types of non-responsive personal information may be redacted, as a general rule, data privacy is not heavily legislated or regulated in the US. When subpoenas or requests call for data that is housed overseas, consideration must be given to the data protection laws in the countries where that data resides. For example, EU member states regulate the processing and transfer of personal data to the US, which has not been found to provide an adequate level of protection over personal data, given its availability to third parties through public court records, FOIA requests and other means.

Two Department of Commerce 'safe harbour' frameworks (one involving the EU and one involving Switzerland) provide a method for US companies to transfer data from the EU to the US, and from Switzerland to the US, in compliance with the EU data protection directive and the Swiss Federal Act on data protection, respectively. To fall within these safe harbour frameworks, US companies must make certain commitments with respect to the collection and handling of data; those commitments are enforced by the US Federal Trade Commission. There also exist applicable foreign laws that permit the transfer of personal data in the public interest, such as for production in a law enforcement proceeding. However, this exemption depends on the nature of the proceedings and the restrictiveness of the particular member state. Foreign blocking statutes also prohibit the transfer of data out of the country where it resides. Despite these restrictions, US law enforcement agencies and regulators may insist on the production of relevant materials, leaving a target company in a difficult position. It is critical for counsel to identify these issues as early as possible in an investigation and to consult with experienced local counsel to attempt to resolve them.

16 On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

Demands for corporate documents can be challenged on several grounds. First, corporate documents can be privileged – and can be withheld on that basis – when they reflect legal advice provided to the corporation by its in-house or outside counsel, or when they constitute attorney work-product (ie, they were prepared by or at the direction of counsel in anticipation of litigation). Second, subpoenas for information can be challenged where the subject matter of the inquiry falls outside the agency's authority, the demand is 'too indefinite' or the information sought is not 'reasonably relevant' to the agency's investigation. Subpoenas can also be challenged if compliance is otherwise overly burdensome or oppressive. More commonly, the business, through its counsel, negotiates a narrowing of the subpoena or request for documents, an extension of time to respond, and permission to respond on a rolling basis.

17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

Corporate employees have a constitutional right pursuant to the Fifth Amendment not to incriminate themselves, and therefore the government cannot compel an employee to testify or to make statements in an interview if his or her statements would tend to be self-incriminating. Corporations, though legal persons, do not have a right not to incriminate themselves.

A company that is cooperating with an investigation will likely want to encourage its employees to cooperate, including by agreeing to be interviewed by the government. The company will also want to interview key employees in the course of conducting its own investigation and can terminate employees who do not cooperate with that investigation. As part of its cooperation, the company may provide the government with information obtained from such interviews, thereby putting the government in essentially the same position as interviewing the employee. Should the government seek to compel that information, however, the company could refuse to provide it on privilege grounds.

18 Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

It is prudent for employees whose conduct is or may become a focus of the investigation to have their own counsel. Such employees may have interests that diverge from the corporation's interests – for example they may wish to cooperate against members of senior management – and counsel for the target business therefore cannot represent both the employee and the corporation. Employees with no direct role in the conduct under investigation and whose conduct is unlikely to be scrutinised can be represented either by outside counsel or by counsel for the target business. Employees with common interests – but whose interests may diverge from the corporation's interest – are commonly represented by a 'pool counsel' that represents several employees with similar roles at the company.

19 Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

Target businesses can share information to assist in their defence. That information will remain privileged pursuant to the 'joint defence' or 'common interest' privilege, which protects information that is shared with other parties where those parties are part of a joint defence effort undertaken by the parties and their counsel. A written joint defence agreement (though not required to preserve the privilege) can be useful in establishing the scope of the agreement and the common defence goals it serves.

Such agreements do restrict each party's ability to disclose to the government the information obtained from other parties to the agreement. This restriction can limit the information that a party who chooses to cooperate is able to provide. DoJ policy expressly does not bar corporations that are parties to joint defence agreements from receiving credit for cooperation, but the policy notes that such agreements may limit the corporation's ability to provide factual information to the government if those facts were obtained in a joint defence communication. Should a corporation enter into such agreements with its employees, the corporation might be unable to share information learned from employee interviews with the government. The CFTC's policies on cooperation note that in examining cooperative conduct the CFTC will consider (as a positive factor) whether a company avoided entering into joint defence agreements with counsel for employees or other entities.

20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

Public companies have a duty under the federal securities laws to disclose to investors certain events that arise during an investigation. Among other things, disclosure is required where an investigation results in a material pending legal proceeding, or where such a

Update and trends

Questions have been raised with respect to whether the DoJ in the Trump administration will reverse course on the trend of aggressive law enforcement and regulatory actions against multinational corporations and financial institutions, especially for violations of the FCPA, based in part on concerns about the statute that President Trump expressed a number of years ago. While it is too soon to be certain, it appears that the DoJ intends to continue to actively enforce the FCPA with respect to entities and individuals. In the spring of 2017, in a speech at the 10th Anti-Corruption, Export Controls & Sanctions Compliance Summit in Washington, DC, Acting Principal Deputy Assistant Attorney General Trevor McFadden (the P-DAAG), stated '[T]he department remains committed to enforcing the FCPA and to prosecuting fraud and corruption more generally'. However, he did imply that there may potentially be less emphasis on procuring large fines and lengthy prison sentences, stating, 'The Criminal Division's aims are not to prosecute every company we can, nor to break our own records for the largest fines or longest prison sentences'. While this statement may herald some additional flexibility on the part of the department with respect to corporate and individual fines, and individual sentences, those cases whose particular facts yield significant fines and sentences under the United States Sentencing Guidelines will likely still generate heavy penalties. The P-DAAG's speech also emphasised the importance of pursuing FCPA prosecutions against individuals, which would continue prior policies underlying the Yates memo, which confirms the department's commitment to individual prosecutions where the facts so warrant. In addition, it also does not appear that the DoJ plans to move away from seeking to obtain voluntary disclosures of potential FCPA violations. The P-DAAG also highlighted the importance of compliance and voluntary disclosures, noting that in the past year, the DoJ had declined to prosecute a number of companies where criminal cases would have been brought but for the companies' voluntary self-disclosure and cooperation.

Accordingly, it would be prudent for businesses and their officers to prepare for more of the same aggressive enforcement from the DOJ under the Trump administration that we have seen in past years. Companies would be well advised to continue building and implementing robust compliance programmes in order to minimise the risk of FCPA-related exposure, and other criminal exposure, given the Department's commitment to continued enforcement.

proceeding is known to be contemplated by the government, or where a director is a defendant in a pending criminal proceeding. Absent these specific events, public companies should disclose investigations if they are material, meaning there is a substantial likelihood that a reasonable investor would view the investigations 'as having significantly altered the "total mix" of information made available' about the company (*TSC Indus, Inc v Northway, Inc*, 426 US 438, 449 (1976)). An assessment of materiality generally turns on the probability and magnitude of potential investigative outcomes, including the likelihood of an enforcement proceeding or indictment.

When making disclosures, it is advisable to provide sufficient information to make clear the type, subject matter and status of the inquiry and to avoid the need for frequent updates. Predictions regarding the outcome of the investigation should be avoided because they may turn out to be incorrect and may frustrate the investigating agency. It may be prudent to preview the fact and content of the proposed disclosure with the investigating agency so that investors can identify areas of particular concern.

Cooperation

21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

Prior to the commencement of a government investigation, or before a company is aware of such an investigation, it can self-report misconduct to the relevant regulatory agency: the DoJ, the SEC or the CFTC (depending on the nature of wrongdoing). Early, voluntary disclosure has a number of advantages.

First, the DoJ considers timely and voluntary disclosure in determining whether to criminally charge a corporation, and the SEC and CFTC consider timely self-reporting in determining whether to bring a civil enforcement action. Second, if a company is the first to report the wrongdoing at issue, the company's information will likely be more valuable to the government than if reported at a later time, when the government is already aware of the information. Third, it is preferable to self-report rather than have the government learn about misconduct from media reports or whistle-blowers' claims, some of which may eventually prove false, but which in the meantime may cast the company in an unnecessarily negative light. Self-reporting may (but does not always) result in a more favourable resolution (such as a deferred prosecution agreement in lieu of a guilty plea, or a reduced fine). On the other hand, premature self-reporting may unnecessarily subject the company to government scrutiny when additional internal investigation might reveal that the issue is narrower or less problematic than originally understood. The question of when and whether to report potential wrongdoing is a highly fact-specific determination to be carefully weighed and considered in each case.

Once a government investigation has commenced, a target company can make clear to the investigating agencies, both explicitly and through its conduct in response to government inquiries, that it will fully cooperate with the investigation. For example, the company can provide documents without a subpoena, regularly report the findings of its internal investigation to the government and encourage its employees to agree to government interviews.

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

The DoJ has a leniency programme through which corporations and individuals can avoid criminal convictions, prison sentences and fines if they are the first to confess participation in a criminal antitrust violation. The DoJ grants only one corporate leniency application per conspiracy. Typically, a company may be unable to complete a leniency application when it first reports wrongdoing because a further inquiry is needed to gather the relevant facts. In that event, the DoJ will grant a marker to hold the applicant's place for a limited period if counsel:

- provides a report that the available evidence indicates that the client has engaged in a criminal antitrust violation;
- discloses the general nature of the conduct;
- identifies the industry, product or service involved so that the DoJ can determine whether leniency is still available; and
- identifies the client.

The types of leniency vary based on the stage at which wrongdoing is reported and the nature of the conduct, among other issues. This programme applies to non-antitrust crimes only if committed in connection with the antitrust activity that is being reported.

The DoJ's recently initiated Foreign Corrupt Practices Act (FCPA) Pilot Program, to expire in April 2017, rewards those companies that self-disclose infractions of the FCPA, fully cooperate with investigations, and timely install appropriate remedial measures. Potential benefits include up to a 50 per cent reduction in potential fines, no instalment of a corporate monitor or a declination of prosecution.

23 Can a target business commence cooperation at any stage of the investigation?

Yes, but the later a company decides to cooperate, the less valuable its cooperation may be to the government, and the less weight its cooperation may carry in resolution determinations.

24 What is a target business generally required to do to fulfil its obligation to cooperate?

A target business is required to promptly provide the government with complete and thorough information relevant to the misconduct at issue and to make appropriate remediation efforts, including disciplining responsible wrongdoers and modifying internal controls to prevent a recurrence of the misconduct. The DoJ has explained that it is seeking, first and foremost, the relevant facts, and disclosure of relevant factual knowledge is a critical component of cooperation. A corporation can supply those facts through producing documents and electronic media and through gathering information through an internal investigation,

including witness interviews, and can report the results of that investigation to the government.

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

The target business can require its employees to be interviewed by outside counsel in connection with the investigation and can require its employees to provide relevant documents. Whether an employee can be terminated for refusing to participate in an interview or to supply documents will depend to some extent on the employment laws in the relevant jurisdictions and any employment agreements, though as a general rule, US businesses can terminate US-based employees for refusing to cooperate with an internal investigation.

Target businesses can generally pay attorneys' fees for their employees in connection with a government investigation, subject to state statutes regarding indemnification, as well as the company's articles of incorporation and by-laws. The DoJ is prohibited from considering whether a company is advancing attorneys' fees when evaluating a company's cooperation.

26 What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

In evaluating the costs and benefits of cooperation, an individual employee will want to first assess his or her role in the misconduct at issue. If the employee has useful information to provide and limited culpability, cooperation may increase the likelihood that he or she will continue to be employed by the target business, and may eliminate or substantially decrease the likelihood that he or she will face criminal charges or an enforcement action or be banned from the industry. If the employee has substantial culpability, he or she will consider whether, based on the government's evidence, he or she is likely to be charged and whether he or she can successfully defend against those charges in court. If the employee perceives a low risk of a charge or conviction despite substantial culpability, he or she may not want to cooperate because cooperation would expose him or her to significant criminal charges. On the other hand, if the employee perceives a significant risk of conviction and a potential prison sentence, he or she may be more likely to cooperate with the government in an effort to obtain leniency.

As noted above, an individual can be terminated for failing to cooperate with the company's own internal investigation.

27 How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

It may be difficult for a corporation successfully to maintain that documents or information provided to the government remain privileged in other contexts, such as civil litigation, as the vast majority of federal appellate courts have rejected the notion of the selective waiver. A corporation can seek to minimise the extent of the waiver of privilege by presenting information to the government through an attorney proffer of factual information that is not attributed to specific witnesses or materials. This issue is likely to be litigated in any subsequent civil litigation.

Resolution

28 What mechanisms are available to resolve a government investigation?

Potential resolutions of a criminal investigation can range from a decision not to criminally charge the corporation to a guilty plea to felony charges. Other options include a Non-Prosecution Agreement (NPA), in which, in exchange for a corporation's cooperation, the DoJ agrees not to prosecute the corporation. The DoJ can also enter into a Deferred Prosecution Agreement (DPA), in which criminal charges are filed, along with an agreement that the charges will be dismissed within a specific period of time, if the corporation fulfils the requirements of the DPA. If a guilty plea by the corporation would have significant collateral consequences for innocent third parties, the DoJ is more likely to consider an NPA or DPA.

29 Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

The DoJ generally requires an admission of wrongdoing to resolve an investigation of a corporation. A guilty plea, NPA and DPA all require an admission of wrongdoing, or acceptance of the government's statement of facts describing that wrongdoing. NPAs and DPAs also may prohibit the corporation from publicly contradicting those admissions or statements of facts. The SEC and CFTC had a longstanding practice of permitting defendants to settle cases without admitting liability until the SEC, in mid-2013, announced that while it would continue to allow 'neither-admit-nor-deny-settlements', admissions would be required in specific cases where heightened accountability or acceptance of responsibility were deemed appropriate.

Dispositions involving admissions of wrongdoing are likely admissible against the corporation in civil litigation, subject to pretrial litigation. The significance of such admissions, of course, will vary depending on the specific issues in dispute in the civil litigation.

30 What civil penalties can be imposed on businesses?

The SEC and CFTC can impose civil penalties, including monetary penalties, disgorgement of moneys obtained in the course of the violations and restitution to victims of the offence. They can also seek court orders that bar the target business from future legal violations and require special supervisory arrangements. The SEC and CFTC can also suspend necessary registrations for certain types of work in the securities and commodities industries and can bar businesses from working in those industries altogether. Negotiated settlements commonly involve agreements that companies will improve their compliance programmes,

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Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

David M Zornow **david.zornow@skadden.com**
Jocelyn E Strauber **jocelyn.strauber@skadden.com**

4 Times Square
New York
NY 10036
United States

Tel: +1 212 735 3000
Fax: +1 212 735 2000
www.skadden.com

terminate employees engaged in misconduct, and agree to continued cooperation.

31 What criminal penalties can be imposed on businesses?

The DoJ can impose very substantial criminal fines on companies, and impose a host of restrictions on their operations, including prohibiting the company from engaging in certain types of work, requiring appropriate compliance policies and review of those policies by an independent expert or the appointment of a monitor to review the company's operations and make reports to the court and the government on a regular basis.

32 What is the applicable sentencing regime for businesses?

Advisory federal sentencing guidelines govern sentences for corporations and financial institutions, as well as individual employees. The guidelines are not binding on sentencing courts, but courts must consider them in imposing sentence. By law, courts must also consider certain relevant characteristics of the offender and the offence, and sentences are imposed on a case-by-case basis. Corporations and financial institutions as well as individual employees that cooperate with government investigations and provide substantial assistance to the government are eligible for a reduction in sentence.

33 What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

An admission of wrongdoing – whether via an NPA, DPA, guilty plea, or otherwise – can have substantial negative consequences for a business's future activities. The extent and nature of those consequences depend on determinations made by a variety of other regulators in the industry. For example, a financial institution that pleads guilty to a felony can be severely limited in the types of work it can engage in, may be disqualified from membership in certain national securities exchanges, may be barred from contracting with state or local governments and may face revocation of its banking licences in a number of locations. An institution subject to a DPA may face similar limitations, while an NPA's consequences may be less onerous. However, as part of a negotiated disposition those authorities may agree to waive those requirements, or to quickly reinstate the financial institutions' memberships and authorisations, thereby limiting the collateral consequences that would otherwise result.

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Getting the Deal Through

Acquisition Finance
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