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The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Fifth Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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10

Co-operating with the Authorities: The US Perspective

John D Buretta, Megan Y Lew and Courtney A Gans[1]

Government investigations of corporations can start quietly or loudly. A subpoena might arrive in the mail; an employee might speak up to a manager; federal agents might raid the offices and seize files, computers and cell phones; or border patrol agents might stop an employee, or a CEO, at the airport. However, an investigation commences, a critical question at the outset is whether the company should co-operate in a government inquiry, and, if so, how, and to what extent. Like a game of chess, a company's opening moves can dictate the end game and must be chosen with care. In the best case, investigations quickly and cost-effectively point the authorities toward individual wrongdoers, the company's effort is short-lived, and it incurs no penalty. In the worst case, Pandora's box is opened.

While the decision to co-operate will turn on the unique factual and legal circumstances faced by a company, this chapter aims to guide the reader through the decision-making process, whether the investigation concerns the Foreign Corrupt Practices Act (FCPA), securities, antitrust or sanctions laws, or the False Claims Act, or other government actions. This chapter discusses how US government authorities define co-operation, identifies the pros and cons of co-operating with the authorities and discusses special considerations in multi-agency and cross-border investigations.

What is co-operation? 10.1

Co-operating with a US government authority generally entails providing all relevant, non-privileged information. This can amount to ensuring that key witnesses are available for interviews by the government, sharing information gleaned from internal interviews of employees, providing relevant documents as well as context

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and background for those documents, giving factual presentations, and agreeing to take remedial action where appropriate.

10.1.1 Department of Justice's general approach to co-operation

The Department of Justice (DOJ) issues guidance and policies for prosecutors in its Justice Manual. Its chapter on Principles of Federal Prosecution of Business Organizations sets forth ten factors that prosecutors should consider when investigating, deciding whether to charge and negotiating a plea or other agreement with a company. Among these is consideration for 'the corporation's willingness to cooperate, including as to potential wrongdoing by its agents'.[2] The Justice Manual states that a company is eligible for co-operation credit if it:

> *identif[ies] all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide[s] to the Department all relevant facts relating to that misconduct. If a company seeking co-operation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals substantially involved in or responsible for the misconduct, its co-operation will not be considered a mitigating factor under this section.*[3]

In other words, to obtain co-operation credit, a company must provide all non-privileged facts concerning misconduct.[4] In addition, the company must not intentionally remain ignorant about misconduct and cannot cherry-pick facts to share with the DOJ.[5]

The DOJ's current approach to co-operation, as reflected in the Justice Manual, emphasises holding individuals accountable for their misconduct and strongly encourages companies to disclose the identities of individuals involved. Prior to September 2015, companies might obtain partial co-operation credit without identifying the individual wrongdoers to the DOJ; this might even have been sufficient to avoid charges in some instances.[6] In September 2015, the DOJ

2 US Dep't of Justice, Justice Manual § 9-28.300. Additional noteworthy factors include 'the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision' and 'the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution'. Id. In June 2020, the DOJ released an updated guidance document concerning these factors, entitled Evaluation of Corporate Compliance Programs, available at https://www.justice.gov/criminal-fraud/page/file/937501/download.

3 US Dep't of Justice, Justice Manual §§ 9-28.300, 9-28.700.

4 Id. § 9-28.720.

5 Id. § 9-28.700 ('If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information . . . its cooperation will not be considered a mitigating factor under this section.').

6 Sally Quillian Yates, Deputy Att'y Gen., US Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate

announced that co-operation would require disclosure of individual misconduct, regardless of the individual's title or seniority at the company.[7] The DOJ's newly announced approach in part reflected the inherent challenges in charging individuals in complex, white-collar investigations, where prosecutors often must sort through and understand 'complex corporate hierarchies, enormous volumes of electronic documents and a variety of legal and practical challenges that can limit access to the evidence' that the DOJ needs to bring charges against individuals, especially when evidence is located outside the United States.[8]

What does this mean in practice for a company under investigation? The DOJ wants to learn information such as: how and when the alleged misconduct occurred; who promoted or approved it; who was responsible for committing it;[9] and which individuals played significant roles in setting a company on a course of criminal conduct.[10] To provide this, company counsel may relay facts to the DOJ by producing relevant documents, allowing the DOJ to interview employees (including acquiescing to 'deconfliction' requests from the DOJ that the government interview employees before company counsel does so), proffering information obtained from an internal investigation or analysing voluminous or complex documents. To obtain full credit, the DOJ will consider the timeliness of the disclosures, whether the company undertook a proactive approach to co-operating, and the thoroughness of the company's investigation.[11] The DOJ does not expect companies to undertake a 'years-long, multimillion dollar investigation every time a company learns of misconduct'; rather, companies are expected 'to carry out a thorough investigation tailored to the scope of the wrongdoing'.[12] Nor does the DOJ want companies to delay their investigations 'merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted'.[13] The investigation should instead focus on individuals who had 'significant roles' in the misconduct.[14] In practice, companies seeking co-operation therefore need not 'have all the facts lined up on the first day' they

Wrongdoing (10 September 2015), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

7 Id.

8 Id.

9 US Dep't of Justice, Justice Manual § 9-28.720.

10 Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (29 November 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

11 US Dep't of Justice, Justice Manual § 9-28.700.

12 Sally Quillian Yates, Deputy Att'y Gen., US Dep't of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (10 May 2016), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association.

13 Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (29 November 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

14 Id.

talk to the DOJ, but they should turn over relevant information to the DOJ on a rolling basis as they receive it.[15]

To ensure that the company's disclosures to the DOJ are extensive and that its internal investigation is thorough, and to fulfil the DOJ's own obligation to make just decisions based on the fullest possible set of facts, the DOJ usually undertakes its own parallel investigation. Accordingly, the Justice Manual instructs prosecutors to:

> *proactively investigat[e] individuals at every step of the process – before, during, and after any corporate co-operation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize, exaggerate, or otherwise misrepresent the behaviour or role of any individual or group of individuals.*[16]

Counsel may encounter situations where it is unclear whether misconduct has actually occurred, either because the corporate client does not have access to the relevant information or, even with full access, cannot discern whether there is malfeasance. In this regard, the DOJ has emphasised that it 'just want[s] the facts' – it does not expect counsel for the company 'to make a legal conclusion about whether an employee is culpable, civilly or criminally'.[17]

In other cases, a company may find that relevant documents in a foreign location cannot be produced to US authorities because of foreign data privacy, bank secrecy or other blocking laws. The Justice Manual recognises that such situations may occur and acknowledges that a company may still be eligible for co-operation credit, though the company will bear the burden of explaining why co-operation credit is still justified despite the restrictions faced by the company in gathering or disclosing certain facts.[18]

The DOJ has emphasised that co-operation does not require a company to waive the attorney–client privilege or the attorney work-product protection.[19] While a company may decide to waive these privileges and protections when it suits its interests to do so, prosecutors may not request such a waiver.[20]

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15 Sally Quillian Yates, Deputy Att'y Gen., US Dep't of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (10 May 2016), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association.

16 US Dep't of Justice, Justice Manual § 9-28.700.

17 Sally Quillian Yates, Deputy Att'y Gen., US Dep't of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (10 May 2016), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association.

18 US Dep't of Justice, Justice Manual § 9-28.700.

19 Id. § 9-28.710.

20 Id. See also Memorandum from Mark Filip, Deputy Att'y Gen., US Dep't of Justice, to Heads of Department Components and United States Attorneys (28 August 2008), available at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

Other Department of Justice policies regarding co-operation 10.1.2

Several components of the DOJ maintain policies regarding company co-operation separate from the guidelines set out in the Justice Manual. Three examples are discussed below: (1) the Criminal Division's policy regarding FCPA enforcement, (2) the Antitrust Division's leniency programme and (3) the Civil Division's False Claims Act enforcement policy.

The FCPA Pilot Program and Corporate Enforcement Policy 10.1.2.1

In April 2016, the DOJ announced a pilot programme for FCPA cases with the goal of motivating 'companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the [DOJ Criminal Division's] Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs'.[21] The Pilot Program, which was initially meant to last one year, became a permanent DOJ programme in November 2017.[22] Known as the FCPA Corporate Enforcement Policy, it is designed to encourage companies to self-report any potential FCPA violations and promote increased co-operation with the DOJ.[23]

To be eligible for the full benefits of the FCPA Corporate Enforcement Policy, companies must: (1) voluntarily self-report all facts within a reasonably prompt time, (2) offer full co-operation and (3) undertake remedial measures in a timely fashion.[24] In addition, the company must disgorge itself of all profits related to the misconduct.[25] If a company complies with these requirements, the DOJ will apply a presumption that the matter will be resolved through a declination.[26] If aggravating circumstances lead the DOJ to determine that declination is not appropriate, the DOJ will nonetheless recommend a 50 per cent reduction off the low end of the US Sentencing Guidelines' fine range appropriate to the offence and will generally not require appointment of a monitor.[27] As of August 2020,

21 Leslie R Caldwell, Ass't Att'y Gen., US Dep't of Justice, Criminal Division Launches New FCPA Pilot Program (5 April 2016), available at https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

22 Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (29 November 2017), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

23 Id.

24 FCPA Corporate Enforcement Policy, US Dep't of Justice, Justice Manual § 9-47.120.

25 Id.

26 Id; Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (29 November 2017), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

27 Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (29 November 2017), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign; FCPA Corporate Enforcement Policy, US Dep't of Justice, Justice Manual § 9-47.120.

the DOJ has issued over a dozen declination letters under the FCPA Corporate Enforcement Policy.[28]

'Th[e] presumption [of declination] may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist.'[29] For example, in June 2020, the DOJ reached a US$233 million settlement agreement with Novartis AG (Novartis), Alcon Inc (a former Novartis subsidiary) and their subsidiaries over violations of the FCPA. Novartis admitted that it conspired to violate the FCPA by bribing employees of state-owned and state-controlled hospitals in Greece to increase the sales of Novartis pharmaceutical products, among other violative conduct. Notably, Alcon's monetary penalty reflected a 25 per cent reduction off the bottom of the US Sentencing Guidelines' range due to its 'full cooperation with the government's investigation.' On the other hand, Novartis received a 25 per cent reduction near the midpoint of the Guidelines' range despite fully co-operating and engaging in remediation because of recidivism – 'its parent company . . . was involved in similar conduct for which it previously reached a resolution with the SEC in March 2016'.[30]

In November 2019, the DOJ made clarifying revisions to certain provisions of the FCPA Corporate Enforcement Policy. First, the DOJ changed a policy that stated a company must alert the DOJ when it 'is or should be aware of opportunities' to 'obtain relevant evidence not in the company's possession and not otherwise known to the Department'. The change removed the wording 'should be' and replaced it with 'is aware', so that the company must now only report opportunities to obtain evidence not in its possession when it is actually aware of such evidence. Second, the November update makes clear that self-disclosure following only a preliminary investigation is acceptable and may earn self-disclosure credit. A footnote in the self-disclosure section now underscores that a company 'may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible' and provides that companies should make clear during a self-disclosure when their knowledge is based on a preliminary investigation. Third, the DOJ clarified that to receive self-disclosure credit, companies must turn over all relevant facts related to 'any individuals' who played a substantial part in the 'misconduct at issue'. The previous version of the policy stated that companies must turn over relevant facts related to 'all individuals' who played a part in a 'violation of law'. This new

28 US Dep't of Justice, Declinations (6 August 2020), available at https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations.

29 Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (29 November 2017), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

30 US Dep't of Justice, 'Novartis Hellas S.A.C.I. and Alcon Pte Ltd Agree to Pay Over $233 Million Combined to Resolve Criminal FCPA Cases', press release (25 June 2020), available at https://www.justice.gov/opa/pr/novartis-hellas-saci-and-alcon-pte-ltd-agree-pay-over-233-million-combined-resolve-criminal.

terminology makes it clear that a company need not determine that there has been a violation early on in the investigation in order to turn over information necessary for self-disclosure credit.[31]

The DOJ recently secured the largest global foreign bribery resolution to date, in which co-operation credit played a significant role. In January 2020, the DOJ entered into a deferred prosecution agreement (DPA) with Airbus SE, whereby the company agreed to pay over US$3.9 billion, in part to resolve foreign bribery charges brought under the FCPA. The FCPA charges were predicated on Airbus' scheme to bribe foreign officials to obtain and retain business, namely contracts to sell aircraft. Notably, the DOJ stated that the resolution 'reflects the significant benefits available . . . for companies that choose to self-report export violations, cooperate, and remediate as to those violations, even where there are aggravating circumstances.' Airbus also agreed in the DPA to 'continue to cooperate with the department in any ongoing investigations and prosecutions relating to the conduct'.[32]

The antitrust leniency programme 10.1.2.2

The DOJ Antitrust Division has a corporate leniency programme granting leniency to the first company that (1) self-discloses conduct related to unlawful anti-competitive conspiracies and (2) co-operates with the DOJ's ensuing investigation.[33] A company that has been granted leniency is only liable for the actual damages in related follow-on litigation, rather than treble damages.[34] Additionally, a company given leniency is not liable for the damages caused by other members of the conspiracy, which a conspirator typically would be responsible for under a theory of joint-and-several liability in antitrust conspiracy cases.[35]

The Antitrust Division expects companies that receive leniency to provide 'truthful, continuing, and complete cooperation', which includes 'conducting a timely and thorough internal investigation, providing detailed proffers of the reported conduct, producing documents no matter where they are located, and making cooperative witnesses available for interviews'.[36]

31 Judy Godoy, 'DOJ Tweaks FCPA Corporate Enforcement Policy for Clarity', Law360 (20 November 2019), available at https://www.law360.com/securities/articles/1221939/doj-tweaks-fcpa-corporate-enforcement-policy-for-clarity; FCPA Corporate Enforcement Policy, US Dep't of Justice, Justice Manual § 9-47.120.

32 US Dep't of Justice, 'Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case', press release (31 January 2020), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case.

33 US Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (26 January 2017), available at https://www.justice.gov/atr/page/file/926521/download.

34 Id.; Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 213(a).

35 US Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (26 January 2017), available at https://www.justice.gov/atr/page/file/926521/download; Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 213(a).

36 Richard A. Powers, Deputy Assistant Att'y Gen., US Dep't of Justice, Remarks at the 13th International Cartel Workshop (19 February 2020), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international.

While only the first company to self-report and co-operate can receive leniency, subsequent co-operators may still be rewarded for their efforts. The Antitrust Division recently clarified that the extent of any fine reduction does not merely reflect the timing of co-operation, but will also reflect the 'nature, extent, and value of that cooperation to the investigation'.[37] Nevertheless, the Division maintains that 'the earlier the cooperation is provided, the more valuable it usually is in assisting the [D]ivision's efforts.'[38] If a company's cooperation is insufficient, the Division 'will not hesitate' to withhold a fine reduction and may even increase the fine.[39]

Traditionally, the Antitrust Division did not use DPAs to resolve criminal antitrust matters since, under the leniency programme, companies that were the first to self-report and co-operate could be fully insulated from prosecution.[40] However, in 2019, the Antitrust Division announced that DPAs could be an option for companies that did not obtain leniency but had an effective compliance programme.[41] Despite this development, the Antitrust Division continues to expect that companies will seek leniency as the benefits under the leniency programme are more generous than those associated with a DPA.[42]

10.1.2.3 The False Claims Act

In May 2019, for the first time, the DOJ issued guidelines for awarding entities with co-operation credit in False Claims Act (FCA) cases.[43] The FCA, frequently used in healthcare litigation, imposes civil liability on entities that defraud government programmes.[44] While the new federal guidance does not present any radically new considerations, it does provide helpful standards and brings FCA cases in line with existing DOJ practices in other types of investigations.[45]

The federal guidance contemplates eligibility for co-operation credit in FCA matters in three circumstances. First, eligibility is available for voluntary self-disclosure by entities that discover conduct that violates the FCA.[46] Notably, co-operation credit is not limited to entities that self-disclose before an investigation commences. Rather, if '[d]uring the course of an internal investigation into

37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 US Dep't of Justice, Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual (7 May 2019), available at https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.
44 False Claims Act, 31 U.S.C. §§ 3729–3733 (2012).
45 Peter B. Hutt II, Michael Wagner, Michael Maya and Brooke Stanley, 'New DOJ Cooperation Credit Guidelines a Welcome Sign, but Key Questions Remain Unresolved', Inside Government Contracts (9 May 2019), available at https://www.insidegovernmentcontracts.com/2019/05/new-doj-cooperation-credit-guidelines-a-welcome-sign-but-key-questions-remain-unresolved/.
46 US Dep't of Justice, Justice Manual § 4-4.112.

the government's concerns . . . entities . . . discover additional misconduct going beyond the scope of the known concerns, . . . the voluntary self-disclosure of such additional misconduct will qualify the entity for credit.'[47] Second, co-operation credit is available for entities providing assistance to an ongoing government investigation, including, but not limited to, identifying employees or individuals responsible for the misconduct, accepting responsibility for the misconduct, making employees available for depositions and interviews, and preserving and collecting relevant information and data in excess of what is required by law.[48] Finally, entities that undertake remedial measures in response to an FCA violation may also be eligible for co-operation credit.[49]

In January 2020, the DOJ announced a new reform to the policy. To complement the existing incentives to voluntarily disclose and co-operate, the Department will now also consider the 'nature and effectiveness of a company's compliance system' in determining whether prosecution under the FCA is the appropriate remedy.[50] This reform in part reflects that a key element of the FCA is the scienter requirement 'and a robust compliance program executed in good faith could demonstrate the lack of scienter'.[51] DOJ also emphasised that 'good corporate citizens that effectively police themselves should not be subjected to unnecessary enforcement costs'.[52]

See Chapter 46 on compliance

Approaches to co-operation by other federal agencies 10.1.3

Other US enforcement agencies take similar approaches to rewarding company co-operation. Two examples of such agency processes – the US Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) – are described below.

The SEC's approach to co-operation was first described in a report of investigation and statement regarding the public company Seaboard.[53] This report, which became known as the 'Seaboard Report', concluded that charges against Seaboard were not warranted based on the consideration of four broad factors: (1) self-policing by the company prior to the discovery of the misconduct; (2) self-reporting the misconduct to the SEC, including investigating the

47 Id.

48 Id.

49 Id.

50 Stephen Cox, Deputy Associate Att'y Gen., US Dep't of Justice, Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (27 January 2020), available at https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

51 Id.

52 Id.

53 US Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Co-operation to Agency Enforcement Decisions, Release No. 34-44969 (23 October 2001) (Seaboard Report), available at https://www.sec.gov/litigation/investreport/34-44969.htm.

misconduct; (3) remediation of the misconduct; and (4) co-operation with the SEC.[54] The benefits of co-operating with the SEC could range from the SEC 'declining an enforcement action, to narrowing charges, limiting sanctions, or including mitigating or similar language in charging documents'.[55] Entry into a deferred or non-prosecution agreement may also be an option depending on the level of co-operation from the company.[56] Similar to the DOJ's current approach, the SEC expects a co-operating company to provide 'the Commission staff with all information relevant to the underlying violations and the company's remedial efforts'.[57]

The CFTC, which regulates US derivatives markets, also offers co-operation credit. While the CFTC has had a longstanding policy of offering co-operation credit, in 2017 it issued advisories that further incentivised 'individuals and companies to cooperate fully and truthfully in CFTC investigations and enforcement actions'.[58] Similar to the approaches adopted by the DOJ and SEC, the CFTC will, in its discretion, consider the following broad factors in determining whether to grant co-operation credit: (1) 'the value of the co-operation' to the instant investigation and enforcement action; (2) 'the value of the co-operation to the [CFTC's] broader law enforcement interests'; (3) 'the culpability of the company or individual and other relevant factors'; and (4) 'uncooperative conduct that offsets or limits credit that the company or individual would otherwise receive'.[59] The

54 Id. See also US Securities and Exchange Commission, Spotlight on Enforcement Cooperation Program (20 September 2016), available at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

55 Andrew Ceresney, Director, SEC Division of Enforcement, 'The SEC's Co-operation Program: Reflections on Five Years of Experience', Remarks at University of Texas School of Law's Government Enforcement Institute in Dallas, Texas (13 May 2015), available at https://www.sec.gov/news/speech/sec-cooperation-program.html.

56 Id. See, e.g., US Securities and Exchange Commission, Deferred Prosecution Agreement between Tenaris, S.A. and the SEC (23 March 2011), available at https://www.sec.gov/news/press/2011/2011-112-dpa.pdf; US Securities and Exchange Commission, Akamai Technologies, Inc. Non-Prosecution Agreement (3 May 2016), available at https://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf.

57 US Securities and Exchange Commission, Spotlight on Enforcement Cooperation Program (20 September 2016), available at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

58 US Commodity Futures Trading Commission, CFTC's Enforcement Division Issues New Advisories on Co-operation, Release Number 7518-17 (19 January 2017), available at https://cftc.gov/PressRoom/PressReleases/7518-17. See US Commodity Futures Trading Commission, Enforcement Advisory: Co-operation Factors in Enforcement Division Sanction Recommendations for Companies (19 January 2017), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf; US Commodity Futures Trading Commission, Enforcement Advisory: Co-operation Factors in Enforcement Division Sanction Recommendations for Individuals (19 January 2017), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf.

59 US Commodity Futures Trading Commission, CFTC's Enforcement Division Issues New Advisories on Co-operation, Release No. 7518-17 (19 January 2017), available at https://cftc.gov/PressRoom/PressReleases/7518-17.

CFTC's advisories emphasise that co-operation credit will be given to co-operation that is 'sincere', 'robust' and 'indicative of a willingness to accept responsibility for the misconduct'.[60] The benefits of co-operating with the CFTC range from the agency taking no enforcement action to imposing reduced charges against the co-operating company.[61] Furthermore, in March 2019, the CFTC announced a new advisory on self-reporting and co-operation to build on the existing foundation of co-operation to further incentivise 'individuals and companies to self-report misconduct, cooperate fully in CFTC investigations and enforcement actions, and appropriately remediate to ensure the wrongdoing does not happen again'.[62]

The CFTC advisories collectively list dozens of specific and concrete factors that the agency will consider when assessing whether to grant co-operation credit.[63] Company counsel may find it beneficial to refer to these factors when determining the company's course of action at various points in time, such as when learning about misconduct, investigating misconduct, self-disclosing misconduct to government authorities and co-operating with government authorities. For example, the advisory concerning co-operation by companies includes a section concerning the 'quality' of the company's co-operation, which the advisory states should be assessed by looking at whether the company 'willingly used all available means to . . . preserve relevant information', 'make employee testimony' or company documents 'available in a timely manner', 'explain transactions and interpret key information', and 'respond quickly to requests and subpoenas for information' from the CFTC, among other things.[64] Indeed, these considerations are relevant to any situation where a company is considering co-operating with authorities, regardless of the type of misconduct or whether the misconduct falls under the jurisdiction of the CFTC.

Case study: Walmart 10.1.4

Choosing to co-operate with the government is not a one-size-fits-all decision, and companies often may choose to (or be able to) co-operate with some aspects of a government investigation, but not others. For example, in June 2019, Walmart Inc and a Brazilian Walmart subsidiary agreed to pay US$137 million to settle criminal charges brought by the DOJ in connection to alleged FCPA violations.

60 US Commodity Futures Trading Commission, Enforcement Advisory: Co-operation Factors in Enforcement Division Sanction Recommendations for Companies (19 January 2017), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

61 Id.

62 US Commodity Futures Trading Commission, CFTC Division of Enforcement Issues Advisory on Violations of the Commodity Exchange Act Involving Foreign Corrupt Practices, Release No. 7884-19 (6 March 2019), available at https://www.cftc.gov/PressRoom/PressReleases/7884-19.

63 See US Commodity Futures Trading Commission, Enforcement Advisory: Co-operation Factors in Enforcement Division Sanction Recommendations for Companies (19 January 2017), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

64 Id.

These allegations arose out of conduct that occurred from 2000 to 2011, in which Walmart employees failed to implement and maintain the company's internal accounting controls to prevent improper payments to foreign government officials. This lapse in controls allowed Walmart subsidiaries in Mexico, India, Brazil and China to hire third-party intermediaries who, in turn, made improper gifts and payments to foreign officials to open store locations in those countries without delay, avoiding detection from Walmart's accounting system. Crucially, certain senior executives at the company were aware of this lapse in controls, yet these practices persisted.[65]

Walmart's co-operation with the government led to a reduction in the overall fine that was levied against the company. Walmart fully co-operated with the investigations into conduct in Brazil, China and India; however, it did not provide full documents and information in connection with the Mexican investigation and chose to interview a key witness before making the witness available for a DOJ interview, contrary to the DOJ's request. Furthermore, Walmart did not self-disclose the misconduct that occurred in Mexico, while it did disclose the conduct in the other countries after the government began investigating the Mexican conduct. Because Walmart fully co-operated with the investigations in Brazil, China and India, it received a 25 per cent reduction in the fines applicable to those jurisdictions under the US Sentencing Guidelines, while it only received a 20 per cent reduction in the fines applicable to the Mexican misconduct.[66]

10.2 Key benefits and drawbacks to co-operation

Deciding whether to co-operate with a government investigation requires careful consideration of the associated benefits and drawbacks. On the one hand, co-operation affords the opportunity of reduced or no charges and penalties; however, co-operation also brings other risks.

10.2.1 Reduced or no charges and penalties

By and large, companies and individuals choose to co-operate with the government to receive some leniency in the form of reduced (or even no) penalties or charges. Research has shown that companies that choose to co-operate with the government tend to achieve better outcomes and typically end up paying lower fines than those that do not.[67] For example, in 2016, Dutch telecommunications company VimpelCom (now known as VEON) paid a criminal fine to the DOJ and Dutch authorities of US$460 million rather than US$836 million to US$1.67 billion, as suggested by the US Sentencing Guidelines, because of the

65 US Dep't of Justice, 'Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case', press release (20 June 2019), available at https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt.

66 Id.

67 See, e.g., Alan Crawford, 'Research Shows It Pays To Cooperate With Financial Investigations', Impact (June 2014), available at http://pac.org/wp-content/uploads/Impact_06_2014.pdf.

Dutch telecommunications company's co-operation with the DOJ in its investigation of alleged FCPA violations.[68] On the other hand, in 2015, Alstom SA was required to pay a criminal fine of US$772 million, the largest-ever recorded fine for FCPA violations at that time, in part because of 'Alstom's failure to voluntarily disclose the misconduct . . . [and] Alstom's refusal to fully cooperate with the department's investigation for several years'.[69]

In addition to the reduced monetary fines that can result from co-operation, the form of a penalty may also vary depending on whether, and how much, a company co-operates with government authorities. If a company has fully co-operated, the government may consider offering a declination (the government declines to prosecute the entity for any alleged wrongdoing), if the facts and circumstances warrant such a resolution. If a declination is not an option, the next best scenario is a non-prosecution agreement (NPA), which is a contractual agreement between the wrongdoer and the government in which the government agrees not to bring criminal charges in exchange for certain requirements from the company (e.g., a fine, admitting to certain facts, further co-operating with the government or entering into compliance or remediation efforts). Another option in the government's toolbox is a DPA, which is an agreement with the government where criminal charges are filed with the court but prosecution is postponed for a certain period in exchange for the company undertaking certain conditions (e.g., payment of fines, compliance reforms, further co-operating with the government, annual reporting or certification requirements, or the appointment of a monitor). If the company complies with these conditions, the government will move to dismiss the charges at the end of the term of deferment. Unlike NPAs, DPAs require court approval, which is usually granted. Finally, if the government believes a stronger penalty is warranted, it could request that a subsidiary of the company, rather than the parent, enter a guilty plea, which can reduce some of the collateral consequences facing the parent company had it been required to plead guilty.[70]

Suspension and debarment 10.2.2

In addition to criminal fines, companies may also face collateral damage from pleading guilty, or otherwise admitting to wrongdoing.[71] For instance, companies in the healthcare, defence and construction fields are particularly vulnerable because any admissions of wrongdoing could have the collateral consequence of excluding

68 US Dep't of Justice, 'VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme', press release (18 February 2016), available at https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

69 US Dep't of Justice, 'Alstom Sentenced to Pay $772 Million Criminal Fine to Resolve Foreign Bribery Charges', press release (13 November 2015), available at https://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreign-bribery-charges#:~:text=Alstom%20S.A.%2C%20a%20French%20power,%2C%20including%20Indonesia%2C%20Saudi%20Arabia%2C.

70 See US Dep't of Justice, Justice Manual §§ 9-28.200, 9-28.1100.

71 See id. § 9-28.1100.

them from eligibility for the government contracts on which their business heavily relies. Furthermore, any admission of wrongdoing could trigger a host of civil litigation from shareholders or other claimants. Similarly in the Employee Retirement Income Security Act (ERISA) sphere, entities that have registered as a qualified professional asset manager, allowing them to work with pension funds and make investments for ERISA clients, may have their status revoked by the Department of Labor if key individuals or the company has been convicted of a crime. Likewise, for companies regulated by the SEC, enforcement actions can result in suspension, disbarment, or both, from the securities markets. Furthermore, even if an issuer is not disqualified altogether, it can lose its well-known seasoned issuer status if it has been found to violate the securities laws. This can have a significant impact on an issuer's ability to quickly file registration statements with the SEC and the issuer's ability to appropriately time the market when offering securities for sale.[72]

See Chapter 26 on fines, disgorgement, etc

In July 2019, the SEC announced that it was changing certain rules related to settlement offers to streamline the process for issuers seeking to settle violations of the securities laws and, concurrently, requesting a waiver from certain collateral consequences of such violations. Chairman Jay Clayton announced:

> *Recognizing that a segregated process for considering contemporaneous settlement offers and waiver requests may not produce the best outcome for investors in all circumstances, I believe it is appropriate to make it clear that a settling entity can request that the [SEC] consider an offer of settlement that simultaneously addresses both the underlying enforcement action and any related collateral disqualifications.*[73]

The simultaneous review of offers of settlement and requests for waivers is a noteworthy development because previously the SEC considered these requests separately, resulting in longer delay and uncertainty for issuers it regulates.[74]

10.2.3 Financial cost

While co-operation between company counsel and the DOJ can save scarce government resources, it often represents a significant cost for the company itself. A company may generally be better placed to run an investigation because conceivably it may know where information is housed and whom to talk to, and

72 Adam Hakki et al., 'SEC Chairman Announces Significant Changes To Commission Procedures For Considering Disqualification Waivers', Shearman & Sterling (7 August 2019), available at https://www.shearman.com/perspectives/2019/08/sec-chairman-announces-significant-changes-to-commission-procedures.

73 Jay Clayton, Chairman, US Securities and Exchange Commission, 'Statement Regarding Offers of Settlement', Public Statement, (3 July 2019), available at https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement.

74 Adam Hakki et al., 'SEC Chairman Announces Significant Changes To Commission Procedures For Considering Disqualification Waivers', Shearman & Sterling (7 August 2019), available at https://www.shearman.com/perspectives/2019/08/sec-chairman-announces-significant-changes-to-commission-procedures.

can more readily determine the relevant facts and documents at issue. Running a high-quality, diligent and thorough internal investigation, despite the relative ease of doing so, is expensive. Document review of company emails, hiring external counsel, travel to and from interviews and preparing presentations to the government, all add up to significant expense. Moreover, if individual employees are implicated in the wrongdoing, they may also choose to hire their own counsel who will also perform an investigation, albeit in a more limited fashion, for which the company may bear financial responsibility. Finally, companies that are found to have committed misconduct may also need to reimburse the victims of their misconduct for certain expenses or pay restitution, which could be considerable and affect other aspects of an investigation or settlement. For example, in 2016, asset management firm Och-Ziff (now named Sculptor Capital Management) agreed to a US$412 million criminal settlement with the DOJ and SEC for violations of the FCPA.[75] In September 2019, however, Judge Garaufis of the Eastern District of New York ruled that certain former investors in a Congolese mine should be classified as victims of Och-Ziff's misconduct, raising the question of whether those investors would be entitled to restitution from the firm.[76] While Judge Garaufis has not yet ruled on whether, and in what amount, these investors are entitled to restitution, the investors initially claimed that they were entitled to US$1.8 billion, opening up the possibility that Och-Ziff may be obligated to pay out more than it agreed to in its settlement with the government.[77] As of July 2020, the investors have decreased their calculation to US$421.8 million, and the parties have submitted a tentative settlement agreement to Judge Garaufis.[78]

Recently, there has also been a trend of victims attempting to recoup the costs of their own internal investigations in connection to misconduct under principles of restitution. In May 2018, however, the United States Supreme Court held that the Mandatory Victims Restitution Act's (MVRA) provision for reimbursement of expenses related to investigations only applied to government investigations and not to private investigations undertaken by a victim.[79] The MVRA requires that certain convicted felons 'reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense'.[80] The Court found that the MVRA does not 'cover the costs of a private investigation that the victim chooses on its own to conduct, which are

75 Dylan Tokar, 'Restitution Battle Throws Three-Year-Old Och-Ziff Settlement Into Limbo', *Wall St. J.* (7 September 2019), available at https://www.wsj.com/articles/restitution-battle-throws-three-year-old-och-ziff-settlement-into-limbo-11567810832.

76 Id.

77 Id.

78 Dean Seal, 'Och-Ziff Reaches Tentative Deal in $421.8M Restitution Bid', Law360 (14 July 2020), available at https://www.law360.com/newyork/articles/1291993/och-ziff-reaches-tentative-deal-in-421-8m-restitution-bid.

79 *Lagos v. United States*, 138 S. Ct. 1684, 1685-86 (2018).

80 18 U.S.C. § 3663A(b)(4).

not "incurred during" participation in a government's investigation'.[81] Even if 'the victim shared the results of its private investigation with the Government', that does not mean that the private investigation was 'necessary' under the MVRA.[82]

10.2.4 Disruption to business

Any business executive or in-house counsel will know keenly that an investigation, regardless of whether the company chooses to co-operate with government authorities, will result in some amount of disruption to key business activities. While declining to co-operate with an investigation should not in and of itself indicate an organisation's culpability, it could have negative public relations consequences as investors and other third-party stakeholders may view this as indicative of guilt or the potential magnitude of the financial penalty. The Justice Manual does make clear, however, that 'the decision not to co-operate by a corporation . . . is not itself evidence of misconduct at least where the lack of co-operation does not involve criminal misconduct or demonstrate consciousness of guilt'.[83]

Whether or not a company chooses to co-operate with the government in an investigation, any investigation will cause disruption to the company's daily operations, and may even affect share prices. For example, an investigation can take up executives' time and attention; in-house counsel must coordinate extensively with external counsel; any key witnesses have to set aside time to be prepped and interviewed and financial resources may need to be diverted to help cover the costs of complying with or conducting an internal investigation.

Furthermore, investigations often bring about significant uncertainty for a business, depending on the seriousness and scale of the investigation. Investors may lose confidence in the company's financial prospects, especially because it may be necessary to divulge details related to the investigation to lenders and other third-party finance partners even before the investigation has been concluded (including details that have not been disclosed publicly). In the event that a company is facing the prospect of paying a substantial financial penalty in an investigation, lenders may choose to withdraw funding or revaluate the terms of any outstanding loans, causing the company's share price to drop accordingly.[84]

10.2.5 Exposure to civil litigation

Companies that co-operate with the government are often at risk of follow-on civil litigation based on any admissions or acceptance of lesser charges in connection with an investigation. Many investigations result in companies making certain admissions to the government, which potential plaintiffs can use to base any civil ligation on, either through class or derivative actions. These civil actions can also have significant financial ramifications. For example, civil penalties in

81 *Lagos v. United States*, 138 S. Ct. 1684, 1686 (2018).

82 Id.

83 US Dep't of Justice, Justice Manual § 9-28.700.

84 See, e.g., US Dep't of Justice, Justice Manual § 9-28.700 ('a protracted government investigation . . . could disrupt the corporation's business operations or even depress its stock price').

the antitrust sphere can result in treble damages.[85] Because of the associated risks of derivative civil actions, companies may ultimately decide that the cost of co-operation is simply too high, and instead decide to decline to co-operate and deny liability and risk defending the company's innocence at trial.

A government investigation or admission of guilt may only be the first stage of a company's legal issues. For example, in 2014, following an investigation, the SEC charged Avon Products with having violated the FCPA for failing to put in place comprehensive controls for detecting instances of bribery in China. Avon settled the civil and criminal cases by agreeing to a fine of US$135 million. This resulted in shareholders filing several securities class action lawsuits against the company, claiming that Avon's management failed to put in place adequate controls to prevent FCPA violations, causing the company to lose millions of dollars of shareholder money through the cost of the related investigations and government fines. Ultimately, the case was dismissed because the court declined to find that the FCPA created a private right of action; however, the resultant civil litigation cost yet more resources and time.[86]

VEON (formerly known as VimpelCom) faced similar ramifications following a government investigation in 2017. VEON's share prices dropped after it disclosed that it was under investigation by US and Dutch government authorities for potential FCPA violations and was conducting its own internal investigation. Ultimately, VEON entered into a DPA with the US government and paid roughly US$460 million in penalties. Additionally, the company had spent nearly US$900 million in related investigation and litigation costs. VEON shareholders brought a securities fraud action against the company, claiming that it had failed to disclose that the company's gains were the result of bribes paid to foreign governments in violation of the FCPA. The plaintiffs relied on certain admissions that VEON had made in connection with its DPA, which the court ultimately decided were actionable.[87]

See Chapter 35 on parallel civil litigation

Excessive co-operation between counsel and the government 10.2.6

At what point is co-operation and coordination between the DOJ and company counsel too much? There have been a few instances where a company's internal investigation is deemed to be so entangled with a government investigation and government and company counsel are so coordinated, that it appears as if the government has 'outsourced' its investigatory authority. This can cause problems later down the line. For example, a company's investigation records could become subject to discovery, even if those records would otherwise be considered privileged. Additionally, a court could decide to exclude certain evidence or testimony

85 15 U.S.C. § 15(a).

86 Benjamin Galdston, 'Shareholder Litigation for Waste of Corporate Assets in Internal FCPA Investigations', *The Review of Securities & Commodities Regulation* (18 April 2018), available at https://s3.amazonaws.com/documents.lexology.com/9877aa80-bdfa-49fb-871b-734a74300baa.pdf.

87 Id.

for running afoul of certain constitutional provisions, even if that testimony was elicited by company counsel and not the government.

While judicial oversight of internal investigations is rare, recent developments suggest some judges may be more hostile to the perceived 'outsourcing' of criminal investigations to the private sector. In *United States v. Connolly*, Judge McMahon of the Southern District of New York issued a decision in May 2019 that was highly critical of the degree of coordination between the DOJ and Deutsche Bank's external counsel involving an internal investigation ostensibly run by the bank's external counsel.[88] The investigation involved allegations that several banks, including Deutsche Bank, unlawfully manipulated the setting of LIBOR interest rates.[89] Deutsche Bank launched an internal investigation into the misconduct and eventually entered into a DPA with the DOJ.[90]

Two former Deutsche Bank traders, Matthew Connolly and Gavin Campbell Black, were subsequently indicted. During his trial, Black moved to suppress statements he had made in connection with Deutsche Bank's internal investigation, arguing that, because the DOJ had effectively 'outsourced' its own investigation function to Deutsche Bank's company counsel, his statements had actually been compelled by the US government in violation of his right against self-incrimination.[91] Because Black's statements were not used at trial, before the grand jury or during its investigation, Judge McMahon found that Black's rights against self-incrimination were not actually violated.[92] She did, however, write a scathing summation of the degree of coordination between the DOJ and Deutsche Bank's company counsel, writing that:

> *[R]ather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to Deutsche Bank – the original target of that investigation . . . Deutsche Bank . . . effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies.*[93]

Since *Connolly* was decided recently, it is currently unclear how it will impact a company's internal investigations and ensuing co-operation with government authorities. Judge McMahon stopped short of saying that any level of coordination at all is impermissible. To steer clear of this risk, company counsel are advised to carefully evaluate (and re-evaluate) their relationship to the government and ensure that they are keenly aware of how their fiduciary duties may differ from and conflict with those of the government.

88 No. 16 Cr. 0370 (CM) (ECF No. 432), 2019 WL 2120523 (S.D.N.Y. 2 May 2019) (Opinion Denying Defendant Gavin Black's Motion for *Kastigar* Relief).

89 Id.

90 Id.

91 Id.

92 Id.

93 Id.

Other options besides co-operation 10.2.7

Co-operation is not the only option for companies or individuals when facing a government investigation. While companies that co-operate are generally guaranteed some degree of leniency, there are situations in which co-operation many not effectively prevent prosecution or reduce a financial penalty, which the Justice Manual guidelines themselves acknowledge: 'The government may charge even the most cooperative corporation . . . if . . . the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has . . . engaged in an egregious, orchestrated, and widespread fraud.'[94] Therefore, there are situations when it is actually pointless to pursue co-operation and other methods must be employed.

First, the company can request a meeting with authorities to explain why the allegations do not amount to an actual violation of law or the particular agency does not have jurisdiction. Second, the defendant could challenge the jurisdiction of the court or regulator's jurisdiction to investigate the matter. Third, companies always have the option to fight the charges on the merits based on insufficiency of evidence in a court of law. This method was employed to dramatic effect by FedEx, when it refused to settle charges that it had conspired to ship illegal prescription drugs to online pharmacies.[95] Just four days into the trial, the DOJ voluntarily dismissed the charges, because it had insufficient evidence to proceed.[96] Meanwhile, United Parcel Service, Google, Walgreens Company and CVS Caremark Corporation had to pay hefty fines after settling with the government.[97]

Special challenges with multi-agency and cross-border investigations 10.3

Multi-agency coordination 10.3.1

Multi-agency coordination is a crucial element of successfully resolving any large, corporate investigation in which multiple US agencies are involved. In 2012, the DOJ issued guidance, which solidified long-standing agency practice, to ensure that 'Department prosecutors and civil attorneys coordinate together and with agency attorneys in a manner that adequately takes into account the government's

94 US Dep't of Justice, Justice Manual § 9-28.720.

95 Dan Levine, 'US Ends $1.6 billion Criminal Case Against FedEx', Reuters (17 June 2016), available at https://www.reuters.com/article/us-fedex-pharmaceuticals-judgment-idUSKCN0Z32HC.

96 Id.; Dan Levine & David Ingram, 'US Prosecutors Launch Review of Failed FedEx drug case', Reuters (15 July 2016), available at https://www.reuters.com/article/us-fedex-doj-idUSKCN0ZV0GO.

97 Dan Levine & David Ingram, 'US Prosecutors Launch Review of Failed FedEx drug case', Reuters (15 July 2016), available at https://www.reuters.com/article/us-fedex-doj-idUSKCN0ZV0GO; Alicia Mundy & Thomas Catan, 'Pain-Pill Probe Targets FedEx, UPS', *Wall St. J.* (15 November 2012), available at https://www.wsj.com/articles/SB10001424127887324595904578121461533102062.

criminal, civil, regulatory and administrative remedies'.[98] The policy statement emphasises 'that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law' by ensuring that 'criminal, civil, and agency attorneys coordinate in a timely fashion, discuss common issues that may impact each matter, and proceed in a manner that allows information to be shared to the fullest extent appropriate to the case and permissible by law'.[99] Furthermore, the Justice Manual has policies obliging departmental attorneys to consider the possibility of any parallel proceeding '[f]rom the moment of case intake' and discuss remedies and communication with other interested investigatory agents and to 'consider investigative strategies that maximize the government's ability to share information among' various agencies.[100] Additionally, the Justice Manual directs prosecutors to assess '[a]t every point between case intake and final resolution . . . the potential impact of [agency] actions on criminal, civil, regulatory, and administrative proceedings'.[101]

In practice, each agency has its own processes and time frames for investigating alleged misconduct and approving settlements. As a result, on occasion, it can be difficult for agencies to effectively communicate and coordinate on a particular investigation such that multi-agency resolutions are reached simultaneously. In this regard, a company that co-operates with all of the relevant government agencies could play a role in encouraging agencies to coordinate by ensuring they are aware of each agency's progress in the investigation and settlement discussions, and encouraging agencies to communicate, when appropriate.

See Chapter 24 on negotiating global settlements

10.3.2 Cross-border coordination

Coordination between international law enforcement agencies has only grown in recent years. In 2018, the DOJ announced that FCPA cases typically involve between four and five different international agencies, particularly because many of the largest DOJ bribery cases target foreign companies in coordination with foreign authorities.[102]

98 US Att'y Gen., 'Memorandum for all United States Attorneys, Director, Federal Bureau of Investigation, All Assistant United States Attorneys, All Litigating Divisions, All Trial Attorneys', US Dep't of Justice (30 January 2012), available at https://www.justice.gov/jm/organization-and-functions-manual-27-parallel-proceedings.

99 Id.

100 US Dep't of Justice, Justice Manual § 1-12.000.

101 Id.

102 Evan Norris, 'How Enforcement Authorities Interact', Global Investigations Review (19 August 2019), available at https://globalinvestigationsreview.com/chapter/1196461/how-enforcement-authorities-interact. See also US Dep't of Justice, 'Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case', press release (31 January 2020), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case (recognising that the largest global foreign bribery resolution to date was made 'possible thanks to the dedicated efforts of [the DOJ's] foreign partners at the Serious Fraud Office in the United Kingdom and the PNF in France', and noting

Cross-border investigations may present special challenges and opportunities in comparison to single-jurisdiction investigations. A recent trend apparent in large, corporate investigations is the increased level of coordination and co-operation between various law enforcement agencies. This coordination may come in the form of official, administrative channels such as mutual legal assistance treaties (MLATs), memoranda of understanding, or specific agreements between countries in relation to particular subjects.[103]

The MLAT process has undergone significant reform in recent years, in response to the oft-criticised laborious nature of preparing the requests and having them fulfilled. In December 2017, the US Attorney General called on the international law enforcement community to 'expedite mutual legal assistance requests', stating: 'If [requests for information are] not properly shared between nations, then, in many cases, justice cannot be done. It is essential that we continue to improve that kind of sharing'.[104] In accordance with this commitment to improve information sharing between the DOJ and other international law enforcement agencies, the DOJ has (1) allocated increased resources to the office responsible for handing MLAT requests and (2) established a cyber unit to process requests for electronic evidence.[105]

In addition to these formal channels, however, international law enforcement agencies may also informally choose to share investigative strategies, information and access to information and witnesses within their respective jurisdictions. One notable innovation has been the use of text messaging between various prosecutorial agencies to compare evidence and coordinate simultaneous raids.[106] For example, in 2016, Brazilian and French prosecutors used WhatsApp to communicate in advance of the raids in the 2016 Rio Olympic Games.[107] Informal coordination presents obvious upsides to the US government. Instead of relying on slow, burdensome and languorous official processes for co-operation, informal co-operation allows US authorities to gain the benefits of shared knowledge in an expedient manner, more akin to the fast-paced nature of the wrongdoer's misconduct in large, complex cross-border investigations.

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that 'the department has taken into account these countries' determination of the appropriate resolution into all aspects of the US resolution').

103 Id.

104 Jeff Sessions, Att'y Gen., US Dep't of Justice, Remarks at the Global Forum on Asset Recovery Hosted by the United States and the United Kingdom' (4 December 2017), available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-global-forum-asset-recovery-hosted-united.

105 Id.; Evan Norris, 'How Enforcement Authorities Interact', Global Investigations Review (19 August 2019), available at https://globalinvestigationsreview.com/chapter/1196461/how-enforcement-authorities-interact.

106 Evan Norris, 'How Enforcement Authorities Interact', Global Investigations Review (19 August 2019), available at https://globalinvestigationsreview.com/chapter/1196461/how-enforcement-authorities-interact.

107 See Clara Hudson, 'GIR Live: Brazilian Prosecutor Says WhatsApp Chat Group Drove Investigation Forward', Global Investigations Review (27 October 2017), available at https://globalinvestigationsreview.com/article/1149463/gir-live-brazilian-prosecutor-says-whatsapp-chat-group-drove-investigation-forward.

For companies, this increased co-operation changes the calculus of whether and how to co-operate with authorities, precisely because information that is shared in one jurisdiction may easily and quickly become known in another jurisdiction, potentially with different criteria for liability.

See Chapter 11 on production of information to authorities

10.3.3 DOJ's policy against 'piling on'

Given the number of different government agencies, both foreign and domestic, that could have an interest in any given investigation, in May 2018, Deputy Attorney General Rod Rosenstein announced the DOJ's new policy against 'piling on', which favours a less aggressive approach to cumulative prosecution. In describing this new policy, Rosenstein stated that the DOJ should 'discourage disproportionate enforcement of laws by multiple authorities', likening it to the football practice of multiple players 'piling on' after a player has already been tackled.[108] He added: 'Our new policy discourages "piling on" by instructing Department [of Justice] components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct', noting that often large, regulated companies are accountable to 'multiple regulatory bodies', which creates the risk of duplicative and onerous punishments beyond 'what is necessary to rectify the harm and deter future violations'.[109]

Piling on can negatively affect the morale of companies, investors and customers and often can mean that companies seldom have a sense of finality when it comes to investigations by an alphabet soup of different law enforcement agencies or regulatory agencies.

Under this new policy, the DOJ now considers 'the totality of fines, penalties, and/or forfeiture imposed by' all enforcement agencies to avoid excessive punishment.[110] Moreover, Rosenstein emphasised that the new policy reinforces the following core policies: ensuring that the federal government (1) does not use its enforcement power for impermissible purposes (i.e., leveraging the threat of criminal prosecution to induce a company to settle a civil case), (2) encourages intra-governmental coordination to ensure an 'overall equitable result', (3) encourages DOJ officials to coordinate with other DOJ officials, and (4) specifies concrete factors that the DOJ will evaluate in the event that a case does warrant multiple penalties.[111]

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108 Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

109 Id.

110 Memorandum from Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, to Heads of Department Components and United States Attorneys (9 May 2018), available at https://www.justice.gov/opa/speech/file/1061186/download#:~:text=In%20reaching%20corporate%20resolutions%2C%20the,to%20achieve%20an%20equitable%20result.

111 Rod J Rosenstein, Deputy Att'y Gen., US Dep't of Justice, Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

In the enforcement of the FCPA, in particular, it has been long-standing practice for the DOJ and SEC to coordinate their investigations and ensuing resolutions; however, the formalisation of the anti-piling-on policy indicates that this practice will become more commonplace in other legal arenas.

Indeed, since former Deputy Attorney General Rod Rosenstein's announcement of the anti-piling on policy in May 2018, there have been several corporate settlements involving federal and state prosecutors and regulators that reflect this policy. For example, in April 2019, Standard Chartered Bank reached a settlement with the DOJ, the Department of the Treasury's Office of Foreign Assets Control (OFAC), the Federal Reserve Board of Governors, New York State prosecutors and regulators and the UK's Financial Conduct Authority, regarding sanctions violations.[112] Standard Chartered agreed to pay more than US$1 billion in penalties, fines and forfeiture to these different authorities.[113] The DOJ agreed to 'credit a portion' of the related payments to other authorities, and after crediting received US$52 million in fines and US$240 million in forfeiture. OFAC assessed a separate civil penalty of US$639 million, which was deemed satisfied by the payments to the DOJ and the Federal Reserve Board of Governors.[114]

It remains to be seen whether companies can successfully use the DOJ's anti-piling-on policy to defend against perceived duplicative charges by various government agencies. Volkswagen, the car manufacturer facing charges by the SEC for failing to disclose its clean diesel emission cheating scheme in a recent bond offering, has argued that the SEC cannot 'pile on' more charges after the company had already pleaded guilty to three felonies and paid US$25 billion in fines, penalties and settlements to US and state authorities, as well as car owners and dealers, in connection to the alleged misconduct.[115] Indeed, the judge presiding over the case has questioned why the SEC brought its case against Volkswagen two years after the company resolved the matter with the DOJ.[116] In addition, the judge acknowledged that it might be possible for Volkswagen's penalty in the SEC

112 US Dep't of Justice, 'Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than $1 Billion', press release (9 April 2019), available at https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions#:~:text=Standard%20Chartered%20Bank%20(SCB)%2C,two%20years%20for%20conspiring%20to.

113 Id.

114 OFAC, 'U.S. Treasury Department Announces Settlement with Standard Chartered Bank', press release (9 April 2019) available at https://home.treasury.gov/news/press-releases/sm647#:~:text=WASHINGTON%20%E2%80%93%20As%20part%20of%20a,settle%20its%20potential%20civil%20liability.

115 Linda Chiem, 'SEC, VW Must Cut Deal in Emissions Fraud Suit, Judge Says', Law360 (16 August 2019), available at https://www.law360.com/articles/1189726/sec-vw-must-cut-deal-in-emissions-fraud-suit-judge-says.

116 David Shepardson, 'US Judge Urges VW, SEC to Resolve Civil Dieselgate Suit', Reuters (16 August 2019), available at https://www.reuters.com/article/us-volkswagen-emissions/u-s-judge-urges-vw-sec-to-resolve-civil-dieselgate-suit-idUSKCN1V61SN.

case to be reduced in light of the penalties the company has already paid.[117] The judge has strongly encouraged the parties to settle the case, but they have been unable to reach a deal after months of court-ordered settlement negotiations.[118] In April 2020, Volkswagen filed a motion to narrow the scope of the SEC's suit, calling it 'unprecedented' given the attempt at piling-on.[119]

117 Id.

118 Id.; Linda Chiem, 'SEC Says Volkswagen, Ex-CEO Can't Escape Emissions Suit', Law360 (29 May 2020), available at https://www.law360.com/articles/1277958/sec-says-volkswagen-ex-ceo-can-t-escape-emissions-suit.

119 Linda Chiem, 'SEC Says Volkswagen, Ex-CEO Can't Escape Emissions Suit', Law360 (29 May 2020), available at https://www.law360.com/articles/1277958/sec-says-volkswagen-ex-ceo-can-t-escape-emissions-suit.

Appendix 1

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