

# GOVERNMENT INVESTIGATIONS 2023

Contributing editor

**John D Buretta**

*Cravath, Swaine & Moore LLP*



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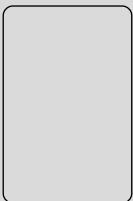
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Lexology Getting the Deal Through is delighted to publish the ninth edition of *Government Investigations*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Hong Kong, Japan and South Korea.

Lexology Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, John D Buretta of Cravath, Swaine & Moore LLP, for his continued assistance with this volume.

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# Global overview

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Business organisations face dual enforcement headwinds – more investigations by law enforcement agencies across the world and more complex and at times labyrinthine regulation. As a result, organisations must navigate regulatory and investigative matters both within and across jurisdictions. Lexology Getting the Deal Through: *Government Investigations 2023* – a practitioner’s guide to civil and criminal investigations of corporate entities around the world – will therefore undoubtedly serve as a valuable resource to business organisations when confronting investigative matters.

Several key enforcement themes have emerged across the globe. Enforcement of economic sanctions and export controls has taken centre stage in response to Russia’s invasion of Ukraine. Coordinated, but not entirely synchronous, restrictions have been imposed by the US, the EU member states and many other countries. Business organisations are prioritising sanctions compliance with new emphasis and at times opting to ‘self-sanction’ by winding down certain business activities despite the fact that such activities are permissible.

The long-standing priority for government authorities of deterring and uncovering corruption across the globe remains unchanged. In January 2022, the Biden administration announced a comprehensive strategy for countering corruption – the first of its kind in the country’s history. Companies can anticipate even more intensive efforts by US authorities to enforce the Foreign Corrupt Practices Act in the wake of this directive. Enforcement authorities in numerous other jurisdictions have also emphasised anti-corruption initiatives, and increasingly have been pursuing corporations and individuals who engaged in corruption. Coordination – and sometimes conflict – across jurisdictions regarding corruption investigations will naturally evolve.

Many countries, as well as multinational regulatory bodies, have pivoted to more active scrutiny of potential antitrust violations, especially towards technology companies perceived to have amassed concentrated market power by, for example, acquiring rivals, amassing user data and operating platforms that prioritise their own products or content over that of competitors. One interesting question that events over the coming year may raise is whether enforcers looking at this industry segment under the microscope will pursue a more coordinated approach to remedies when the same conduct under scrutiny is detected across different territories. Law enforcement agencies in many countries are grappling with effective detection and enforcement in this evolving space.

Government authorities worldwide are focusing regulation and enforcement efforts on the digital currency market. While many countries are pushing for greater transparency in financial transactions to clamp down on money laundering, an increasing volume of wealth transfer is occurring through cryptocurrencies, which have become the favoured mechanism to obfuscate financial transactions. Given the borderless aspects of cryptocurrency, investigations are sure to involve government authorities from multiple jurisdictions. Such investigations inherently will be expansive since the criminal uses of cryptocurrency are nearly limitless, ranging from payments for ransomware attacks to payments for illicit products purchased on the dark web. As the complexity of blockchain and related cryptocurrency products increases, we can expect a proportional proliferation of the types of investigations initiated by government authorities.

Lastly, regulatory bodies continue to focus on environmental, social and governance (ESG) issues as a major area of heightened regulation and enforcement, especially as investor interest in ESG-focused products or services has skyrocketed. In the US, the Securities and Exchange Commission (SEC) recently formed an ESG task force and initiated its first enforcement action against an investment adviser marketing funds that considered ESG factors in their investment decision making. In addition, the SEC has proposed several rules regarding ESG-related disclosures for corporations, as well as ESG-focused investment products. Parallel efforts are under way in Europe.

There is a clear trajectory to investigations this year – they are increasing and they are more complex, especially in light of a more rigorous regulatory environment across many subject areas. These factors provide ample opportunity for law enforcement authorities and regulators to continue to strengthen collaboration with their foreign counterparts. Corporate entities suspected of wrongdoing, regardless of their size or global reach, are likely to face inquiries from enforcement agencies that are not limited to a single forum. We hope that this ninth edition of Lexology Getting the Deal Through: *Government Investigations* serves as a helpful introduction and reference tool for those situations.

\* *The author would like to thank of counsel Megan Y Lew and summer associate Cristina Urquidí for their contributions to this guide.*

# United States

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## ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

### Government agencies

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

The US Department of Justice (DOJ) handles a broad range of civil and criminal enforcement matters that concern corporations. The US Securities and Exchange Commission (SEC) is the primary regulator for public companies and private offerings of securities. Numerous other agencies have enforcement authority over discrete subject matter areas. For example, the Office of Foreign Assets Control has jurisdiction over enforcement of violations of economic sanctions. In addition, the DOJ and the Federal Trade Commission (FTC) share jurisdiction over enforcement of the antitrust laws. The Commodity Futures Trading Commission (CFTC) regulates the United States derivatives markets, including swaps.

### Scope of agency authority

- 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 and the SEC have authority to pursue corporations and individuals for liability, and frequently pursue matters that concern both. Other federal agencies, including OFAC, the FTC and CFTC, can pursue actions against corporations and individuals within their respective enforcement jurisdictions.

### Simultaneous investigations

- 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?

Different government agencies can simultaneously investigate the same company. Ordinarily, the agencies coordinate their efforts and engage in information-sharing to make the process more efficient. For example, the DOJ and the SEC often coordinate investigations involving the US Foreign Corrupt Practices Act, and the DOJ and OFAC can conduct parallel investigations into violations of the United States' sanctions regime.

### Civil fora

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

In federal investigations, civil actions and criminal charges are brought in federal courts, which have jurisdiction over both. Civil enforcement actions can be brought within the adjudicatory systems that many federal agencies, such as the SEC, have developed, with appeal available to the federal courts. State and local authorities can pursue civil and criminal matters in state courts of the appropriate jurisdiction.

### Corporate criminal liability

- 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?

The doctrine of respondeat superior provides that corporations may be held criminally liable for misconduct committed by their employees and agents acting within the scope of their employment (which is construed broadly).

### Bringing charges

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

In assessing whether to bring criminal charges against a corporation, the DOJ applies the written guidelines set forth in its Principles of Federal Prosecution of Business Organizations, which include:

- the nature and seriousness of the offence;
- the pervasiveness of wrongdoing within the corporation;
- the corporation's history of similar misconduct;
- the corporation's willingness to cooperate, including, as described below, providing information about all individuals involved in any wrongdoing;
- the adequacy and effectiveness of the corporation's compliance programme at the time of the offence and thereafter;
- the corporation's remedial actions;
- any collateral consequences to persons not proven culpable;
- the adequacy of non-criminal remedies;
- the adequacy of the prosecution of individuals; and
- the interests of any victims.

## INITIATION OF AN INVESTIGATION

### Investigation requirements

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

There are no specific predication requirements to initiate an investigation.

### Triggering events

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

Investigations can be triggered in a number of ways, such as by press reports, whistle-blower complaints, self-reporting by the company or by one of its competitors, or data analytics.

### Whistle-blowers

- 9 | What protections are whistle-blowers entitled to?

Whistle-blowers are protected under federal non-retaliation laws in some circumstances. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Act) expanded protections for whistle-blowers and broadened prohibitions against retaliation. The US Securities and Exchange Commission (SEC) implemented rules under the Act enabling the SEC to take legal action against employers who have retaliated against whistle-blowers. The Act also created a private right of action regarding securities law violations enabling whistle-blowers to bring a retaliation complaint in federal court.

### Investigation publicity

- 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?

Ordinarily, a government agency does not publicly acknowledge an investigation unless and until (1) a public court filing occurs in the matter that involves the initiation of a civil action or criminal prosecution or (2) the investigation is resolved via settlement, which would include a public announcement from the government agency but may not require a court filing.

## EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

### Covert phase

- 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?

On occasion, government agencies investigate a company before advising the company about the investigation. There is no rule regarding the length of such a covert phase, though ordinarily it is less than a year.

- 12 | What investigative techniques are used during the covert phase?

A covert phase can involve a variety of investigative techniques, such as conducting witness interviews (including interviews of current or former employees of the company), issuing subpoenas for documents and information from third parties involved in the alleged misconduct (eg, financial institutions or co-conspirators) and obtaining covert

recordings by witnesses of conversations with persons of interest in the investigation.

### Investigation notification

- 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?

Typically, a company conducts its own independent internal investigation of the facts and cooperates with the government during its investigation.

### Evidence and materials

- 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?

When a company becomes aware of a government investigation it is involved in, the company typically seeks to preserve all pertinent materials, which can include electronic communications and documents and hard-copy documents. Preservation steps may include sending hold notices to relevant employees, suspending any routine document disposal policies to ensure that documents are preserved and, in some circumstances, undertaking an affirmative collection of relevant materials.

### Providing evidence

- 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 agencies can seek production of all forms of relevant materials. Ordinarily, the agency and the company discuss an appropriate scope for production, including the relevant time frame, relevant custodians and pertinent search criteria. In criminal investigations, government requests can be made by voluntary request or by way of grand jury subpoena. In civil matters, government requests can occur through voluntary requests, investigative demands or civil subpoenas.

Data protection and privacy laws do not, in respect of production from US geographic locations, impose meaningful limitations on production. Production from locations outside the United States, by contrast, can implicate data protection, privacy, national security or other blocking statute issues. Companies typically discuss those limitations openly with the government agency to ensure transparency.

- 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?

Companies ordinarily do not produce materials protected by attorney-client privilege or attorney-work product protection. On occasion, companies decide to waive those privileges and protections, and produce such materials, for example where a company seeks to demonstrate that it relied in good faith on legal advice. Attorney-client privilege extends to all communications pertaining to seeking or receiving legal advice and includes in-house attorneys.

## Employee testimony

- 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?

All individuals have a right under the Fifth Amendment to the US Constitution to refuse to provide testimony that would tend to incriminate them. Where an individual invokes his or her right to avoid self-incrimination, the government agency may only compel testimony from that individual in a criminal investigation and only by granting the individual immunity from prosecution.

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

Employees should have separate legal counsel where they or the company believe their personal interests diverge from the interests of the company. Absent such a divergence, employees are often represented by company counsel.

## Sharing information

- 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?

A common interest or joint defence privilege exists under US law and enables the sharing of information across companies.

## Investor notification

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

Disclosure to investors may be governed by securities law requirements or by written agreements with investors that may, in certain circumstances, require disclosure. For example, public companies traded on US exchanges should conduct a careful analysis into whether an investigation is material to the company, and should assess the likelihood and quantum of potential liability to understand whether a contingent liability reserve is appropriate under applicable accounting standards and securities law requirements. When disclosure is necessary, such disclosures should also be transparent to ensure that there is no material omission or misstatement in the company's public statements.

## COOPERATION

### Notification before investigation

- 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?

Companies are permitted to cooperate before or during a government investigation. Voluntary self-disclosure of issues, before the government has commenced an investigation, is encouraged.

## Voluntary disclosure programmes

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

US enforcement agencies generally encourage voluntary disclosure by providing greater leniency in resolving misconduct issues where voluntary disclosure has occurred. In the antitrust context, and in some instances in the tax context, companies can secure amnesty by voluntarily self-disclosing matters.

## Timing of cooperation

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

Yes.

## Cooperation requirements

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

To secure cooperation credit, a company is generally required to provide the requested documents and communications, to relay factual information and to make employees available for interviews. The Biden administration has made clear that companies must provide all non-privileged information about all individuals involved in any misconduct to earn full cooperation credit.

## Employee requirements

- 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?

Companies can, as a matter of policy, require employees to cooperate with government investigations. Companies can also provide – on a voluntary basis, or pursuant to contractual or other legal requirements – reimbursement of counsel costs. Such reimbursement is not ordinarily viewed as suggestive of any lack of cooperation on the company's part.

## Why cooperate?

- 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?

Employees generally seek to cooperate in a government investigation and in an internal investigation by the company. Where employees decide to refuse to cooperate, they may have certain employment protections depending on the terms of their employment contract, the company's written policies and the state in which they are employed. For example, for employees who can only be terminated for cause and where the company does not have a written policy requiring cooperation in an investigation, failure to cooperate does not necessarily provide a for-cause basis upon which to terminate the employee.

## Privileged communications

- 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?

A company can fully cooperate in a government investigation without divulging any privileged material to the government. Where a company provides privileged material to the government, the privilege ordinarily would be deemed waived in respect of any civil litigation.

## RESOLUTION

### Resolution mechanisms

- 28 | What mechanisms are available to resolve a government investigation?

There are several mechanisms. In the criminal context, guilty pleas, deferred prosecution agreements (ie, filing criminal charges, the pursuit of which is deferred for a specified period) and non-prosecution agreements are available. In the civil context, consent orders, cease-and-desist orders, and other similar forms of civil settlement are available. These typically involve the payment of a fine, a requirement that the company not engage in further similar misconduct and a requirement that the company implement a more robust compliance programme (see, for example, *Securities and Exchange Commission v Amec Foster Wheeler Limited*, 25 June 2021). Recent guidance from the Biden administration, discussed further below, emphasised that any company entering into a deferred prosecution agreement or non-prosecution agreement would be monitored closely during the term of the agreement to ensure its compliance.

### Admission of wrongdoing

- 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?

Ordinarily, a company admits to a statement of facts, which can be used against the company in related civil litigation.

### Civil penalties

- 30 | What civil penalties can be imposed on businesses?

Corporations can receive a monetary fine, have profits stemming from the misconduct disgorged, be subject to compliance requirements and have an independent compliance monitor imposed. Such penalties do not significantly differ from criminal penalties, therefore penalties are often offset in cases involving both a civil and criminal settlement. Recent guidance from the Biden administration makes the use of independent compliance monitors more likely going forward.

### Criminal penalties

- 31 | What criminal penalties can be imposed on businesses?

Corporations can receive a monetary fine, have profits stemming from the misconduct disgorged, be subject to compliance requirements and have an independent compliance monitor imposed.

### Sentencing regime

- 32 | What is the applicable sentencing regime for businesses?

Federal courts consider the United States Sentencing Guidelines when formulating an appropriate sentence for a corporation. These guidelines are discretionary but influential.

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### Future participation

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

An admission of wrongdoing by a company can, in certain circumstances, cause the company to be suspended or debarred from governmental contracting. It can also cause the company to lose other governmental privileges, such as preferential filing status with the Securities and Exchange Commission or its qualified pension asset manager status with the Department of Labor.

## UPDATE AND TRENDS

### Key developments of the past year

- 34 | Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

The Biden administration is actively pursuing corporate investigations in a variety of areas. These efforts include launching a new corruption initiative requiring inter-agency collaboration to target domestic and foreign corruption. The Securities and Exchange Commission has also established an environment, social and governance (ESG) task force focused on ensuring that companies provide appropriate disclosure about environmental risks and accurately market ESG-labelled securities. Cybercrime, including ransomware attacks, is also attracting significant attention from several government agencies, including the Department of Justice (DOJ). In light of the unprecedented sanctions imposed against Russia following the invasion of Ukraine in February 2022, the DOJ has emphasised sanctions enforcement as an important priority area.

The DOJ also issued new guidance in October 2021 regarding how it will approach the prosecution of corporations. This guidance applies to all investigations, regardless of their subject matter.

Specifically, the guidance reverses several policies from the prior administration, including Trump-era policies that disfavoured the use of independent compliance monitors. Under the October 2021 policy, prosecutors may impose an independent corporate monitor if they believe a monitor is required to ensure that the settling company will abide by the compliance and disclosure obligations in the settlement agreement. This policy change is likely to increase the use of independent compliance monitors as a penalty. The DOJ also explained in October 2021 that it would consider the "entire" prior criminal history of a company



when evaluating the appropriate penalty instead of the company's prior "similar" criminal history under the prior policy. Lastly, the guidance expanded the amount of information that companies would have to share with the DOJ to earn full cooperation credit: companies must now provide all non-privileged information about *all* individuals involved in any misconduct instead of only those who were *substantially involved* in any misconduct.

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