

Government Investigations 2022

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Government Investigations 2022

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Government Investigations*, which is available in print and online at 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.

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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 assistance with this volume.



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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 for economic sanctions.

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.

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.

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. 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;
- 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 a public court filing occurs in the matter that involves the initiation of a civil action or criminal prosecution.

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 witness interviews (including interviews of current or former employees of the company) and 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.

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).

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.

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.

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 new Biden administration is actively pursuing corporate investigations. This includes 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, sustainability and governance (ESG) task force focused on ensuring that companies provide appropriate disclosure about environmental risks and accurately market ESG-labelled securities. Ransomware attacks are also attracting significant attention from several government agencies, including the Department of Justice.

Coronavirus**35 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?**

The principal US programme in response to the pandemic is the Paycheck Protection Program, which has provided funding to various companies to ensure continued workforce employment. Instances of fraud on the

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programme have been detected and prosecuted, including the use of sham companies, and stolen and fictitious identities. Employers using the programme should ensure candid and transparent communications in the application and in any follow-up communications.

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