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Cooperating with US government investigations: the risks and rewards

Arian M June, **Winston M Paes** and **Douglas S Zolkind**
Debevoise & Plimpton

Summary

IN SUMMARY

In this article, we discuss certain critical considerations that frequently arise, whether in criminal or civil investigations led by the Department of Justice (DOJ), or regulatory investigations led by agencies such as the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC) and the Office of Foreign Assets Control (OFAC). We examine key considerations that must be confronted in the early stages of a government investigation. Next, we discuss the process of cooperating with a government investigation, and explore the benefits and risks of doing so. Finally, we discuss strategies for navigating parallel investigations, where multiple federal, state and foreign agencies are examining the same conduct.

DISCUSSION POINTS

- Counsel should evaluate how a government investigation began and how far it has progressed to assess how best to respond
- Careful consideration must be given to undertaking an internal investigation if the company has not already done so
- Cooperation – including self-reporting any new violations – carries significant benefits and risks, and must be tailored to the specific agency's expectations
- Care must be taken to engage with the government and respond to requests without waiving the attorney–client privilege or other applicable privileges
- Parallel investigations by multiple federal, state and foreign agencies carry unique challenges and require careful coordination

REFERENCED IN THIS ARTICLE

- Department of Justice, Justice Manual, Principles of Federal Prosecution of Business Organizations
- Securities and Exchange Commission, Enforcement Manual
- Commodity Futures Trading Commission, Enforcement Manual
- Department of Treasury, Office of Foreign Assets Control, Enforcement Guidelines
- 'Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies' memorandum
- 'Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advocacy Group' memorandum

In the early stages of a government investigation, a company will often face daunting decisions that can have an outsize impact on the course of the investigation for months or years to come. As discussed below, some of the important considerations are: evaluating how the investigation began and how far it has progressed; preserving potential evidence and other data; deciding whether to launch an internal investigation; and engaging with the investigating agency while protecting the attorney–client privilege.

HOW DID THE INVESTIGATION BEGIN?

Government investigations may be initiated in many different ways. Understanding how the investigation began can provide insight into how far it has progressed, which is a key factor to consider in deciding how best to respond.

Whistleblowers

The US legal system contains a variety of state and federal mechanisms that incentivise and shield individuals who come forward to report potential misconduct. In recent decades, the DOJ has used the False Claims Act (FCA)[1] to prosecute a broad range of false monetary claims submitted to the government, often relying on whistleblowers who are incentivised to bring lawsuits on behalf of the government in exchange for monetary awards.[2]

In the spring of 2024, the DOJ announced two major programmes to further incentivise individuals to self-report criminal misconduct. First, in March 2024, the DOJ announced that it was launching a 90-day pilot whistleblower programme.[3] Under the programme, the DOJ will provide individual whistleblowers the opportunity to receive financial rewards in exchange for new information about 'significant corporate or financial misconduct'. To be eligible for this programme, a whistleblower cannot have been involved in the criminal activity.

Second, in April 2024, the DOJ announced a Voluntary Self-Disclosures Pilot Programme, which seeks to incentivise individuals who were involved in criminal misconduct to self-report to the DOJ. Such individuals have the opportunity to obtain a non-prosecution agreement (NPA), not a monetary award.[4] Although it remains to be seen how these two programmes will be implemented in practice, DOJ officials expect that they will lead more individuals to decide to self-report corporate misconduct to the Department.

The SEC, the CFTC and the Treasury Department also have effective whistleblower programmes. Under the Sarbanes-Oxley Act of 2002[5] and the Dodd-Frank Act of 2010,[6] individuals may report voluntarily to the SEC 'original information' about potential violations of US securities laws. In fiscal year 2023, for the second year in a row, the SEC received a record-breaking number of whistleblower tips – more than 18,000 – an increase of nearly 50 per cent from the prior record set in 2022.[7] The SEC also issued the largest-ever whistleblower award, US$279 million, in May 2023.[8]

The SEC is notably seeking increasingly stringent penalties against companies that attempt to limit employees' ability to report potential violations to the SEC. In 2023, the SEC brought five enforcement actions against companies under Rule 21F-17 of the Securities Act, also known as the 'whistleblower protection rule'.[9] One noteworthy example was a January 2024 settlement with JP Morgan Securities, LLC (JPMS). There, the SEC ordered JPMS to pay an US$18 million civil penalty for including a provision in its release agreements with retail clients in which the clients 'promised not to sue or solicit others to institute any action or proceeding against JPMS arising out of events concerning' their accounts.[10]

The CFTC operates a virtually identical whistleblower programme under the Commodity Exchange Act,[11] which allows individuals to report potential violations of US commodities laws. The Treasury Department's whistleblower programme has been significantly bolstered by recent laws. In late 2022, the Anti-Money Laundering Whistleblower Improvement Act was enacted to strengthen whistleblower protections, expand the scope of reportable violations and increase incentives by setting a minimum for any potential award of not less than

10 per cent of the collected monetary sanctions.[12] In 2022, the Treasury Department also established the Kleptocracy Asset Recovery Rewards Program, which offers up to US$5 million to whistleblowers who provide information regarding foreign government corruption.[13]

Government officials report that whistleblowers continue to provide immense value to investigators. As insiders or individuals with knowledge of the workings of the target company, whistleblowers often have the ability to influence investigators' view of otherwise ambiguous conduct, particularly early on in a government investigation.

The most effective way for companies to mitigate whistleblower risks is to create and foster a compliance culture that encourages internal reporting and addresses complaints with as much transparency as possible. A robust compliance programme, coupled with easily accessible whistleblower and anti-retaliation policies, will provide comfort to employees by making it clear that improper conduct will not be tolerated and reassuring employees that their complaints will be handled sensitively and seriously. Companies should also establish an ethics policy that requires personnel to comply with all applicable legal duties and sets forth specific requirements in areas more prone to violations. Companies should ensure these programmes are implemented through robust and regular training, and provide routine surveys and checks to ensure the programme is meeting its desired goals.

Where a government investigation has been launched based on a whistleblower report, the target company is already at a significant deficit. The government is likely in possession of sensitive and potentially damaging information, including key documents or even recordings of meetings. Government investigators typically will not disclose to the company that the government has received a whistleblower report. In these circumstances, it would be prudent to undertake an internal investigation. However, special care must be taken to avoid even the appearance of retaliatory conduct against the whistleblower. An investigation can be critical in developing additional facts and providing context to counterbalance the prevailing government narrative.

Subpoena Or Other Formal Request

Companies often learn of a government investigation for the first time when they receive a formal written notice demanding the disclosure of documents and information. In criminal investigations, the DOJ typically issues these demands in the form of a grand jury subpoena. A corporation has no Fifth Amendment privilege against self-incrimination,[14] and therefore cannot refuse to produce records, even if it is the target of the investigation.

Many federal agencies are also statutorily authorised to issue administrative subpoenas compelling document production and testimony. These subpoenas are similar to grand jury subpoenas, except they are issued in an agency's name.[15] Another investigative tool is the civil investigative demand (CID), a compulsory procedure used to obtain documents, answers to interrogatories and oral testimony. CIDs are often utilised by the Federal Trade Commission, as well as by the DOJ's Antitrust and Civil Divisions.

Upon receipt of a subpoena or a CID, a reasonable first step is often to begin a dialogue with the government agency. While it is not always necessary to retain outside counsel to handle this outreach, it may be wise to do so, especially if it is clear from the demands that the government is focused on a sensitive subject area or critical part of the business.

Key questions to try to answer are: what is the focus of the government's investigation? Is the investigation targeting the company or some other entity or person? How far along is the investigation? Answers to these questions will inform counsel's advice about what approach to take. Every situation is unique, but common approaches include negotiating with the government to narrow the subpoena, offering to provide a live presentation on the facts in lieu of a subpoena response in the first instance or – if the demand seems unduly burdensome or baseless – trying to persuade the government to drop the demand, or pursuing a challenge in court. Depending on the circumstances, counsel may also recommend an internal investigation to get to the bottom of what the government is investigating.

AWARENESS OF GOVERNMENT INVESTIGATIONS IN THE SAME INDUSTRY

Government agencies often focus their enforcement efforts on particular industries where many firms engage in similar practices that prosecutors or regulators believe to be problematic. Thus, when news breaks of a government investigation or corporate resolution in a particular industry, it can be a potent warning sign to other industry participants that they may soon be under investigation too, if they are not already.

For example, since late 2021, agencies have been intensely focused on companies in the cryptocurrency space, and in 2024, regulators have expressed similar concerns with the burgeoning field of artificial intelligence (AI).[16] Indeed, in April 2024, SEC Director of Enforcement Gurbir Grewal remarked on the 'perfect storm of risks' found in crypto markets and the 'brewing' storm around artificial intelligence.[17] In June 2023, the SEC brought civil enforcement actions against two prominent crypto exchanges, Binance and Coinbase, following several years of public statements and other regulatory actions that highlighted the likelihood that the SEC would eventually take such a step.[18] Over the past year, the DOJ has obtained convictions of the CEOs of the world's two largest cryptocurrency platforms – FTX and Binance – and the SEC is currently litigating high-profile cases against TerraForm Labs, Ripple and Cemtrex.[19]

As to AI, a similar trend is developing. For instance, the SEC has repeatedly identified 'AI-washing'[20] as a concern and emerging enforcement focus.[21] In March 2024, the SEC brought its first-ever AI-washing cases against two investment advisers. The companies were charged with allegedly makingfalse and misleading statements about their use of AI in connection with providing investment advice.[22] The DOJ indicated a similar focus in February 2024 when it launched its AI enforcement programme, an initiative targeting the detection and prosecution of crimes perpetrated through AI.[23] In March 2024, Deputy Attorney General Lisa Monaco stated that the DOJ would integrate AI assessments into evaluations of corporate compliance programmes and would seek 'stiffer sentences' for AI misuse.[24]

Companies and their counsel should, therefore, pay close attention to enforcement trends in their industry. When they learn of an investigation or enforcement action involving a peer company, it would be wise to conduct an immediate risk assessment to evaluate the likelihood that employees at their company have engaged in similar conduct. If that risk assessment yields troubling results – or if a deeper dive otherwise seems prudent – serious thought should be given to retaining outside counsel to conduct an internal investigation. These efforts will also put the company in a better position if it identifies misconduct and decides to self-report to the government, as the benefits of self-reporting and cooperating are greatest when a company acts proactively before it is contacted by the government.

Self-report

Some investigations begin when a company voluntarily discloses potential violations to a government agency. Many companies self-report in the hopes of obtaining a more favourable resolution, but this should not be an automatic decision. Any organisation considering whether to self-disclose should carefully weigh the potential benefits and risks.

Benefits Of Self-reporting

For several years, US agencies have actively promoted incentives for self-disclosure. To take a recent example, in a March 2024 speech, Deputy Attorney General Lisa Monaco said:

> We want to make the math easy. When a business discovers that its employees broke the law, the company is far better off reporting the violation than waiting for DOJ to discover it. Now, when DOJ does discover the violation, the company can still reduce its exposure by proactively cooperating in our investigation. But I want to be clear: no matter how good a company's cooperation, a resolution will always be more favorable with voluntary self-disclosure.[25]

Indeed, all DOJ components and offices that prosecute corporate crime now publish voluntary self-disclosure policies on their websites, setting forth their expectations for what constitutes a voluntary self-disclosure and laying out the benefits of such disclosure.[26]

The SEC has likewise encouraged self-reporting. In a May 2024 speech, Director ofEnforcement Grewalstressed that:

> once you discover a possible violation, self-report without delay. It's okay to come in before you know all the facts. And you can even self-report when you think there is a possible securities law violation. You don't have to be certain that there is one.[27]

He also warned, 'when market participants don't self-report, not only are they likely to lose out on very significant benefits, but it may also raise questions about their supervisory systems and compliance function'.[28]

Similarly, in April 2024, Ian McGinley, the CFTC's Director of Enforcement, cited self-disclosure and cooperation as 'one of the most significant and consequential decisions a company needs to make'.[29] Below, we discuss in greater detail the frameworks for obtaining cooperation credit with the DOJ, the SEC and other agencies.

In some cases, self-reporting may better enable an organisation to maintain direction and control over the course of the investigation. The company's information is most valuable to the government where the government is not already aware of the misconduct, and the government is unlikely to discover the misconduct by other means. In these circumstances, if a company can show the government that it is conducting a thorough investigation and making a full, voluntary disclosure, it has a better opportunity to frame the narrative before the government has cemented an inaccurate or excessively negative view.

Risks Of Self-reporting

Self-reporting may have serious consequences that should be thoroughly considered. Self-reporting risks throwing open the doors to lengthy and costly organisational

examinations. Enhanced government scrutiny may mean the matter quickly escalates beyond the bounds of the initial wrongdoing uncovered. This may be particularly risky where the misconduct turns out to be fairly confined and easily remediated by the company. When deciding to self-report, a company should be prepared to commit to a full-blown, well-resourced investigation and to report on all findings to the government, no matter what facts the investigation uncovers.

Further, counsel should consult the relevant agency's guidelines for what qualifies as voluntary self-disclosure. Some agencies have stringent requirements. For example, OFAC declines self-reporting credit where the disclosure 'is materially incomplete' or does not include 'a report of sufficient detail to afford a complete understanding of an apparent violation's circumstances."[30] Organisations should also recognise that voluntary self-disclosure is often merely one component needed to receive full cooperation credit. If a company is not prepared to meet all agency-specific cooperation obligations (which are discussed further below), the potential benefits of self-reporting could be obviated entirely.

Self-reporting may also draw the attention of other regulators, including other US agencies and global regulators, and may invite collateral litigation, such as shareholder derivative suits. Finally, there is no guarantee self-reporting will ultimately end in a successful resolution or reduced penalty.

There is also an increased risk, brought on by the new DOJ whistleblower and self-disclosure pilot programmes, discussed above, that an employee may try to report misconduct to the DOJ before the company decides to do so. A company will stand to earn much less credit if, by the time it self-reports, the DOJ has already learned of the misconduct from an individual source. Thus, when deciding to self-report, time is often of the essence.

Factors To Consider In Self-reporting

In weighing the potential risks and rewards of self-reporting, counsel should consider at least the following factors.

- Likelihood of detection: whether the misconduct will be detected by regulators through other means, such as a whistleblower or a regular audit or examination. Companies should also be cognisant of current enforcement trends; entities that operate in industries of high regulatory priority should be more wary of detection.
- Likelihood of prosecution: weighing the seriousness of the misconduct, including the frequency and pervasiveness of the violations, as well as the potential penalties at issue.
- Cooperation requirements: whether the organisation is prepared to meet potentially extensive cooperation obligations when opening the door to a US government agency.
- Commercial costs: inviting the government to initiate an investigation has real-world financial costs. Business operations are likely to be diverted as employees are called upon to meet the regulator requests.
- Reputational risk: self-reporting raises a high likelihood that the conduct could ultimately be disclosed publicly, even if the investigating agency declines to prosecute or pursue an enforcement action.
- National security implications: if the conduct at issue implicates US national security concerns, that may open a host of additional considerations, including the possibility

that the DOJ will find 'aggravating circumstances' that could limit the otherwise available benefits.

DATA PRESERVATION

At the outset of a government investigation, a company must promptly take reasonable steps to preserve evidence and other data. Failure to do so may violate legal requirements and, additionally, could lead to adverse inferences regarding the company's culpability.[31]

Broadly, counsel should assess the need for a legal hold on materials, determine the scope of the data required and develop instructions for its preservation. The hold should be issued as soon as possible, identifying key custodians and instructing them not to delete or otherwise alter relevant data. Counsel should work with the company's IT department to confirm automated deletions are managed appropriately, data is properly collected and preserved, and responses and acknowledgements of hold responsibilities are tracked. Regulators provide differing guidance on preservation requirements, which may also be useful to keep in mind.[32]

It is critical to keep in mind that employees may utilise various means of communication, such as text messaging and third-party apps, even if prohibited by corporate policy. Especially with the increase in remote work since the covid-19 pandemic, many employees may conduct work on personal devices that exist outside of corporate systems and are typically not protected with enterprise-grade security mechanisms. There has been a marked increase in government scrutiny of such 'off-systems communications', and US regulators are increasingly seeking business-related messages from employees' personal devices. Indeed, the SEC and the CFTC are conducting sweeping investigations across the US securities industry in search of record-keeping violations under federal securities laws.[33] And, in March 2023, the DOJ Criminal Division updated its policies regarding the evaluation of corporate compliance programmes to specifically direct prosecutors to consider how companies approach the use of personal devices and messaging apps.[34]

In anticipating these issues, firms should consider how to locate, collect and preserve this data. Enhanced security and employee training may help address immediate concerns, while reassessing the location of servers and the manner in which data is stored may help mitigate foreign privacy concerns, particularly at global firms. Companies may find it helpful to consult with foreign legal counsel as to what is permissible in particular jurisdictions. Where particular employees are of concern, companies may also want to be especially mindful of how to balance collection and preservation with the risk of potentially informing custodians, who could in turn attempt to destroy data. Companies should craft a plan to retrieve data from furloughed or terminated employees, and may consider implementing requirements for the return of devices and data in severance arrangements.

WHETHER TO UNDERTAKE AN INTERNAL INVESTIGATION

Once a company is put on notice of a government investigation – whether through a subpoena, formal notice, leak or other means, and especially if the firm has not already rigorously investigated the subject matter – careful thought should be given to retaining outside counsel to lead a comprehensive internal investigation.

Benefits Of An Internal Investigation

A company that proactively conducts an internal investigation will be better situated to navigate a government investigation. If the company expends the effort and resources to learn the facts, it can make informed decisions as to how to proceed and what posture to take with the government.

An internal investigation often opens the door to cooperation. In any government investigation, the nature and severity of the penalty will depend in part on whether, and how robustly, the company cooperated in the investigation. Whether or not to cooperate is a complex question, but if the company fails to do an internal investigation, the path to cooperation is significantly narrowed.

In the eyes of the government, internal investigations demonstrate the organisation's commitment to good corporate governance and a culture of compliance. The investigational findings may enable the company to proactively remediate the harm (potentially staving off future inquiries, litigation or reputational harm), while also demonstrating the company's good faith and diligence to the investigating agency.

ADDITIONAL FACTORS TO CONSIDER

Internal investigations can be extremely expensive, time-consuming and distracting to the business. A company should assess whether it can effectively respond to the government's requests without launching an investigation. It may also wish to conduct a preliminary inquiry using in-house lawyers (in a manner that protects the attorney–client privilege) to test the waters. If no evidence of misconduct emerges during an initial inquiry, the company may decide not to devote further resources to an internal investigation conducted by outside counsel.

There are instances when the investigative agency may be opposed to the company conducting an internal investigation. This is especially true when the investigative agency has concerns about the company's or its counsel's ability to disclose all the facts and fully cooperate with the investigation. In these situations, the investigative agency may view an internal investigation as doing more harm than good by 'trampling the crime scene'. When conducted poorly or by inexperienced counsel, an internal investigation may be counterproductive by developing a self-serving record, or worse, creating the appearance of influencing witnesses. Thoughtful investigations are designed and executed to avoid future allegations from government agencies that the company followed a flawed, biased or incomplete process. When the government agency is aware that the company is conducting an internal investigation, it is good practice to be transparent and provide the government with an overview of the investigation so there is no misunderstanding about the scope of the investigation.

PRIVILEGE CONSIDERATIONS

When engaging with government agencies and responding to their requests, special care must be taken to avoid inadvertently waiving privilege. In general terms, the attorney–client privilege shields confidential communications between an attorney and a client for the purpose of providing legal advice.[35] The work-product privilege protects materials prepared by or at the direction of lawyers in anticipation of litigation.[36] In this section, we discuss a number of questions that should be top of mind when responding to a government investigation or conducting an internal investigation.

Who Will Lead The Inquiry?

At the outset of an investigation, companies must determine who will direct and conduct the inquiry. Differences between in-house and outside counsel, as well as attorneys and non-attorneys, can lead to meaningfully different privilege protections.[37] Privilege shields communications and work product with legal purpose, and can therefore be compromised if an investigation is conducted by in-house counsel that performs both legal and non-legal functions. In cases where the need to preserve privilege is a strong consideration, companies are best served by retaining outside counsel.

In addition to preserving privilege, the use of outside counsel may bolster the credibility and quality of the investigation, particularly where underlying allegations concern a company's board or senior management. Even in routine matters where outside counsel are not regularly engaged, companies should consider whether in-house counsel possess sufficient technical and substantive experience with the core issues. Related to this, if the investigation is delegated to a company's internal compliance, audit or human resources teams, in-house counsel should supervise and direct the investigation, so as to preserve privilege to the extent possible.

What Is Considered Privileged Information?

Privilege is determined through an analysis of the facts and circumstances surrounding a communication. Contrary to many organisations' expectations, including an attorney as an email recipient or inviting an attorney to a meeting will not necessarily shield the content of the communication. A conversation with counsel that primarily deals with business matters may not be protected regardless of the attorney's presence. How privilege applies to 'dual purpose' communications (ie, communications in which the business and legal nature of the advice are inextricably intertwined) remains an evolving question. In January 2023, the US Supreme Court declined to decide a case (after hearing oral argument) that would have clarified the scope of protections afforded by the attorney-client privilege to such communications.[38] Companies should, therefore, be sensitive to the context of their communications and consider clearly articulating the bases of applicable privileges in the communications themselves. Doing so will help develop the necessary record to support a privilege determination at a later date.

The underlying facts of an investigation are generally not protected from disclosure.[39] A witness could, therefore, be asked about the existence of an attorney–client relationship, for example, without delving into any privileged communications. A witness could similarly be asked to discuss the facts of an event, provided the questioning does not veer towards divulging what the witness discussed with counsel. Facts, therefore, do not become privileged just because a client has discussed them with or learned them from their counsel. The dividing line between attorney–client communications and underlying facts is often case-specific.

Companies should expect scrutiny from regulators on their assertions of privilege. To respond to investigators effectively, counsel must have a clear and defined basis for withholding materials. Failing to do so may cause them to lose credibility in the eyes of the regulators, and may negatively impact the investigation in the long run.

When Should Privilege Be Waived?

Despite government policies regarding privilege protections,[40] companies can feel pressure to produce privileged and protected documents in exchange for potential leniency. However, voluntarily disclosing privileged communications to anyone outside a company, including

the government, almost always waives attorney–client privilege.[41] Accordingly, disclosure of privileged documents and materials to government sources runs the risk that those materials will be discoverable by third parties, including other government agencies or private plaintiffs. In short: leniency in one case may result in liability in another.

Counsel should strategically consider ways in which they can satisfy government information requests to obtain leniency, without waiving privilege. DOJ, for example, explicitly states that privilege waivers are not a prerequisite for cooperation, but disclosure of all relevant facts is.[42] Using this guidance, one way to effectively cooperate with regulators is to share information in reports or presentations that exclusively contain facts uncovered during an internal investigation and withhold any opining on those facts.[43] Such a disclosure would avoid waiving privilege while simultaneously establishing robust cooperation with investigators. Even if government investigators promise to maintain confidentiality of privileged documents disclosed to them, courts are likely to consider the privilege waived and will not countenance a later assertion by the company that the documents are still privileged. Nearly every circuit that has addressed attempts to selectively disclose privileged material has held that sharing information with the government amounts to a waiver of that information as to third parties as well.[44]

COOPERATION CONSIDERATIONS

In most instances, companies will benefit from cooperating with the government. However, there are rare circumstances that may warrant a more defensive approach. An organisation may choose to forego cooperation where:

- it is factually unclear a violation occurred: the company does not believe the government's evidence is credible. The company has conducted its own internal investigation and has substantial reason to believe no violation, including a lesser violation, occurred;
- it is legally unclear a violation occurred: the investigating agency may be engaging in impermissible 'rulemaking by enforcement' and the legal basis for liability is unclear or unsupported by the company's assessment; or
- the government's demands are intolerable: the investigating agency's penalty expectations are so severe or disproportionate to the misconduct that it would be impossible for the company to tolerate.

If an organisation decides to cooperate with the government, it should familiarise itself with the relevant agency's cooperation guidelines so as to maximise the likelihood of earning credit.

COOPERATION CREDIT GUIDELINES

Each government agency has different expectations for cooperation. Before engaging with the government, counsel should consult cooperation guidelines and policies for the relevant agency. Agencies may also have differing guidelines based on the type of violation. This section explores the basic cooperation framework for the DOJ, the SEC, the CFTC and OFAC.

Department Of Justice

The DOJ Justice Manual instructs that federal prosecutors consider a set of eleven factors when investigating and deciding whether to criminally charge a company. These factors, commonly referred to as the Filip factors, include 'the corporation's willingness

to cooperate.'.[45] Cooperation credit is predicated on the company's identification of all individuals 'substantially involved in or responsible for the misconduct at issue'.[46] The company must provide the government with'complete factual information' about these identified individuals.[47] However, the policy also acknowledges the practical difficulties of meeting this standard; accordingly, organisations may still earn cooperation credit where 'despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence'.[48]

In the civil context, cooperation credit is awarded on a sliding scale, at the discretion of the DOJ attorneys handling the matter.[49] To earn maximum cooperation credit, the organisation must: conduct a 'timely self-analysis'; proactively and voluntarily disclose the wrongdoing; and 'identify[] all individuals substantially involved in or responsible for the misconduct'.[50] However, even if the company does not qualify for maximum credit, an organisation may still receive some credit for providing 'meaningful assistance to the government's investigation'.-[51] The DOJ will consider the factors 'traditionally applied' when assessing the extent of cooperation credit earned, including the timeliness, diligence, speed and proactive nature of the cooperation.[52]

In October 2021, Lisa Monaco, Deputy Attorney General, announced major changes in the DOJ's corporate enforcement policies, including a renewed emphasis on individual culpability and corporate recidivism (that is, a company's prior history of regulatory or criminal violations, even if factually unrelated to the matter at hand).[53] In September 2022, Monaco further clarified the application of these policies.[54] First, Monaco reiterated that individual accountability is the DOJ's 'number one priority' and called for companies to present evidence of individual misconduct 'more quickly'.[55] This evidence must be both complete and timely to receive full cooperation credit.[56] Regarding corporate recidivism, Monaco explained that 'prosecutors should assign the greatest significance to . . . prior misconduct involving the same personnel and management' and that 'dated conduct' should receive less weight.[57] Prosecutors should also contextualise prior misconduct within the company's industry, which may be highly regulated.[58] Monaco also announced that all DOJ divisions are expected to adhere to certain 'core principles' of voluntary self-disclosure. Most significantly, absent aggravating factors or 'deeply pervasive' wrongdoing, the DOJ will not seek a guilty plea from companies that voluntarily self-report, fully cooperate, and timely and appropriately remediate.[59]

In January 2023, Kenneth A Polite, Jr, former Assistant Attorney General, announced 'the first significant changes' to the DOJ's Corporate Enforcement Policy since its inception in 2017.[60] The revised policy now applies to all corporate matters handled by the Criminal Division, whereas previously it applied only to Foreign Corrupt Practices Act (FCPA) matters. Consistent with Monaco's guidance, prosecutors may offer declinations even in cases where aggravating factors (such as recidivism) are present, as long as the company timely self-discloses, provides 'extraordinary' cooperation and has an effective compliance programme that identified the misconduct.[61] If a declination is inappropriate, voluntary disclosure, full cooperation, and effective remediation may still yield a discount of at least 50 per cent and up to 75 per cent off the low end of the potential fine range. Perhaps most notably, under the updated policy, even if a company does not voluntarily disclose, full cooperation and timely and appropriate remediation may still yield a discount of up to 50 per cent off the low end of the potential fine range. The policy also clarified the impact of recidivism, noting that the 50 to 75 per cent discount will be taken from a higher point in the range, at the prosecutor's discretion, for recidivists, depending on the particular facts and

circumstances of the case.[62] The recent criminal resolution with SAP SE may be illustrative of the DOJ's approach moving forward.

In January 2024, SAP SE entered into a three-year deferred prosecution agreement in connection with FCPA violations relating to a scheme to bribe government officials in South Africa and Indonesia.[63] SAP agreed to pay a criminal penalty of US$118.8 million and administrative forfeiture of US$103.3 million.[64] Although SAP did not voluntarily self-disclose, DOJ highlighted SAP's extensive cooperation, which resulted in a 40 per cent reduction in the criminal penalty.[65] Specifically, the DOJ cited 18 different examples of SAP's cooperation and remedial efforts, including expeditiously producing relevant documents and other information from multiple foreign countries, taking significant affirmative steps to facilitate interviews, promptly collecting, analysing, and organising voluminous information,preserving relevant business communications, including those sent on mobile messaging applications, and undertaking a comprehensive risk assessment focusing on high-risk areas.[66]

In February 2023, the DOJ also released a voluntary self-disclosure policy applicable to all US attorneys' offices (USAOs).[67] The USAOs' policy is generally aligned with the Criminal Division's approach, but is focused primarily on voluntary self-disclosure and, notably, does not describe the possible monetary benefits of cooperation and remediation in the absence of self-disclosure.[68] Building on these efforts to encourage self-disclosure, the US Attorney's Office for the Southern District of New York (SDNY) has also instituted a pilot whistleblower programme.[69] Effective February 2024, this programme is intended to encourage early and voluntary self-disclosure of criminal conduct of which the government was not aware by participants in certain non-violent offences.[70] In exchange for an individual's disclosure and cooperation, the government will offer that individual a NPA.[71] The US Attorney's Office for the Northern District of California has also instituted a similar pilot programme, which went into effect in March 2024.[72]

Another significant development occurred in October 2023 when the DOJ announced a new department-wide safe harbour policy for voluntary self-disclosures made in connection with mergers and acquisitions.[73] Acquiring companies that voluntarily and promptly disclose criminal misconduct within six months of the closing date, regardless of when the conduct was discovered, and that cooperate with the ensuing investigation, remediate within one year of closing and engage in appropriate restitution and disgorgement will receive the presumption of a declination.[74] Deputy Attorney General Lisa Monaco emphasised that '[b]y contrast, [companies that do] not perform effective due diligence or self-disclose misconduct at an acquired entity, [] will be subject to full successor liability for that misconduct under the law'.

Securities And Exchange Commission

In 2001, the SEC issued the Report of Investigation and Statement, known as the Seaboard Report, laying out the framework for earning cooperation credit.[75] The report identifies four broad measures of cooperation, including: self-policing prior to the discovery of misconduct; self-reporting the misconduct once discovered; remediation efforts; and cooperation with law enforcement authorities.[76] From there, the report describes 13 considerations the SEC will weigh:

> in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.[77]

Notwithstanding this historical framework, SEC Director of Enforcement Grewal has made clear that there is 'no exhaustive checklist of what constitutes cooperation'.[78] Grewal has warned that '[w]hile meaningful cooperation starts with self-policing and self-reporting, it does not end there. It also means proactively cooperating with [the SEC's] investigations and remediating violations'.[79]

The SEC's February 2024 settlement with Cloopen Group Holding Limited, a China-based technology company, is an example of the benefits of meaningful cooperation.[80] The SEC alleged that two senior managers at Cloopen Group orchestrated a fraudulent scheme to improperly recognise revenue on service contracts for which Cloopen Group had either not started or completed work.[81] Cloopen Group undertook an internal investigation, self-reported to the SEC staff and provided substantial cooperation, 'including summarizing interviews of witnesses located in China and identifying and translating key documents originally written in Chinese'.[82] Cloopen Group also engaged in remediation, including:

> firing or disciplining the people involved in the fraudulent scheme, reorganizing the departments engaged in the misconduct, strengthening its accounting controls, and recruiting new finance and accounting staff with expertise in U.S. generally accepted accounting principles.[83]

As a result of Cloopen Group's self-reporting, cooperation, and remediation, the SEC declined to impose a civil penalty.[84] In a press release announcing the charges, Director Grewal praised the Cloopen case as an example of the 'real benefits to companies' of voluntary self-disclosure and cooperation.'[85]

Commodity Futures Trading Commission

In recent years, the CFTC has issued several pieces of enforcement guidance on self-reporting, cooperation and remediation, which are incorporated into the agency's Enforcement Manual.[86] CFTC guidance emphasises that 'ordinary cooperation' is insufficient for credit; rather, the company's conduct during an investigation should be 'sincere, robustly cooperative, and indicative of a willingness to accept responsibility for the misconduct'.[87] Broadly, the CFTC will consider: the value of the cooperation to the investigation; the value of the cooperation to the CFTC's broader law enforcement interests; and the culpability of the company (and other relevant factors).[88] The CFTC will also take into account any 'uncooperative conduct', such as failing to adequately respond to requests, failing to preserve relevant information or minimising the misconduct at issue.[89]

For example, in May 2023, the CFTC reached a settlement with HSBC Bank USA, NA, for manipulative and deceptive trading related to swaps with bond issuers, spoofing, and supervision and mobile device record-keeping failures.[90] According to the settlement order, HSBC:

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on its own initiative, undertook fact-finding more expansive than the CFTC's investigation and reported the results;

- drew the CFTC's attention to relevant documents (including documents that were non-responsive to the agency's requests); and
- facilitated the production of documents located overseas.

HSBC was ordered to pay a US$45 million civil penalty, which the CFTC stated was 'reduced' in recognition of HSBC's 'substantial cooperation' and 'appropriate remediation'.[91]

Department Of Treasury, Office Of Foreign Assets Control

OFAC's Enforcement Guidelines lay out a series of factors the agency considers when assessing the quality of cooperation.[92] Specifically, OFAC considers the 'nature and extent' of an entity's cooperation by assessing, among other items:

- whether the organisation voluntarily self-disclosed the violation;
- whether the organisation provided 'all relevant information' to OFAC;
- whether the company investigated and disclosed other potential violations caused by the same underlying conduct; and
- the nature and timeliness of responses to OFAC's requests.[93]

In April 2023, OFAC reached a settlement with Microsoft Corporation to resolve violations related to the export of software from the United States to sanctioned jurisdictions.[94] OFAC stated that the settlement amount of US$3 million reflected the Office's determination that the conduct was non-egregious and voluntarily self-disclosed.[95] OFAC also considered Microsoft's cooperation with this investigation, including 'proactively providing voluminous, detailed information and engaging responsively with OFAC', and additionally noted that Microsoft 'undertook significant remedial measures and enhanced its sanctions compliance program through substantial investment and structural changes'.[96]

In comparison, London-headquartered British American Tobacco plc (BAT) and its subsidiary British American Tobacco Marketing Singapore (BATMS), which did not receive any cooperation credit, paid OFAC a historic US$508 million penalty, reflecting the statutory maximum, to resolve charges of bank fraud and sanctions violations. [97]

Navigating Parallel Investigations

We live in an era of heightened attention to white-collar enforcement, both domestically and globally. It is increasingly common for companies to face concurrent investigations by multiple US and foreign government agencies covering the same conduct. To successfully navigate such parallel investigations, counsel must keep a number of additional considerations in mind.

PARALLEL INVESTIGATIONS BY MULTIPLE US FEDERAL AGENCIES

For several decades, the federal government has made efforts to increase inter-agency cooperation.[98] In 2018, DOJ issued an anti-piling on policy, instructing DOJ attorneys to coordinate with one another [as well as with other federal, local, state, or foreign authorities] to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture'.[99]

Despite the government's pronouncements, parallel investigations are often marked – from a practitioner's perspective – by a distinct lack of coordination among agencies. Federal agencies have different guidelines and standards, different priorities and different personalities. It is crucial for the target company to understand how each regulator operates and what each regulator expects for a successful resolution.

Companies should also be prepared to assume responsibilities to centrally coordinate the investigation rather than counting on agencies to organise among themselves. Counsel should expend the effort to come up with a comprehensive plan for responding to requests, including – where feasible – combining responses and document productions.

The organisation should take a proactive role in pushing for a global resolution. Negotiating a global resolution can be challenging given the varied degree of coordination among agencies, and developing a solid understanding of the underlying policies and inter-agency dynamics is vital. The benefits of a coordinated settlement are enormous – greater legal certainty, a sense of closure and relief, and the avoidance of unnecessary duplication in penalties and disclosure.

Parallel US Federal-state Investigations

In recent years, state regulators and attorneys general have become increasingly aggressive enforcers, especially in the areas of consumer protection, antitrust, and financial and healthcare fraud. Companies should recognise that the federal government and state agencies often have overlapping investigative authority, and it is common for state investigators to piggyback onto federal investigations. These types of parallel proceedings may be particularly challenging as federal and state governments have different agendas and legal constraints.

Parallel US-foreign Investigations

Parallel investigations involving US and foreign authorities are increasingly frequent, and US agencies have developed a collaborative relationship with foreign counterparts.[100] Such parallel proceedings have led to massive global penalties in recent years.[101] US-foreign coordination may come in different forms: formally, it may involve mutual legal assistance treaties (MLATs), memoranda of understanding or subject-specific agreements. Informally, coordination may involve ad hoc decisions to share investigative strategies and access to witnesses and information.

The Biden administration has expressed a strong commitment to cooperating with international authorities to fight global corruption. The US Strategy on Countering Corruption, released in December 2021, described the administration's plan to strengthen relationships with foreign authorities and bolster anti-corruption institutions.[102] As part of this initiative, the United States intends to 'elevate and expand the scale of diplomatic engagement and foreign assistance' in combating corruption.[103] Since the strategy's launch, relevant US authorities have implemented a number of programmes and policies aimed at anti-corruption enforcement.[104] For example, in March 2022, the DOJ launched Task Force KleptoCapture, an inter-agency task force focused on enforcing US sanctions and restrictions against Russia, which has since seized over US$500 million in assets.[105] In time, we expect the Strategy on Countering Corruption will lead to greater coordination between the United States and foreign authorities on anti-corruption and anti-money laundering efforts, sanctions and related criminal investigations.

Coordinating cross-border resolutions raises some distinct issues, particularly surrounding data privacy. Global organisations responding to discovery requests should remain especially mindful of the ways in which they might get caught between the conflicting pressures of permissive US data privacy laws and non-US restrictive data protections. The US enforcement landscape is wholly distinct from other jurisdictions. A patchwork of state and federal laws comprise a complex framework, which is generally far less protective than foreign omnibus statutes, such as the European Union's General Data Protection Regulation.[106] A key difference is the extent of the government's reach into personal data. For example, DOJ can, and regularly does, use search warrants and subpoenas to obtain text messages, emails and other communications from business and personal devices, such as data stored in messaging apps and in the cloud.

In addition, privileges that are well-established in the United States, such as those shielding attorney–client communications and work product, may look very different in other jurisdictions. For example, US privilege law generally protects notes of employee interviews conducted during an internal investigation, while English privilege law does not.-[107] Because of these material differences in privilege laws, consulting with local counsel can be indispensable.

Companies should also consider the distinct legal regimes they are dealing with, as less than careful coordination can lead to sub-optimal outcomes. For example, a company may self-report to DOJ to earn cooperation credit; should it also self-report to a foreign jurisdiction which provides no benefit for doing so? Cooperating in one jurisdiction may force the company into cooperating in other jurisdictions as well. In addition, different legal systems move at different speeds. An investigation may linger in one country's judicial system, even where another country's agencies are prepared to resolve the matter.

CONCLUSION

There is no one-size-fits-all approach to advising a client facing a US government investigation. Much depends on the nature of the investigation, the scope and stage of the inquiry, the potential consequences of an enforcement action and the potential risks of collateral consequences, such as reputational damage and civil litigation. This article has sought to describe certain key considerations that should be given serious attention in all manner of white-collar and regulatory investigations. Ultimately, counsel must provide strategic advice and constantly assess, as an investigation progresses, the pros and cons of cooperating with the government versus challenging the government's assertions, undertaking a voluntary internal investigation versus merely responding to requests, and negotiating over the terms of a resolution versus seeking a declination and appealing to supervisors within the agency.

* *Debevoise associates Nathan Hogan and Sharon Shaji assisted in the preparation of this article.*

Endnotes

[1] 31 U.S.C. § 3729 et seq.

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ments-and-judgments-exceed-56-billion-fiscal-year (discussing FCA recoveries in fiscal year 2021).

[3] See U.S. Dep't of Justice, 'Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime' (7 March 2024), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

[4] See U.S. Dep't of Justice, 'Criminal Division's Voluntary Self-Disclosures Pilot Program for Individuals' (22 April 2024), available at https://www.justice.gov/opa/blog/criminal-divisions-voluntary-self-disclosures-pilot-program-individuals.

[5] 15 U.S.C. § 7201 et seq.

[6] 12 U.S.C. § 5301 et seq.

[7] U.S. Securities and Exchange Comm'n Office of the Whistleblower, '2023 Annual Report to Congress for Fiscal Year 2023' (14 November 2023), available at https://www.sec.gov/files/fy23-annual-report.pdf.

[8] U.S. Securities and Exchange Comm'n, 'SEC Issues Largest-Ever Whistleblower Award' (5 May 2023), available at https://www.sec.gov/news/press-release/2023-89.

[9] See U.S. Securities and Exchange Comm'n, 'Office of the Whistleblower', available at https://www.sec.gov/whistleblower/retaliation#enforcement-actions (last accessed 20 November 2023).

[10] Debevoise & Plimpton LLP, 'SEC Brings Whistleblower Action Over Retail Client Agreements', (25 January 2024), available at https://www.debevoise.com/insights/publications/2024/01/sec-brings-whistleblower-action-over-retail-client.

[11] 7 U.S.C. § 1 et seq.

[12] Anti-Money Laundering Whistleblower Improvement Act, available at https://www.congress.gov/bill/117th-congress/senate-bill/3316/.

[13] U.S. Dep't of Treasury, 'Kleptocracy Asset Recovery Rewards Program', available https://home.treasury.gov/about/offices/terrorism-and-financial-intelligence/terrorist-financing-and-financial-crimes/kleptocracy-asset-recovery-rewards-program (last visited 27 June 2022).

[14] SeeCurcio v United States, 354 U.S. 118, 122 (1957).

[15] See, eg, 15 U.S.C. § 78dd-2(d)(2) (DOJ); 15 U.S.C § 77s(c) (SEC); 7 U.S.C. § 9(5)–(6) (CFTC).

[16] See, eg, U.S. Dep't of Justice, 'Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team' (6 October 2021), available at https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team; U.S. Securities and Exchange Comm'n, 'SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit' (3 May 2022), available at https://www.sec.gov/news/press-release/2022-78; Testimony of CFTC Chairman Rostin Behnam Regarding 'Examining Digital Assets: Risks, Regulation, and Innovation' before the

U.S. Senate Committee on Agriculture, Nutrition, and Forestry (9 February 2022), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam20.

[17] See Speech, U.S. Securities and Exchange Comm'n, 'Remarks at Program on Corporate Compliance and Enforcement Spring Conference 2024' (15 April 2024), available at https://www.sec.gov/news/speech/gurbir-remarks-pcce-041524.

[18] See Press Release, U.S. Securities and Exchange Comm'n, 'SEC Files 13 Charges Against Binance Entities and Founder Changpeng Zhao' (5 June 2023), available at https://www.sec.gov/news/press-release/2023-101; Press release, U.S. Securities and Exchange Comm'n, 'SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency' (6 June 2023), available at https://www.sec.gov/news/press-release/2023-102.

[19] See, e.g., U.S. Securities and Exchange Comm'n, 'Crypto Assets and Cyber Enforcement Actions' (24 May 2024), available at https://www.sec.gov/spotlight/cybersecurity-enforcement-actions; Kevin J. O'Brien, 'FTX and Binance: a tale of two cases' (13 February 2024 12:37 PM), available at https://www.reuters.com/legal/legalindustry/ftx-binance-tale-two-cases-2024-02-13/.

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[21] See, eg, Video Transcript, U.S. Securities and Exchange Comm'n, 'Chair Gary Gensler on AI Washing' (18 March 2024), available at https://www.sec.gov/news/video-transcript/sec-chair-gary-gensler-ai-washing; Speech, U.S. Securities and Exchange Comm'n, 'Remarks at Program on Corporate Compliance and Enforcement Spring Conference 2024' (15 April 2024), available at https://www.sec.gov/news/speech/gurbir-remarks-pcce-041524.

[22] Press release, U.S. Securities and Exchange Comm'n, 'SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence' (18 March 2024), available at https://www.sec.gov/news/press-release/2024-36.

[23] See Speech, U.S. Dep't of Justice, 'Deputy Attorney General Lisa O. Monaco Delivers Remarks at the University of Oxford on the Promise and Peril of AI' (14 February 2024), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-university-oxford-promise-and.

[24] See Speech, U.S. Dep't of Justice, 'Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime' (7 March 2024), available athttps://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar

[25] See Speech, U.S. Dep't of Justice, 'Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime' (17 March 2024), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-a

[26] U.S. Dep't of Justice, 'Voluntary Self Disclosure and Monitor Selection Policies' (8 March 2024), available at https://www.justice.gov/corporate-crime/voluntary-self-disclosure-and-monitor-selection-policies.

[27] See Speech, U.S. Securities and Exchange Comm'n, '"The Five Principles of Effective Cooperation in SEC Investigations," Remarks at Securities Enforcement Forum West 2024' (23 May 2024), available at https://www.sec.gov/news/speech/grewal-remarks-securities-enforcement-forum-west-052324?utm_medium=email&utm_source=govdelivery.

[28] id.

[29] Keynote Address of Ian McGinley Before the New York City Bar Association Futures and Derivatives Committee Conference (11 April 2024), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcginley3.

[30] 31 C.F.R. pt. 501, app. A § (I)(l).

[31] See, eg, SEC Enforcement Manual § 3.2.9.4 (discussing duty to preserve records);US v Arthur Andersen, LLP, 374 F.3d 281 (5th Cir. 2004) (affirming conviction of company for obstructing government investigation), rev'd on other grounds,Arthur Andersen LLP v US, 544 U.S. 596 (2005).

[32] See, eg, Justice Manual §§ 9-5.004 (Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases), 9-47.120 (FCPA Corporate Enforcement Policy), 9-48.000 (Computer Fraud and Abuse Act); SEC Enforcement Manual §§ 3.2.9.4, 3.2.9.6 to 3.2.9.9; CFTC Enforcement Manual §§ 5.10, 9.1.

[33] See, eg, Press Release, U.S. Securities and Exchange Comm'n, 'SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures' (27 September 2022), available at https://www.sec.gov/news/press-release/2022-174; Harry Wilson, 'HSBC Under Investigation in U.S. Over Whatsapp Use', Bloomberg (22 February 2022, 2:38 AM), available at https://www.bloomberg.com/news/articles/2022-02-22/hsbc-says-it-s-under-investigation-in-u-s-over-whatsapp-use; Daniel Taub and Sridhar Natarajan, 'Goldman Probed by SEC Over Messages Sent Using Unapproved Services', Bloomberg (25 February 2022, 11:04 AM), available at https://www.bloomberg.com/news/articles/2022-02-25/goldman-probed-over-messages-sent-using-unapproved-services; Daniel Taub, 'Citi Is Latest Bank to Be Probed Over Unapproved Messaging Services', Bloomberg (28 February 2022, 11:19 AM), available at https://www.bloomberg.com/news/articles/2022-02-28/citi-is-latest-to-be-probed-over-unapproved-messaging-services.

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[36] SeeHickman v Taylor, 329 U.S. 495, 510–12 (1947).

[37] SeeIn re Kellogg Brown & Root, Inc, 756 F.3d at 757–59 (upholding privilege where investigation was led by in-house counsel and interviews were conducted by non-attorney, compliance employees because providing legal advice was a 'significant purpose[]' of the investigation);Wultz v Bank of China Ltd, 304 F.R.D. 384, 393 (S.D.N.Y. 2015) (distinguishing Kellogg Brown & Root's attorney-led investigation from internal investigation led by compliance officer, who lacked the purpose of providing legal advice).

[38] SeeIn re Grand Jury, 598 U.S. 15 (2023).

[39] SeeUpjohn Co, 449 U.S. at 395–96.

[40] See, eg, Justice Manual § 9-28.710 (Attorney-Client and Work Product Protections).

[41] See, eg,In re Qwest Commc'ns Int'l Inc, 450 F.3d 1179, 1192–93 (10th Cir. 2006).

[42] See Justice Manual § 9-28.720 (Cooperation: Disclosing the Relevant Facts).

[43] SeeUnited States v Coburn, No. 2:19-cr-00120 (KM), 2022 WL 357217 (D.N.J. 1 February 2022) (finding company effected a broad subject-matter privilege waiver by providing DOJ with detailed accounts of employee interviews conducted as part of internal investigation).

[44] SeeIn re Pac Pictures Corp, 679 F.3d 1121, 1127 (9th Cir. 2012) (collecting cases); but seeDiversified Indus, Inc v Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

[45] Justice Manual § 9-28.300 (Factors to Be Considered).

[46] Justice Manual § 9-28.700 (The Value of Cooperation).

[47] id.

[48] id.

[49] See Justice Manual § 4-3.100(3) (Pursuit of Claims Against Individuals).

[50] id.

[51] id.

[52] id.

[53] Memorandum from DOJ Deputy Att'y General Lisa O Monaco, 'Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies' (28 October 2021), available at https://www.justice.gov/dag/page/file/1445106/download.

[54] Memorandum from DOJ Deputy Att'y General Lisa O. Monaco, 'Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advocacy Group' (15 September 2022), available at https://www.justice.gov/opa/speech/file/1535301/download.

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[56] Memorandum from DOJ Deputy Att'y General Lisa O Monaco, 'Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advocacy Group', at 3 (15 September 2022), available at https://www.justice.gov/opa/speech/file/1535301/download.

[57] id. at 5.

[58] id. at 5-6.

[59] id. at 7-8.

[60] Kenneth A Polite, Jr., Assistant Att'y Gen., DOJ, Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (17 January 2023), available at https://www.justice.gov/opa/speech/assistant -attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.

[61] U.S. Dep't of Justice, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, available at https://www.justice.gov/opa/speech/file/1562851/download.

[62] id.

[63] Press Release, U.S. Dep't of Justice, 'Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions' (10 January 2024), available at https://www.justice.gov/opa/pr/sap-pay-over-220m-resolve-foreign-bribery-investigations.

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[66] id.

[67] U.S. Dep't of Justice, United States Attorney's Offices Voluntary Self-Disclosure Policy, available at https://www.justice.gov/d9/2023-03/usao_voluntary_self-disclosure_policy_0_1.pdf.

[68] id.

[69] U.S. Dep't of Justice, 'SDNY Whistleblower Pilot Program' (1 May 2024), available at https://www.justice.gov/usao-sdny/sdny-whistleblower-pilot-program.

[70] id.

[71] id.

[72] U.S. Dep't of Justice, NDCA Whistleblower Pilot Program, available at https://www.justice.gov/d9/2024-03/ndca_whistleblower_pilot_program.pdf.

[73] See Speech, U.S. Dep't of Justice, 'Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions' (4 October 2023), available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.

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[77] Seaboard Report.

[78] Gurbir S Grewal, Dir., SEC Div. of Enf't, Remarks at Securities Enforcement Forum West (12 May 2022), available at https://www.sec.gov/news/speech/grewal-remarks-securities-enforcement-forum-west-051222.

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[81] id.

[82] id.

[83] id.

[84] id.

[85] id.

[86] See CFTC Enforcement Manual § 7 (Consideration of Self-Reporting, Cooperation, and Remediation).

[87] Div. of Enf't, CFTC, Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (2017), available at https://www.cftc.gov/sites/default/files/idc/groups/public/ @lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

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[89] id. at 6–7.

[90] 'CFTC Orders HSBC Bank USA, N.A. to Pay a $45 Million Penalty for Manipulative and Deceptive Trading in Connection with Swaps Related to Bond Issuances, Spoofing, and Supervision and Mobile Device Recordkeeping Failures' (12 May 2023), available at https://www.cftc.gov/PressRoom/PressReleases/8702-23.

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[92] See 31 CFR pt. 501, app. A.

[93] id. §§ (III)(G)(1)–(6).

[94] Press Release, U.S. Dep't of Treasury, 'Microsoft to Pay Over $3.3M in Total Combined Civil Penalties to BIS and OFAC to Resolve Alleged and Apparent

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[100] See, e.g., Kenneth A. Blanco, Acting Assistant Att'y Gen., DOJ, Remarks at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national; U.S. Securities and Exchange Comm'n, SEC's Cooperative Arrangements with Foreign Regulators (Oct. 20, 2012), available at https://www.sec.gov/about/offices/oia/oia_coopfactsheet.htm.

[101] For example, in 2020, Airbus SE agreed to pay a record-breaking settlement of over $3.9 billion in combined penalties with U.S., French, and U.K. regulators to resolve bribery charges. Press Release, U.S. Dep't of Justice, "Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case" (Jan. 31, 2020), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case. In January 2024, DOJ and the SEC coordinated with South African authorities to obtain a US$118.8 million penalty and US $103,396,765 administrative forfeiture against SAP SE. Press Release, U.S. Dep't of Justice, "SAP to Pay Over $220M to Resolve Foreign Bribery Investigations" (Jan. 10, 2024), available at https://www.justice.gov/opa/pr/sap-pay-over-220m-resolve-foreign-bribery-investigations.

[102] The White House, United States Strategy on Countering Corruption (December 2021), available at https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

[103] id.

[104] The White House, 'FACT SHEET: Implementing the United States Strategy on Countering Corruption: Accomplishments and Renewed

Commitment in the Year of Action' (29 March 2023), available at https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/29/fact-sheet-implementing-the-united-states-strategy-on-countering-corruption-accomplishments-and-renewed-commitment-in-the-year-of-action/.

[105] id.; see also 'Press Release. Attorney General Merrick B Garland Announces Launch of Task Force KleptoCapture' (2 March 2022), available at https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture.

[106] Parliament & Council Regulation 2016/679, 2016 O.J. (L 119) (EU).

[107] See generallyRe the RBS Rights Issue Litigation [2016] EWHC (Ch) 3161.

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Arian M June ajune@debevoise.com
Winston M Paes wmpaes@debevoise.com
Douglas S Zolkind dzolkind@debevoise.com

TaunusTurmTaunustor , 160310 Frankfurt, Germany

Tel: +49 69 2097 5000

https://www.debevoise.com/