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DEFENDING PARALLEL PROCEEDINGS

KEY CONSIDERATIONS AND BEST PRACTICES

Given the close regulatory scrutiny many companies face, corporate defendants increasingly are subject to simultaneous investigations, litigations, and enforcement actions arising out of a common set of facts. Counsel must anticipate threats from a myriad of directions, and think critically and strategically about how best to manage these parallel proceedings.

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Parallel proceedings refer to two or more concurrent investigations or litigations arising out of a common set of facts. These proceedings can involve any combination of criminal, civil, or administrative authorities, as well as private plaintiffs. The government has refined its investigatory tools and now can launch investigations, gather facts, and prosecute cases more efficiently than ever before through increased cooperation and coordination, both within and across agencies.

As an ever-increasing number of companies face parallel proceedings, the challenges these proceedings present will likely expand in scope, depth, and intensity. Areas of law likely to generate parallel proceedings include:

- Securities and other financial industry regulatory matters, including those involving the Financial Institutions Reform, Recovery, and Enforcement Act and consumer protection.
- Matters involving foreign corrupt practices.
- Antitrust.
- Environmental.
- Health care.
- Tax.

Parallel proceedings force corporate defendants to simultaneously navigate multiple forums and more than one substantive area of the law. For example, an antitrust enforcement action might result in private plaintiffs bringing antitrust claims against a company. The Securities and Exchange Commission (SEC) might also decide to investigate the company, leading to a drop in stock value after the investigation is disclosed. This, in turn, might lead to shareholders asserting claims against the company.

Given that government agencies are encouraged to coordinate and cooperate in their enforcement efforts, and have broad authority to share information with each other, counsel can assume that information provided to one agency during an investigation will inevitably be shared with multiple agencies, and also eventually end up in the hands of private litigants. Significantly, information gathered in a civil proceeding may be provided to criminal authorities. (See *Box, Judicial and Executive Endorsement of Parallel Proceedings.*)

Throughout the duration of parallel proceedings, it is crucial for counsel and the client to maintain a consistent position with all constituents, including government agencies, private litigants, shareholders, and employees. Counsel must think strategically about how the manner and process of defending one proceeding will impact the ability to defend another.

This article highlights key issues that counsel for a corporate defendant should address when managing parallel proceedings, including:

- Proactive steps a company should take to prepare for potential parallel proceedings.
- Action items for a company once the investigatory or discovery phase of the proceedings begins.
- Procedural considerations for a company facing both civil and criminal proceedings.
- Important topics for counsel to cover, and best practices to follow, when communicating with the client and company employees about parallel proceedings.
- The pros and cons of cooperation in parallel proceedings, and how the company can cooperate effectively.
- Settlement and other resolution options, and how the resolution reached in one proceeding might impact the client in the other proceedings.

PREPARING FOR POTENTIAL PARALLEL PROCEEDINGS

Given the high level of regulatory scrutiny many companies face, counsel should assume that the client will encounter issues that might precipitate parallel proceedings. A company should take the following proactive steps to be prepared:

- **Understand the inherent risks.** Counsel should understand the key risk areas for the company based on the nature of its business. These will be likely areas of interest to the government. Counsel should manage the risks in the context of the client's business objectives, identifying specific steps that the company can take to prevent future problems. Additionally, counsel should periodically assess and monitor those areas identified as key risks.
- **Designate internal resources to handle government inquiries.** If possible, a company should identify specific individuals within the company who have appropriate expertise to receive and review any government inquiries.
- **Adopt policies on responding to government requests for interviews.** Providing employees with information about their rights and options if confronted with a government request for an interview will help the employees be better prepared for potential interviews, and can assist the company in managing its exposure (see below *Communicating with the Client and Company Employees*).
- **Create and maintain a crisis roadmap.** The goal of a crisis roadmap is to enable the company to quickly identify the individuals who will provide advice and assistance to the company during parallel proceedings. The roadmap should be updated periodically and specify:
  - the experts to whom the company should turn for advice, including data specialists, experts on particular subject areas where the company might face risk and exposure, and legal experts with knowledge of specific subject areas or government agencies;
  - potential outside counsel the company could hire due to the firm's specific expertise;
  - the individual who will prepare and circulate an initial litigation hold notice to preserve potentially relevant documents;
  - for each jurisdiction in which the company operates, the data privacy experts who will help navigate privacy issues in the collection, review, and production of documents;
  - the individuals in the relevant jurisdictions who will assist in preserving and collecting evidence;
  - the company's key insurance contacts, including the individuals who will provide guidance on the substance of any relevant insurance policies, and the locations of relevant insurance policies;

Judicial and Executive Endorsement of Parallel Proceedings

Judicial support of parallel proceedings is long-standing. The US Supreme Court has recognized that these proceedings promote the enforcement of federal law and has identified only a few limited circumstances when parallel proceedings could be improper, including when:

- The civil action is brought solely to obtain evidence for a criminal prosecution.
- The government fails to advise the defendant in a civil proceeding that it is contemplating criminal prosecution.
- A defendant is unrepresented.
- Special circumstances exist that might suggest that a criminal prosecution would be unconstitutional or improper.

(*United States v. Kordel*, 397 U.S. 1, 11-12 (1970).)

In the absence of these circumstances, civil and criminal law enforcement agencies are generally free to coordinate in developing information and evidence for use in a criminal case (*United States v. Stringer*, 535 F.3d 929, 933 (9th Cir. 2008)).

Similarly, in recent years, the government has announced policy statements that promote the use of parallel proceedings by:

- Encouraging coordination between the civil and criminal divisions of enforcement agencies, both within a single agency and across multiple agencies.
- Targeting multiple defendants simultaneously, for instance, both a corporate defendant and individual defendants within the company.

(See, for example, Memorandum from the US Department of Justice's (DOJ's) Office of the Deputy Attorney General on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) (Yates Memo), available at *justice.gov* (affirming the DOJ's focus on combating corporate malfeasance by holding accountable both the corporations and the responsible individuals); DOJ US Attorneys' Manual (USAM), Organization and Functions Manual, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (Jan. 30, 2012) (highlighting the government's continued focus on and approval of the coordination of parallel proceedings).)

Search Expert Q&A on the DOJ's Yates Memo for more on the DOJ's emphasis on individual accountability when investigating and resolving matters of corporate misconduct.

- the public relations firms or other resources the company will use to handle internal and external communications in the wake of an investigation, a government action, or a private lawsuit, or a combination of all three; and
- the individuals who will serve on the internal crisis management team responsible for gathering and analyzing information, overseeing and coordinating communications and strategic disclosure of information, and structuring a resolution of the matter.

NAVIGATING THE INVESTIGATORY OR DISCOVERY PHASE

Counsel responding to information or discovery requests in parallel proceedings must proceed cautiously. Counsel should assume that any discrepancy in a company's position will be discovered and harm the company. Counsel should seek to maintain consistency by documenting each substantive conversation with an adverse party and relaying the information to the client.

Information provided to one agency may be shared with others, and each agency will likely issue different requests for information, which may or may not overlap. Accordingly, counsel should ensure that they understand the nature and scope of each request, and immediately implement case management strategies for responding to requests from different regulators. In particular, counsel should:

- **Quickly issue a litigation hold notice.** Counsel should notify all individuals who might have possession, custody, or control of potentially relevant documents, including IT personnel who can secure relevant server data, of their obligation to retain those documents. Counsel should not be overly restrictive in deciding what information to preserve. Because the scope of information requests is likely to expand over time, a narrow preservation scope might require issuing multiple litigation hold notices, which can confuse recipients. Additionally, overly narrow litigation hold notices can put a company at risk of document spoliation or obstruction claims. Once a litigation hold notice is issued, counsel should:
  - require confirmations from notice recipients that they have affirmatively read, understood, and complied with the notice and any document retention policies; and
  - keep detailed and accurate records of steps taken to preserve relevant information.
- **Assemble a team to handle all inquiries and preserve consistency.** Counsel should make sure that a uniform and experienced team will review all information requests to ensure a consistent approach. Counsel should resist responding to individual requests from any adverse party, whether a government agency, non-governmental regulator, or private plaintiff, before ensuring that the information provided is consistent with that provided to other parties and in line with the client's objectives in multiple proceedings.

Best Practices at a Glance

Given the complexity of navigating parallel investigations and legal proceedings, counsel should set up a framework of best practices as early in the process as possible, while retaining the flexibility to adjust to changing circumstances. For example, counsel should:

- Maintain a consistent position with all constituents, including government agencies, private litigants, employees, and shareholders.
- Resist responding to individual requests from any adverse party, whether a government agency, non-governmental regulator, or private plaintiff, before ensuring that the information provided is consistent with that provided to other parties and in line with the client's objectives in multiple proceedings.
- Think strategically about how the manner and process of defending in one proceeding or investigation will impact the ability to defend in another.
- Assess the risks of parallel proceedings, communicate those risks to the client, and manage them in the context of the client's business objectives.
- Develop a process for documenting all correspondence and materials produced in parallel proceedings.
- Prepare the client for the potentially high costs associated with handling parallel proceedings.
- Consider hiring outside counsel to offer specific expertise, reduce strain on the in-house legal department, and eliminate the perception of bias.

- **Understand the differences between the civil and criminal discovery rules.** Civil discovery is broader than criminal discovery, and knowing the differences can help counsel think tactically about defending against parallel proceedings, including gaining insight into the strategies being employed by the relevant government agencies.
- **Consider whether to ask the regulators to coordinate their information requests.** This strategy might enhance the company's credibility with the different regulators and make it easier to provide consistent responses. However, providing additional information beyond each regulator's area of inquiry also poses the risk of opening new areas of investigation.
- **Negotiate to narrow the scope of responses to discovery or information requests.** Counsel should discuss with adverse parties narrowing the scope of the requests, especially because initial requests, whether made by the government or private plaintiffs, tend to be broad. Counsel should also limit disclosure of privileged or work product materials, even if the company has entered into a confidentiality agreement with the agency.
- **Develop a document collection and production strategy.** Counsel should create a process for logging all correspondence and materials produced in the parallel proceedings (for more information, search Data Collection: Log of Documents and Electronically Stored Information on Practical Law). The document collection process should be flexible enough to respond to information requests of varying scope and time periods, but should allow the company to limit the impact of responding to information requests on its day-to-day business.
- **Work with the client to understand its document management and storage system.** Counsel should identify key personnel capable of assisting with the technological aspects of the investigations.
- **Set up an electronic document storage and review database.** The database should include information about the locations and custodians from which the documents were collected.
- **Establish a system for reviewing, tracking, and tagging documents as if both a civil and criminal case will ultimately proceed.** This might help identify instances where opposing counsel is inappropriately using discovery in one proceeding to assist in another. Counsel should:
  - set up issue and witness tags relevant for both types of proceedings; and
  - consider using tools to assist with document, information, witness, and case issue management, and witness preparation, for both types of proceedings.
- **Consider whether the type of discovery request signals the possibility of additional proceedings.** Counsel should note:
  - whether there are any requests from civil authorities that are inconsistent with the scope of their agency or stated area of interest; and
  - whether the individuals issuing the discovery request have ties to criminal prosecutors through previous employment or involvement in joint investigations or parallel proceedings.
- **Assess whether the information provided in a civil proceeding could be used in a criminal proceeding.** Counsel should evaluate whether the government is using the civil proceeding to obtain information to help a criminal case, which might serve as strong support to stay the civil proceeding (see below *Stay of Civil Proceeding*). A government agency is not obligated to disclose the existence of a parallel criminal investigation where the criminal prosecutors rely on the information and documents obtained in that agency's case (see, for example, *Stringer*, 535 F.3d at 934, 940). Counsel should weigh the benefits and risks of specifically asking an investigating agency whether other agencies are involved. While the agency's response can potentially help the client lay the groundwork for a claim that the investigators are intentionally circumventing the criminal discovery rules, making this inquiry might highlight potential issues that the investigators had not previously considered.

- **Confirm that the prosecutors satisfied their obligations under *Brady* and *Giglio*.** If the client is a defendant in a criminal proceeding, the prosecutors must search all relevant files for exculpatory information or information that can be used to impeach a prosecution witness (see *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972)). The USAM requires prosecutors to search for these materials in the files of all members of the "prosecution team," which in parallel investigations might include other agencies, such as the SEC (USAM, Crim. Res. Manual 165; see *United States v. Martoma*, 990 F. Supp. 2d 458, 460-61 (S.D.N.Y. 2014) (detailing factors to consider in determining when another agency is deemed part of the prosecution team)).
- **If the SEC has commenced a proceeding, ensure that it has disclosed all material exculpatory facts.** This disclosure should be made regardless of whether the information is contained in privileged documents. In at least two recent matters, the SEC has stated that this disclosure is required by SEC Rule of Practice 230(b)(2). (17 C.F.R. § 201.230(b)(2); see *In re John Thomas Capital Mgmt. Grp. LLC*, Release No. 3733, File No. 3-15255, 2013 WL 6384275, at *2 n.4 (Dec. 6, 2013); *In re optionsXpress, Inc.*, Release No. 9466, File No. 3-14848, 2013 WL 5635987, at *5 (Oct. 16, 2013).)

Search Securities Enforcement: Responding to Regulator's Request for Information and Documents for more on the steps a company should take after receiving a securities regulator's request for information and documents.

Search E-Discovery Toolkit and Litigation Hold Toolkit for a variety of resources to help counsel manage e-discovery in litigation and implement a litigation hold.

SEEKING PROCEDURAL REMEDIES

When a company faces both civil and criminal proceedings, counsel should try to avoid providing additional evidence from civil discovery to the criminal prosecutors that would otherwise be unattainable under the criminal discovery rules. Under Federal Rule of Civil Procedure (FRCP) 26(b)(1), both parties in a civil case are entitled to all relevant, non-privileged materials reasonably calculated to lead to the discovery of admissible evidence. By contrast, under Federal Rule of Criminal Procedure 16(a)-(b), the government is entitled only to the evidence that the defendant intends to introduce in its case in chief where the defendant made a reciprocal discovery request.

In particular, counsel may seek:

- A stay of the civil proceeding until the criminal proceeding is over.
- Protective orders.

STAY OF CIVIL PROCEEDING

Stays are considered extraordinary remedies, and their issuance is within the discretion of the court. Either the company or the government may request a stay. (FRCP 26(c); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980) (*en banc*); *SEC v. Trujillo*, 2010 WL 2232388, at *1-2 (D. Colo. June 1, 2010).)

While simultaneously litigating on two fronts requires significant resources, counsel should consider whether a stay would benefit the client. For example, a corporate defendant might be able to obtain its own discovery in a civil proceeding through avenues not available in a criminal proceeding, such as certain discovery from key government witnesses.

On the other hand, if no stay is sought, corporate employees, appearing either as third-party witnesses or as co-defendants, may assert the Fifth Amendment privilege against self-incrimination in the civil proceeding due to the pendency or likelihood of a criminal proceeding, in which case either:

- The court may preclude the introduction of evidence necessary for the company's defense (see, for example, *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191-92 (3d Cir. 1994); *Traficant v. Comm'r of IRS*, 884 F.2d 258, 265 (6th Cir. 1989); *In re Anthracite Coal Antitrust Litig.*, 82 F.R.D. 364, 370 (M.D. Pa. 1979)).
- The fact finder may make an adverse inference against the company in the civil case (*Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976)).

PROTECTIVE ORDERS

As an alternative to a stay, or where a stay is denied or otherwise unattainable, counsel should consider seeking a protective order to preclude the disclosure of civil discovery in the criminal proceeding. In particular, counsel may seek to:

- Quash or modify subpoenas under FRCP 45(d) (for more information, search Motion to Quash or Modify a Subpoena (Federal): Motion or Notice of Motion on Practical Law).
- Limit depositions under FRCP 30(d).
- Seal depositions.
- Delay depositions until after the conclusion of the criminal case.

COMMUNICATING WITH THE CLIENT AND COMPANY EMPLOYEES

Throughout the parallel proceedings, counsel should ensure that communications with the client are comprehensive and informative. Counsel should address with the client:

- Key information about the proceedings, including:
  - the parties involved;
  - the different goals of the investigating authorities and their tools for identifying and collecting evidence;
  - the likelihood that the government agencies will coordinate and cooperate with each other;
  - the potentially high costs associated with handling parallel proceedings; and
  - the possible sanctions and penalties.
- The company's business objectives in the context of the proceedings.
- The usefulness of an internal investigation to determine whether or where the company has exposure (for more information, search Conducting Internal Investigations Toolkit on Practical Law).
- The importance of issuing litigation hold notices to preserve any potentially relevant information that different adversaries might seek or that might be useful for the company's defense (for more information, search Litigation Hold Notice on Practical Law). Counsel should alert the client to the likely need for multiple litigation hold notices, as various adversaries

make additional information requests (see above *Navigating the Investigatory or Discovery Phase*).

- The document retention and data privacy policies in the various jurisdictions where the company operates and where potentially relevant information might be located, as well as whether to consult a data privacy expert in any jurisdiction where corporate counsel anticipates collecting documents.
- The differences between how each jurisdiction treats certain privileges, immunities, and rights, such as the Fifth Amendment privilege against self-incrimination, the attorney-client privilege, and the work product doctrine. For example, communications between in-house counsel and the corporation generally are not protected by the attorney-client privilege in certain foreign jurisdictions (see Case C-550/07 P, *Akzo Nobel Chems. v. Comm'n*, 2010 E.C.R. I-08301 ¶¶ 72, 86 (Sept. 14, 2010); Case C-155/79, *AM & S Europe Ltd. v. Comm'n*, 1982 E.C.R. 1575 ¶ 27 (May 18, 1982)). Also, unlike individuals, US corporations generally cannot assert the Fifth Amendment privilege (see *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989)). (See *Box, Tips for Handling Parallel Proceedings Involving Foreign Jurisdictions*.)
- The benefits and risks of cooperating with the government (see below *Cooperating with Caution*).
- Interactions with employees who might face individual liability. In light of the Yates Memo, which requires a company to provide to the DOJ all relevant facts about the individuals involved in corporate misconduct to receive cooperation credit, counsel should consider how an employee's assertion of the Fifth Amendment privilege during the course of parallel investigations might impact the company's ability to receive cooperation credit.

Additionally, counsel should be careful in how they approach their interactions with current or former company employees. In particular, counsel should:

- Debrief and prepare employees for different interviews by multiple agencies. This will help promote consistency in responding to various investigative information requests.
- Always provide *Upjohn* warnings, which notify employees that counsel represent only the company and not the employees individually, when interviewing employees for information (see *Upjohn Co. v. United States*, 449 U.S. 383, 392-97 (1981)). (For more information, search Attorney-Client Privilege: Identifying the Attorney and the Client on Practical Law.)
- Be prepared to respond to likely questions, such as whether an employee should retain his own attorney, and consider engaging shadow counsel if conflicts of interest might arise. This is particularly important where the employee might be viewed as having participated in the potentially violative conduct.
- Refrain from making any statements or acting in any way that might create the impression that the employees are precluded from speaking with the government.
- Put appropriate whistleblower protections in place, including in severance agreements. Companies should assume that whistleblowers are involved. Even if a government investigation is not precipitated by a whistleblower complaint, whistleblowers might emerge as a matter progresses. When interviewing current or former employees, counsel should not try to identify whistleblowers. Rather, they should keep the identity of any known whistleblowers confidential. Counsel should also be careful in how they ask employees to maintain the confidentiality of the matters discussed during the interview. Otherwise, the company might face retaliation claims or allegations that the company impeded the ability of a whistleblower to communicate with a regulator. (See *In re Health Net, Inc.*, Release No. 78590, File No. 3-17396, 2016 WL 4474755, at *1-4 (Aug. 16, 2016); *In re BlueLinx Holdings Inc.*, Release No. 78528, File No. 3-17371 , 2016 WL 4363864, at *2-5 (Aug. 10, 2016); see also SEC, *2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, at 19-20 (2015), available at *sec.gov*; Rachel B. Cowen and others, *Redux – Federal Agencies Attack Employment Agreements, and What You Can Do About It: 8 Steps to Consider*, DLA Piper Employment Alert (Aug. 18, 2016), available at *dlapiper.com*.)

COOPERATING WITH CAUTION

A company's cooperation throughout an investigation is one of the key paths to achieving a favorable settlement with regulators (see below *Resolving Parallel Proceedings*). Government authorities have long emphasized that cooperation will benefit defendants and have in various public statements offered examples of those benefits, such as declinations or reduced criminal fines (see, for example, Justice News, Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), available at *justice.gov*). Effective cooperation is:

- **Proactive.** The company should be forthcoming and not wait for government investigators to discover issues. Disclosing the relevant information on its own initiative also gives the cooperator an opportunity to provide explanations or put the information in a more favorable context.
- **Thorough.** The company should provide all relevant facts about the alleged misconduct, including, as emphasized by the Yates Memo, all relevant facts about the individuals involved.
- **Organized.** The company should consider, for example, whether to provide important documents arranged chronologically by topic, prepare summaries or timelines of the important events, create diagrams of key relationships, or use other similar tools that will help the government understand what occurred and why, and who was involved and to what degree.
- **Prompt.** The company should provide information in a timely manner and, if a delay is necessary, explain in advance why more time is needed.

Despite the potential benefits, cooperating might not always be in the client's best interest. The main risk is that information and materials provided as part of the cooperation might be discoverable and can have an adverse impact on follow-on litigation. On the other hand, companies have no Fifth Amendment privilege against self-incrimination and, therefore, have a limited ability to challenge government subpoenas. This makes it likely that the government will discover damaging information even without cooperation.

Tips for Handling Parallel Proceedings Involving Foreign Jurisdictions

Counsel should implement the following best practices when handling parallel proceedings that involve non-US jurisdictions:

- Set up a legal and compliance team in each of the relevant foreign jurisdictions.
- Create reporting channels between the company, foreign counsel, and US counsel.
- Before collecting evidence outside of the US and sending evidence to the US, consider all relevant issues, including, for example, the data privacy rights of employees pursuant to the data privacy and labor laws of the relevant foreign jurisdictions and limits on, and requirements related to, the ability to interview potential witnesses.
- Conduct compliance training and maintain hotlines for whistleblowers.
- Understand key jurisdictional issues in each foreign jurisdiction, including:
  - data privacy laws;
  - labor and employment issues;
  - the client's potential criminal exposure;
  - differences in the right to refuse to provide testimony or documents; and
  - differences in rules relating to the attorney-client privilege and work product protection.

Another significant risk of cooperating is that the government may request a waiver of the attorney-client privilege or work product protection. While the government does not always seek a waiver, it often wants access to all relevant information, whether protected or not. Counsel should be extremely cautious when advising the client on this issue. For example, should a company produce an otherwise privileged internal investigation report, private litigants will likely be able to access the report by asserting that producing it to the government waived any protection. An internal investigation report might give private litigants a clear roadmap for prosecuting their claims. To minimize the risks of waiver, counsel should:

- **Negotiate confidentiality agreements that contain non-waiver provisions.** This should be done before providing the results of internal investigations and similar information. In some jurisdictions, these agreements can help preserve the attorney-client privilege and work product protection.
- **Be aware of what information is being disclosed when providing the results of an internal investigation.** In particular, counsel should ensure that the company:
  - presents only facts, which are not privileged and will not trigger a waiver;
  - does not disclose the mental impressions, strategies, or conclusions of counsel; and
  - does not disclose any underlying privileged communications, unless the information is necessary or the company plans to pursue an advice-of-counsel defense.
- **Be familiar with Federal Rule of Evidence (FRE) 502(a).** This rule addresses limitations on waiver when privileged information or attorney work product is disclosed.

RESOLVING PARALLEL PROCEEDINGS

Counsel must think through several key issues to achieve the optimal outcome for the client, taking into account how the resolution reached in one or more proceedings will impact the client in subsequent proceedings. Counsel and the client should consider:

- Whether or not to settle.
- Whether or not to seek a global settlement.
- The risks associated with different resolutions and best practices for negotiating the settlement agreement.

Search Securities Enforcement: Settling Securities Cases with Regulators for more on the issues counsel and the client should consider before reaching a settlement.

DECIDING WHETHER TO SETTLE

The threshold question for any company facing actual or potential parallel proceedings is whether it should try to settle any or all of those matters. A settlement might not be the best course of action if the client perceives the cost of settlement as so high that the risk of litigating makes more sense in light of the company's business objectives. Generally, corporate clients opt to settle at least the proceedings involving the government.

Before deciding whether to settle, counsel should understand:

- The identities and settlement practices of the adverse parties.
- The advantages and disadvantages of a settlement, including collateral consequences.
- The available settlement options and the impact of each option on the client in the existing or potential related proceedings.
- The risks of engaging in settlement negotiations and how best to manage those risks.
- The requirements for cooperation credit, whether the client is prepared to meet those requirements, and any potential consequences (see above *Cooperating with Caution*).
- The likelihood of achieving a global settlement and the best way to resolve matters if a global settlement is not possible.

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DECIDING WHETHER TO SEEK A GLOBAL SETTLEMENT

In parallel proceedings, seeking a global settlement that resolves all proceedings at once is almost always in the client's best interest. A global settlement offers multiple benefits, including:

- Coordinated remedies.
- More limited publicity by making only one announcement of the resolution.
- A lower likelihood of future proceedings.
- A reduced risk that criminal prosecutors will use statements made during the course of settlement negotiations with civil regulators against the client. Because this use is not prohibited by FRE 408, counsel trying to separately resolve a civil proceeding might risk harming the client's position in a criminal proceeding.
- A potentially reduced risk of criminal charges, which might prove helpful in subsequent civil cases.

For these reasons, counsel should request a global settlement where possible. Best practices for counsel negotiating a global settlement include:

- Identifying past, similar matters where global settlements were negotiated.
- Highlighting government policies that favor global settlements.
- Involving all regulators with authority over the subject in settlement negotiations.

However, counsel should be mindful that even different divisions of the same agency might not follow the same approach to global settlements. For example, while global settlements with the DOJ are common in some areas of law, such as in cases involving the Foreign Corrupt Practices Act (FCPA), the Environment and Natural Resources Division of the DOJ generally cannot negotiate global settlements in criminal cases without approval from the Assistant Attorney General (USAM 5-11.115).

Where a global settlement is not possible, counsel must develop a strategy for resolving the various matters over time that is consistent with the client's objectives. Counsel should assess how the resolution of one proceeding will affect remaining or future proceedings. For example, resolution of a criminal matter will address the most serious consequences, but might also deprive the company of the ability to defend itself in subsequent proceedings. Resolving the civil case first will allow criminal authorities to access broader civil discovery, but might allow the company to provide restitution to affected parties, which could assist resolution of the criminal matter. Given the inherent complexity and unpredictability in these situations, counsel should be prepared to assess the facts and circumstances of each matter as they arise.

NEGOTIATING THE SETTLEMENT AGREEMENT

Resolution of parallel proceedings can take many forms. An acquittal or a government declination is the best possible result for a client, as it does not result in findings that could impact the client in any future litigation. Regardless, counsel should remind the client that each time the client produces information or documents to the government, there is a risk that future litigants will obtain access to the information.

By contrast, resolutions such as convictions, plea agreements, deferred prosecution agreements, and non-prosecution agreements each present the additional risk that factual findings, admissions, or statements of fact accompanying these resolutions might impact other proceedings. Courts generally admit this information into evidence as statements against interest in subsequent proceedings. Even more seriously, these documents may have a preclusive effect in subsequent cases. Issue preclusion applies if:

- The identical issue was decided in a prior action.
- The issue was actually litigated in a prior action.
- The resolution of the issue was critical and necessary to the final judgment in the prior action.

- The party against which collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

(*In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326-27 (4th Cir. 2004).)

While companies can enter into settlements on a "neither admit nor deny" basis, some courts have admitted documents associated with these settlements into evidence against the defendant for a variety of purposes other than to prove direct liability or damages (see, for example, *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) (finding that an earlier SEC consent decree was admissible in a criminal case for the purpose of showing the defendant's knowledge of SEC reporting requirements)). Accordingly, counsel should negotiate the language of charging or settlement documents, and any related statements of fact, to be as narrow and neutral as possible.

Additionally, to minimize the adverse consequences of any resolution, counsel negotiating a settlement agreement should aim to:

- Reduce the risk of future claims, or at least allow for offset by, for example, providing that monetary sanctions be paid to those affected by the claimed violations. If state regulators are involved, counsel should seek to have them enter into agreements on behalf of their citizens.
- Avoid or minimize collateral consequences, such as suspension or debarment.
- Seek a well-known seasoned issuer (WKSI) waiver if the defendant is a public company that qualifies as a WKSI, so that the resolution will not result in the company's loss of its WKSI status (for more information, search Benefits of Being a WKSI on Practical Law).
- Bind other US Attorneys' offices and DOJ divisions.
- Maximize the client's ability to seek insurance recoveries and tax deductions. Recently, the Internal Revenue Service released an advice memorandum stating that disgorgement made pursuant to an SEC settlement of an FCPA matter was not deductible because there was no evidence that the payment was compensatory (see Memorandum from Office of Chief Counsel, Internal Revenue Service, No. 201619008, 2016 WL 2605802 (May 6, 2016)). This is not a formal ruling and may not be used or cited as precedent, but nonetheless might provide guidance to practitioners.
- Ensure the client can comply with the settlement terms without compromising its business. Failure to comply with terms can result in new charges and resurrection of deferred charges.

Additionally, counsel should, to the extent possible, avoid offering factual representations and written statements in settlement discussions. These statements are admissible under FRE 408(a)(2) and are also discoverable. Further, statements included in a Wells submission to the SEC, which sets out the positions of the company under investigation regarding why an enforcement proceeding should not be pursued, can also be discoverable (see SEC Enforcement Manual § 2.4; *In re Initial Pub. Offering Sec. Litig.*, 2004 WL 60290, at *3-4 (S.D.N.Y. Jan. 12, 2004)).

Search Securities Enforcement: The SEC's Wells Process or see page 18 in this issue for more on Wells submissions.