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Cooperating with the authorities: the US perspective

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1 Introduction

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

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

2 What is cooperation?

Cooperating with a US government authority generally entails providing all relevant, non-privileged information. This can amount to ensuring that key witnesses are available for interviews by the government, sharing information gleaned from internal interviews of employees, providing relevant documents as well as context and background for those documents, giving factual presentations, and agreeing to take remedial action where appropriate.

2.1 Department of Justice's general approach to cooperation

The Department of Justice (DOJ) issues guidance and policies for prosecutors in its Justice Manual. Its chapter on 'Principles of Federal Prosecution of Business Organizations' sets forth 11 factors that prosecutors should consider when investigating, deciding whether to charge, and negotiating a plea or other agreement with a company. Among these is consideration for 'the corporation's willingness to cooperate, including as to potential wrongdoing by its current and former employees, directors, officers and agents, as well as other individuals and entities that engaged in the misconduct under investigation'.[1] The Justice Manual states:

> *"In order for a corporation to receive any consideration for cooperation under this section, the corporation must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and timely provide to the Department all relevant facts relating to that misconduct. If a corporation seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved in or responsible for the misconduct, its cooperation will not be considered a mitigating factor under this section.*[2]"

In other words, to obtain cooperation credit, a company must provide all non-privileged facts concerning misconduct.[3] In addition, the company must not intentionally remain ignorant about misconduct and cannot cherry-pick facts to share with the DOJ.[4]

The DOJ's current approach to cooperation, as reflected in the Justice Manual, emphasises holding individuals accountable for their misconduct and requires companies to disclose the identities of all individuals involved. The DOJ's approach to cooperation has evolved over the years, often changing with each new administration, as articulated through a series of DOJ policy speeches.

Prior to September 2015, companies might obtain partial cooperation credit without identifying the individual wrongdoers to the DOJ; this might even have been sufficient to avoid charges in some instances.[5] In September 2015, in the Yates Memorandum, the DOJ announced that cooperation would require disclosure of all individual misconduct, regardless of the individual's title or seniority at the company.[6] In November 2018, the DOJ scaled back this requirement for cooperation credit, announcing a policy revision that required companies to identify only individuals substantially involved in or responsible for misconduct.[7]

In October 2021, the DOJ rescinded its prior 2018 guidance, stating that it would 'no longer be sufficient for companies to limit disclosures to those they assess to be "substantially involved" in the misconduct'.[8] Instead, the DOJ returned to its guidance under the Yates Memorandum, requiring identification of all individuals involved and all non-privileged information about individual wrongdoing for companies to be eligible for cooperation credit.[9] The DOJ emphasised in September 2022, however, that the 'mere disclosure of records . . . is not enough';[10] rather, to receive full cooperation credit, companies must produce all relevant, non-privileged information 'on a timely basis'. Such information includes relevant work-related communications, including those sent on personal devices and through third-party messaging systems for business purposes.[11]

Moreover, the DOJ expects that companies share particularly 'relevant information' 'promptly' after its discovery.[12] The failure to cooperate timely, the DOJ commented, could lead to cooperation credit being reduced or eliminated. This change in guidance makes it more difficult to obtain cooperation credit because companies must provide significant detail about all employees and management involved in the alleged misconduct without delay.

The DOJ's evolving approach continues to reflect the inherent challenges in charging individuals in complex, white-collar investigations, where prosecutors often must sort through and understand 'complex corporate hierarchies [and] enormous volumes of electronic documents' while navigating 'a variety of legal and practical challenges that can limit access to the evidence' that the DOJ needs to bring charges against individuals, especially when evidence is located outside the United States.[13]

What this means in practice for a company under investigation is that the DOJ wants to learn information such as: how and when the alleged misconduct occurred; who promoted or approved it; who was responsible for committing it;[14] and all those individuals involved in setting a company on a course of criminal conduct, regardless of their position, status or seniority.[15] To provide this, company counsel may relay facts to the DOJ by producing relevant documents, allowing the DOJ to interview employees (including acquiescing to 'deconfliction' requests from the DOJ that the government interview employees before company counsel does so), proffering information obtained from an internal investigation or analysing voluminous or complex documents.

To obtain full credit, the DOJ will consider the timeliness of the disclosures, whether the company undertook a proactive approach to cooperating, and the thoroughness of the company's investigation.[16] The DOJ does not expect companies to undertake a 'years-long, multimillion dollar investigation every time a company learns of misconduct'; rather, companies are expected 'to carry out a thorough investigation tailored to the scope of the wrongdoing'.[17] The DOJ, consistent with indications from Attorney General Merrick Garland, has said that its 'first priority in corporate criminal matters [is] to prosecute the individuals who commit and profit from corporate malfeasance'.[18] In practice, companies seeking cooperation, therefore, need not 'have all the facts lined up on the first day' they talk to the DOJ, but they should turn over relevant information to the DOJ on a rolling basis as they receive it.[19]

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

> *"proactively investigate individuals at every step of the process – before, during, and after any corporate cooperation. Prosecutors should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize, exaggerate, or otherwise misrepresent the behavior or role of any individual or group of individuals."*[20]

Counsel may encounter situations where it is unclear whether misconduct has actually occurred, because the corporate client either does not have access to the relevant information or, even with full access, cannot discern whether there is malfeasance. In this regard, the DOJ has emphasised that it 'just want[s] the facts': it does not expect counsel for the company 'to make a legal conclusion about whether an employee is culpable, civilly or criminally'.[21]

In other cases, a company may find that relevant documents in a foreign location cannot be produced to US authorities because of foreign data privacy, bank secrecy or other blocking laws. The Justice Manual recognises that such situations may occur and acknowledges that a company may still be eligible for cooperation credit, though the company will bear the burden of explaining why cooperation credit is still justified despite the restrictions faced by the company in gathering or disclosing certain facts.[22] In September 2022, the DOJ indicated that cooperating companies must also identify 'reasonable alternatives' to providing the requested facts and evidence if foreign laws prevent disclosure.[23] Conversely, it noted that using foreign laws to shield against the detection and investigation of misconduct may lead to an adverse inference being drawn against the company.[24]

Likewise, the DOJ recognises that work communications are increasingly occurring outside a company's systems: instead, personal devices and third-party messaging services are increasingly being used for business purposes. To ensure that this trove of evidence is preserved, the DOJ has made clear that a company's ability to preserve and produce relevant work-related communications, whether on its systems or otherwise, is an important factor in assessing its cooperation.[25]

The DOJ has emphasised that cooperation does not require a company to waive the attorney–client privilege or the attorney work-product protection.[26] While a company may decide to waive these privileges and protections when it suits its interests to do so, prosecutors may not request such a waiver.[27]

2.2 Corporate Enforcement Policy and Voluntary Self-Disclosure Policy

In January 2023, the DOJ announced a revised Corporate Enforcement Policy and Voluntary Self-Disclosure Policy (CEP). The CEP (previously known as the FCPA Corporate Enforcement Policy) applies to all FCPA cases and 'all other corporate criminal matters handled by the Criminal Division' of the DOJ.[28] The CEP describes the circumstances under which the DOJ will presume a declination is appropriate, may grant a declination based on its discretion and may enter into a criminal resolution and grant significant cooperation credit to the company.[29]

Under the CEP, the DOJ will presume that a declination (i.e., a decision by the government not to prosecute the entity for any alleged wrongdoing) is appropriate if there are no 'aggravating circumstances involving the seriousness of the offense or the nature of the offender' and 'a company has voluntarily self-disclosed misconduct' to the Criminal Division, 'fully cooperated, and timely and appropriately remediated'.[30] To qualify for a declination, 'the Criminal Division will require a company to pay all disgorgement/forfeiture, and/or restitution/victim compensation payments resulting from the misconduct at issue'.[31]

A presumption of a declination will not apply if there are aggravating circumstances. The CEP provides a non-exhaustive list of such circumstances, including 'involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism'.[32] While the presumption will not apply in situations with aggravating circumstances, prosecutors nonetheless may conclude that a declination is appropriate if the company timely made a voluntary self-disclosure (VSD), had an effective compliance programme at the time of the misconduct and disclosure, provided 'extraordinary cooperation' and 'undertook extraordinary remediation'.[33] Between June 2016 and April 2024, the DOJ issued 20 declination letters pursuant to the CEP.[34]

The CEP also describes the amount of cooperation credit that would be appropriate if the DOJ determined that a criminal resolution was warranted but the company nonetheless submitted a VSD, 'fully cooperated, and timely and appropriately remediated'.[35] In those situations, the DOJ would recommend 'a reduction of at least 50% and up to 75% off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range'.[36] For a criminal recidivist, the DOJ would recommend 'a reduction of at least 50% and up to 75%' but the reduction 'will generally not be from the low end of the U.S.S.G. fine range'.[37] In the absence of 'particularly egregious or multiple aggravating circumstances', the DOJ 'will generally not require a corporate guilty plea—including for criminal recidivists'.[38] Moreover, it 'generally will not require appointment of a monitor if a company has, at the time of resolution, demonstrated that it has implemented and tested an effective compliance program and remediated the root cause of the misconduct'.[39]

For matters that are resolved through convictions, guilty pleas, deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs), the DOJ 'will generally require the company to pay a criminal penalty/fine as well as, where applicable, disgorgement/forfeiture, and/or restitution/victim compensation payments'.[40] In March 2023, the DOJ announced the creation of the Compensation Incentives and Clawbacks Pilot Program (the Pilot Program), which is a three-year programme that applies to all corporate matters before the DOJ's Criminal Division.[41] The Pilot Program has two components for companies that have entered into criminal resolutions: (1) companies must 'implement compliance-related criteria in their compensation and bonus system' and 'report to the [Criminal] Division about such implementation during the term of such resolutions' and (2) companies may be subject to reduced criminal fines if they 'seek to recoup compensation from culpable employees and others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct'.[42] The DOJ may extend or modify the Pilot Program when it concludes in 2026.[43]

In February 2023, the DOJ further revised the Voluntary Self-Disclosure Policy (the VSD Policy) to clarify when it will consider a disclosure from a company to qualify as a VSD. In announcing the new VSD Policy, the DOJ stated:

> *"a company is considered to have made a VSD if it becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the DOJ, and discloses all relevant facts known to the company about the misconduct to a [US Attorney's Office] in a timely fashion prior to an imminent threat of disclosure or government investigation.*[44]"

The VSD Policy also reiterates that, absent aggravating circumstances, prosecutors will not seek a guilty plea if the company submitted a VSD, fully cooperated and implemented timely and appropriate remediation.[45]

2.3 Mergers and Acquisitions Safe Harbor Policy

The DOJ recently announced a new Mergers and Acquisitions (M&A) Safe Harbor Policy (the Safe Harbor Policy), a department-wide policy designed to encourage companies to voluntarily self-disclose criminal misconduct uncovered by acquiring companies during the M&A process.[46] Under the Safe Harbor Policy, acquiring companies will receive a presumption of a

declination if they (1) 'promptly and voluntarily disclose criminal misconduct within the Safe Harbor period', (2) 'cooperate with the [DOJ's] investigation' and (3) engage in remediation, restitution and disgorgement in a timely manner.[47] The applicable baseline safe harbour period is six months from the date of closing, irrespective of whether the misconduct was discovered pre- or post-closing.[48] The baseline period to remediate the misconduct is one year.[49] However, these baseline periods 'are subject to a reasonableness analysis because [the Department] recognize[s] deals differ and not every transaction is the same. . . . [D]epending on the specific facts, circumstances, and complexity of a particular transaction, those deadlines could be extended by Department prosecutors'.[50] The Safe Harbor Policy applies only to criminal misconduct discovered in *bona fide*, arm's-length M&A transactions.[51]

In unveiling the Safe Harbor Policy, Deputy Attorney General Lisa Monaco explained that it is designed to avoid 'discourag[ing] companies with effective compliance programs from lawfully acquiring companies with ineffective compliance programs and a history of misconduct'.[52] The presence of aggravating factors, therefore, will not affect the presumption of a declination and misconduct disclosed under the Safe Harbor Policy will not be factored into a future recidivist analysis for the acquiring company.[53]

2.4 Other Department of Justice policies regarding cooperation

In September 2022 – a few months before issuing the CEP – the Deputy Attorney General directed all DOJ components that prosecute corporate crimes to issue their own cooperation guidelines, if such guidelines did not already exist.[54] Each set of guidelines was required to be consistent with the DOJ's principles regarding the availability of declinations and the circumstances that would warrant a guilty plea or the imposition of a monitor,[55] which were subsequently reiterated in the CEP. Several DOJ components had already issued guidelines as of September 2022, and many others quickly followed with new or revised policies in 2023.[56] Several of these policies are summarised below.

2.4.1 Antitrust leniency programme

The DOJ Antitrust Division has a long-standing corporate leniency programme granting leniency to the first company that (1) 'promptly' self-discloses conduct relating to unlawful anticompetitive conspiracies, (2) 'provides timely, truthful, continuing, and complete cooperation' with the DOJ's ensuing investigation and (3) 'uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity'.[57] A company that has been granted leniency is liable only for the actual damages in related follow-on litigation, rather than treble damages.[58] Additionally, a company given leniency is not liable for the damage caused by other members of the conspiracy, which a conspirator typically would be responsible for under a theory of joint and several liability in antitrust conspiracy cases.[59]

The Antitrust Division expects companies that receive leniency to provide 'truthful, continuing, and complete cooperation', which includes 'conducting a timely and thorough internal investigation, providing detailed proffers of the reported conduct, producing documents no matter where they are located, and making cooperative witnesses available for interviews'.[60] In 2022, the Antitrust Division revised its programme to require promptness in self-reporting of wrongful conduct and undertaking remedial measures.[61]

While only the first company to self-report and cooperate can receive leniency, subsequent cooperators may still be rewarded for their efforts. The Antitrust Division has clarified that the extent of any fine reduction does not merely reflect the timing of cooperation but will also reflect the 'nature, extent, and value of that cooperation to the investigation'.[62] Nevertheless, the Division maintains that 'the earlier the cooperation is provided, the more valuable it usually is in assisting the [D]ivision's efforts'.[63] If a company's cooperation is insufficient, the Division 'will not hesitate' to withhold a fine reduction and may even increase the fine.[64]

Traditionally, the Antitrust Division did not use DPAs to resolve criminal antitrust matters since, under the leniency programme, companies that were the first to self-report and cooperate could be fully insulated from prosecution.[65] However, in 2019, it announced that DPAs could be an option for companies that did not obtain leniency but had an effective compliance programme.[66] Despite this development, the Antitrust Division continues to expect that companies will seek leniency as the benefits under the leniency programme are more generous than those associated with a DPA.[67]

In March 2024, the DOJ released a revised leniency programme containing minor additions integrating the Safe Harbor Policy. To qualify for a presumption of declination under the updated policy, an acquiror must (1) satisfy all the above-described leniency requirements, (2) disclose the misconduct before the transaction closes and (3) agree to suspend any review period until a conditional leniency letter is issued or the marker lapses, or otherwise commit to not close the transaction for a specified period.[68]

2.4.2 Export controls and sanctions enforcement policy

In March 2023, the DOJ's National Security Division (NSD) updated its 2019 policy regarding self-disclosure of potential criminal violations of export control and sanctions laws (the NSD Policy).[69] The NSD Policy closely tracks the CEP and the VSD Policy.

The NSD Policy notes that, to obtain the benefits of the Policy, the VSD must be made to the NSD and not solely to regulatory agencies that also have jurisdiction over export controls and sanctions enforcement (i.e., the Department of the Treasury's Office of Foreign Assets Control or the Department of Commerce's Bureau of Industry and Security).[70] The NSD Policy identifies several aggravating circumstances that are unique to this subject matter, including the following:

> "
> - *Sanctions or export offenses that are actively concealed by other serious criminal activity such as fraud, or corruption;*
> - *Unlawful transactions or exports involving a Foreign Terrorist Organization or Specially Designated Global Terrorist;*
> - *Exports of items controlled for nuclear nonproliferation or missile technology reasons to a proliferator country; items known to be used in the construction of weapons of mass destruction; or military items to a hostile foreign power.*[71]
>
> "

In 2021, the DOJ entered into its first resolution under the 2019 version of the NSD Policy with software company SAP SE.[72] Owing to SAP's voluntary disclosure, extensive cooperation and strong remediation, the DOJ entered into an NPA with SAP to settle violations of export control and sanctions laws involving the unauthorised export of software and services to Iran.[73] SAP also agreed to pay US$8 million in penalties.[74]

In March 2024, the NSD issued further revisions to the NSD Policy. While the core of the NSD Policy remained largely unchanged, the updates incorporated the DOJ's Safe Harbor Policy.[75] The March 2024 revisions also clarified that the NSD Policy encourages companies to voluntarily self-disclose violations of all criminal statutes that affect national security, such as money laundering or bank fraud, in addition to violations of sanctions and export control laws.[76]

More recently, the DOJ announced its first corporate declination under the current NSD Policy with the company MilliporeSigma.[77] In explaining its decision, the NSD emphasised the company's 'timely disclosure' and 'extraordinary cooperation', which included 'proactively identifying and producing documents' relevant to the investigation.[78]

2.4.3 Consumer Protection Branch

The DOJ's Consumer Protection Branch (CPB) issued its own Voluntary Self-Disclosure Policy for Business Organizations (the CPB Policy) in February 2023 (which was updated in March 2024).[79] The CPB is responsible for 'enforc[ing] laws that protect Americans' health, safety, economic security, and identity integrity'.[80] Under the CPB Policy, the CPB encourages companies to submit VSDs for any violations of a variety of laws governing consumer health and safety, data privacy and fraud schemes.[81] In adherence to the principles outlined in the CEP, the CPB Policy states:

> "
> *[The] CPB will not seek a guilty plea as to a company, its subsidiaries, or successors for disclosed conduct if the company has (1) voluntarily self-disclosed in writing directly to CPB; (2) fully cooperated as described in JM § 9-28.700; and (3) timely and appropriately remediated the criminal conduct.*[82]
>
> "

The CPB Policy provides a non-exhaustive list of aggravating circumstances that are relevant to the CPB's jurisdiction, including '[i]ntentional or willful conduct that places consumers at significant risk of death or serious bodily injury' and '[c]onduct that intentionally or willfully targets older adults, immigrants, veterans and servicemembers, or other vulnerable victims'.[83]

The March 2024 amendment to the CPB Policy incorporated the department-wide Safe Harbor Policy and, as noted above, clarified that VSDs should be communicated in writing.[84]

2.5 Approaches to cooperation in civil matters

Other US enforcement agencies take similar approaches to rewarding company cooperation in the context of civil matters. Described below are the DOJ's approach to cooperation in civil matters involving the False Claims Act and approaches by the US Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC).

2.5.1 False Claims Act

In May 2019, for the first time, the DOJ's Civil Division issued guidelines for awarding entities with cooperation credit in False Claims Act (FCA) cases.[85] The FCA, frequently used in healthcare litigation, imposes civil liability on entities that defraud government programmes.[86] While the new federal guidance does not present any radically new considerations, it does provide helpful standards and brings FCA cases in line with existing DOJ practices in other types of investigations.[87]

The federal guidance contemplates three main factors that the DOJ will consider in determining eligibility for and the extent of cooperation credit in FCA matters. First, the DOJ weighs whether eligibility should be available for VSD by entities that discover conduct that violates the FCA.[88] Notably, cooperation credit is not limited to entities that self-disclose before an investigation commences. Rather, if '[d]uring the course of an internal investigation into the government's concerns . . . entities . . . discover additional misconduct going beyond the scope of the known concerns, . . . the voluntary self-disclosure of such additional misconduct will qualify the entity for credit'.[89] Second, the DOJ considers whether the entity has provided assistance to an ongoing government investigation, including, but not limited to, identifying employees or individuals responsible for the

misconduct, accepting responsibility for the misconduct, making employees available for depositions and interviews, and preserving and collecting relevant information and data in excess of what is required by law.[90] Finally, the DOJ considers the extent to which entities have undertaken remedial measures in response to an FCA violation.[91]

In January 2020, the DOJ announced a reform to the policy. To complement the existing incentives to voluntarily disclose and cooperate, the DOJ now also considers the 'nature and effectiveness of a company's compliance system' in determining whether prosecution under the FCA is the appropriate remedy.[92] This reform in part reflects that a key element of the FCA is the *scienter* requirement 'and a robust compliance program executed in good faith could demonstrate the lack of scienter'.[93] The DOJ also emphasised that 'good corporate citizens that effectively police themselves should not be subjected to unnecessary enforcement costs'.[94]

To this end, the DOJ has continued to draw attention to steps companies can take to establish effective compliance systems. For example, in September 2022, it highlighted how compensation systems can be used to incentivise compliance, including through rewarding employees who promote an ethical corporate culture and clawing back compensation from employees who engage in misconduct.[95]

2.5.2 US Securities and Exchange Commission

The SEC's approach to cooperation was first described in a report of investigation and statement regarding the public company Seaboard.[96] This report, which became known as the 'Seaboard Report', concluded that charges against Seaboard were not warranted based on the consideration of four broad factors: (1) self-policing by the company prior to the discovery of the misconduct; (2) self-reporting the misconduct to the SEC, including investigating the misconduct; (3) remediation of the misconduct; and (4) cooperation with the SEC.[97]

The benefits of cooperating with the SEC could range from the SEC declining an enforcement action, to narrowing charges, limiting or eliminating penalties and sanctions, or including mitigating or similar language in charging documents. The SEC has used each of these approaches in its cases.[98] Entry into a DPA or an NPA may also be an option depending on the level of cooperation from the company.[99] For instance, in each FCPA case where the SEC entered into a DPA or an NPA, the company self-reported the violations and provided significant cooperation throughout the investigation.[100] Gurbir Grewal, the SEC Director of Enforcement, recently emphasised the importance of self-reporting as he explained that, to qualify for a no-penalty resolution, a firm is likely to have to self-report alleged violations.[101] Similar to the DOJ's current approach, which SEC Chair Gary Gensler has stated is 'broadly consistent' with his view of how to handle corporate offenders, the SEC expects a cooperating company to provide 'the Commission staff with all information relevant to the underlying violations and the company's remedial efforts'.[102]

2.5.3 Commodity Futures Trading Commission

The CFTC, which regulates US derivatives markets, also offers cooperation credit. While the CFTC has had a long-standing policy of offering cooperation credit, in 2017 it issued advisories that further incentivised 'individuals and companies to cooperate fully and truthfully in CFTC investigations and enforcement actions'.[103] Similar to the approaches adopted by the DOJ and the SEC, the CFTC will, at its discretion, consider the following broad factors in determining whether to grant cooperation credit: (1) 'the value of the cooperation' to instant investigation and enforcement actions; (2) 'the value of the cooperation to the [CFTC's] broader law enforcement interests'; (3) 'the culpability of the company or individual and other relevant factors'; and (4) 'uncooperative conduct that offsets or limits credit that the company or individual would otherwise receive'.[104] The CFTC's advisories emphasise that cooperation credit will be given to cooperation that is 'sincere', 'robust' and 'indicative of a willingness to accept responsibility for the misconduct'.[105]

The benefits of cooperating with the CFTC range from the agency taking no enforcement action to imposing reduced charges against the cooperating company.[106] Furthermore, in March 2019 and October 2020, the CFTC announced new guidance on self-reporting and cooperation to build on the existing foundation of cooperation to further incentivise 'individuals and companies to self-report misconduct, cooperate fully in CFTC investigations and enforcement actions, and appropriately remediate to ensure the wrongdoing does not happen again'.[107]

The CFTC guidance lists dozens of specific and concrete factors that the agency will consider when assessing whether to grant cooperation credit.[108] Company counsel may find it beneficial to refer to these factors when determining the company's course of action at various points in time, such as when learning about misconduct, investigating misconduct, self-disclosing misconduct to government authorities and cooperating with government authorities. For example, the advisory concerning cooperation by companies includes a section concerning the 'quality' of the company's cooperation, which the advisory states should be assessed by looking at whether the company 'willingly used all available means to . . . preserve relevant information', 'make employee testimony' or company documents 'available in a timely manner', 'explain transactions and interpret key

information' and 'respond quickly to requests and subpoenas for information' from the CFTC, among other things.[109] These considerations are relevant to any situation where a company is considering cooperating with authorities, regardless of the type of misconduct or whether the misconduct falls under the jurisdiction of the CFTC.

2.6 Case studies: Glencore and Ericsson

Choosing to cooperate with the government is not a one-size-fits-all decision, and companies sometimes choose to (or may be able to) cooperate with some aspects of a government investigation but not others. Moreover, issues regarding cooperation do not end once a criminal resolution is reached, given that the DOJ requires companies to continue to cooperate during the term of a DPA or an NPA, or the probationary period following a guilty plea. If the corporate defendant fails to meet the cooperation requirements, it may face severe consequences. FCPA resolutions involving Glencore International AG (Glencore) and Telefonaktiebolaget LM Ericsson (Ericsson) highlight these considerations and their consequences.

In May 2022, Glencore, a multinational commodity trading and mining firm, agreed to pay US$700 million in fines, forfeiture and disgorgement to settle criminal charges brought by the DOJ in connection with FCPA violations.[110] These allegations arose out of conduct that occurred from 2007 to 2018, in which Glencore employees and agents paid 'more than $100 million to third-party intermediaries, while intending that a significant portion of these payments would be used to pay bribes to officials in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela, and the Democratic Republic of the Congo'.[111] Glencore sought to obtain and retain business with state-owned companies and successfully secured several contracts with state-owned entities in Nigeria, including to purchase crude oil and refined petroleum products.[112] To conceal the bribe payments, Glencore entered into sham consulting agreements, paid inflated invoices and used intermediary companies to make corrupt payments to foreign officials.[113]

As part of the resolution, the DOJ did not grant Glencore full cooperation credit 'because it did not consistently demonstrate a commitment to full cooperation, it was delayed in producing relevant evidence, and it did not timely and appropriately remediate with respect to disciplining certain employees involved in the misconduct'.[114] Additionally, it commented that, while Glencore implemented remedial measures, it did not do so sufficiently before the resolution. The DOJ observed that 'some of the compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, necessitating the imposition of an independent compliance monitor for a term of three years'.[115] In all, Glencore's partial cooperation credit translated to a 15 per cent reduction off the lower end of the US Sentencing Guidelines fine range.[116]

The FCPA matter with Ericsson reveals the reach and seriousness of the DOJ's cooperation requirements in a criminal resolution. In 2019, Ericsson entered into a DPA relating to charges of conspiring 'to violate the anti-bribery, books and records, and internal controls provisions of the FCPA'.[117] The misconduct occurred from 2000 to 2016 and involved a bribery scheme to obtain telecommunications contracts with state-owned entities in Djibouti, China, Vietnam, Indonesia and Kuwait.[118] As part of the DPA, Ericsson agreed to cooperate fully with any investigation by the DOJ and to not provide 'deliberately false, incomplete, or misleading information' to the DOJ during the term of the DPA.[119]

Ericsson did not, however, 'truthfully disclose all factual information and evidence related to the Djibouti scheme, the China scheme, and other potential violations of the FCPA's anti-bribery or accounting provisions' during the term of the DPA.[120] Moreover, the DOJ determined that Ericsson 'failed to promptly report and disclose evidence and allegations of conduct related to its business activities in Iraq that may constitute a violation of the FCPA'.[121] As a result of this failure, the DOJ was unable to bring 'charges against certain individuals and tak[e] key investigative steps'.[122] In March 2023, Ericsson pleaded guilty to the criminal charges underlying the DPA and paid an additional penalty of US$207 million – reflecting the reduction that the company originally received under the 2019 DPA for cooperating.[123]

3 Key benefits and drawbacks to cooperation

Deciding whether to cooperate with a government investigation requires careful consideration of the associated benefits and drawbacks. On the one hand, cooperation affords the opportunity of substantially reduced or even no criminal charges and penalties; on the other hand, cooperation brings with it significant risks and costs.

3.1 Reduced or no charges and penalties

By and large, companies and individuals choose to cooperate with the government to receive some leniency in the form of reduced (or even no) penalties or charges. It is no surprise that research has shown that companies choosing to cooperate with the government tend to achieve better outcomes and typically end up paying lower fines than those that do not.[124] For example, in 2021, British engineering company Amec Foster Wheeler Energy Limited paid US$18.4 million in criminal fines to the DOJ, and to UK and Brazilian authorities, reflecting a 25 per cent reduction off the applicable US Sentencing Guidelines fine for the company's full cooperation and remediation.[125] On the other hand, in 2015, Alstom SA was required to pay a criminal fine of US$772 million, the largest-ever fine for an FCPA violation recorded at that time, in part because of 'Alstom's failure to voluntarily disclose the misconduct . . . [and] Alstom's refusal to fully cooperate with the department's investigation for several years'.[126]

In 2020, Beam Suntory Inc (Beam) was required to pay a criminal fine of US$19 million – a 10 per cent reduction off the applicable US Sentencing Guidelines fine for the company's partial cooperation and remediation – to resolve DOJ charges of FCPA violations. The DOJ awarded only partial credit for cooperation and remediation and no credit for self-disclosure because

of Beam's 'failure to fully cooperate', 'significant delays caused by Beam in reaching a timely resolution', 'its refusal to accept responsibility for several years' and Beam's 'failure to fully remediate, including its failure to discipline certain individuals involved in the conduct'.[127] The DOJ also did not credit any of the US$8 million that the company paid to settle parallel charges with the SEC because Beam 'did not seek to coordinate a parallel resolution' with the DOJ.[128]

The SEC imposed no civil fine in its settlement with Gulfport Energy Corporation in 2021 regarding failures to disclose executive perks as compensation. The SEC, in its press release, noted Gulf's 'significant cooperation' and timely remediation were key factors in its decision not to impose a penalty.[129]

In addition to the reduced monetary fines that can result from cooperation, the form of a resolution may also vary depending on whether, and how much, a company cooperates with government authorities. If a company has fully cooperated, and if the facts and circumstances warrant such a resolution, the government may consider offering a declination. If a declination is not an option, the next best scenario is an NPA, which is a contractual agreement between the wrongdoer and the government in which the government agrees not to bring criminal charges in exchange for certain requirements from the company (e.g., a fine, admitting to certain facts, further cooperating with the government, or entering into compliance or remediation efforts).

Another option in the government's toolbox is a DPA, which is an agreement with the government where criminal charges are filed with the court but prosecution is postponed for a certain period in exchange for the company undertaking certain conditions (e.g., payment of fines, compliance reforms, further cooperating with the government, annual reporting or certification requirements, or the appointment of a monitor). If the company complies with these conditions, the government will move to dismiss the charges at the end of the term of deferment. In April 2020, for example, the DOJ explained that it had, at least in part, agreed to enter into a DPA with the Industrial Bank of Korea to resolve violations of the Bank Secrecy Act because the bank accepted and acknowledged responsibility for its conduct, had conducted a 'thorough internal investigation', provided 'frequent and regular updates' and made non-US-based employees available for interviews.[130] Unlike NPAs, DPAs require court approval, which is nearly always granted.

If the government believes a stronger penalty is warranted, it could request that a subsidiary that was involved in the misconduct, rather than the parent, enter a guilty plea, which can reduce some of the collateral consequences facing the parent company had it been required to plead guilty.[131] The resolution of the Goldman Sachs FCPA charges, in which the bank's Malaysian's subsidiary pleaded guilty to an FCPA charge, is one example of this phenomenon.[132] Finally, the government could request that the parent company enter a guilty plea if it is culpable – an even more severe penalty.

In 2021, the DOJ announced a new emphasis on ensuring that companies signing a guilty plea, NPA or DPA comply with the terms of those agreements.[133] Often, these agreements require settling companies to remediate the misconduct, implement strong compliance programmes, and report future misconduct that occurs or is discovered during the term of the agreement. The DOJ stated that it will be firm with settling companies that do not uphold their obligations set forth in the guilty plea, NPA or DPA. Violations of such agreements 'may be worse than the original punishment'. As such, according to the DOJ, a settlement 'is not the end of an obligation for a company' but rather is just the start.[134] The DOJ has put these principles into action with Ericsson's 2023 guilty plea, discussed above, and with Boeing's agreement to plead guilty in July 2024, following its 2021 DPA relating to deceiving and defrauding the US government's evaluation of the 737 MAX aircraft line.[135]

3.2 Suspension and debarment

One consideration in deciding whether a company will plead guilty or otherwise admit wrongdoing is whether the company also faces collateral consequences from doing so.[136] For instance, companies in the healthcare, defence and construction fields are particularly vulnerable because any admissions of wrongdoing could have the collateral consequence of excluding them from eligibility for the government contracts on which their business heavily relies. Furthermore, any admission of wrongdoing could trigger a host of civil litigation from shareholders or other claimants.

Similarly, entities that have registered as a qualified professional asset manager under the Employee Retirement Income Security Act (ERISA), allowing them to work with pension funds and make investments for ERISA clients, may have their status revoked by the Department of Labor if key individuals or the company has been convicted of a crime. Likewise, for companies regulated by the SEC, enforcement actions can result in suspension or debarment, or both, from the securities markets.

Even if an issuer is not disqualified altogether, violations of certain provisions of federal securities laws may give rise to automatic disqualification from exercising certain privileges; for example, a company that violated certain federal securities laws risks no longer being able to be considered a well-known seasoned issuer, to engage in certain private securities offerings or to serve in certain capacities for an investment company.[137] Being disqualified from these privileges can have a significant impact on an issuer's ability to quickly file registration statements with the SEC and the issuer's ability to appropriately time the market when offering securities for sale.[138]

The SEC generally may, at its discretion, grant waivers from these disqualifications. However, the SEC and the DOJ's settlement processes are separate from the process for requesting waivers from disqualification.[139] The SEC considers these requests separately. As such, a settling entity cannot request that the SEC consider an offer of settlement that simultaneously addresses both the underlying enforcement action and any related collateral disqualifications.[140] The segregated process of reviewing offers of settlement and requests for waivers results in longer delay and uncertainty for issuers.

3.3 Financial cost

While cooperation between company counsel and the DOJ can save scarce government resources, it often represents a significant cost for the company itself. A company may generally be better placed to run an investigation because conceivably it may know where information is housed and to whom to talk, and can more readily determine the relevant facts and documents at issue.

Still, running a high-quality, diligent and thorough internal investigation, despite the relative ease of doing so compared with an external investigation, is expensive. Document review of company emails, hiring external counsel, preparing for and conducting interviews of employees and preparing presentations to the government, all add up to significant expense. Moreover, if individual employees are implicated in the wrongdoing, they may also choose to hire their own counsel, who will also perform an investigation, albeit in a more limited fashion, for which the company may bear financial responsibility.

Finally, companies that are found to have committed misconduct may also need to reimburse the victims of their misconduct for certain expenses or pay restitution, which could be considerable and affect other aspects of an investigation or settlement. In 2016, for example, asset management firm Och-Ziff (now named Sculptor Capital Management) agreed to a US$412 million criminal settlement with the DOJ and the SEC for violations of the FCPA.[141] In September 2019, however, a federal judge ruled that certain former investors in a Congolese mine should be classified as victims of Och-Ziff's misconduct, raising the question of whether those investors would be entitled to restitution from the firm.[142] While the investors initially claimed that they were entitled to US$1.8 billion,[143] they ultimately entered into a settlement agreement in September 2020 that entitled them to US$136 million in restitution.[144]

In years past, companies attempted to recoup the costs of their own internal investigations of misconduct by seeking restitution under the Mandatory Victims Restitution Act (MVRA), which requires that certain convicted felons 'reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense'.[145] In May 2018, however, the US Supreme Court held that the MVRA's provision for reimbursement of investigation expenses applied only to government investigations and not to private investigations undertaken by a victim.[146] It explained that the MVRA does not 'cover the costs of a private investigation that the victim chooses on its own to conduct, which are not "incurred during" participation in a government's investigation'.[147] Even if 'the victim shared the results of its private investigation with the Government', that does not mean that the private investigation was necessary under the MVRA.[148]

3.4 Disruption to business

Any business executive or in-house counsel will know that an investigation, regardless of whether the company chooses to cooperate with government authorities, will result in some amount of disruption to key business activities. While declining to cooperate with an investigation should not in and of itself indicate an organisation's culpability, it could have negative public relations consequences as investors and other third-party stakeholders may view this as indicative of guilt or the potential magnitude of the financial penalty. The Justice Manual does make clear, however, that 'the decision not to cooperate by a corporation . . . is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt'.[149]

Regardless of whether a company chooses to cooperate with the government in an investigation, any investigation will cause disruption to the company's daily operations and may even affect share prices; for example, an investigation can take up executives' time and attention, in-house counsel must coordinate extensively with external counsel, and any key witnesses have to set aside time to be prepared and interviewed. In addition, financial resources may need to be diverted to help cover the costs of complying with or conducting an internal investigation.

Investigations often bring about significant uncertainty for a business, depending on the seriousness and scale of the investigation. Investors may lose confidence in the company's financial prospects, especially because it may be necessary to divulge details regarding the investigation to lenders and other third-party finance partners even before the investigation has been concluded (including details that have not been disclosed publicly). In the event that a company is facing the prospect of paying a substantial financial penalty in an investigation, lenders may choose to withdraw funding or re-evaluate the terms of any outstanding loans, causing the company's share price to drop.[150]

Monitorships can also disrupt standard business operations.[151] Monitors are appointed at the expense of the company and the fees can run into the millions of dollars. Monitors also need access to company documents, information and employees (for interviews) to be able to make informed assessments of the company's compliance programme.

3.5 Exposure to civil litigation

Companies that cooperate with the government are often at risk of follow-on civil litigation based on any admissions or acceptance of lesser charges in connection with an investigation. Many investigations result in companies making certain admissions to the government, which can be used by potential plaintiffs as a basis for any civil ligation, including through class or derivative actions and suits brought by a competitor. These civil actions can also have significant financial ramifications; for example, civil penalties in the antitrust sphere can result in treble damages.[152] Because of the associated risks of derivative civil actions, companies may ultimately decide that the cost of cooperation is simply too high and instead decline to cooperate, deny liability and risk defending the company's innocence at trial.

A government investigation or admission of guilt may be only the first stage of a company's legal issues. In 2014, for example, following an investigation, the SEC charged Avon Products with having violated the FCPA for failing to put in place comprehensive controls for detecting instances of bribery in China. Avon settled the civil and criminal cases by agreeing to a fine of US$135 million.[153] This resulted in shareholders filing several derivative action lawsuits against the company, claiming that Avon's management failed to put in place adequate controls to prevent FCPA violations, causing the company to lose millions of dollars of shareholder money through the cost of the related investigations and government fines. Ultimately, the case was dismissed because the court declined to find that the FCPA created a private right of action; however, defending the follow-on civil litigation cost yet more resources and time.[154]

VEON (formerly known as VimpelCom) faced similar ramifications following a government investigation in 2017. Its share price dropped after it disclosed that it was under investigation by US and Dutch government authorities for potential FCPA violations and was conducting its own internal investigation. Ultimately, VEON entered into a DPA with the US government and paid roughly US$460 million in penalties.[155] Additionally, VEON spent nearly US$900 million in related investigation and litigation costs. VEON shareholders brought a securities fraud action against the company, claiming that it had failed to disclose that the company's gains were the result of bribes paid to foreign governments in violation of the FCPA. The plaintiffs relied on certain admissions that VEON had made in connection with its DPA, which the court ultimately decided were actionable.[156]

Ericsson faced a follow-on civil suit from a competitor after it settled civil and criminal cases with respect to the violation of the FCPA for more than US$1 billion in 2019. Less than 16 months after entering into these agreements, Ericsson entered into a settlement with Nokia for €80 million, which arose from the same conduct as the FCPA settlement with the government.[157] Nokia did not file a formal legal action, so many of the specific details of the settlement and Nokia's legal theory remain unknown.

3.6 Excessive cooperation between counsel and the government

There is a point at which the level of cooperation and coordination between the DOJ and company counsel is too much. Sometimes a company's internal investigation becomes so entangled with a government investigation, and government and company counsel are so coordinated, that it appears as if the government has 'outsourced' its investigatory authority. This can cause problems at a later stage; for example, a company's investigative records could become subject to discovery in a criminal case against one of its employees, even if those records would otherwise be considered privileged. Additionally, a court could decide to exclude certain evidence or testimony in the criminal case for running afoul of certain constitutional provisions, even if that testimony was elicited by company counsel and not the government.

Complications from perceived 'outsourcing' of criminal investigations to the private sector have resulted in judicial oversight of internal investigations, which would otherwise be rare. In *United States v. Connolly*, for example, Gavin Campbell Black, a former Deutsche Bank trader who was charged with unlawfully manipulating LIBOR interest rates, moved to suppress statements he had made in connection with Deutsche Bank's internal investigation of his trading activity and that of other traders.[158] Black argued that, because the DOJ had effectively outsourced its own investigation function to Deutsche Bank's company counsel, his statements had actually been compelled by the US government in violation of his right against self-incrimination. The underlying investigation – which included interviews with Black and other traders – involved allegations that several banks, including Deutsche Bank, unlawfully manipulated the setting of LIBOR interest rates, and Deutsche Bank eventually entered into a DPA with the DOJ. Because Black's statements were not used at his criminal trial, before the grand jury or during its investigation, the then Chief Judge Colleen McMahon found that Black's right against self-incrimination was not actually violated. She did conclude, however, that Deutsche Bank's company counsel had essentially become an arm of the DOJ, writing that:

> *"[R]ather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to Deutsche Bank—the original target of that investigation. . . . Deutsche Bank . . . effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies."*[159]

Judge McMahon's findings underscore the need for the DOJ and company counsel to maintain their independence during an internal investigation, lest the company become a *de facto* part of the prosecution team. Given widespread sensitivity to the issue, it is unlikely that the line between an independent but appropriately coordinated investigation and an excessively outsourced investigation will actually be crossed. Defendants may nevertheless continue to raise outsourcing arguments when

they see an opening to demand additional discovery from the DOJ as well as the company. To steer clear of this risk, company counsel are advised to carefully evaluate (and re-evaluate) their relationship to the government and ensure that they are keenly aware of how their fiduciary duties may differ from and conflict with those of the government.

3.7 Other options besides cooperation

Cooperation is not the only option for companies or individuals facing a government investigation. While companies that cooperate are generally guaranteed some degree of leniency, there are situations in which cooperation many not effectively prevent prosecution or reduce a financial penalty, which the Justice Manual guidelines themselves acknowledge:

> *"The government may charge even the most cooperative corporation . . . if . . . the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has . . . engaged in an egregious, orchestrated, and widespread fraud."*[160]

There are therefore situations when it is pointless to pursue cooperation and other methods must be employed.

First, the company can request a meeting with authorities to explain why the allegations do not amount to an actual violation of law or the particular agency does not have jurisdiction. Second, the defendant could challenge either the jurisdiction of the court or the regulator's jurisdiction to investigate the matter. Third, companies always have the option to fight the charges on the merits based on insufficiency of evidence in a court of law. This method was employed to dramatic effect by FedEx, when it refused to settle charges that it had conspired to ship illegal prescription drugs to online pharmacies.[161] Just four days into the trial, the DOJ voluntarily dismissed the charges because it had insufficient evidence to proceed.[162] Meanwhile, United Parcel Service, Google, Walgreens Company and CVS Caremark Corporation had to pay hefty fines after settling with the government.[163]

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

4.1 Multi-agency coordination

Multi-agency coordination is a crucial element in successfully resolving any large, corporate investigation in which multiple US agencies are involved. In 2012, the DOJ solidified long-standing agency practice and issued guidance to ensure that 'Department prosecutors and civil attorneys coordinate together and with agency attorneys in a manner that adequately takes into account the government's criminal, civil, regulatory and administrative remedies'.[164] The policy statement emphasises 'that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law' by ensuring that 'criminal, civil, and agency attorneys coordinate in a timely fashion, discuss common issues that may impact each matter, and proceed in a manner that allows information to be shared to the fullest extent appropriate to the case and permissible by law'.[165]

Furthermore, the Justice Manual has policies obliging departmental attorneys to consider the possibility of any parallel proceeding '[f]rom the moment of case intake' and discuss remedies and communication with other interested investigatory agents and to 'consider investigative strategies that maximize the government's ability to share information among' various agencies.[166] It also directs prosecutors to assess '[a]t every point between case intake and final resolution . . . the potential impact of [agency] actions on criminal, civil, regulatory, and administrative proceedings'.[167]

In practice, each agency has its own processes and time frames for investigating alleged misconduct and approving settlements. The same is true for state government enforcement actions, which may follow on from a federal investigation. As a result, on occasion, it can be difficult for agencies to effectively communicate and coordinate on a particular investigation such that multi-agency resolutions are reached simultaneously. In this regard, a company that cooperates with all the relevant government agencies could play a role in encouraging agencies to coordinate by ensuring they are aware of each agency's progress in the investigation and settlement discussions, and encouraging agencies to communicate, when appropriate.[168]

4.2 Cross-border coordination

Coordination between international law enforcement agencies has grown in recent years. In 2018, the DOJ announced that FCPA cases typically involve between four and five different international agencies, particularly because many of the largest DOJ bribery cases target foreign companies in coordination with foreign authorities.[169]

Cross-border investigations may present special challenges and opportunities in comparison with single-jurisdiction investigations. A recent trend apparent in large, corporate investigations is the increased level of coordination and cooperation between various law enforcement agencies. This coordination may come in the form of official, administrative channels such as mutual legal assistance treaties (MLATs), memoranda of understanding or specific agreements between countries in relation to particular subjects.[170]

The MLAT process has undergone significant reform in recent years, in response to the oft-criticised laborious nature of preparing the requests and having them fulfilled. In December 2017, Jeff Sessions, then US Attorney General, called on the international law enforcement community to 'expedite mutual legal assistance requests', stating '[i]f [requests for information are] not properly shared between nations, then, in many cases, justice cannot be done. It is essential that we continue to improve that kind of sharing'.[171]

In accordance with this commitment to improve information sharing between the DOJ and other international law enforcement agencies, the DOJ has (1) allocated increased resources to the office responsible for handing MLAT requests and (2) established a cyber unit to process requests for electronic evidence.[172]

Aligning with the DOJ's efforts, Congress passed the Anti-Money Laundering Act of 2020 (the AML Act),[173] which, among other things, authorises the DOJ and the US Department of the Treasury to obtain foreign bank records during criminal investigations and in civil forfeiture actions.[174] Specifically, under the AML Act, regulators can issue subpoenas to any foreign bank that maintains a correspondent account in the United States to request records maintained abroad.[175] This provides regulators with an alternative to the MLAT process to obtain foreign records, but it remains to be seen how regulators will use this power in practice.

In addition to these formal channels, however, international law enforcement agencies may also informally choose to share investigative strategies, information and access to information and witnesses within their respective jurisdictions. One notable innovation has been the use of text messaging between various prosecutorial agencies to compare evidence and coordinate simultaneous raids.[176] In 2016, for example, Brazilian and French prosecutors used WhatsApp to communicate in advance of raids at the 2016 Rio Olympic Games.[177] Informal coordination presents obvious upsides to the US government. Instead of relying on slow and burdensome official processes for cooperation, informal cooperation allows US authorities to gain the benefits of shared knowledge in an expedient manner, more akin to the fast-paced nature of the wrongdoer's misconduct in large, complex cross-border investigations.

For companies, this increased cooperation changes the calculus of whether and how to cooperate with authorities, precisely because information that is shared in one jurisdiction may easily and quickly become known in another jurisdiction, potentially with different criteria for liability.[178]

4.3 DOJ's policy against 'piling on'

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

Given the number of different government agencies, both foreign and domestic, that could have an interest in any given investigation, in May 2018, Deputy Attorney General Rod Rosenstein announced the DOJ's new policy against 'piling on', which favours a less aggressive approach to cumulative prosecution. In describing this new policy, Rosenstein stated that the DOJ should 'discourage disproportionate enforcement of laws by multiple authorities', likening it to the football practice of multiple players piling on after a player has already been tackled.[179] He added: 'Our new policy discourages "piling on" by instructing Department [of Justice] components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct', noting that often large, regulated companies are accountable to 'multiple regulatory bodies', which creates the risk of duplicative and onerous punishments beyond 'what is necessary to rectify the harm and deter future violations'.[180]

Under this policy, the DOJ now considers 'the totality of fines, penalties, and/or forfeiture imposed by' all enforcement agencies to avoid excessive punishment.[181] Moreover, Rosenstein emphasised that the policy reinforces the following core policies, ensuring that the federal government (1) does not use its enforcement power for impermissible purposes (i.e., leveraging the threat of criminal prosecution to induce a company to settle a civil case), (2) encourages intra-governmental coordination to ensure an 'overall equitable result', (3) encourages DOJ officials to coordinate with other DOJ officials, and (4) specifies concrete factors that the DOJ will evaluate in the event that a case does warrant multiple penalties.[182] While the DOJ under President Biden has announced changes with respect to policies regarding cooperation, as discussed above, the DOJ has not announced any changes to the 2018 policy against piling on.

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

Since former Deputy Attorney General Rosenstein's announcement of the anti-piling on policy in May 2018, there have been several corporate settlements involving federal and state prosecutors and regulators that reflect this policy. In April 2019, for example, Standard Chartered Bank reached a settlement with the DOJ, the Department of the Treasury's Office of Foreign Assets Control (OFAC), the Federal Reserve Board of Governors, New York State prosecutors and regulators, and the United Kingdom's Financial Conduct Authority regarding sanctions violations.[183] Standard Chartered agreed to pay more than US$1 billion in penalties, fines and forfeiture to these different authorities.[184] The DOJ agreed to 'credit a portion' of the related payments to other authorities and, after crediting, received US$52 million in fines and US$240 million in forfeiture. OFAC assessed a separate civil penalty of US$639 million, which was deemed satisfied by the payments to the DOJ and the Federal Reserve Board of Governors.[185]

In another example, in August 2020, the DOJ declined to prosecute consumer loan company World Acceptance Corporation for violations of the FCPA, in part because the corporation had agreed to disgorge to the SEC the full amount of its ill-gotten gains.[186] World Acceptance agreed to pay US$21.7 million in disgorgement, penalties and prejudgment interest to the SEC to settle the same FCPA violations.[187]

The DOJ's anti-piling on policy can also be used as a defence by corporations against perceived duplicative charges by various government agencies. Volkswagen AG, the car manufacturer, facing charges by the SEC for failing to disclose its clean diesel emission cheating scheme in a bond offering, successfully narrowed the scope of the SEC's civil suit by arguing that the SEC cannot pile on more charges after the company had already pleaded guilty to three felonies and paid US$23 billion in fines, penalties and settlements to US and state authorities, as well as car owners and dealers, in connection with the alleged misconduct.[188] The judge presiding over the case dismissed several claims against Volkswagen, finding that its settlement with the DOJ had already released the company from any government-filed civil claims arising out of the same underlying fraud.[189] In addition, the judge had questioned why the SEC brought its case against Volkswagen two years after the company resolved the matter with the DOJ.[190] In March 2024, the SEC and Volkswagen entered into a consent decree in which the company, without admitting or denying the SEC's allegations, agreed to pay US$48.8 million in disgorgement and prejudgment interest in return for the SEC dismissing all outstanding claims against Volkswagen.[191]

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Endnotes

[1] US Dep't of Justice (DOJ), Justice Manual § 9-28.300. Additional noteworthy factors include 'the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision' and 'the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance programme or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to execute financial compensation measures that punish wrongdoing, or to pay restitution'. In March 2023, the DOJ released an updated guidance document concerning these factors, entitled 'Evaluation of Corporate Compliance Programs', www.justice.gov/criminal-fraud/page/file/937501/download. In August 2023, a federal judge concluded that this general encouragement of corporate cooperation by itself does not constitute coercive misconduct that raises constitutional concerns (*United States v. Tournant*, No. 22-CR-276-LTS, 2023 WL 5276776, at *17 (S.D.N.Y. 15 Aug. 2023)).

[2] DOJ, Justice Manual § 9-28.700.

[3] Id. § 9-28.720.

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

[5] DOJ, Office of Public Affairs (OPA), Speech: 'Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing' (10 Sept. 2015), www.justice.gov/opa/speech/deputy-attorney-general-sally- quillian-yates-delivers-remarks-new-york-university-school.

[6] Ibid.

[7] DOJ, OPA, Speech: 'Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act' (29 Nov. 2018), www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

[8] DOJ, OPA, Speech: 'Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime' (28 Oct. 2021), www.justice.gov/opa/speech/deputy-attorney- general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[9] Ibid.

[10] DOJ, Office of the Deputy Attorney General, Memorandum from Lisa O Monaco to Heads of Department Components and United States Attorneys (15 Sept. 2022), https://www.justice.gov/media/1245451/dl.

[11] DOJ, OPA, Speech: 'Principal Associate Deputy Attorney General Marshall Miller Delivers Live Keynote Address at Global Investigations Review' (20 Sept. 2022), www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-live-keynote-address.

[12] Memorandum from Lisa O Monaco to Heads of Department Components and United States Attorneys (supra note 10).

[13] 'Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing' (supra note 5).

[14] DOJ, Justice Manual § 9-28.720.

[15] 'Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act' (supra note 7); 'Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime' (supra note 8).

[16] DOJ, Justice Manual § 9-28.700.

[17] DOJ, OPA, Speech: 'Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference' (10 May 2016), www.justice.gov/opa/speech/deputy-attorney- general-sally-q-yates-delivers-remarks-new-york-city-bar-association.

[18] 'Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime' (supra note 8).

[19] 'Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference' (supra note 17); see also Memorandum from Lisa O Monaco to Heads of Department Components and United States Attorneys (15 Sept. 2022) (supra note 10).

[20] DOJ, Justice Manual § 9-28.700.

[21] 'Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference' (supra note 17)

[22] DOJ, Justice Manual § 9-28.700.

[23] Memorandum from Lisa O Monaco to Heads of Department Components and United States Attorneys (15 Sept. 2022) (supra note 10).

[24] Ibid.

[25] 'Principal Associate Deputy Attorney General Marshall Miller Delivers Live Keynote Address at Global Investigations Review' (supra note 11); Memorandum from Lisa O Monaco to Heads of Department Components and United States Attorneys (supra note 10).

[26] DOJ, Justice Manual § 9-28.710.

[27] Ibid; see also DOJ, Office of the Deputy Attorney General, Memorandum from Mark Filip to Heads of Department Components and United States Attorneys (28 Aug. 2008), www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[28] See DOJ, Justice Manual § 9-47.120 (https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl).

[29] Ibid.

[30] Id. at [1].

[31] Ibid. (see also, below, regarding the Compensation Incentives and Clawbacks Pilot Program).

[32] Id. at [2].

[33] Ibid.

[34] DOJ, Criminal Division, 'CEP Declinations' (updated 15 Apr. 2024), www.justice.gov/criminal/ criminal-fraud/corporate-enforcement-policy/declinations.

[35] DOJ, Justice Manual § 9-47.120, at [1] (https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl).

[36] Id. at [2].

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] DOJ, 'The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks' (3 Mar. 2023), https://www.justice.gov/file/1277436/dl?inline=.

[42] Ibid.

[43] Ibid.

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